

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

**4 June 2010**

**Reservations to treaties**

Madam Chair,

It is my pleasure, today, to introduce the second 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/Add.1 and concerns 20 draft guidelines which were provisionally adopted by the Drafting Committee in 13 meetings which took place on 11, 12, 17 to 21, 25 and 27 May 2010.

The draft guidelines that are the subject of this report pertain to Part Four of the Guide to Practice, addressing the legal effects of reservations and interpretative declarations. The texts originally proposed by the Special Rapporteur are contained in addendum 2 to his fourteenth report (A/CN.614/Add.2) and in his fifteenth report (A/CN.4/624).

Before I introduce the details of the report, let me once again pay tribute to the Special Rapporteur, Mr. Alain Pellet, for his useful and patient guidance which facilitated the work of the Drafting Committee. I also thank the other members of the

Drafting Committee for their continuous and effective participation. Furthermore, I wish to thank the Secretariat for its valuable assistance.

### **Draft guidelines 4.1 to 4.1.3**

I shall start with draft guidelines 4.1 to 4.1.3, dealing with the establishment of a reservation.

The Drafting Committee began its work on this cluster of guidelines by considering whether reference should be made at all to the “establishment” of a reservation. During the debate in Plenary, several members of the Commission had supported this terminology, also recalling that the word “established” appeared in the chapeau of Article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions. However, some other members had expressed the view that it was not necessary or appropriate to introduce a concept which seemed to refer to a category of reservations that was not clearly defined by the Vienna Conventions. Concerns had also been expressed regarding the precise meaning and implications of such a concept. In the Drafting Committee, similar concerns or doubts were raised by some members. After careful consideration, the Drafting Committee decided to retain the term “establishment” as a short and convenient way to refer to a reservation which meets the substantive and formal requirements for its validity, pursuant to Articles 19 and 23 of the Vienna Conventions, and which has also been accepted in conformity with Article 20 of these Conventions. The commentary would provide the necessary clarifications to that effect, while also indicating that the reference to an “established” reservation does not purport to introduce a new concept or a new category of reservations, but is rather intended to add clarity to the chapeau of Article 21, paragraph 1, of the Vienna Conventions.

### **Draft guideline 4.1**

Draft guideline 4.1 is now entitled “Establishment of a reservation with regard to another State or organization”. It enunciates, in general terms, the three

requirements for the establishment of a reservation, namely its permissibility, its formulation in accordance with the required form and procedures, and the acceptance of the reservation by a contracting State or a contracting organization. The formulation retained by the Drafting Committee is largely based on the text proposed by the Special Rapporteur; however, some changes were introduced to that text.

I should start by indicating that the words “with regard to another State or organization” were added to the title in order to draw attention to the fact that draft guideline 4.1 refers to the normal situation in which the establishment of a reservation occurs *vis-à-vis* a particular contracting State or contracting organization, as opposed to the special cases, addressed in draft guidelines 4.1.1, 4.1.2 and 4.1.3, where the establishment of a reservation occurs *vis-à-vis* all the other contracting States and contracting organizations. This essential difference between draft guideline 4.1, on the one hand, and draft guidelines 4.1.1, 4.1.2 and 4.1.3 on the other hand, would be explained in the commentary.

Turning now to the text of draft guideline 4.1, I should first mention that, for the sake of clarity and completeness, the words “formulated by a State or an international organization” were inserted after the term “reservation”. Furthermore, the Drafting Committee opted for a streamlined wording in the enunciation of the first two conditions for the establishment of a reservation. Thus, the expression “if it meets the requirements for permissibility” was replaced by the words “if it is permissible”, and the expression “in accordance with the form and procedures specified for that purpose” was replaced by the terms “in accordance with the required form and procedures”. The commentary would explain that the reference to the “required [...] procedures” is intended to cover the procedural conditions set forth in the Vienna Conventions, in the Guide to Practice and, as the case may be, in the treaty itself.

Furthermore, the Drafting Committee decided to replace the words “contracting party” by “contracting State or contracting organization”, in order to ensure consistency with the terminology of the Vienna Conventions. The expression “contracting party”, as proposed by the Special Rapporteur, was meant to be a

simplified way of referring simultaneously to a contracting State or a contracting organization. However, several members of the Drafting Committee were of the view that this concise formulation was a source of potential confusion in that it appeared to conflate two distinct definitions contained in the Vienna Conventions, namely the definition of “contracting State” and “contracting organization” provided for in Article 2, paragraph 1 (f), and the definition of a “party” to a treaty, enunciated in Article 2, paragraph 1 (g). Also, in the context of this draft guideline, the Drafting Committee considered it appropriate to refer to a “contracting State or contracting organization”, rather than a “party” as in paragraph 1 of Article 21 of the Vienna Conventions. This is because, while Article 21 directly addresses the effects of a reservation and thus presupposes that the treaty has already entered into force, draft guideline 4.1 intends to specify the conditions under which a reservation is established and will therefore be capable of producing its purported legal effects between its author and a contracting State or organization if and when the treaty comes into force.

Finally, it is understood that, in due course, the term “contracting party” would also need to be replaced by “contracting State or contracting organization”, as appropriate, in the text of a number of other guidelines that have already been provisionally adopted by the Commission.

#### **Draft guideline 4.1.1**

Madam Chair,

Draft guideline 4.1.1 is now entitled “Establishment of a reservation expressly authorized by a treaty”. While the version proposed by the Special Rapporteur comprised three paragraphs, the text provisionally adopted by the Drafting Committee consists of only two paragraphs.

