

RESERVATIONS TO TREATIES

Statement of the Chairman of the Drafting Committee

Mr. Pedro Comissário Afonso
30 July 2008

Monsieur le Président,

J'ai l'honneur de vous présenter le [7ème] rapport du Comité de rédaction, contenu dans le document [A/CN.4/L.739/Add.1]. Il s'agit du troisième rapport consacré lors de cette session au sujet des « Réserves aux traités ».

Les deux rapports précédents ont été soumis à la Plénière les 3 juin et 7 juillet 2008. Les projets de directives de la section 2.8 qui vous sont aujourd'hui présentés traitent de divers aspects de la procédure d'acceptation des réserves. Le Comité de rédaction s'est réuni à six reprises les 7, 8, 9, 10, 16 et 22 juillet. Au cours de ces réunions, il a adopté 12 projets de directives.

Permettez-moi de rendre hommage au Rapporteur spécial, M. Alain Pellet, dont la maîtrise du sujet et la disponibilité ont grandement facilité la tâche du Comité de rédaction, J'aimerais également remercier les membres du Comité pour leur participation active à ses travaux et la contribution importante qu'ils lui ont apportée.

Mr. Chairman,

I shall now proceed to introduce each guideline *seriatim*.

Draft guideline 2.8.1 (Tacit acceptance of reservations)

Draft guideline 2.8.1 is entitled “Tacit acceptance of reservations”.

It will be recalled that the Special Rapporteur proposed two alternative texts for this draft guideline in his twelfth report, a shorter version (2.8.1) and a longer version (2.8.1. *bis*). The latter option essentially tracked the language of article 20, paragraph 5 of the Vienna Conventions and duplicated draft guideline 2.6.13 concerning time period for formulating an objection. In the plenary debate there was a majority preference for the longer option.

In view of the adoption by the Commission of draft guideline 2.6.13 on the time period for formulating an objection the Drafting Committee expressed preference to work on the basis of the shorter version. It was considered that such an approach would avoid duplicating the language of draft guideline 2.6.13.

Several changes were nevertheless introduced to the draft guideline.

First, the brackets around the phrase “Unless the treaty otherwise provides” have been deleted, although their inclusion in draft guideline 2.6.13 may seem to render its retention in the present guideline superfluous.

Secondly, the reference to “in accordance with” has been replaced by “within the time period provided for in” to better reflect the link to time limit after which a tacit acceptance would be implicated.

Thirdly, instead of making reference to guidelines 2.6.1 to 2.6.14 there is only a reference to the guideline relevant in the time period for formulating an objection, namely draft guideline 2.6.13.

Draft guideline 2.8.2 (Unanimous acceptance of reservations)

Draft guideline 2.8.2 is entitled “Unanimous acceptance of reservations” and is intended to cover the specific circumstances where unanimous acceptance is required. Various situations could arise in that regard, which cannot easily be subsumed into a single provision. Accordingly, the commentary will make the necessary distinctions depending on whether the treaty is already in force, or not, when the reservation is notified. It will also make it clear that the reference to “parties” includes contracting parties in the sense of article 2, paragraph 1), f) of the Vienna Convention.

The commentary will also emphasize the case in which the reservation requires acceptance by particular States or international organizations which are parties or entitled to become parties to the treaty. This case, which may for example arise in respect of the acceptance by nuclear powers of a reservation to a nuclear-free zone treaty, is reflected by the words “some or all” in draft guideline 2.8.2.

In these various circumstances, it appears crucial that the participation of the reserving State to the treaty be preserved from subsequent challenges

of objecting States. Hence, draft guideline 2.8.2 states that the unanimous acceptance of the reservation “once obtained is final”.

Draft guideline 2.8.3 (Express acceptance of a reservation)

Draft guideline 2.8.3 is entitled “Express acceptance of a reservation”. Although acceptance of a reservation in the case of multilateral treaties is almost invariably implicit or tacit, the draft guideline simply covers the situation where such an acceptance is expressly made. There are isolated examples in which such express acceptances have been made.

The Drafting Committee adopted this draft guideline without any change.

Draft guideline 2.8.4 (Written form of express acceptance)

Draft guideline 2.8.4 is entitled “Written form of express acceptance”. The draft guideline tracks the language of the Vienna Conventions, whose article 23, paragraph 1 states in part that “an express acceptance of a reservation must be formulated in writing...”

The Drafting Committee adopted this draft guideline without change.

