

Reservations to Treaties

Statement of the Chairman of the Drafting Committee

Mr. Pedro Comissário Afonso

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Monsieur le Président,

J'ai l'honneur de vous présenter le cinquième Rapport du Comité de rédaction portant à nouveau sur les "Réserves aux traités". Il s'agit du deuxième rapport sur ce sujet. Comme vous vous rappelez, lorsque j'ai présenté notre premier rapport sur ce sujet, le 3 juin 2008, la Plénière a décidé de renvoyer au Comité de rédaction les projets de directives 2.6.5. et 2.6.11 afin qu'ils soient réexaminés. Le Comité de rédaction s'est réuni le 5 juin 2008. En mon absence il a été présidé par M. Enrique Candioti à qui je tiens à exprimer ma reconnaissance et mes profonds remerciements pour sa disponibilité à me remplacer avec beaucoup d'efficacité et de compétence. Au cours de cette réunion le Comité de rédaction a pu adopter à titre provisoire 4 projets de directives que je vous présenterai. Il s'agit des projets de directives 2.6.5 ("Auteur") et 2.6.11 ("Inutilité de la confirmation d'une objection faite avant la confirmation formelle de la réserve"), renvoyés comme je l'ai déjà dit par la Plénière au Comité, ainsi que des projets de directives 2.6.12 ("Exigence de la confirmation d'une objection faite avant l'expression du consentement à être lié par le traité") et 2.8. ("Forme des acceptations des réserves"). En ce qui concerne le projet de directive 2.6.12, vous vous rappelez que, après l'adoption par le Comité de rédaction de la première version des projets de directives 2.6.5. et 2.6.11 celui-ci n'avait plus de raison d'être et, par conséquent, il avait été supprimé. Cependant au vue du renvoi de ces deux projets de directives au Comité de rédaction et de leur nouvelle formulation, il fallait revenir au projet de directive 2.6.12 qui, en conséquence, s'avérait nécessaire. Finalement, le projet de directive 2.8 est nouveau et traite de la

forme des acceptations des réserves. Tous ces projets de directives se trouvent dans le document A/CN.4/L.739 et Corr.1.

Mr. Chairman,

Allow me now to introduce the four draft guidelines one by one.

Draft guideline 2.6.5

The Drafting Committee had before it the original version of draft guideline 2.6.5 and a new version prepared by the Special Rapporteur after the recent debate in the Plenary. The Special Rapporteur addressed the concerns of those members who were of the view that States or international organizations who are not parties to the treaty are not entitled to make objections properly speaking. According to this view, they can make declarations which become objections once those States or international organizations become parties to the treaty. This was the reason why in his new proposal, while first repeating his original proposition – in keeping with the already adopted definition of objections in guidelines 2.6.1. This proposition includes 2 sub-paragraphs, one on contracting States and contracting international organizations and the second on States and international organizations entitled to become parties to a treaty. However, the Special rapporteur had added after the second sub-paragraph the phrase: “in which case the objection produces its legal effects only at the time the State or the international organization expresses its consent to be bound by the treaty”.

The Drafting Committee wondered whether such a phrase had its place in this draft guideline. It should be recalled that this phrase addressed the question of effects which in any event will be included in another Section of the Guide to practice. It was admitted that although this was the general rule, in this case, exceptionally, the mention of effects was justified in view of the two irreconcilable positions in the Committee. Moreover it was pointed out that the word “objection” in this additional phrase should be

replaced by the more neutral one “declaration” since it did not constitute an objection yet, according to the adherents of the theory “contracting parties only”.

The Committee considered also the question of using the term “becomes operative” or “becomes effective” as it had done in draft guideline 2.7.7. It was however pointed out that the term “does not produce any legal effect” was much clearer; in addition it had been used in the past in several draft guidelines.

