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**Oral report by the Chairman of the Working Group
on Reservations to Treaties,
Mr. Marcelo Vázquez Bermúdez**

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*Finalization of the set of draft guidelines constituting the Guide to Practice on
Reservations to Treaties*

Mr. Chairman,

It is my pleasure, today, to report to the Commission on the outcome of the work that has been accomplished by the Working Group on Reservations to Treaties at the present session.

You will recall that the Commission, at its 3080th meeting of 26 April 2011, established the Working Group on Reservations to Treaties in order to proceed with the finalization, at the current session, of the Guide to Practice on Reservations to Treaties, as described in paragraph 45 of the Commission's report on last year's session (A/65/10).

The Working Group held 14 meetings, from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011, during which it was able to finalize the text of the

whole set of draft guidelines constituting the Guide to Practice on Reservations to Treaties. The text of the draft guidelines as finalized by the Working Group is reproduced in document A/CN.4/L.779, an advance copy of which has been made available to the members of the Commission in English and French.

Before providing further details concerning the work undertaken by the Working Group, I would like to pay tribute to the Special Rapporteur, Mr. Alain Pellet, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Working Group in finalizing the text of the Guide to Practice. I also thank the other members of the Working Group for their active participation and essential contributions. Furthermore, I wish to thank the Secretariat for its valuable assistance.

In conformity with its mandate, the Working Group revisited the draft guidelines as provisionally adopted by the Commission last year, with a view to finalizing their text by taking into account, as appropriate, the observations made by Governments on the various guidelines. The Working Group also introduced a number of linguistic or technical changes to the text of the draft guidelines. Furthermore, in an attempt to make the Guide to Practice more user-friendly, the Working Group agreed on a few changes to the structure of some sections of the Guide, and this also led to the renumbering of some draft guidelines or sections. In performing its tasks, the Working Group relied, *inter alia*, on a document prepared by the Special Rapporteur, containing his proposals concerning possible modifications to be introduced to the text of the draft guidelines in light of the written comments received from Governments, which are reproduced in document A/CN.4/639 and Add.1, and of the observations made by Governments during the debate in the Sixth Committee of the General Assembly since the beginning of the Commission's consideration of this topic.

In this report, I will present only the main changes that were introduced by the Working Group to the text of the draft guidelines as they had been provisionally

adopted by the Commission and to the structure of certain sections of the Guide to Practice. In contrast, I will not describe those changes that were either of a purely technical or linguistic nature, or were only intended to simplify the text of certain guidelines or clarify their meaning.

With respect to **Part 1 of the Guide to Practice**, I should first mention that the Working Group decided to delete draft guideline 1.1.1, which was entitled “Object of reservations”, and to move its content into the definition of “reservations” provided in **draft guideline 1.1**, by adding a second paragraph to the latter. It was felt that the content of the old draft guideline 1.1.1 should become part of the definition of reservations.

Based on comments received from Governments and after a thorough consideration of their merits, the Working Group decided to simplify Part 1 by deleting some of the draft guidelines provisionally adopted by the Commission, on the understanding that the relevant elements would be addressed, as appropriate, in the commentary. Thus, the Working Group **deleted draft guideline 1.1.2**, dealing with the instances on which reservations may be formulated, since it was felt that this element was already covered in the definition of reservations provided in draft guideline 1.1. Also, the Working Group agreed on the **deletion of some of the draft guidelines (namely draft guidelines 1.4.1, 1.4.2, 1.4.4) that were intended to provide examples of unilateral declarations which are outside the scope of the Guide to Practice**. Reference to such examples, accompanied by the relevant explanations, would be included, as appropriate, in the commentary to draft guideline 1.1. Moreover, the Working Group decided to merge draft guidelines 1.4.6 and 1.4.7, as provisionally adopted by the Commission, into a single provision which has now become **draft guideline 1.5.3**, entitled “Unilateral statements made under a clause providing for options”.

