

**Reservations to treaties**

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

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**5 June 2009 (a.m.)**

Mr. Chairman,

I have the honour, today, to introduce the second report of the Drafting Committee for the sixty-first session of the Commission. This report, which deals with the topic “Reservations to treaties”, is contained in document A/CN.4/L.744.

At its 2891st meeting, on 11 July 2006, the Commission referred draft guidelines 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee. These guidelines deal with the validity of reservations.

At its 2978th meeting, on 15 July 2008, the Commission referred draft guidelines 2.9.1 to 2.9.10 to the Drafting Committee. These draft guidelines deal with the formulation of reactions to interpretative declarations.

Finally, at its 3012th meeting, on 29 May 2009, the Commission referred to the Drafting Committee draft guidelines 2.4.0 and 2.4.3 *bis*, dealing, respectively, with the form and the communication of interpretative declarations.

The Drafting Committee has thus far managed to complete 18 draft guidelines, including a new draft guideline 3.2.5, which it considered in 10

meetings on 5, 6, 18, 19, 20, 27, 28 and 29 May 2009. The Drafting Committee was also able to provisionally adopt the titles of section 2.8 (“Formulations of acceptances of reservations”) and 2.9 (“Formulation of reactions to interpretative declarations”). In contrast, the Drafting Committee has not been able to complete its work on draft guideline 3.3. Also, draft guideline 3.3.1 remains to be considered by the Drafting Committee. An additional report will be given at a later stage.

Before I introduce the Drafting Committee’s report, let me pay tribute to the Special Rapporteur, Mr. Alain Pellet, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the other members of the Drafting Committee for their active participation and valuable contributions in the work of the Committee.

Mr. Chairman,

I shall now turn to the report. You have before you 18 draft guidelines.

The first two draft guidelines deal with the form and communication of interpretative declarations; ten other draft guidelines relate to reactions to interpretative declarations; and the remaining six draft guidelines concern the assessment of the validity of reservations.

Let me first introduce the two draft guidelines dealing with the form and communication of interpretative declaration.

#### Draft guideline 2.4.0

Draft guideline 2.4.0 is now entitled “Form of an interpretative declaration”. Following a suggestion made in the Plenary, the Drafting Committee modified the

title of this draft guideline in order to avoid referring to the “written” form of an interpretative declaration. This change is intended to reflect the fact that there is no legal requirement that an interpretative declaration be made in writing. The commentary would underline this point and indicate that interpretative declarations which are made orally can also produce legal effects.

In the text of the draft guideline, the words “whenever possible” were replaced by the word “preferably”. It was felt that this formulation would adequately reflect the recommendatory nature of this draft guideline, while also recognizing that in certain cases, such as in the framework of an international conference, it may not be appropriate for States or international organizations to make interpretative declarations in writing.

#### Draft guideline 2.4.3 *bis*

Draft guideline 2.4.3*bis* is entitled “Communication of interpretative declarations”, as originally proposed, and refers, *mutatis mutandis*, to certain draft guidelines relating to reservations. The Drafting Committee corrected the English text of the draft guideline in which the words “communication of” had been inadvertently omitted. Furthermore, the Drafting Committee deleted the words “whenever possible” at the beginning of the text, while limiting the scope of this draft guideline to those interpretative declarations that are made in writing.

The Drafting Committee carefully considered a suggestion made in the Plenary to add a reference to draft guideline 2.1.8, which recommends to the depositary a certain course of action in the event of a manifestly invalid reservation. During the discussion, it was observed that the issue of the validity of an interpretative declaration could arise in those rare cases in which a treaty would prohibit or restrict the formulation of interpretative declarations in general, or of certain types of interpretative declarations. Thus, some members were of the view that the same course of action as that envisaged for manifestly invalid reservations

should be followed by the depositary in the event of a manifestly invalid interpretative declaration, and that a failure to provide so in the draft guidelines could even encourage the formulation of invalid interpretative declarations. However, the point was made by other members that the cases in which an interpretative declaration could be invalid were truly exceptional, and that it was therefore unnecessary to transpose to interpretative declarations the content of a draft guideline which, even with respect to reservations, pertained to the progressive development of international law. The commentary would provide a detailed explanation on this issue, while also referring to the minority view expressed by those members of the Drafting Committee who would have preferred the inclusion of a reference to draft guideline 2.8.1.