I should first mention that the Drafting Committee decided to reverse the order of paragraphs 1 and 2, so as to indicate from the outset the specificity that

characterizes the establishment of a reservation expressly authorized by a treaty, namely the fact that such a reservation does not require any subsequent acceptance by the other contracting States and contracting organizations, unless the treaty so provides. The commentary would clarify that, in the present context, the expression “contracting States and contracting organizations” covers three possible scenarios, namely the case in which there are only contracting States, the case in which there are only contracting organizations, and the case in which there are both.

Paragraph 2 of the text provisionally adopted by the Drafting Committee enunciates, in terms that are identical to those of draft guideline 4.1, the only condition for the establishment of a reservation expressly authorized by a treaty, namely that the reservation be formulated in accordance with the required form and procedures.

An extensive discussion took place in the Drafting Committee on paragraph 3 of the text proposed by the Special Rapporteur, which attempted to define the expression “reservation expressly authorized by a treaty”. During the plenary debate, and also in the Drafting Committee, the view was expressed that the fact that a reservation was expressly authorized by a treaty did not necessarily mean, in all cases, that all contracting States and contracting organizations had accepted the reservation and were therefore precluded from raising an objection to it. It was also observed that the definition provided in paragraph 3 as proposed by the Special Rapporteur might be too wide, or imprecise, in that it did not clearly exclude from its scope those cases in which a treaty would authorize specific reservations without defining their content. That said, it was felt in the Drafting Committee that it would be difficult to capture, in the guideline itself, all the nuances relating to the definition of a “reservation expressly authorized by a treaty”. Therefore, the Drafting Committee decided to delete the proposed paragraph 3, with the understanding that the necessary clarifications regarding that definition, including the positions adopted by relevant international bodies, would be provided in the commentary. The commentary would also refer to guidelines 3.1.2 and 3.1.4 dealing, respectively, with the definition and

the permissibility of “specified reservations”. It was further suggested that the commentary indicate that objections should be allowed in respect of authorized reservations the content of which was not defined by the treaty.

### **Draft guideline 4.1.2**

Draft guideline 4.1.2, which is now entitled “Establishment of a reservation to a treaty which has to be applied in its entirety”, concerns the case of a reservation to a treaty the application of which in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty. The draft guideline indicates that, in such a case, the acceptance of the reservation by all contracting States and contracting organizations is a necessary condition for the establishment of the reservation.

You will recall that, during the plenary debate, some members had expressed the view that this draft guideline should be redrafted so as to make it clear that the criterion of the limited participation was not the main factor to be considered in determining whether the application of the treaty in its entirety was an essential condition of the consent of all the parties to be bound, and whether, as a result, a reservation to that treaty required unanimous acceptance. In this context, some members had suggested that an explicit reference to the “object and purpose of the treaty” be included in the draft guideline, and that the text of the guideline follow more closely the wording of article 20, paragraph 2, of the Vienna Conventions.

In order to respond to these concerns, which were reiterated by some members in the Drafting Committee, the Special Rapporteur presented a revised text to the Committee. On the basis of that proposal, the Drafting Committee was able to agree on a text, consisting of a single paragraph, which is largely based on Article 20, paragraph 2, of the Vienna Conventions. It was generally felt that the formulation retained, in spite of its complexity, had the advantage of reproducing as faithfully as possible the language of the Vienna Conventions. The point was also made in the Drafting Committee that the two criteria referred to in this draft guideline, namely the

limited participation and the object and purpose of the treaty, were indicative and should not be regarded as cumulative.

Furthermore, in so far as it refers to the other conditions for the establishment of a reservation, namely its permissibility and its formulation in accordance with the required form and procedures, the wording of this draft guideline was aligned with the text of draft guideline 4.1.

### **Draft guideline 4.1.3**

Madam Chair,

Draft guideline 4.1.3 is entitled “Establishment of a reservation to a constituent instrument of an international organization”, as originally proposed. As this draft guideline was well received in Plenary, the Drafting Committee introduced only minor changes to its text.

Reference is now made, in the opening sentence, to “a treaty *which is* the constituent instrument of an international organization” so as to follow more closely the wording of the Vienna Conventions. Also, for the same reasons as in draft guideline 4.1, the expression “contracting parties” was replaced by “contracting States and contracting organizations”.

Furthermore, following a suggestion made during the plenary debate, the last sentence of draft guideline 4.1.3, relating to the acceptance of the reservation as a requirement for its establishment, was slightly modified in order to reflect the fact that, in the special case, envisaged in draft guideline 2.8.10, of a reservation to a constituent instrument of an international organization which has not yet entered into force, the acceptance of the reservation by a future competent organ of the organization is not required; instead, the reservation would be considered to have been accepted as a result of a lack of objections on the part of the signatory States and signatory international organizations by the end of a period of 12 months after they were notified of the reservation. Accordingly, the Drafting Committee opted for the

broader formulation “and if it [the reservation] has been accepted in conformity with guidelines 2.8.7 to 2.8.10”.

I should also note that the terminology used in the enunciation of the other two conditions for the establishment of the reservation, namely its permissibility and its formulation in accordance with the required form and procedures, was aligned with the wording of the previous draft guidelines.

Finally, it was suggested that some explanations be given in the commentary concerning the rationale of the rule according to which a reservation to a constituent instrument of an international organization requires only the acceptance by the competent organ of the organization, and not by the members of the organization.

## **Section 4.2**

Madam Chair,

I shall now turn to section 4.2 of the Guide to Practice, dealing with the effects on an established reservation. In addition to draft guideline 4.2.1, which is directly related to draft guidelines 4.1 to 4.1.3, the four other draft guidelines in section 4.2 deal respectively with the effects of the establishment of a reservation on the entry into force of a treaty, on the status of the author as a party to the treaty, and on treaty relations, as well as with the specific issue raised by obligations which are not subject to reciprocal application. Let me address each of these five draft guidelines in turn.