In line with the conclusion reached by the Commission with respect to the treatment of conditional interpretative declarations in the Guide to Practice, the

Working Group has complemented the definition of conditional interpretative declarations, which is now provided in **draft guideline 1.4**, by a statement according to which conditional interpretative declarations are subject to the rules applicable to reservations. **Consequently, all other draft guidelines which dealt specifically with conditional interpretative, and which appeared in square brackets in the text provisionally adopted by the Commission, have been deleted from the Guide to Practice. This applies to all sections of the Guide.**

Mr. Chairman,

I shall now turn to **Part 2 of the Guide to Practice**. Most of the modifications introduced by the Working Group to the draft guidelines belonging to Part 2, including the reordering of certain guidelines, are of a technical or linguistic nature; therefore, I will not describe them in my report.

With respect to terminology, I should mention that, after some discussion, the Working Group agreed on the use of the term “right” to formulate a reservation, an objection, an acceptance, etc. (in French, “*droit*”), instead of the term “freedom” (“*faculté*”) which appeared in the guidelines provisionally adopted by the Commission. It was felt that the term “right” was more neutral and more commonly used in this context.

The Working Group agreed on the **deletion of draft guideline 2.1.8**, entitled “Procedure in case of manifestly impermissible reservations”. This was done in consideration of the negative reactions expressed by various Governments against the proposed guideline, which was regarded, *inter alia*, as purporting to confer on the depositary a role that went beyond its functions as described in the Vienna Conventions.

With respect to the late formulation of objections, addressed in the guidelines pertaining to section 2.3, the Working Group agreed on the inclusion of

a **new draft guideline 2.3.2** stating that an objection to a reservation that is formulated late must be made within twelve months of the acceptance, in accordance with guideline 2.3.1, of the late formulation of the reservation.

Concerning the withdrawal of reservations, I should mention that the **model clauses** that accompanied draft guideline 2.5.8 on the effective date of the withdrawal of a reservation, as provisionally adopted by the Commission, **were deleted** on the understanding that reference would be made to relevant examples in the commentary to this guideline.

The Working Group considered it necessary to revise the definition of objections to reservations provided in **draft guideline 2.6.1**, in order to cover the various possible scenarios with regard to the effects that an objection may purport to produce. The wording finally retained is in line with that of draft guideline 4.3. The Working Group was also of the view that **guideline 2.6.2**, which provided a definition of objections to the late formulation or widening of the scope of a reservation, could be deleted while retaining an appropriate explanation in the commentary to draft guideline 2.6.1. Furthermore, the Working Group agreed on the deletion of **draft guideline 2.6.14** on conditional objections, which addressed the case of an objection to a specific potential or future reservation; it was felt, among other things, that the inclusion of such a provision might be a source of confusion for the reader of the Guide to Practice.

Finally, in response to a suggestion made by a number of States, the Working Group decided to delete paragraph 2 of **draft guideline 2.9.9**, entitled “Silence with respect to an interpretative declaration”. The commentary would still provide some indications regarding the cases in which silence might be relevant in relation to the approval of an interpretative declaration.

Mr. Chairman,

I shall now turn to Part 3 of the Guide to Practice, which is entitled “Permissibility of reservations and interpretative declarations”.

I should start by mentioning that, after careful consideration, the Working Group agreed on the retention of the word “permissibility” (in French “*validité substantielle*”) in the guidelines belonging to Part 3 of the Guide to Practice, since these guidelines refer to the substantive conditions for the validity of reservations, interpretative declarations and reactions thereto. In contrast, the term “validity” (in French, “*validité*”) is used in other guidelines of the Guide to Practice where reference is made to both the substantive and formal conditions of validity. The approach followed by the Working Group is in line with a decision that had already been adopted by the Commission at its fifty-eight session with respect to the meaning that should be given to the terms “permissibility” and “validity” in the Guide to Practice (see, in this regard, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, p. 324 and 327, paras. (2) and (7) of the general commentary to Part 3 of the Guide to Practice).