Furthermore, taking into account the position expressed by the Commission at the present session against the elaboration of a draft guideline dealing with the statement of reasons for an interpretative declaration, the Drafting Committee decided not to follow a suggestion made in the Plenary to include a reference to draft guideline 2.1.9 dealing with the statement of reasons for reservations.

Before turning to the next draft guidelines, I must recall that these two draft guidelines belong to section 2.4 of the Guide to Practice, entitled “Procedure for Interpretative Declarations”. Accordingly, all the draft guidelines of this section will need to be renumbered.

Mr. Chairman,

I shall now turn to the ten draft guidelines dealing with reactions to interpretative declarations.

### Draft guideline 2.9.1

Draft guideline 2.9.1 is entitled “Approval of an interpretative declaration”, as originally proposed. Since this draft guideline was well received in the Plenary, the Drafting Committee retained the formulation proposed by the Special Rapporteur, with the exception of two minor linguistic changes, namely the replacement, in the English text, of the expression “in response to” by the expression “in reaction to”, and the replacement, towards the end of the text, of the word “proposed” by the word “formulated” which was considered to be more neutral.

Several members of the Drafting Committee pointed to the fact that, in practice, reactions to interpretative declarations often presented a mixed character in that they may contain elements of approval and elements of opposition. However, after due consideration, the Drafting Committee came to the conclusion that it was not appropriate to reflect this element in the text of a guideline that simply intended to provide a definition of “approval”. However, it was agreed that an appropriate explanation of this phenomenon would be provided in the commentary to the present draft guideline as well as in the commentary to the draft guideline defining “opposition” to an interpretative declaration.

Moreover, given the definitional nature of this draft guideline, the Drafting Committee did not deem it appropriate to address therein the question of the possible effects of the approval of an interpretative declaration.

### Draft guideline 2.9.2

Draft guideline 2.9.2 is entitled “Opposition to an interpretative declaration”, as originally proposed. This provision was also well received in the Plenary. The formulation retained by the Drafting Committee is largely based on the text proposed by the Special Rapporteur. However, in addition to the

replacement, in the English text, of the expression “in response to” by the expression “in reaction to”, and the replacement of the word “proposed” by the word “formulated”, as in draft guideline 2.9.1, some substantive changes were introduced by the Drafting Committee to the text of this draft guideline.

Following a proposal made by some members in the Plenary, the Drafting Committee decided to delete the expression “with a view to excluding or limiting its effects”, which was contained at the end of the text originally proposed by the Special Rapporteur. The main reason for this deletion was that the effects, if any, of an interpretative declaration and of an opposition thereto were yet to be determined and should not be alluded to in a guideline which only purported to define the notion of “opposition” to an interpretative declaration. It was also felt that it was not appropriate, in respect of interpretative declarations and oppositions thereto, to use wording similar to that contained in draft guideline 2.6.1 defining objections to reservations. Moreover, it was said that the question of the motives of an opposition was too subjective to serve as an element for a definition of the notion of “opposition”.

Finally, the last sentence of the draft guideline was modified in order to better convey the idea that the rejection of an interpretative declaration can also occur through the formulation of an alternative interpretation. On this point, the Drafting Committee had a long discussion on whether the term “incompatible” or “inconsistent” should be used instead of the term “alternative”. The Drafting Committee finally agreed on the term “alternative” as more neutral. It was felt by several members that a requirement that the interpretation formulated be “incompatible” or “inconsistent” with that contained in the interpretative declaration would be too strict and could create certain difficulties.