### **Draft guideline 4.2.1**

I shall be very brief on draft guideline 4.2.1, the text of which was only slightly amended by the Drafting Committee. An express reference to guidelines 4.1 to 4.1.3 was inserted in the opening phrase, so as to better reflect the logical sequence existing between the establishment of a reservation and the effects of an established reservation. In the same phrase, it appeared more appropriate that the initial reference be made to “a” reservation rather than “the” reservation. Finally, the Drafting

Committee decided to replace the verb “is considered” with “becomes”, as it is undisputed that the status of the author of a reservation as a contracting State or a contracting organization is directly and immediately related to the establishment of that reservation.

### **Draft guideline 4.2.2**

Draft guideline 4.2.2 is entitled “Effect of the establishment of a reservation on the entry into force of a treaty”, as originally proposed. Paragraph 1 corresponds to the text of draft guideline 4.2.2 as introduced by the Special Rapporteur in his fourteenth report, with the substitution of the conjunction “or” by “and” between “contracting States” and “contracting organizations”.

Following an extensive exchange of views, the Drafting Committee opted for the inclusion of a second paragraph to draft guideline 4.2.2. You will certainly recall that, during the debate in Plenary, a variety of opinions had been expressed as to the opportunity for the Commission to reflect the practice followed by some depositaries of multilateral treaties. The Secretary-General of the United Nations, for instance, includes in the number of instruments required for the entry into force of a treaty those which are accompanied by a reservation without waiting for a prior acceptance of that reservation, in deviation of the rules embodied in the Vienna Conventions.

In summarizing the debate on the draft guidelines in section 4.2, the Special Rapporteur had introduced two possible alternatives to draft guideline 4.2.2 to be considered by the Drafting Committee if it deemed it appropriate. The Drafting Committee however decided to focus on the initial text and to consider various options in order to acknowledge the existence of the practice of depositaries without putting in jeopardy the legal architecture set out in the Vienna Conventions. A first possibility would have been to add at the end of the text now included as paragraph 1 a phrase such as “unless the parties otherwise agree”. The Drafting Committee was however of the view that such a phrase, which could actually apply to the Guide as a whole, would not adequately reflect the existence of the practice here at stake.

Another option envisaged by the Drafting Committee would have been to reaffirm the application of the rule deriving from the Vienna Conventions unless “the well-established practice followed by the depositary differs and no contracting State or organization is opposed”. The reference to the well-established practice, already used in another draft guideline, would have indicated that the Commission does not intend to encourage diverging practices adopted on an *ad hoc* basis. The Drafting Committee however considered that, while the existence of the relevant practice should not be ignored, its acknowledgement should not undermine the legal regime of the Vienna Conventions.

Eventually, the Drafting Committee opted for the addition of a second paragraph to draft guideline 4.2.2, the purpose of which is to describe the existing practice of some depositaries as an alternative to the application of the rule. The words “may however be included” reflect the optional character of such a diverging practice, while the phrase “at an earlier date” is here to specify the main feature of such a practice in a flexible manner. The final phrase “if no contracting State or contracting organization is opposed in a particular case” is intended to emphasize that the entry into force of a treaty by anticipation, that is, by counting the author of the reservation among the contracting States without waiting for the acceptance of that reservation, may not be accepted if, in the particular case at stake, one contracting State or contracting organization favours the application of the rule embodied in the Vienna Conventions.

The commentary to draft guideline 4.2.2 would further clarify this articulation between the rule and the practice and indicate that, while the integrity of the former is to be preserved, the Commission does not intend to condemn the latter. In a similar vein, the commentary would also emphasize that the divergence between the rule and decisions made by some depositaries has not given rise to practical difficulties; in any event, if those were to arise, they could easily be resolved by an express acceptance of the reservation by a single other contracting State.

### **Draft guideline 4.2.3**

The text of draft guideline 4.2.3 has not been substantially modified by the Drafting Committee, which has simply changed the words “contracting States or international organizations” by “contracting States and contracting organizations”, in order to ensure some consistency with the terminology used in the 1986 Vienna Convention and in the Guide to Practice. The use of the phrase “if or when [the treaty is in force]” was questioned but ultimately retained as it reproduces the language of Article 20, paragraph 4 (a), of the Vienna Conventions. The only significant change made to draft guideline 4.2.3 concerns its title, which now reads “Effect of the establishment of a reservation on the status of the author as a party to the treaty”: the Drafting Committee deemed it appropriate in that case to reinforce the meaning of the title by describing the specific nature of the status of the author of an established reservation as a party to a treaty, once that treaty is in force.

### **Draft guideline 4.2.4**

Madam Chair,

I shall now turn to draft guideline 4.2.4, which appears significantly different from the initial text as included in the fourteenth report. Most of these modifications result from the decision taken by the Drafting Committee to merge in a single text the substance of draft guidelines 4.2.4, 4.2.5 and 4.2.6 as they were proposed by the Special Rapporteur. Before introducing this revised text in more details, allow me briefly to emphasize a few changes which the Drafting Committee made as a direct echo to the plenary debate.

The first of those relates to the title of the draft guideline, which now reads “Effect of an established reservation on treaty relations”. While it is more specific than the previous one – “Content of treaty relations” – that title remains broad enough to encompass the dual effect which a reservation may have on treaty relations, pursuant to Article 2, paragraph 1 (d), of the Vienna Conventions. It is precisely to

align the text of the guideline with that provision of the Conventions that the first paragraph of draft guideline 4.2.4 now states that an established reservation may exclude, and not only modify, the legal effect of the provisions of the treaty. Incidentally, you will note that the word “effect” has been put in the singular, here again as a matter of consistency with the text of Article 2, paragraph 1 (d) of the Vienna Conventions.

