

**Reservations to treaties**

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

**8 July 2010**

Mr. Chairman,

It is my pleasure, today, to introduce the third 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.2.

The report concerns 19 draft guidelines pertaining to Part 5 of the Guide to Practice, dealing with reservations, objections to reservations, acceptances of reservations and interpretative declarations in relation to the succession of States. These draft guidelines were considered and provisionally adopted by the Drafting Committee in 2 meetings on 1 and 2 June 2010. The draft guidelines originally proposed by the Special Rapporteur in his sixteenth report (A/CN.4/626 and Add.1) had been referred by the Commission to the Drafting Committee at the 3054<sup>th</sup> meeting on 1 June 2010.

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 and patient guidance greatly facilitated the work of the Drafting Committee. I also thank the other members of the Drafting Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its valuable assistance.

Mr. Chairman,

Before presenting each of the draft guidelines contained in the report, I wish to make some general comments on Part 5 of the Guide to Practice.

You may recall that, during the debate in plenary, some members of the Commission had questioned the placement of the provision on newly independent States at the very beginning of Part 5, as proposed by the Special Rapporteur. In their opinion, this would have put too much emphasis on a type of succession which was more the exception than the rule and which had become somewhat historical after the completion of the decolonization process. However, other members of the Commission had expressed their support for the approach taken by the Special Rapporteur. It had been observed, in particular, that a variety of legal issues were still likely to arise concerning reservations in relation to the succession of newly independent States in respect of treaties. The point had also been made that it was justified to assign a prominent place to the draft guideline on newly independent States, since it reproduced the content of article 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties, which was the only provision addressing the question of reservations in relation to the succession of States.

All things considered, the Drafting Committee decided to retain the order of the draft guidelines as proposed by the Special Rapporteur, with the understanding that the commentary would provide an adequate explanation of the way in which the different types and modalities of succession regulated in the 1978 Vienna Convention – and in particular the distinction between automatic and non-automatic succession – were reflected in the draft guidelines and influenced the solutions retained therein. The commentary would also indicate that the draft guidelines do not intend to revisit the rules governing the succession of States in respect of treaties.

That said, I should indicate that the numbering of the draft guidelines provisionally adopted by the Drafting Committee differs from the numbers under which they appear in the sixteenth report of the Special Rapporteur. This is because the Drafting Committee, following a proposal by the Special Rapporteur, organized the draft guidelines in four subsections dealing, respectively, with reservations, objections to reservations, acceptances of reservations, and interpretative declarations. For each draft guideline, the original number is indicated in brackets.

With these general considerations in mind, I shall now start by introducing the draft guidelines pertaining to **section 5.1**, which is entitled “Reservations and succession of States”.

### **Draft guideline 5.1.1**

Draft guideline 5.1.1 is entitled “Newly independent States”, as originally proposed. It reproduces, in its paragraphs 1 to 3, the text of the 1978 Vienna Convention while replacing, as appropriate, the cross-references to the articles of the 1969 Vienna Convention by cross-references to the relevant provisions of the Guide to Practice. Except for the inclusion of an additional paragraph, the Drafting Committee retained, with minor editorial changes, the formulation of the corresponding draft guideline 5.1 proposed by the Special Rapporteur.

Paragraph 1 of this draft guideline states that a newly independent State which establishes, by a notification of succession, its status as a party or as a contracting State to a treaty is considered as maintaining any reservation to that treaty which was applicable, at the date of the succession of States, in respect of the territory to which the succession relates, unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation. Paragraph 2 recognizes the

right of a newly independent State to formulate a reservation when making its notification of succession, unless that reservation is impermissible according to subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice. Paragraph 3 refers to the rules concerning the procedure for the formulation of a reservation, as set out in Part 2 of the Guide to Practice.

Paragraph 4 is new. In response to a suggestion made during the debate in plenary, this paragraph reproduces the definition of a “newly independent State” provided in article 2, paragraph 1(f), of the 1978 Vienna Convention. The commentary would explain that this definition was reproduced in order to prevent any misunderstanding regarding the meaning of that expression, also considering that the distinction between newly independent States and successor States other than newly independent States plays an important role in addressing the legal issues relating to reservations, objections to reservations, and acceptances of reservations in relation to the succession of States.

### **Draft guideline 5.1.2**

Draft guideline 5.1.2 is entitled “Uniting or separation of States”, as originally proposed. The Drafting Committee retained the substance of the corresponding draft guideline 5.2 presented by the Special Rapporteur, which had not been questioned during the debate in plenary. However, the draft guideline was restructured so as to deal in separate paragraphs with two distinct scenarios, *i.e.*, on the one hand, the cases in which the succession to a treaty by a State arising from a uniting or separation of States takes place *ipso jure* and, on the other hand, the cases in which the succession to the treaty requires a notification by that State.