### Draft guideline 2.9.3

Draft guideline 2.9.3 is now entitled “Recharacterization of an interpretative declaration”. The Drafting Committee considered that the word “recharacterization” was more appropriate in English than the word “reclassification”. The French title of the draft guideline remains, however, unchanged.

During the plenary debate in 2008, some members were of the view that, since the “recharacterization” of an interpretative declaration as a reservation was to be regarded as a form of opposition thereto, it was preferable to merge draft guidelines 2.9.2 and 2.9.3. However, a majority of the members who took the floor in the Plenary expressed support for having a separate draft guideline dealing with the “recharacterization of an interpretative declaration”. The Drafting Committee decided to follow the majority view and therefore retained a separate draft guideline on “recharacterization”. It was felt that the “recharacterization” of an interpretative declaration as a reservation was an issue deserving separate treatment, although in most cases such a “recharacterization” would also convey an opposition to the interpretative declaration.

A number of changes were introduced by the Drafting Committee to the text of draft guideline 2.9.3.

In order to bring about consistency with the text and structure of draft guidelines 2.9.1 and 2.9.2, and also in order to reflect the fact that an attempt to recharacterize an interpretative declaration does not by itself change the nature of that declaration, the terms “of an interpretative declaration” were added after the word “recharacterization” in the first line, and the qualifier “interpretative” was added before “declaration” in the third line. The Drafting Committee also considered that the last part of paragraph 1 was somewhat redundant and could therefore be simplified. Thus, the expression “purports to regard the declaration as

a reservation and to treat it as such” was replaced by the phrase “treats the declaration as a reservation”.

A discussion took place in the Drafting Committee concerning the need and appropriateness of maintaining paragraph 2 of this draft guideline, which indicates that a State or an international organization should, when “recharacterizing” an interpretative declaration, take into account draft guidelines 1.3 to 1.3.3 relating to the distinction between reservations and interpretative declarations. Although a suggestion was made in the Plenary to delete this paragraph, the Drafting Committee considered the paragraph useful and therefore retained it, while redrafting it so as to avoid the repetition of the term “recharacterization”. Moreover, taking into account some concerns expressed in the Plenary, the Drafting Committee replaced the word “shall” by “should” in order to better reflect the recommendatory nature of the statement contained in this paragraph. For the same reason, the Drafting Committee considered that the expression “take into account” was more appropriate than verb “apply”.

It was also suggested in the Drafting Committee that the commentary should make it clear that the recognition of the right of a State or an international organization to “recharacterize” an interpretative declaration as a reservation is without prejudice to whether such a “recharacterization” is legally correct.

#### Draft guideline 2.9.4

Mr. Chairman,

Draft guideline 2.9.4, entitled “Freedom to formulate an approval, opposition or recharacterization”, was well received in the Plenary. Therefore, the Drafting Committee retained the text proposed by the Special Rapporteur with only two minor linguistic changes, namely the replacement of the word “reclassification” by the word “recharacterization” and the replacement, in the title,

of the word “protest” by the word “opposition”. These changes were introduced in order to bring about consistency with the wording of the other draft guidelines.

#### Draft guideline 2.9.5

Draft guideline 2.9.5, which was also well received in the Plenary, is now entitled “Written form of approval, opposition and recharacterization”. This provision is intended to mirror draft guideline 2.4.0, stating that interpretative declarations should be preferably made in writing.

The Drafting Committee adopted the text proposed by the Special Rapporteur with two changes. In the English text, the verb “shall” was replaced by “should”, in order to ensure consistency with the French text which clearly indicates the recommendatory nature of this draft guideline. In the same spirit, the words “whenever possible” were added to the text. The commentary would clarify that the adoption of the written form is a matter of choice by the State or international organization concerned, rather than a matter of capability of doing so.