The first paragraph of draft guideline 4.2.4 contains another modification, if compared with the text proposed in the fourteenth report. The Drafting Committee deemed it necessary to reproduce the phrase “or of the treaty as a whole with respect to certain specific aspects”, which is included in draft guideline 1.1.1 regarding the “Object of reservations”. It is indeed important that a draft guideline specifically devoted to the effect of a reservation on treaty relations contain an explicit reference to the systemic effect which a reservation may have, not only on certain provisions, but on the treaty in its entirety appreciated from a particular perspective. On the other hand, the Drafting Committee ultimately refrained from incorporating in the text of the guideline an express mention of the combination of excluding and modifying effects a reservation may have. The concluding phrase “to the extent of the reservation”, as well as the opening phrase of paragraphs 2 and 3 (“to the extent that”), accompanied with a proper explanation in the commentary to the draft guideline, were deemed sufficient in that regard.

As I indicated earlier, draft guideline 4.2.4 as it appears now incorporates the substance of the text proposed by the Special Rapporteur under the same numbering but also that of draft guidelines 4.2.5 and 4.2.6 contained in the fourteenth report. These two guidelines, respectively devoted to the exclusion and to the modification of the legal effect of a treaty provision, were indeed intended to further specify the general provision embodied in the preceding guideline as to the legal effect of an established reservation on treaty relations. The Drafting Committee considered that a single guideline, covering both the excluding and the modifying effects of a reservation on treaty relations, would simplify the text, by avoiding unnecessary

repetitions, as well as better correspond to the condensed legal regime adopted in Article 21, paragraph 1, of the Vienna Conventions.

After considering various options, the Drafting Committee eventually adopted a draft guideline consisting of three paragraphs. The first one, which I introduced a moment ago, is of a general character and addresses both the excluding and modifying effects of a reservation; its inclusion makes it unnecessary to retain the first paragraph of draft guidelines 4.2.5 and 4.2.6 as presented in the fourteenth report, which merely described the nature of excluding and modifying effects, respectively. The content of these initial paragraphs is now subsumed in the first paragraph of draft guideline 4.2.4.

As explicitly pointed out by the opening phrase “To the extent that an established reservation excludes”, in the second paragraph, “modifies”, in the third one, “the legal effect of certain provisions of a treaty”, each of these paragraphs deals in turn with the excluding or modifying effect of a reservation on treaty relations. Both the second and the third paragraphs of draft guideline 4.2.4 follow a parallel structure in two sentences: the first one deals with the rights and obligations, or the absence thereof, of the author of the reservation; the second sentence deals with those of the other parties to the treaty with regard to which the reservation is established. This structure echoes the second and third paragraphs of both draft guidelines 4.2.5 and 4.2.6 as introduced in the fourteenth report. It is however broader in the sense that it does not only cover the obligations of the author of the reservation and the rights of the other parties with regard to which that reservation is established; it actually deals with the rights and obligations of both the author and the other parties, to the extent that these rights and obligations are affected by the reservation.

Before briefly turning to some specific aspects of the second and the third paragraphs of draft guideline 4.2.4, I wish to draw your attention to an issue which has given rise to some debate in the Drafting Committee. As you will note, the opening phrase of both paragraphs focuses on the effect of the reservation, while the remaining part of the sentence refers to the rights and obligations of the author of that

reservation. This dichotomy is intended to avoid the ambivalences noticed by some members of the Drafting Committee in the definition of a reservation given by Article 2, paragraph 1 (d), of the Vienna Conventions. According to the English version of that provision, a reservation is a unilateral statement made by a State or an international organization whereby “it” purports to exclude or modify the legal effect of certain provisions of a treaty. While the French version leaves no doubt that that “it” actually refers to the author of the reservation, the wording in English might be understood as referring to the reservation itself, as does draft guideline 1.1.1, according to which “a reservation purports to exclude or modify...”

The second paragraph of draft guideline 4.2.4 deals with the case of reservations having an excluding effect on treaty relations. The Drafting Committee has striven to adopt a rather straightforward wording, which clearly states that the author of such a reservation neither has to comply with the obligations nor has any rights under the provisions to which the reservation relates. The word “likewise” in the second sentence emphasizes the symmetrical effect that such a reservation has for the other parties with regard to which the reservation is established.

The third paragraph of draft guideline 4.2.4 deals with the case of reservations having a modifying effect on treaty relations. Its drafting echoes that of the preceding paragraph. The phrase “as modified by the reservation” was included by the Drafting Committee so as to make an implicit reference to the different kinds of modifying effects that a reservation may have. The commentary would further explain that some reservations may only modify the rights and obligations of their author, while others may also have a modifying effect on the rights and obligations of the other parties with regard to which the reservation is established.

### **Draft guideline 4.2.5**

Madam Chair,

Draft guideline 4.2.5 is the last one in section 4.2 of the Guide to Practice. With the change of numbering generated by the expansion of draft guideline 4.2.4, draft guideline 4.2.5 corresponds to draft guideline 4.2.7 proposed by the Special Rapporteur. Between the text of the draft guideline included in the fourteenth report and that of draft guideline 4.2.5 as it appears before you, several modifications have been introduced by the Drafting Committee, to reflect the views expressed during the plenary debate and to ensure a proper articulation between draft guideline 4.2.5 and those which precede it.