Draft guideline 2.8.5 (Procedure for formulating express acceptance)

Draft guideline 2.8.5 is entitled “Procedure for formulating express acceptance”. It will be recalled that the form and procedure for formulating

reservations has been addressed in draft guidelines 2.1.1 to 2.1.7. Draft guidelines 2.1.1 and 2.1.2 deal with formulation of reservations and their formal confirmation in writing and thus correspond to the formal requirements of draft guideline 2.8.4. Draft guidelines 2.1.3 on formulation of a reservation at the international level; 2.1.4 on absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations; 2.1.5 on communication of reservations; 2.1.6 on Procedure for communication of reservations; and 2.1.7 on functions of depositaries, apply *mutatis mutandis* in relation to express acceptances.

The Drafting Committee adopted this draft guideline without any change.

Draft guideline 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation)

Draft guideline 2.8.6 is entitled “Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation”. It reproduces in slightly modified form the provisions of article 23, paragraph 3, of the Vienna Conventions. The reference to draft guideline 2.2.1 is intended to recall the requirement of formal confirmation of a reservation formulated when signing a treaty.

The Drafting Committee adopted this draft guideline without any change.

Draft guideline 2.8.7 (Acceptance of a reservation to the constituent instrument of an international organization)

Draft guideline 2.8.7 is entitled “Acceptance of a reservation to the constituent instrument of an international organization”. It reproduces the text of article 20, paragraph 3, of the 1986 Vienna Convention. For reasons he had previously explained, the Special Rapporteur indicated that he was not in favour of making a distinction between reservations to institutional provisions of a constituent instrument and reservations to its substantive provisions. The distinction, while it may be interesting from an academic point of view, is difficult to make in practice and is not drawn in the Vienna Convention.

Following this explanation, the Drafting Committee adopted draft guideline 2.8.7 without any change.

Draft guideline 2.8.8 (Organ competent to accept a reservation to a constituent instrument)

Draft guideline 2.8.8 is entitled “Organ competent to accept a reservation to a constituent instrument”. It should be noted that the Drafting Committee decided to reverse the order of draft guidelines 2.8.8 and 2.8.9, because it felt that it would be more logical to address first the issue of the organ and then that of the modalities. Like draft guideline 2.8.9, it also deals with an important issue deriving from article 20, paragraph 3, of the 1986 Vienna Convention, that is, the determination of the competent organ for acceptance of the reservation. As indicated by the words “Subject to the

rules of the organization”, this issue is primarily to be resolved by the members of the relevant international organization. Accordingly, the three alternative options introduced in the draft guideline have a subsidiary character, in so far as they are only to be considered if the rules of the organization remain silent.

As to these various options, the Drafting Committee concluded that some flexibility should be retained. Acceptance should not be restrained to the organ competent to decide on the admission of members to the organization, as the reserving State or organization could already be a member of the organization and make a reservation to an amendment to its constituent instrument. In addition to the admitting organ, reference is thus made in draft guideline 2.8.9 to the organs having competence to amend or interpret the constituent instrument.

Draft guideline 2.8.9 (Modalities of the acceptance of a reservation to a constituent instrument)

Draft guideline 2.8.9 (previously draft guideline 2.8.8) is entitled “Modalities of the acceptance of a reservation to a constituent instrument”. As it deals with two questions deriving from draft guideline 2.8.7, the Drafting Committee has considered the possibility of merging the relevant provisions in a single guideline. It has however preferred to preserve the integrity of the text of article 20, paragraph 3, of the 1986 Vienna Convention, as reproduced in draft guideline 2.8.7.

The first issue addressed in guideline 2.8.9 relates to the non-requirement of acceptance, by the members of an organization, of a reservation to its constituent instrument. It is reflected in the first sub-

paragraph of the draft guideline. In the case here envisaged, draft guideline 2.8.1 is not applicable: what is actually required is that the reservation be accepted by the competent organ of the organization. As implied by article 20, paragraph 5, of the Vienna Convention, acceptance of the reservation by the members of the organization is not necessary.

The second issue addressed in draft guideline 2.8.9 relates to the form of acceptance of a reservation by the competent organ of the organization. As indicated by one member of the Committee, the question here at stake is not that of a presumption of acceptance; it rather concerns the refusal of tacit acceptance. On that basis, the suggestion was made that the requirement should be for the competent organ expressly to accept the reservation. Other members of the Committee however considered that an element of flexibility was needed here. Accordingly, the second sub-paragraph of draft guideline 2.8.9 refers to the rules of the organization; it also lifts the requirement of express acceptance when the reserving State or organization is admitted into the organization.