#### Draft guideline 2.9.6

Draft guideline 2.9.6, which is now entitled “Statement of reasons for approval, opposition and recharacterization”, was also well received in the Plenary. Thus, the Drafting Committee adopted the text proposed by the Special Rapporteur with minor linguistic changes. In the English text, the phrase “whenever possible” was replaced by the phrase “to the extent possible”, in order to better convey the idea that States and international organizations are encouraged to state the reasons for their reactions as extensively as possible. This qualifier was inserted after the word “should”, in order to mirror the structure of draft guideline 2.9.5.

A discussion took place in the Drafting Committee on whether this draft guideline should also apply to the approval of an interpretative declaration. The point was made by some members that it might not be easy to understand the reasons why a State or an international organization wishing to approve an interpretative declaration should state the reasons for such approval. It was also pointed out that the reasons provided for an approval could themselves be questioned, thus creating confusion. Finally, the Drafting Committee considered it preferable not to exclude approval from the scope of the draft guideline, bearing in mind its purely recommendatory nature, as reflected in the flexible wording employed therein.

It was agreed that the commentary would make it clear that the statement of reasons for an approval, an opposition or a “recharacterization” is optional. Furthermore, in respect of an approval of an interpretative declaration, the commentary would provide the following explanations: (1) the issue of the statement of reasons arises in terms which are different from the case of an opposition; (2) the statement of reasons for an approval may present an interest in the context of a dialogue relating to the interpretation of a treaty; and (3) in the rare instances of an approval of an interpretative declaration, it occurred that the reasons for such an approval were stated.

#### Draft guideline 2.9.7

Draft guideline 2.9.7 is now entitled “Formulation of an approval, opposition or recharacterization”. This draft guideline concerns the modalities of the formulation and communication of an approval, opposition or recharacterization of an interpretative declaration, and enunciates the applicability *mutatis mutandis* of certain draft guidelines relating to reservations. As this draft guideline was well received in the Plenary, the Drafting Committee adopted the text proposed by the Special Rapporteur with the only exception of the

replacement of the word “reclassification” by the word “recharacterization”. The commentary would explain that the reference to draft guideline 2.1.7, dealing with the functions of the depositary regarding the examination of whether a reservation is in due and proper form, is justified by the existence of some treaties which may prohibit or restrict the formulation of certain interpretative declarations.

#### Draft guideline 2.9.8

Draft guideline 2.9.8, entitled “Non-presumption of approval or opposition” as originally proposed, was considered by the Drafting Committee together with draft guideline 2.9.9, dealing with the case of silence.

The text of the draft guideline as proposed by the Special Rapporteur, stating the absence of any presumption of either approval of, or opposition to an interpretative declaration, was retained by the Drafting Committee with minor linguistic changes and has now become paragraph 1 of draft guideline 2.9.8.

Paragraph 2 is new. It refers to the exceptional cases in which an approval of an interpretative declaration or an opposition thereto may be inferred from the conduct of the States or organizations concerned, taking into account all relevant circumstances. The reference to draft guidelines 2.9.1 and 2.9.2 purports to clarify that paragraph 2 of draft guideline 2.9.8 deals with exceptional cases in which an approval or an opposition that were not expressed by means of a unilateral statement, pursuant to draft guidelines 2.9.1 and 2.9.2, may be inferred from certain conduct. In the draft guidelines originally proposed by the Special Rapporteur, the issue of conduct in reaction to an interpretative declaration was addressed only in the context of draft guideline 2.9.9, dealing with silence, and only in relation to an approval of an interpretative declaration. However, the Drafting Committee came to the conclusion that the issue of “conduct” deserved a more general treatment, both in relation to an approval of, and an opposition to, an interpretative declaration.