The first of these modifications concerns the title of the draft guideline, which now reads “Non-reciprocal application of obligations to which a reservation relates”. This title focuses more than the previous one on the particular case here considered, in which the ordinary effect of an established reservation on treaty relations as described in draft guideline 4.2.4 cannot operate because of the specific nature of the obligations at stake.

You may recall that, in the version proposed in the fourteenth report, the draft guideline consisted of a *chapeau* restating the principle of reciprocity of the effects of an established reservation, followed by three cases in which reciprocal application was not possible. Given the logical sequence existing between draft guidelines 4.2.4 and 4.2.5, the Drafting Committee did not deem it necessary to replicate in the latter the principle of reciprocal application which is already set out in the former.

The Drafting Committee was thus left with the consideration of the three options listed in draft guideline 4.2.7 as introduced in the fourteenth report, that is, those in which the reservation does not affect the performance of the obligations of the other parties to the treaty. Following views expressed by members of the Commission during the plenary debate, the Drafting Committee decided not to retain

the second of these options, concerning situations in which the obligation to which the reservation relates is not owed individually to the author of the reservation, considering that that hypothesis could be subsumed under the case of non-reciprocal application due to the nature of the obligation or the object and purpose of the treaty.

The first sentence of draft guideline 4.2.5 precisely deals with that case of non-reciprocal application. The opening phrase “in so far as” is intended to convey that, even in cases in which the nature of the obligation commands its continuing application notwithstanding the existence of a reservation, some degree of reciprocity may remain in the relations between the author of that reservation and the other parties to the treaty. For instance, the author of the reservation may not invoke the obligation concerned and claim its performance from the other parties, even though those parties still have to comply with the obligation. In other words, draft guideline 4.2.5 does not create any exception to the normal effect of a reservation between the parties to a treaty in that particular respect. The point will be further clarified in another draft guideline of the Guide to Practice, together with a reference to Article 21, paragraph 2, of the Vienna Conventions.

In the first sentence of draft guideline 4.2.5, the Drafting Committee retained the wording proposed by the Special Rapporteur as to the “nature of the obligation or the object and purpose of the treaty”. That terminology is indeed usual to refer to those obligations which are not subject to reciprocal application, in the field of human rights or the environment for example, to mention only some of the most common illustrations of such cases. By contrast with the reference to the nature of the relevant obligation, the mention of its “content” in the last part of the first sentence and in the second sentence of the draft guideline must be read in conjunction with draft guideline 4.2.4 and refers to the effect that the reservation would normally have on the application of the obligation, if the principle of reciprocity were to apply. The phrase “remains unaffected” is precisely intended to describe in broad terms the absence of effect of a reservation for the other parties to the treaty in case of non-reciprocal application of the obligation concerned.

The second sentence of draft guideline 4.2.5 deals with a different case of non-reciprocal application envisaged by the Special Rapporteur in his fourteenth report. In that case, the principle of reciprocal application is not prevented by the nature of the obligation but by the specific content of the reservation, which only concerns the author of that reservation. Such may be the case, for instance, of a reservation by which a party to the treaty modifies the territorial application of the relevant obligation. The hypothesis here envisaged clearly has a different rationale than the one covered in the first sentence; as the use of the word “likewise” intends to convey, the result is however identical, in that the content of the obligations of the other parties to the treaty remains unaffected by the modification entailed by the reservation.

### **Draft guidelines 4.3 to 4.3.7**

Madam Chair,

I shall now address draft guidelines 4.3 to 4.3.7, dealing with the effect of an objection to a valid reservation.

### **Draft guideline 4.3**

Draft guideline 4.3 is entitled “Effect of an objection to a valid reservation”, as originally proposed. It indicates that, unless a reservation has been established with regard to the objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or international organization. Since this draft guideline was well received during the plenary debate, the text adopted by the Drafting Committee is largely based on that proposed by the Special Rapporteur. However, the following changes were introduced to the original text.

First, in order to make this draft guideline easier to read, and also to better reflect the sequence of events which is envisaged therein, the Drafting Committee reversed the order of the two sentences as they appeared in the original proposal by

the Special Rapporteur. Thus, the draft guideline now begins with the proviso “unless the reservation has been established with regard to an objecting State or organization”.

Another change introduced by the Drafting Committee is the replacement of the words “renders the reservation inapplicable” by the words “precludes the reservation from having its intended effects”. After some discussion, it was felt that the latter formulation was more in line with Article 21, paragraph 3, of the Vienna Conventions, which does not refer to the non-applicability of the reservation as such, but rather to the non-applicability of the provisions to which the reservation relates, to the extent of the reservation.

Furthermore, the Drafting Committee replaced the expression “objecting State or international organization” by “objecting State or organization” in order to ensure consistency with the text of Article 21, paragraph 3, of the Vienna Conventions.

A suggestion was made in the Drafting Committee to accompany the proviso contained in the opening sentence of this draft guideline by a cross-reference to draft guideline 2.8.12, which states the final nature of the acceptance of a reservation. However, in view of the introductory nature of draft guideline 4.3, it was deemed preferable to avoid the insertion of a cross-reference that would have rendered the reading of the text unnecessarily cumbersome. The relation between this draft guideline and draft guideline 2.8.12 would be explained in the commentary.

### **Draft guideline 4.3.1**

Draft guideline 4.3.1 is now entitled “Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation”. It states that, except in the case mentioned in guideline 4.3.4, an objection to a valid reservation does not preclude the entry into force of the treaty between the reserving State or organization and the objecting State or organization.

