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Reservations to treaties

Statement of the Chairman of the Drafting Committee for the sixty-second session of the International Law Commission, Mr. Donald M. McRae

26 May 2010

Madam Chairman,

It is my pleasure, today, to introduce the first report of the Drafting Committee for the sixty-second session of the Commission. This report, which deals with the topic "Reservations to treaties", is contained in document A/CN.4/L.760 and concerns eleven draft guidelines which were provisionally adopted by the Drafting Committee during the second part of last year's session, in four meetings which took place on 23, 28 and 30 July 2009.

The first two draft guidelines, 2.6.3 and 2.6.4, relate, respectively, to the freedom to formulate objections to reservations and to the freedom for the objecting State or international organization to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation. These two draft guidelines were proposed by the Special Rapporteur in his eleventh report (A/CN.4/574), and were referred to the Drafting Committee in 2007.

The other set of draft guidelines, namely guidelines 3.4.1 to 3.6.2, concern the permissibility of reactions to reservations, and the permissibility of interpretative declarations and reactions thereto. The original proposals are contained in the Special Rapporteur's fourteenth report (A/CN.4/614/Add.1). However, following the plenary debate in 2009, the Special Rapporteur presented a revised version of these draft guidelines (except for draft guidelines 3.5.2 and 3.5.3 which were not revised). The revised set of draft guidelines was referred to the Drafting Committee in 2009.

Before I introduce the details of the report, let me once again 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 essential contributions. Furthermore, I wish to thank the Secretariat for its valuable assistance.

Madam Chairman,

I shall now turn to the substance of the report, beginning with draft guideline 2.6.3.

Draft guideline 2.6.3

Draft guideline 2.6.3 is now entitled "Freedom to formulate objections". A discussion took place in the Drafting Committee on whether

this draft guideline should refer to the "freedom" or to the "right" to formulate an objection. After careful consideration, the Drafting Committee decided to retain the term "freedom" (in French, "*faculté*") which appeared in the text originally proposed by the Special Rapporteur and referred to the Drafting Committee. It was observed, in particular, that the term "right" might not be appropriate in this context because, unlike the freedom to formulate an objection, a right could be regarded as implying the existence of a correlative obligation and, possibly, of a remedy in the event of its violation. Furthermore, in order to harmonize the text and the title of the draft guideline, the term "make" was replaced by the term "formulate" in the title.

That said, the main change introduced to the text referred to the Drafting Committee is the replacement of the expression "for any reason whatsoever" by the expression "irrespective of the permissibility of the reservation". During the plenary debate in 2007, the expression "for any reason whatsoever" had been criticized by some members who were of the view that this formulation needed to be qualified, at least by a reference to the Vienna Conventions and to general international law. Similar concerns were raised in the Drafting Committee, particularly with respect to the limitations on the freedom to formulate objections that would arise, according to some members, from *jus cogens* norms. Moreover, some members were of the view that objections to reservations expressly authorized by the treaty were not allowed. After an extensive discussion, and on the basis of a revised text proposed by the Special Rapporteur, the Drafting Committee agreed on a formulation that was deemed to convey, in a more accurate manner, the original intent of the draft guideline as proposed

by the Special Rapporteur. Such original intent was to state that, in contemporary international law, and contrary to what had been suggested by the International Court of Justice in its advisory opinion of 28 May 1951 on the question concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[1], the freedom to formulate objections to reservations is not limited to the case of impermissible reservations such as reservations incompatible with the object and purpose of the treaty. The commentary would provide the necessary explanations in that respect, while also indicating that, according to some members, the freedom to formulate objections was subject to certain limitations such as those arising from *jus cogens* norms and certain general principles such as good faith and non-discrimination.

Finally, the Drafting Committee did not consider it necessary to repeat, in the present context, that the freedom to formulate an objection should be exercised in accordance with the provisions of the Guide to Practice.

Draft guideline 2.6.4

Madam Chairman,

Draft guideline 2.6.4 is entitled “Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation”, as originally proposed.

[1] *I.C.J. Reports 1951*, p. 24.

