

RESERVATIONS TO TREATIES

Statement of the Chairman of the Drafting Committee

6 June 2006

Mr. Roman A. Kolodkin

Mr. Chairman,

I have the pleasure to present the report of the Drafting Committee on the topic “Reservations to treaties”. This report is found in document A/CN.4/L.685. The Committee had two meetings on the topic on 23 and 24 May 2006.

The Committee considered five draft guidelines referred to it by the Plenary during the fifty-seventh session of the International Law Commission. In addition, the Drafting Committee revisited two draft guidelines also referred to it by the Commission, which were already adopted with a view to reconsider the terminology used therein after the debate on this issue which took place in the Commission last year.

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

Mr. Chairman,

The five guidelines before you deal with the substantial validity of reservations. The term “validity” is quite general and encompasses both the substantive and formal requirements/conditions necessary for the formulation of reservations. These guidelines

belong to the third part of the guide to practice which would bear the general title “Validity of reservations”. To distinguish substantive validity from general validity the Drafting Committee decided to use the term “permissibility” (“validité matérielle” in French) to denote the former. The Committee thought that the use of these terms “validity” and “permissibility” clarifies a much debated question and contributes to more consistency and precision in the draft guidelines. The commentary would analyse the terminological issues involved and the selection by the Commission of the term “validity”.

Draft guideline 3.1.

This draft guideline was originally entitled “Freedom to formulate reservations”. In the Plenary there was a lengthy discussion both on its title and its content. You will recall that the content of this guideline reproduces faithfully the text of article 19 of the Vienna Convention of 1986 on the Law of Treaties between States and International Organizations or between International Organizations.

The Committee considered in great detail the text of this guideline and although there was initially a suggestion to omit the temporary factor from the text (“when) since this was found in the definition of guideline 1.1, it was finally decided to keep it. Indeed it appears in the text of article 19.

The title of this draft guideline now reads “Permissible reservations”. (In French “Validité matérielle d’une réserve”). The Drafting Committee considered various alternatives for the title inspired both by proposals which had been made in the Plenary and by the wish to align this title to article 19. Article 19 is entitled “Formulation of reservations”. It was however pointed out that a very similar title was already used for guideline 2.1.3 (“Formulation of a reservation at the international level”). The Committee finally opted for the current title bearing in mind the fact that this guideline should be the first one in this part 3 which, as I said earlier, deals with the validity of

reservations. The term “permissible reservation” pertains of course to the “substantive” aspect of valid reservations while the term “valid” is more generic and encompasses both substantive and formal conditions of validity. It is understood that this distinction should also form part of the commentary to this guideline.

Draft guideline 3.1.1

Draft guideline 3.1.1 is entitled “Reservations expressly prohibited by the treaty”. I recall that during the debate which took place in the plenary, it had been pointed out that there was a discrepancy between the “chapeau” of the guideline and its main text (the general term “prohibited by the treaty” in the chapeau is not quite in conformity with sub-paragraphs 2 and 3 (prohibiting reservations to specific provisions, prohibiting certain categories of reservations). The Committee felt that the addition of two phrases, i.e. (a) “and a reservation in question is formulated to one of such provisions”, (b) “and a reservation in question, falls within one of such categories” would establish the consistency between the chapeau and the text.

The Committee had a long discussion on the use of the word “expressly” in the title and text of the guideline. The question of “implicit” prohibition of reservations was raised; the view was expressed that such an implicit prohibition was characteristic of some types of treaties (constitutive acts of international organizations, ILO Conventions) although it was pointed out that with respect to those ILO Conventions the prohibition derived from practice rather than from the conventions themselves. It was however pointed out that the “object and purpose” test was adequate for all possible categories of prohibition of reservations (either explicit or implicit). The Drafting Committee considered also whether a separate guideline on reservations to constitutive acts of international organizations would be useful but it decided that the commentary to this guideline 3.1.1 could cover this category. However, the Committee is of the view that it would be desirable that the Special Rapporteur make an effort to draft a guideline to that effect which could be presented to the Plenary.

The Committee was of the view that the term “expressly” should be retained in the title and included in the introductory part of the draft guideline. Its significance should be explained in the commentary as well as the possibilities of implicit prohibitions of reservations. In cases that reservations were made despite their implicit prohibition they should be subject to the “object and purpose” test.