### Draft guideline 2.9.9

Draft guideline 2.9.9 is now entitled “Silence with respect to an interpretative declaration”. In the plenary debate in 2008, a suggestion was made to delete this draft guideline, mainly because it appeared to contradict the absence of any presumption of either approval or opposition, as stated in draft guideline 2.9.8. However, a majority of members was in favor of retaining this provision. After due consideration, the Drafting Committee found that the inclusion of a draft guideline dealing specifically with the case of silence was appropriate, provided that it was carefully drafted in order to properly circumscribe the role that silence may play in determining whether an interpretative declaration has been approved.

Paragraph 1, as adopted by the Drafting Committee, is a more concise version of the text proposed by the Special Rapporteur. The words “consent to”, at the beginning of the paragraph, were replaced by the words “approval of”, in order to bring about consistency with the text of the other draft guidelines.

Several changes were introduced by the Drafting Committee to paragraph 2, dealing with situations in which silence may be relevant in determining whether an interpretative declaration has been approved. In this regard, the Drafting Committee decided to refer to “approval”, rather than “acquiescence”, in order to align the text of this draft guideline to that of the other draft guidelines and also to avoid the ambiguities possibly surrounding the notion of “acquiescence”. At the beginning of the paragraph, the reference to “certain specific circumstances” was replaced by the words “in exceptional cases”. The reason for this change is that the Drafting Committee did not deem it appropriate to refer to “specific circumstances” that could not be easily defined, and found it preferable to use some wording underlining the infrequency of cases where silence would be relevant to determining whether an interpretative declaration has been approved. Furthermore, a discussion took place in the Drafting Committee on the relation

between silence and conduct, and on the way to reflect this relation in the text of paragraph 2. The formulation finally retained purports to convey the idea that, in exceptional cases, silence as an element of conduct may be relevant in determining whether the State or international organization concerned has approved an interpretative declaration, “taking account of the circumstances”. This qualifier was considered to be more accurate than the general formula “as the case may be” contained in the text originally proposed by the Special Rapporteur.

#### Draft guideline 2.9.10

Draft article 2.9.10 is entitled “Reactions to conditional interpretative declarations”, as originally proposed. The Drafting Committee decided to retain this draft guideline in brackets, pending a decision by the Commission on the desirability of devoting specific provisions to conditional interpretative declarations. The reference to draft guideline “2.6” was replaced by a reference to draft guideline “2.6.1”, since 2.6 corresponds to the title of the corresponding section.

Mr. Chairman,

I shall now turn to the set of draft guidelines dealing with the assessment of the validity of reservations. As I said earlier, these draft guidelines had been referred to the Drafting Committee in 2006.

#### Draft guideline 3.2

Draft guideline 3.2 is now entitled “Assessment of the validity of reservations” and refers to certain entities and bodies which may proceed to such an assessment. The Drafting Committee had a long discussion on the purpose and

meaning of this draft guideline, and on the formulation that would best reflect its general and introductory character. Several changes were introduced to the text.

In the chapeau, the verb “rule on” was replaced by the verb “assess”. The latter was deemed more appropriate since the pronouncements that could be made, concerning the validity of a reservation, by the entities and bodies listed in this draft guideline are not necessarily binding. In doing so, the English wording in the chapeau was aligned to the French word “*apprécier*” and also to the title of the draft guideline where the word “assessment” is used. The commentary would indicate that the verb “assess” was chosen because of its neutral character; while alluding to the existence of an institutional basis for the pronouncements made by the bodies referred to in this draft guideline, the verb “assess” does not prejudge the legal effect that such pronouncements may have. The replacement of the words “are competent” by the words “may assess, within their respective competences”, was intended to reflect the fact that the ability of certain bodies – in particular, dispute settlement bodies and treaty monitoring bodies – to assess the validity of a reservation is not automatic nor unlimited, but depends on the extent of the competences conferred on such bodies.