Since this guideline was well received in Plenary, the Drafting Committee introduced only minor modifications to its text. As in draft guideline 4.3, the adjective “international” was omitted in the phrase “objecting State or organization”, as a matter of consistency with Article 21, paragraph 3, of the Vienna Conventions. Furthermore, the definite article “the” was replaced by the indefinite article “a” before the words “objection” and “reservation” in the title.

### **Draft guideline 4.3.2**

Draft guideline 4.3.2 is now entitled “Entry into force of the treaty between the author of a reservation and the author of an objection”. It states that the treaty enters into force between the author of a valid reservation and the objecting contracting State or contracting organization as soon as the author of the reservation has become a contracting State or a contracting organization in accordance with guideline 4.2.1 and the treaty has entered into force.

Given that this provision had received broad support during the plenary debate, the Drafting Committee introduced only minor changes to its text. In order to bring about consistency with draft guideline 4.3.1, reference is now made, in the first line of draft guideline 4.3.2, to “a valid” reservation. Furthermore, with a view to facilitating the reading of this provision, the Drafting Committee decided to reverse the order in which the two conditions for the entry into force of the treaty between the author of the reservation and the author of the objection are enumerated in the draft guideline. Finally, as in previous guidelines and for the same reasons, the words “contracting party” were replaced by “contracting State or contracting organization”.

### **Draft guideline 4.3.3**

Draft guideline 4.3.3 is now entitled “Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required”. This guideline, which concerns those situations in which the unanimous acceptance is required for the establishment of a valid reservation, provides that, in such cases, any objection to the

reservation by a contracting State or by a contracting organization precludes the entry into force of the treaty for the reserving State or organization.

Since this guideline was also well received during the debate in Plenary, the Drafting Committee retained the text originally proposed by the Special Rapporteur, except for the replacement, in the title, of the definite article “the” by the indefinite article “a” before the word “reservation”.

#### **Draft guideline 4.3.4**

Draft guideline 4.3.4 is now entitled “Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect”. The substance of this provision, which reiterates the content of Article 21, paragraph 4 (b) of the Vienna Conventions, did not generate any controversy during the plenary debate. However, some members believed that there was some duplication between this provision and guideline 4.3.1. In this regard, it was also suggested that a positive formulation of draft guideline 4.3.4 would be more appropriate. The Drafting Committee decided to follow that suggestion. Thus, the current text provides that an objection to a reservation *precludes* the entry of force of the treaty as between the objecting State or organization and the reserving State or organization, *if* the objecting State or organization “has definitely expressed an intention to that effect in accordance with guideline 2.6.8”. While the wording retained by the Drafting Committee is based on that of Article 21, paragraph 4 (b), of the Vienna Conventions, the Committee opted for the active form, which was deemed more concise and straightforward, in referring to the expression of intention by the objecting State or organization. The cross-reference to guideline 2.6.8, which appeared in brackets in the text proposed by the Special Rapporteur, was retained by the Drafting Committee, although the view was also expressed that an appropriate explanation in the commentary could have sufficed.

Furthermore, the adjective “international” was omitted in the phrase “contracting organization” in order to align the text with the wording of the 1986

Vienna Convention. Also, the definite article “the” was replaced by the indefinite article “a” before the term “reservation” in the title.

### **Draft guideline 4.3.5**

Madam Chair,

I shall now turn to draft guideline 4.3.5, which is now entitled “Effects of an objection on treaty relations”. This draft guideline is the result of the merging of draft guidelines 4.3.5, 4.3.6 and 4.3.7 as they were originally proposed by the Special Rapporteur, decided by the Drafting Committee for the sake of consistency with the approach taken with respect to the new draft guideline 4.2.4 which incorporates the text of previous guidelines 4.2.4, 4.2.5 and 4.2.6. Draft guideline 4.3.5 as provisionally adopted by the Drafting Committee comprises four paragraphs.

Paragraph 1, which corresponds to the text of draft guideline 4.3.5 referred to the Drafting Committee, is introductory and general in nature. It reiterates the content of Article 21, paragraph 3, of the Vienna Conventions by enunciating, in general terms, the effect of an objection on the treaty relations between the author of a valid reservation and an objecting State or organization. The Drafting Committee retained the text originally proposed, except for the deletion of the words “or parts of provisions” in response to a suggestion made during the debate in Plenary. The commentary would clarify that the term “provisions” should be given a broad and generic meaning so as to cover also those situations in which a reservation would relate only to certain parts of a provision of the treaty.

Paragraphs 2 and 3 of draft guideline 4.3.5 are to be understood as specifications of the general rule enunciated in paragraph 1. They concern, respectively, reservations that purport to exclude or modify the legal effect of certain provisions of the treaty. These two paragraphs are based on paragraph 1 of draft guidelines 4.3.6 and 4.3.7 that were referred to the Drafting Committee. However, they were redrafted by the Drafting Committee so as to echo the structure of paragraphs 2 and 3 of draft guideline 4.2.4. Here again, the opening phrase “to the

extent that” takes into account the fact that a reservation may produce a combination of excluding and modifying effects. The expressions “purports to exclude” or “purports to modify”, which are taken from the definition of a reservation in Article 2, paragraph 1 (d), of the Vienna Conventions, were retained, as opposed to the words “excludes” or “modifies” that appear in draft guideline 4.2.4, in order to reflect the fact that the reservations envisaged in draft guideline 4.3.5 are not established, since they have given rise to an objection. The commentary would emphasize that point, while also indicating that, in this context, the verb “purport” would cover not only the consequences arising from the declared intentions of the author of the reservation, but also the objective or even indirect effects that the reservation might have produced if it had been established. Also, in both paragraphs 2 and 3, the Drafting Committee found it more appropriate to refer to “certain”, rather than “one or more”, provisions of the treaty, and omitted the adjective “international” in the expression “objecting State or organization” in order to align the wording of this draft guideline to the text of Article 21, paragraph 3, of the Vienna Conventions.