As for draft guideline 2.6.3, several members of the Committee expressed concerns about the expression “for any reason whatsoever”, which they regarded as too broad or excessively strong. After careful consideration, and on the basis of a revised text proposed by the Special Rapporteur, the Drafting Committee opted for a simplified formulation, enunciating the freedom of a State or an international organization that formulates an objection to oppose the entry into force of the treaty as between itself and the author of the reservation. The commentary would clarify that, as for draft guideline 2.6.3 dealing with the freedom to formulate objections, the freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation is not limited to those cases in which the reservation is incompatible with the object and purpose of the treaty or is regarded as such by the objecting State or international organization.

Furthermore, as in draft guideline 2.6.3, the Drafting Committee did not deem it necessary to repeat, in the text of this guideline, that the freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation is to be exercised in accordance with the provisions of the Guide to Practice.

Madam Chairman,

I shall now turn to the set of draft guidelines dealing with the permissibility of reactions to reservations, and with the permissibility of interpretative declarations and reactions thereto. I shall start with the two guidelines on reactions to reservations, which would constitute section 3.4 of the Guide to Practice, entitled “Permissibility of reactions to reservations”.

Draft guideline 3.4.1

Draft guideline 3.4.1 is now entitled "Permissibility of the acceptance of a reservation". It states that the express acceptance of an impermissible reservation is itself impermissible.

The text referred to the Drafting Committee had been presented by the Special Rapporteur to the Plenary in 2009, in order to respond to the concerns expressed by some members who were of the view that – contrary to what had been suggested by the Special Rapporteur in his fourteenth report – issues of permissibility *did* arise with respect to the acceptance of an impermissible reservation.

The Drafting Committee adopted that text referred to it with some linguistic changes.

Pursuant to a decision adopted by the Commission at its fifty-eighth session in 2006, which is reflected in the general commentary to section 3 of the Guide to Practice (see document A/61/10, p. 327), the Drafting Committee replaced, in the English text of the draft guideline, the terms "substantive validity" and "validity" by "permissibility", while in the French text the expression "*validité matérielle*" was replaced by "*validité substantielle*". These changes were also introduced, as appropriate, in the other draft guidelines contained in the present report. In this regard, I should recall that "permissibility" ("*validité substantielle*") refers to the substantive conditions for the validity of a reservation set forth in Article 19 of the 1969

and 1986 Vienna Conventions, and referred to in draft guideline 3.1, as opposed to the formal and procedural requirements which are addressed in Article 23 of the Vienna Conventions and in section 2 of the Guide to Practice.

Furthermore, in the English text of draft guideline 3.4.1, the term "explicit", in relation to "acceptance", was replaced by the term "express".

Draft guideline 3.4.2

Draft guideline 3.4.2 is now entitled "Permissibility of an objection to a reservation". It should be recalled that the Special Rapporteur, in his fourteenth report, had adopted the position that objections to reservations were not subject to any conditions for permissibility. However, during the plenary debate in 2009, some members expressed the view that such conditions *did* exist with respect to the so-called objections "with intermediate effect" – that is, objections purporting to exclude the application of provisions of the treaty to which the reservation does not relate. Thus, the Special Rapporteur presented to the Plenary a new draft guideline, which was referred to Drafting Committee, enunciating two conditions for the permissibility of an objection by which the objecting State or international organization purported to exclude, in its relation with the author of the reservation, the application of provisions of the treaty not affected by the reservation.

The text provisionally adopted by the Drafting Committee is largely based on that referred to it by the Plenary. Some minor changes were

nevertheless introduced. Thus, the term "permissibility", instead of "substantive validity" or "validity", was inserted both in the title and in the text. Also, in order to follow more closely the terminology contained in Article 21(1)(a) and (3) of the 1969 and 1986 Vienna Conventions, the Drafting Committee preferred to refer, in this context, to an objection purporting to exclude the application of provisions of the treaty "to which the reservation *does not relate*", instead of "provisions of the treaty *not affected* by the reservation".