In the first bullet point, the term “other” was deleted. This deletion was intended to reflect the fact that, under certain circumstances, the judicial authorities of the State author of a reservation may be competent to assess the validity of the reservation. However, taking into account the views expressed by the majority of the members during the plenary debate in 2006, the Drafting Committee decided to delete the reference to domestic courts, which appeared in brackets in the text of the draft guideline as referred to the Drafting Committee. It was agreed that the possibility that domestic courts may, in certain cases as provided for by domestic law, be competent to assess the validity of a reservation would be referred to in the commentary.

In the second bullet point referring to dispute settlement bodies, the phrase “that may be competent to interpret or apply the treaty” was deleted. This qualifier

was considered to be unnecessary in the light of the addition, in the chapeau, of the words “within their respective competences”. The commentary would underline the role that judicial bodies may play in the assessment of the validity of reservations. It would also indicate that the case of dispute settlement bodies empowered to adopt binding decisions is specifically addressed in draft guideline 3.2.5.

Finally, in the third bullet point referring to treaty monitoring bodies, the phrase “that may be established by the treaty” was deleted in order to cover also those monitoring bodies that may be established subsequently to the adoption of a treaty but within its framework, such as the Committee on Economic, Social and Cultural Rights. This point would be clarified in the commentary. A number of specific issues relating to the assessment of reservations by treaty monitoring bodies are addressed in draft guidelines 3.2.1 to 3.2.4.

#### Draft guideline 3.2.1

Draft guideline 3.2.1 is now entitled “Competence of the treaty monitoring bodies to assess the validity of reservations”. Very few comments were made on this draft guideline during the plenary debate in 2006.

For the reasons already mentioned, the words “established by the treaty” were deleted from the title of the draft guideline. Paragraph 1, stating that a treaty monitoring body may, for the purposes of discharging the functions entrusted to it, assess the validity of reservations, is a simplified version of the text initially proposed by the Special Rapporteur, with the replacement of the words “shall be competent” by the word “may assess”.

Paragraph 2, which circumscribes the legal effect of an assessment made by a treaty monitoring body regarding the validity of a reservation, is also based on the text proposed by the Special Rapporteur. This paragraph reflects paragraph 8 of the Preliminary conclusions, adopted by the Commission at its forty-ninth

session in 1997, on reservations to normative multilateral treaties including human rights treaties. In the English text, the words “findings made” were replaced by the words “conclusions formulated”, in order to restore consistency with the neutral formulation contained in the French text, which is clearly without prejudice to the question of any legal effect that may be attached to the conclusions of a treaty monitoring body regarding the validity of reservations. The terms “legal force” were replaced, in the English text, by the terms “legal effect”, and the commentary would explain what it meant by legal effect (“*valeur juridique*”) in this context. Finally, towards the end of the paragraph, the word “general” was deleted in order to refer to the performance by treaty monitoring bodies of all the functions relating to their monitoring role, including the examination of individual communications.

#### Draft guideline 3.2.2

Mr. Chairman,

Draft guideline 3.2.2, which is now entitled “Specification of the competence of monitoring bodies to assess the validity of reservations”, is inspired from paragraph 7 of the Preliminary conclusions, adopted by the Commission at its forty-ninth session in 1997, on reservations to normative multilateral treaties including human rights treaties. According to this draft guideline, States are encouraged, when providing certain bodies with the competence to monitor the application of a treaty, to specify, where appropriate, the nature and the limits of the competence of those bodies to assess the validity of reservations. The first sentence was reformulated in order to avoid conveying the wrong impression that the draft guideline purported to recommend the establishment of treaty monitoring bodies. Also, in order to reflect the purely recommendatory nature of the draft guideline, the placement of the words “where appropriate” was changed so as to make this qualifier applicable to the recommendation as a whole.

The second sentence of this draft guideline concerns those monitoring bodies that already exist. The formulation originally proposed by the Special Rapporteur envisaged the adoption of protocols in order to specify the competence of such bodies to assess the validity of reservations. The Drafting Committee preferred a more general formulation, thus leaving open the question of the types of measures (protocols, amendments to existing treaties, etc.) that could be adopted to those ends.