Furthermore, the Drafting Committee decided to simplify the closing phrase of both paragraphs 2 and 3. Thus, in paragraph 2 which deals with reservations purporting to exclude the legal effects of certain provisions of the treaty, the Committee deleted the final sentence “to the extent that they [these provisions] would not be applicable as between them if the reservation were established”: it was felt that this clarification was superfluous, also in light of the insertion of the phrase “to the extent that” at the beginning of the paragraph. The Drafting Committee also decided to shorten the end of paragraph 3 concerning reservations purporting to modify the legal effects of certain provisions of the treaty: the final phrase, which originally read “by the provisions to which the reservation relates to the extent they would be modified as between them if the reservation were established”, now reads “by the provisions of the treaty as intended to be modified by the reservation”.

Finally, paragraph 4 of draft guideline 4.3.5 corresponds, in its substance, to the second paragraph of draft guidelines 4.3.6 and 4.3.7 as they had been originally

proposed by the Special Rapporteur. However, the Drafting Committee simplified the formulation of this paragraph, which now states, in a clearer and more direct way, that all provisions of the treaty other than those to which the reservation relates shall remain applicable as between the reserving State or organization and the objecting State or organization. Here again, for the sake of consistency with the text of Article 21, paragraph 3, of the Vienna Conventions, the adjective “international” was omitted in the expressions “reserving State or organization” and “objecting State or organization”.

### **Draft guideline 4.3.6**

Draft guideline 4.3.6, which is now entitled “Effect of an objection on provisions other than those to which the reservation relates”, is based on draft guideline 4.3.8 that was referred to the Drafting Committee. The numbering of this guideline has changed as a result of the merging of draft guidelines 4.3.5, 4.3.6 and 4.3.7 into the new draft guideline 4.3.5 which I have just introduced.

Draft guideline 4.3.6 deals with the so-called “objections with intermediate effect”, *i.e.* objection purporting to exclude the application of provisions of the treaty other than those to which the reservation relates. You will recall that the conditions for the permissibility of an objection “with intermediate effect” are enunciated in draft guideline 3.4.2, provisionally adopted by the Commission at its 3051<sup>st</sup> meeting on 26 May 2010. Draft guideline 4.3.6 as provisionally adopted by the Drafting Committee consists of two paragraphs.

Paragraph 1 enunciates the non-applicability, in the treaty relations between the author of the reservation and the author of an objection formulated in accordance with draft guideline 3.4.2, of a provision to which the reservation does not relate, but which has a sufficient link with the provisions to which the reservation does relate. This paragraph preserves the substance of the text originally proposed by the Special Rapporteur, to which a number of changes were however introduced by the Drafting Committee.

The Drafting Committee decided to reformulate paragraph 1 by making an explicit reference to draft guideline 3.4.2, in order to emphasize that the purported effect of an objection with intermediate effect, that is the exclusion of a treaty provision to which the reservation does not relate, may only occur if such an objection fulfills all the conditions set forth in draft guideline 3.4.2. Furthermore, in order to ensure consistency with the text of draft guideline 3.4.2, the expression “does not refer directly” was replaced by the words “does not relate” in the first line of the new text, and the word “refers” was replaced by the words “does relate” in the second line.

Following an intense debate, the Drafting Committee eventually retained the expression “sufficient link”, instead of “sufficiently close link” as proposed by the Special Rapporteur, in order to harmonize the terminology with that of guideline 3.4.2 provisionally adopted by the Commission. The commentary would indicate, however, that some members regarded the expression “sufficient link” as being too loose and proposed that it be replaced by a stronger wording such as “inextricable link”. In this connection, it was suggested that the commentary indicate that objections with intermediate effect entailed the risk of undermining the conventional equilibrium and should therefore remain exceptional. On the other hand, the point was made that some of these concerns might be alleviated in the light of the safeguards provided for in paragraph 2.

Paragraph 2 of draft guideline 4.3.6 is largely based on the text of an additional paragraph which, as you will recall, had been presented by the Special Rapporteur in response to a suggestion made during the plenary debate and supported by several members of the Commission. This additional paragraph was intended to preserve the principle of consensualism and the conventional equilibrium that an objection “with intermediate effect” was likely to undermine. It aimed at recognizing the possibility for the reserving State or organization to prevent such an objection from producing its intended effect by opposing the entry into force of the treaty between itself and the objecting State or organization.

The Drafting Committee retained the substance of the additional paragraph. However, it was felt that the formulation could be simplified and that the emphasis should be put, in this paragraph, on the freedom of the author of the reservation to oppose the entry into force of the treaty *vis-à-vis* the objecting State or organization. In that spirit, the text was split into two sentences, the first of which enunciates that the reserving State or organization may, within a period of twelve months following the notification of such an objection, oppose the entry into force of the treaty between itself and the objecting State or organization. The second sentence specifies that, in the absence of such opposition, the treaty shall apply between the author of the reservation and the author of the objection, to the extent provided by the reservation and the objection. The commentary would clarify that the formula “to the extent provided by the reservation and the objection” means that the treaty would apply between the author of the reservation and the author of the objection, except for (1) the provisions the application of which was excluded by the reservation and (2) the additional provisions the application of which was excluded by the objection.

Once again, for the sake of consistency with the text of Article 21, paragraph 3, of the Vienna Conventions, the adjective “international” was omitted in the expressions “reserving State or organization” and “objecting State or organization”.