The first condition for the permissibility of an objection with intermediate effect, which is stated in paragraph (1) of draft guideline 3.4.2, concerns the required link between the provision to which the reservation relates and the additional provisions that the objection with intermediate effects purports to exclude. Following an extensive discussion regarding the nature of this link, the Drafting Committee decided to retain the expression "sufficient link" which had been proposed by the Special Rapporteur. It was felt, in particular, that this formulation would accommodate two different views expressed in the Drafting Committee, namely the view that the link between the provisions concerned should be particularly strong, or even inextricable, and the view according to which an adequate link was sufficient and no substantive relationship between those provisions was required. It was also felt that a flexible terminology such as "sufficient link" was particularly adequate in view of the fact that this condition probably pertained to the progressive development of international law.

The second condition for the permissibility of an objection with intermediate effect, which is enunciated in paragraph 2 of draft guideline

3.4.2, is that such an objection must not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection. The wording of this second paragraph is largely based on the text proposed by the Special Rapporteur. However, the beginning of the sentence was simplified by using the words “would not defeat the object and purpose of the treaty”.

Madam Chairman,

I shall now turn to the draft guidelines dealing with the permissibility of interpretative declarations.

Draft guideline 3.5

Draft guideline 3.5 is now entitled “Permissibility of an interpretative declaration”. It provides that a State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty or is incompatible with a peremptory norm of general international law. The first exception to the freedom to formulate interpretative declarations appeared already in the text originally proposed by the Special Rapporteur. The second exception was subsequently included by the Special Rapporteur, following the plenary debate in 2009, in the revised text of this draft guideline that was then referred to the Drafting Committee.

The Drafting Committee adopted the text as referred to it, except for the replacement of the words “substantive validity” by “permissibility” in the

title, and for deletion of the words “express or implicit”, before the word “prohibited”, in order to bring about consistency with the text of other draft guidelines. The commentary would explain that a prohibition of interpretative declarations that might be contained in a treaty could be either explicit or implicit.

Draft guideline 3.5.1

Draft guideline 3.5.1 is now entitled “Permissibility of an interpretative declaration which is in fact a reservation”. It states that, if a unilateral statement which purports to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the guidelines relating to the permissibility of reservations.

The text referred to the Drafting Committee was a revised version presented by the Special Rapporteur following the plenary debate in 2009, the title of which referred explicitly to the recharacterization of an interpretative declaration as a reservation. While preserving the substance of the draft guideline referred to it, the Drafting Committee introduced a number of changes to the text. Apart from the replacement of the term “validity” by “permissibility”, the Committee opted for a reformulation of this provision whereby its text would begin with a conditional sentence introduced by “if…”. In addition, the words “recharacterized as a reservation” in the title were replaced by the formula “which is in fact a reservation”. These changes are intended to make it clear that the recharacterization of an interpretative declaration cannot, in itself, change the nature of the declaration into a reservation, and that the nature of a

statement as an interpretative declaration or a reservation is to be determined on the basis of objective criteria.

The view was expressed in the Drafting Committee that a draft guideline addressing these situations should also be included in Part II of the Guide to Practice, dealing with the procedure for the formulation of reservations and interpretative declarations.

Draft guideline 3.5.2

Draft guideline 3.5.2 is now entitled "Conditions for the permissibility of a conditional interpretative declaration". It states that the permissibility of conditional interpretative declarations must be assessed in accordance with the guidelines relating to the permissibility of reservations. This guideline complements guideline 2.4.7, relating to the formal requirements for the formulation of a conditional interpretative declaration.

During the plenary debate in 2009, and also in the Drafting Committee, the point was made that, if a conditional interpretative declaration provided the correct interpretation of the treaty or were to be accepted by the contracting States or international organizations, such a declaration should not be treated as a reservation for permissibility purposes. However, the opposite view was also expressed, according to which the nature of a conditional interpretative declaration would not depend on the correctness of the interpretation formulated therein. It was also observed in the Drafting Committee that this issue could be revisited following the Commission's consideration of the effects of reservations, interpretative declarations and

reactions thereto. Furthermore, some doubts were raised in the Drafting Committee regarding the appropriateness of a complete alignment of the legal regimes of reservations and conditional interpretative declarations.