### Draft guideline 3.2.3

Draft guideline 3.2.3 is entitled “Cooperation of States and international organizations with treaty monitoring bodies”, as originally proposed. This draft guideline is inspired from paragraph 9 of the Preliminary conclusions, adopted by the Commission at its forty-ninth session in 1997, on reservations to normative multilateral treaties including human rights treaties.

The Drafting Committee had an extensive discussion of the scope and formulation of this draft guideline. The Committee decided that this draft guideline should only deal with treaty monitoring bodies, which are not vested with the power to adopt binding decisions, and that a separate draft guideline should be devoted to those bodies which possess that power, such as regional human rights courts. Consequently, the second sentence contained in the text proposed by the Special Rapporteur was deleted from draft guideline 3.2.3.

The current formulation of draft guideline 3.2.3, as adopted by the Drafting Committee, is based on the first sentence of the original draft guideline proposed by the Special Rapporteur. However, the formulation of this sentence was modified in order to avoid conveying the impression that States or international organizations would have a legal obligation to give effect to the assessment by a treaty monitoring body of the validity of reservations. Thus, the wording “are required [...] to take into full consideration” was replaced by the wording “should

give full consideration to” that body’s assessment. However, the enunciation of a general requirement for States and international organizations to cooperate with treaty monitoring bodies was maintained as proposed by the Special Rapporteur.

To mirror this draft guideline, the Special Rapporteur will present an additional draft guideline stating that treaty monitoring bodies should take into account the positions adopted by States or international organizations.

#### Draft guideline 3.2.4

Draft guideline 3.2.4 is now entitled “Bodies competent to assess the validity of reservations in the event of the establishment of a treaty monitoring body”. This provision, which did not give rise to many comments during the plenary debate in 2006, is partially inspired from paragraph 6 of the Preliminary conclusions, adopted by the Commission at its forty-ninth session in 1997, on reservations to normative multilateral treaties including human rights treaties.

The title was modified in order to indicate clearly that this draft guideline refers to the establishment of a treaty monitoring body within the meaning of the preceding draft guidelines, as opposed to a dispute settlement body that is vested with the power to make binding decisions.

Some modifications were introduced to the text originally proposed by the Special Rapporteur. In addition to some changes that were only intended to simplify the text, the Drafting Committee decided to formulate this draft guideline as a “without prejudice” clause, indicating that the competence of a treaty monitoring body to assess the validity of reservations does not prejudge the competence of the contracting States or contracting organizations, or the competence of dispute settlement bodies, to do so.

Draft guideline 3.2.5.

Draft guideline 3.2.5, entitled “Competence of dispute settlement bodies to assess the validity of reservations”, is new. This provision is a reformulation of the second sentence that appeared in draft guideline 3.2.3 as proposed by the Special Rapporteur, and which the Drafting Committee decided to delete. As I have mentioned earlier, after a long discussion the Drafting Committee decided to devote a separate draft guideline to those bodies that are vested with the power to make binding decisions – namely judicial bodies – in order to distinguish such bodies from treaty monitoring bodies which do not possess such power.

Draft guideline 3.2.5 applies to those dispute settlement bodies that are competent to adopt binding decisions upon the parties. It recognizes the binding character upon the parties of an assessment made by such bodies on the validity of a reservation, when such assessment is necessary for the discharge of the competence of those bodies.

The indication that the assessment is binding “as an element of the decision” purports to clarify that this draft guideline covers not only those cases in which the validity of a reservation would be the very subject-matter of the decision, but also situations in which the validity of a reservation would be one of the elements to be assessed, including incidentally, by a dispute settlement body in order to adopt a binding decision in a given case. The commentary would provide an appropriate explanation on this point.

Mr. Chairman,

This concludes my introduction of the second report of the Drafting Committee. It is my sincere hope that the Plenary will be in a position to adopt the draft guidelines presented.

Thank you Mr. Chairman.