Draft guideline 3.1.2

Draft guideline 3.1.2 is entitled “Definition of specified reservations”. The guideline gives a general definition of the term “specified reservations” contained in article 19(b) of the 1986 Vienna Convention. The initial wording of this guideline as proposed by the Special Rapporteur attempted to combine a definition of specified reservations with that of “authorized reservations” as described in article 20(1) of the Vienna Convention. The Committee bearing in mind the debate in the Plenary which had pointed out the need to determine whether the treaty permitted only specific reservations (and if so, one needed to determine whether or not a reservation that was formulated fell into that category) opted for a more general and comprehensive approach . Thus the words “authorized by the treaty” were replaced by the words “envisaged in the treaty”.

It was also observed that specified reservations could be made not only to specific provisions but to the treaty as whole with regard to certain categories. It was felt thus that the terminology used in guideline 1.1.1 (“Object of reservations”) could be usefully transferred to guideline 3.1.2. Moreover, the term “which meet conditions specified by the treaty” inspired by the arbitral award on the English Channel case was deemed too limiting and eventually unnecessary. It is understood that this definition is sufficiently wide to include both general reservations as well as provisions specifying in detail the content of reservations envisaged in the treaty. The commentary should explain this aspect of the draft guideline.

Draft guideline 3.1.3

Draft guideline 3.1.3 was originally entitled, as proposed by the Special Rapporteur, “Reservations implicitly permitted by the treaty”. It was also proposed, as an alternative, in a version which combined this draft guideline with draft guideline 3.1.4. The Committee opted for two separate guidelines for the sake of clarity. This guideline covers the case of treaties prohibiting certain reservations; in such a case a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty. The wording of the last phrase of this guideline was slightly modified to align it with guideline 3.1 (and article 19 (c) of the Vienna Convention). The title was changed to read “Permissibility of reservations not prohibited by the treaty” (in French “validité des réserves” non-interdites par le traité”). In this instance the term « permissibility » as compared to the more general term “validity” signifies the substantive requirements (as opposed to the formal ones) for the effective formulation of a reservation, that is to say its compatibility with the object and purpose of the treaty.

Draft guideline 3.1.4

Draft guideline 3.1.4 covers the category of specified reservations which however are not defined precisely (as opposed to specified reservations, the content of which is defined exactly in the treaty). In such a case again the test of compatibility with the object and purpose of the treaty is applied. The wording of the guideline was modified to reflect the definition of specified reservations in guideline 3.1.2. However, whereas guideline 3.1.2 gives a general definition of specified reservations, guideline 3.1.4 refers to a category of specified reservations whose content is not specified. It is of course understood that specified reservations whose content is exactly defined by the treaty would not have to go through the criterion of compatibility with the object and purpose of the Treaty. The Committee thought that in a place of a specific guideline to that effect, this conclusion should figure in the commentary to guideline 3.1.4. The title of this

guideline is “Permissibility of specified reservations” (in French “validité des réserves déterminées”). In this connection I would like to point out that the titles of both guidelines 3.1.3 and 3.1.4 in French contain the term “validité”; this term should be understood as meaning “validité matérielle”. Since the term “validité matérielle” appears in the title of the first guideline 3.1, the Committee thought that it would be superfluous to repeat it in guidelines 3.1.3 and 3.1.4. In English the word “permissibility” is used in both guidelines denoting this specific aspect (i.e. substantive requirements) of the overall validity of reservations.

Draft guidelines 1.6 and 2.1.8

Mr. Chairman,

You recall that last year at the conclusion of a debate on the use of terminology, the Commission referred to the Drafting Committee draft guidelines 1.6 and 2.1.8 which were already adopted in order that the Committee revisits the term “permissibility” (in French “licéité”). The Special Rapporteur had advocated the use of the more neutral term “validity” (in French “validité”) and many members of the Commission had concurred with this approach. After a thorough discussion the Committee felt that the term “validity” (in French “validité”) was the most appropriate to use in a general manner. This term encompasses both the formal (presented in part 2 of the Guide to Practice) and the substantive (presented in Part 3 of the Guide to Practice) conditions for the formulation of reservations. Thus, in guideline 1.6 the term “validity/validité” replaces now the term “permissibility/licéité”.

I would like to say once again that the formal conditions relate to questions of procedure while the substantive ones focus mainly on the compatibility with the object and purpose of the treaty. In order to distinguish these last ones the terms “permissibility/permissibilité should be used (in French “validité matérielle”).

In guideline 2.1.8 the terms “impermissible/impermissibility” are replaced by the terms “invalid/invalidity”. In French the terms “illicite/illicéité” are replaced by the terms “non-valide”/”non-validité”.

In draft guideline 2.1.8 a phrase was added (“grounds for the invalidity of the reservations”) necessitated by the term “invalidity”.

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.

Thank you Mr. Chairman.