#### **Draft guideline 4.3.7**

Draft guideline 4.3.7, which corresponds to draft guideline 4.3.9 originally proposed by the Special Rapporteur, is now entitled “Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation”. Here again, the numbering of the guideline has changed due to the merging of draft guidelines 4.3.5, 4.3.6 and 4.3.7. You will recall that the Commission referred this draft guideline to the Drafting Committee with the understanding that the Drafting Committee was not mandated to address the legal consequences that would result from the incapacity of an objection purporting to deprive the reserving State or organization of the benefit of the reservation, to

produce its intended legal effects. It was understood that the terms of the debate regarding such consequences would be exposed in the commentary.

The Drafting Committee introduced only minor changes to the text proposed by the Special Rapporteur, which had been well received in Plenary. Thus, in both the title and text of the draft guideline, the Drafting Committee decided to use the words “compelled to comply with” instead of “bound by” and “bound to comply with”. Also, the adjective “all”, referring to the provisions of the treaty, and the words “in no case”, were considered superfluous and therefore deleted. Furthermore, the wording of this draft guideline was brought in line with that of previous guidelines as regards the enunciation of the substantive and formal requirements for the validity of a reservation.

#### **Section 4.4**

Madam Chair,

I shall now turn to section 4.4 of the Guide to Practice which, according to its current title, concerns the effects of a reservation on rights and obligations outside of the treaty.

#### **Draft guideline 4.4.1**

Draft guideline 4.4.1 is now entitled “Absence of effect on rights and obligations under another treaty”. It states that a reservation, acceptance of it or objection to it neither modifies nor excludes the respective rights and obligations of their authors under another treaty to which they are parties. Since this draft guideline had been well received in Plenary, the Drafting Committee retained the text originally proposed, while replacing, in the title of the guideline, the words “the application of provisions of another treaties” by the expression “rights and obligations under another treaty”, in order to harmonize the title of the guideline with its text.

The Drafting Committee considered a suggestion, which had been made in Plenary and was reiterated in the Committee, that the qualifier “as such” be included in the text of this draft guideline. The idea behind that suggestion was that, under certain circumstances, a reservation, an acceptance of a reservation or an objection to a reservation might produce certain interpretative effects on the provisions of another treaty. However, after careful consideration, the majority of the members of the Drafting Committee came to conclusion that the insertion of those words was neither necessary nor appropriate. It was felt, in particular, that this draft guideline was limited the *non-modification* or *non-exclusion* of rights and obligation under another treaty; in contrast, by its very terms, it did not address the question of whether a reservation, acceptance or objection might, in certain cases, produce certain indirect effects on the interpretation or application of provisions of another treaty. A reference to such a possibility could be included, as appropriate, in the commentary.

#### **Draft guideline 4.4.2**

Draft guideline 4.4.2 is now entitled “Absence of effect on rights and obligations under customary international law”. Again, the text provisionally adopted by the Drafting Committee is largely based on that originally proposed by the Special Rapporteur. However, some changes were introduced to the text.

The main change was the addition of words “of itself”, so that the first sentence now provides that a reservation to a treaty provision which reflects a rule of customary international law “does not *of itself* affect” the rights and obligation under that rule. This modification was introduced in response to a suggestion made in Plenary, calling for the insertion of the words “as such” in the first sentence of the draft guideline, in order to take into account the fact that a reservation to a treaty provision reflecting a rule of customary international law, while not affecting *per se* the binding nature of that rule, might be regarded, in certain circumstances, as a manifestation of an *opinio juris* which could also be an element of a process that could eventually lead to a modification or to the extinction of the rule. In spite of some hesitations expressed in the Drafting Committee regarding the merit of that

suggestion, the Drafting Committee eventually decided to follow it by adopting a formulation that would leave open the possibility that a reservation might produce certain effects on the process leading to the formation and modification of a rule of customary international law. The Committee found that the expression “does not *of itself* affect” could serve that purpose. An appropriate explanation would be included in the commentary.

That said, the Drafting Committee felt that it was more appropriate to refer, in the context of this draft guideline, to the rights and obligations under a rule of customary international law, rather than to “the binding nature” of that rule. The text of the draft guideline was thus modified accordingly. As a result, the Drafting Committee also harmonized the title of the guideline with its text by replacing the words “the application of customary norms” by the expression “rights and obligations under customary international law”.

Furthermore, the word “norm” was replaced by “rule” in the text of the draft guideline. Finally, in order to ensure consistency with the text of other draft guidelines, the expression “reserving State or international organization” was replaced by “reserving State or organization”.

### **Draft guideline 4.4.3**

Draft guideline 4.4.3 is now entitled “Absence of effect on a peremptory norm of general international law (*jus cogens*)”. Once again, since the text proposed by the Special Rapporteur had received broad support in Plenary, the formulation retained by the Drafting Committee is largely based on that text.

You will recall, however, that several members suggested, during the plenary debate, that the words “which are bound by that norm” at the very end of the draft guideline be deleted, as they would seem to imply that some States or international organizations might not be bound by a *jus cogens* norm. The Drafting Committee followed that suggestion and deleted those words. The commentary would however

indicate that this provision should not be read as excluding the possibility, which was recognized by some members, that regional rules of *jus cogens* might also exist.

Furthermore, the Drafting Committee simplified the first sentence of this draft guideline by replacing the expression “the norm in question” by “that norm”. Finally, in order to bring about consistency with the text of other draft guidelines, the expression “the reserving State or international organization” was replaced, once again, by “the reserving State or organization”.

Madam Chair,

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

Thank you Madam Chair.