The Working Group decided to **renumber the guidelines which immediately follow draft guideline 3.1.5** on the incompatibility of a reservation with the object and purpose of the treaty, in order to convey the idea that these guidelines are to be regarded as illustrations of draft guideline 3.1.5. The Working Group also decided to simplify the guideline concerning the question of reservations to a provision reflecting a customary rule, which has now become **draft guideline 3.1.5.3**, by deleting the second paragraph thereof, which indicated that such a reservation did not affect the binding nature of the customary rule. This element would be appropriately addressed in the commentary. Moreover, the Working Group was of the view that the enunciation of the principle according to which a reservation cannot exclude or modify the legal effect of a treaty in a

manner contrary to a peremptory norm of general international law could be **moved to draft guideline 4.4.3, as a second paragraph**. Thus, the Working Group agreed on the deletion of draft guideline 3.1.9 as provisionally adopted by the Commission.

Draft guideline 3.1.5.6, entitled “Reservations to treaties containing numerous interdependent rights and obligations”, is based on draft guideline 3.1.12 provisionally by the Commission, which addressed the issue of reservations to “general human rights treaties”. The Working Group was of the view that the substance of that guideline could be retained, while avoiding, however, a reference to the notion of “general human rights treaties”, and while also making it clear that the issue addressed in this guideline related, in more general terms, to the need to take into consideration, in determining the compatibility of a reservation to certain treaties with the object and purpose of such treaties, the interdependence between numerous rights and obligations contained therein.

Draft guideline 3.2.3, as finalized by the Working Group, is a reformulation of the corresponding guideline that was provisionally adopted by the Commission. However, the reference to a duty to cooperate with the treaty monitoring bodies has been omitted in the new text, which refers only to the consideration, to be given by States and international organizations, to an assessment by a monitoring body of the permissibility of a reservation.

Taking into consideration the negative views that were expressed, for various reasons, by numerous Governments with respect to the soundness of **draft guideline 3.3.3** concerning the effect of collective acceptance of an impermissible reservation, as provisionally adopted by the Commission last year, and also considering the concerns raised by the Human Rights Committee in relation to that provision in view of its potential impact on the Committee’s capacity to carry out an effective assessment of the permissibility of reservations, the Working Group agreed on the deletion of that draft guideline.

Following a suggestion made by the Special Rapporteur in response to comments made by States concerning the formulation of **draft guideline 3.4.1** on the permissibility of the acceptance of a reservation, as provisionally adopted by the Commission, as well as its relations with other draft guidelines, the Working Group modified this guideline so as to indicate that the acceptance of a reservation is not subject to any condition of permissibility. Concerning, in particular, the question of the acceptance of an impermissible reservation, it was felt that the real issue to be addressed was not the permissibility of the acceptance itself, but rather the absence of effect of such acceptance, as clearly stated in paragraph 1 of draft guideline 4.5.2.

With respect to **draft guideline 3.5**, on the permissibility of interpretative declarations, the Working Group opted for the deletion of the reference to the incompatibility of an interpretative declaration with a peremptory norm of general international law. The majority of the members was of the view that the issue of the absence of effects of an interpretative declaration which is contrary to a peremptory norm of general international law could be adequately addressed in the commentary.

Furthermore, concerning the permissibility of reactions to interpretative declarations, the Working Group agreed on the **deletion of draft guidelines 3.6.1 and 3.6.2** provisionally adopted by the Commission, on the understanding that the relevant explanations concerning the scenarios that were addressed therein would be given in the commentary to draft guideline 3.6.

Mr. Chairman,

I shall now turn to **Part 4 of the Guide to Practice**, to which some substantive changes were introduced by the Working Group.