The Drafting Committee nevertheless decided to retain the text proposed by the Special Rapporteur, while using the term "permissibility" in the title and in the text of the draft guideline, and while also correcting a typographical error in the cross-reference to the relevant draft guidelines. I should note, however, that this guideline should appear in brackets for the time being, pending a final decision by the Commission as to the treatment of conditional interpretative declarations in the Guide to Practice.

Draft guideline 3.5.3

Draft guideline 3.5.3 is now entitled "Competence to assess the permissibility of a conditional interpretative declaration". This guideline, which states that the provisions of guidelines 3.2 to 3.2.4, relating to the competence to assess the permissibility of reservations, apply *mutatis mutandis* to conditional interpretative declarations, was well received during the plenary debate in 2009. Therefore, apart from the replacement of term "validity" by "permissibility", as in the previous guidelines, and a few editorial changes, the text adopted by the Drafting Committee corresponds the text originally proposed by the Special Rapporteur.

Madam Chairman,

I shall now turn to the set of draft guidelines dealing with permissibility of reactions to interpretative declarations.

Draft guideline 3.6

Draft guideline 3.6, which was adopted by the Drafting Committee on the basis of a new text presented to the Committee by the Special Rapporteur, is entitled "Permissibility of reactions to interpretative declarations". It states the principle according to which an approval of, an opposition to, or a recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility, subject to the provisions of draft guidelines 3.6.1 and 3.6.2.

Draft guideline 3.6.1

Draft guideline 3.6.1, which is entitled "Permissibility of approvals of interpretative declarations", states that an approval of an impermissible interpretative declaration is itself impermissible.

This provision corresponds, in its substance, to paragraph 1 of the revised text of draft guideline 3.6 as presented by the Special Rapporteur to the Plenary in 2009, in the light of comments made during the debate, and referred to the Drafting Committee also last year. It should be recalled that the Special Rapporteur had initially proposed a draft guideline indicating that reactions to interpretative declarations were not subject to any condition for permissibility. While some members had supported this position, some others were of the view that, in certain circumstances, an approval of, or

opposition to, an interpretative declaration could be impermissible. Thus, the Special Rapporteur presented to the Plenary a revised text indicating that a State or an international organization may not approve an interpretative declaration expressly or implicitly prohibited by the treaty.

While retaining the substance of this proposal, the Drafting Committee opted for a simplified formulation, stating in a more direct manner the impermissibility of an approval of an impermissible interpretative declaration. In order to ensure consistency with the text of other draft guidelines, the words “expressly or implicitly”, in relation to the prohibition of an interpretative declaration that might be contained in a treaty, were omitted from the text. The possibility of express or implicit prohibitions of interpretative declarations in a treaty would be referred to in the commentary.

Draft guideline 3.6.2

Finally, draft guideline 3.6.2 is entitled “Permissibility of oppositions to interpretative declarations”. It states that an opposition to an interpretative declaration is impermissible to the extent that it does not comply with the conditions for permissibility of an interpretative declaration set forth in guideline 3.5.

It should be recalled that, in the revised version of draft guideline 3.6 that was referred to the Drafting Committee last year, the Special Rapporteur had maintained his position according to which an opposition to, or a recharacterization of, an interpretative declaration was not subject to any

condition for permissibility. However, at a later stage, in order to take into account some concerns which had already been expressed in the plenary debate and which were reiterated by some members in the Drafting Committee, the Special Rapporteur presented to the Drafting Committee a new text that has now become draft guideline 3.6.2.

This draft guideline purports to indicate that, in certain circumstances, an opposition to an interpretative declaration may be itself impermissible to the extent that it would not comply with the conditions for permissibility of an interpretative declaration. Thus, in the event that a treaty prohibits an interpretative declaration, as envisaged in draft guideline 3.5, the prohibition would also cover an opposition to that declaration, if the opposition suggests an alternative interpretation.

Madam Chairman,

This concludes my introduction of the first report of the Drafting Committee on the topic “Reservations to treaties”. It is my sincere hope that the Plenary will be in a position to provisionally adopt the draft guidelines presented.

Thank you, Madam Chairman.