Draft guideline 2.8.10 (Acceptance of a reservation to a constituent instrument that has not yet entered into force)

Draft guideline 2.8.10 relates to situations in which a constituent instrument has not yet entered into force and “where the competent organ has not yet been established” as contemplated in article 20(3) of the Vienna Convention. It seeks to provide a *modus vivendi* for an anomaly, thereby complementing draft guideline 2.8.7 which reflects article 20 (3) of the Vienna Convention. It is intended to address a particular *lacuna* that exists because there is no mechanism for accepting a reservation to a constituent

instrument when the treaty has not yet entered into force or when the competent organ has not yet been established. The draft guideline was intensely debated.

Some members felt there was no need for such a guideline on the matter, since the issue could await the entry into force of the treaty or once the organization is established. Such a guideline would also not resolve all problems because a time lag may still exist between the time that a treaty enters into force and when a competent organ of that organization is established. Some other members however were of the view that such a guideline would provide legal certainty and stability in treaty relations. Moreover, in the practice of the Secretary-General, as depositary, there are some consultations with all the States that are already parties to the constituent instrument.

In the final analysis, the general orientation favoured the formulation of a possible guideline. At least three aspects were considered crucial. First, it was essentially agreed that “all the States and international organizations” was vague while “all contracting states and international organizations” was limited. The Drafting Committee settled on “all signatory States and international organizations”.

Secondly, it was considered necessary to ensure that there is some degree of legal certainty. The central aspect was not so much whether the time period provided for in draft guideline 2.6.13 is complied with but whether once acceptance has been given it ought to be varied. It was agreed to follow the solution provided for in guidelines 2.8.2 relating to unanimous acceptance of reservations that an acceptance once obtained is final.

In this respect there is no need for an express acceptance, which rarely occurs in practice. The reservation is considered to have been accepted if no signatory State or organization has raised an objection by the end of the 12-month period.

Thirdly, it was recognized that the time lines between the entry into force of a treaty and the actual establishment of a competent organ may be different. The commentary will address the various aspects implicated by this time lag. The essential consideration is to avoid more than one scheme applying. Once the treaty enters into force, the relevant guidelines relating to article 20, paragraph 3 of the Vienna Convention will provide the necessary guidance.

The title of draft guideline 2.8.10 has been amended to read **“Acceptance of a reservation to a constituent instrument that has not yet entered into force”** in order to correspond with the text of the draft article.

Draft guideline 2.8.11 (Reaction by a member of an international organization to a reservation to its constituent instrument)

Draft guideline 2.8.11 is entitled “Reaction by a member of an international organization to a reservation to its constituent instrument”. It ought to be read in conjunction with draft guideline 2.8.7 and the first subparagraph of draft guideline 2.8.9. The Drafting Committee has retained deliberately a general wording in order to avoid giving the impression that members of the organization would have a right – or a “*faculté*” – to accept the reservation. These words have accordingly been deleted from the draft

guideline, the title of which now refers to a “reaction” by a member of the organization. The substance of draft guideline 2.8.11 remains however unchanged.

Draft guideline 2.8.12 (Final nature of acceptance of a reservation)

This draft guideline was originally entitled "final and irreversible nature of acceptances of reservations".

The Drafting Committee discussed at length the categorical nature of the guideline which states that the acceptance of a reservation is final and irreversible and cannot be withdrawn or amended. It was pointed out that since States or international organizations had a 12-month period to object to a reservation, it would be logical that they would be allowed, during that same period, to reverse their acceptance of a reservation, provided that they did not jeopardize treaty relations. In other words, they could reject a reservation that they had previously accepted but they could not declare they would not have treaty relations with the reserving State or organization if they had not already made such a declaration. On the other hand, several members of the Committee wondered whether this possibility to reverse the acceptance of a reservation would not result in different regimes with respect to tacit acceptances, which by definition, would become operative only after the expiry of the 12-month period whereas the express ones would already have taken place before. However, it was recalled that this concern was rather theoretical since there were hardly any examples of express acceptances of reservations. From this point of view, most of the acceptances would be tacit and become operative after the 12-month period;

in that case they could not of course be reversed. But even in the hypothesis that an acceptance was made expressly before the 12-month period expired, it was felt that such a solemn and formal acceptance would not be reversed.

Bearing that in mind, the Committee decided to keep the draft guideline almost as it was proposed with only a few changes. It deleted the word "irreversible" from the title which was redundant. It did not maintain the distinction in the text between express and tacit acceptances which did not have any longer a *raison d'être*. And it combined the two sentences of the original drafting into one, deleting also the word "subsequently". The guideline states that acceptance of a reservation cannot be withdrawn or amended.

Mr. Chairman,

This concludes my third report on the topic "Reservations to treaties". I recommend that at this stage of our work the Commission take note of the draft guidelines 2.8.1 to 2.8.12.

Thank you.