The Committee finally decided to keep most of the wording as proposed by the Special Rapporteur. However, as I mentioned earlier, it decided to bring some changes in the additional phrase: It replaced the word “objection” by the neutral word “declaration” and it changed the positive mode of the phrase (“produces its legal effects...”) into a negative one (“does not produce any legal effect...”) which confirmed more categorically the absence of legal effects of such declarations. The commentary will explain of course the complicated history of this draft guideline. Its title remained unchanged: “Author”.

Draft guideline 2.6.11

Since the Drafting Committee adopted draft guideline 2.6.5 in its modified form, it led to reconsider draft guideline 2.6.11. After a very short debate, the Committee decided that the original version of this draft guideline as proposed by the Special Rapporteur was the most appropriate to be adopted. Consequently the draft guideline is much shorter. The title has remained the same “Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation”. The guideline is much simpler stating that an objection made prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation. It basically repeats article 23, paragraph 3, of the Vienna Convention. There was a comment on the appropriate use of the word “made” in this instance instead of the more accurate “formulate”. It was pointed out that the word “made” is used in the Vienna Convention and therefore should not be changed. The commentary will also address this issue.

Draft guideline 2.6.12

After the adoption of draft guideline 2.6.5 and 2.6.11, the Committee felt that the original draft guideline 2.6.12 should now be re-considered. You will recall that when the Committee had adopted the previous version of draft guidelines 2.6.5 and 2.6.11 it had come to the conclusion that draft guideline 2.6.12 did not have any “raison d’être” and had to be deleted. Now, after the adoption of the new version of guidelines 2.6.5 and 2.6.11, the Drafting Committee had before it another version of draft guideline 2.6.12 proposed by the Special Rapporteur. The guideline was still entitled “Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty” and the proposed consisted of two options, one more detailed and the other more concise and simpler. The Committee focused on the simpler one. The guideline stated that, if an objection is formulated prior to the consent to be bound by the treaty by a signatory State or international organization, it does not need to be reconfirmed when that State or organization expresses its consent to be bound by the treaty. On the contrary, it needs to be reconfirmed if the State or organization had not signed the treaty when making the objection. The Committee had a useful debate on this guideline and was informed of the current depository practice (especially of the Secretary-General of the United Nations) which however, was not conclusive. It was of the view that if a State or organization has formulated an objection before even signing the treaty and expresses its consent to be bound by it after a long period of time, the security and certainty of treaty relations required that such an objection be reconfirmed at the time of the expression of the consent to be bound. If however, the State or organization had already signed the treaty when formulating the objection, such confirmation is not necessary. The title of the draft guideline was changed to reflect this distinction. It now reads “Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty”.

Draft guideline 2.8

This draft guideline constitutes the first one in a series of guidelines dealing with acceptances of reservations. The original draft as proposed by the Special Rapporteur stated that the acceptance of a reservation arose from the absence of objections. This absence of objections may arise either from a unilateral statement (which constitutes an express acceptance) or by silence kept by a contracting State or organization (tacit acceptance).

Such tacit acceptance should however be distinguished from an implicit acceptance which constitutes rather a presumption of acceptance and may be reversed. In the course of the debate, the Committee was of the view that the first paragraph in the original version of the guideline was not really necessary. In fact, it was redundant since the second paragraph repeated practically the same principle. The Committee decided, however, that some elements of the first paragraph can be usefully inserted into the second paragraph so that both paragraphs could be merged into one.

The Committee also thought that the term “express acceptance” and “tacit acceptance” in brackets should be deleted. The final wording is much more concise and clear. The title of the guideline changed and reads now “Form of acceptance of reservations” since it was felt that the express and tacit methods of acceptances pertain rather to the form of such an action than to its formulation.

Mr. Chairman,

This concludes my second report on the topic “Reservations to treaties”. If time allows, the Drafting Committee on Reservations will meet again during the second part of the session in order to complete its examination of draft guidelines included in Section 2.8 of the Guide to Practice.

I recommend to the Plenary the adoption of the four draft guidelines.

Thank you Mr. Chairman.