I should first mention that **draft guideline 4.2.6**, entitled “Interpretation of reservations”, is new. Following a suggestion made by the Special Rapporteur, the Working Group agreed on the usefulness of including in the Guide to Practice a provision addressing this issue in general terms. The guideline states the requirement that a reservation be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated. These various elements, as well as the need to consider the unilateral character of a reservation for purposes of its interpretation, would be addressed in the commentary.

Draft guideline 4.3.2, concerning the effect of an objection to a reservation that is formulated late, also represents an addition to Part 4 of the Guide to Practice. However, the text of this guideline corresponds, with minor changes, to that of draft guideline 2.3.2 as provisionally adopted by the Commission.

Draft guideline 4.4.3, concerning the absence of effect of a reservation on a peremptory norm of general international law (*jus cogens*), has been complemented by an additional paragraph stating that “[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law”.

The Working Group devoted special attention to **draft guideline 4.5.3**. This guideline deals with the complex and sensitive issue of the status of the author of an invalid reservation in relation to the treaty, which was addressed in draft guideline 4.5.2 as provisionally adopted by the Commission last year. Based on a proposal made by the Special Rapporteur, the Working Group decided to restructure and reformulate this provision in an attempt to reconcile, to the extent possible, the divergent views that had been expressed by Governments on this issue.

The text of draft guideline 4.5.3 as finalized by the Working Group comprises four paragraphs. Paragraph 1 states the principle that it is the intention of the reserving State or international organization that determines the status of the author of an invalid reservation in relation to the treaty, that is to say, whether the author of the invalid reservation should be considered to be bound by the treaty without the benefit of the reservation or whether it should not be considered bound by the treaty. Paragraph 2 enunciates the positive presumption according to which the author of an invalid reservation is considered a contracting State or a contracting organization without the benefit of the reservation, unless it has expressed a contrary intention or such an intention is otherwise established. While paragraph 3 enunciates the principle that the author of the invalid reservation may express, at any time, its intention not to be bound by the treaty without the benefit of the reservation, paragraph 4 – which is of recommendatory nature – addresses the specific case in which a treaty monitoring body expresses the view that a reservation is invalid; in such a case, if the author of the invalid reservation intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment regarding the invalidity of the reservation.

A view was expressed that, considering its complexity and the sensitivity of the issues that it raised, draft guideline 4.5.3 could deserve further consideration.

Mr. Chairman,

I shall finally turn to **Part 5 of the Guide to Practice** which addresses the issue of succession of States. No specific drafting suggestions were made by Governments with respect to this Part of the Guide. That said, the English version of the title of Part 5 and, as appropriate, of its subtitles has been slightly modified by the Working Group so as to refer to reservations, acceptances of reservations, objections to reservations and interpretative declarations “*in cases of*” succession

of States. It was felt that the use of the plural would better reflect the diversity of cases of successions that are covered in Part 5.

In paragraph 2 of **draft guideline 5.1.2**, the Working Group included a reference to the widening by the successor State of the scope of a reservation formulated by the predecessor State. It appeared logical to the Working Group that, in those cases in which the right of the successor State to formulate a new reservation is to be excluded, the widening, by the successor State, of the scope of a reservation that had been formulated by the predecessor State should likewise be excluded.

Furthermore, the Working Group replaced draft guideline 5.1.4, which referred to the “Establishment of a reservation formulated by a successor State”, by a **new draft guideline 5.4** dealing, in more general terms, with the legal effects of reservations, acceptances of reservations and objections to reservations in cases of succession of States. The draft guidelines of section 5.1 were renumbered accordingly, and the old section 5.4 has become section 5.5.

The other modifications introduced by the Working Group to the text of the guidelines of Part 5 were of a purely linguistic or technical nature.

Mr. Chairman,

This concludes my report on the outcome of the work of the Working Group on Reservations to Treaties. It is my hope that the Commission will be in a position to take note of this report.

Thank you, Mr. Chairman.