Paragraphs 1 and 2 deal with the first scenario, where the succession to the treaty takes place *ipso jure*. In order to convey this idea, reference is made to a

successor State which is a party to a treaty “as the result of” a uniting or separation of States. An appropriate explanation regarding the meaning of this phrase would be provided in the commentary. According to the relevant provisions of 1978 Vienna Convention, in the event of a uniting or separation of States, the succession takes place *ipso jure* in respect of treaties which, at the date of the succession of States, were in force for the predecessor State. It was suggested, however, that mention be made in the commentary of the fact that – especially in cases of separation of States – the practice of States and depositaries did not appear to be uniform in recognizing the automatic character of the succession in respect of such treaties.

Paragraph 1 enunciates the presumption that the reservations are maintained, unless the successor State expresses its intention not to maintain one or more reservations of the predecessor State at the time of the succession. That presumption is, however, subject to the provisions of draft guideline 5.1.3, stating the irrelevance of certain reservations in cases involving a uniting of States. Since paragraph 1, as redrafted by the Drafting Committee, refers only to those cases in which the succession takes place *ipso jure*, the reference to the hypothesis of the formulation of a reservation relating to the same subject matter was omitted because, in such cases, the successor State is not entitled to formulate a new reservation, as it is stated in paragraph 2. This point would be emphasized in the commentary.

In contrast, paragraph 3 refers to those cases in which, following a uniting or separation of States, the succession to the treaty does not take place *ipso jure* but requires a notification to that effect by the successor State. According to the relevant provisions of the 1978 Vienna Convention, such is the case of treaties which, at the date of the succession of States, were not in force for the predecessor State but in respect of which the predecessor State was a contracting State. The presumption that the reservations are maintained is also applicable in these cases,

given that it applies to all successor States, including newly independent States as indicated in paragraph 1 of draft guideline 5.1.1. Since, in the cases envisaged in paragraph 3, the succession to the treaty does not take place *ipso jure*, the successor State may formulate a new reservation, as indicated in the last sentence of paragraph 3. Furthermore, if the reservation formulated by the successor State relates to the same subject matter as a reservation that was formulated by the predecessor State, the latter is not considered as maintained.

Paragraph 4 of draft guideline 5.1.2 recalls the conditions for the formulation of a reservation pursuant to paragraph 3 of the draft guideline. For the sake of consistency with paragraph 2 of draft guideline 5.1.1, and also in response to a suggestion made during the debate in plenary, the Drafting Committee decided to add a reference to the conditions for the permissibility of a reservation set out in subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice.

### **Draft guideline 5.1.3**

Draft guideline 5.1.3, which corresponds to draft guideline 5.3 presented by the Special Rapporteur, is entitled “Irrelevance of certain reservations in cases involving a uniting of States”, as originally proposed. The text provisionally adopted by the Drafting Committee is identical to the text presented by the Special Rapporteur, except for the replacement of the expression “State so formed” by the words “successor State” in the third line.

### **Draft guideline 5.1.4**

Draft guideline 5.1.4, entitled “Establishment of new reservations formulated by a successor State”, is new. It states that Part 4 of the Guide to Practice applies to new reservations formulated by a successor State in accordance with guideline 5.1.1 or 5.1.2. During the debate in plenary, it had been observed

that the draft guidelines proposed by the Special Rapporteur did not indicate the conditions under which a reservation formulated by a successor State was to be regarded as established. In response to that concern, the Drafting Committee decided to include a new draft guideline making an express reference to the general provisions relating to the establishment of a reservation, contained in Part 4 of the Guide to Practice. It was felt that such a reference was appropriate in order to make it clear that a successor State which formulates a reservation finds itself in the same position as any other reserving State or international organization as regards the establishment of that reservation; this concerns, in particular, the right of the other contracting States or contracting organizations to accept, or object to, the reservation formulated by the successor State.

The Drafting Committee considered that the inclusion of this new draft guideline rendered superfluous two draft guidelines on related issues that had been proposed by the Special Rapporteur, namely draft guideline 5.8 on the timing of the effects of a reservation formulated by a successor State, and draft guideline 5.16 on objections to reservations of the successor State. These two draft guidelines were therefore deleted.

### **Draft guideline 5.1.5**

Draft guideline 5.1.5, which corresponds to the original guideline 5.4, is entitled “Maintenance of the territorial scope of reservations formulated by the predecessor State”, as initially proposed. While the principle enunciated in this draft guideline had not been questioned during the debate in plenary, it had nevertheless been suggested that the possibility for the successor State to express a contrary intention be recognized in the text of the draft guideline. The Drafting Committee decided to follow that suggestion and added a sentence to that effect at the end of the draft guideline. The commentary would explain, however, that the rights and obligations of other contracting States or contracting organizations

would not be affected, as such, by a declaration whereby the successor State would extend the territorial scope of a reservation formulated by the predecessor State.

As a result of this addition, the Drafting Committee moved the proviso “subject to the provisions of guideline 5.1.6” to the beginning of the text, in order to facilitate the reading of this draft guideline.

### **Draft guideline 5.1.6**

Draft guideline 5.1.6, which corresponds to draft guideline 5.5 presented by the Special Rapporteur, is entitled “Territorial scope of reservations in cases involving a uniting of States”, as originally proposed. You will recall that, during the plenary debate, some members of the Commission had noted the complexity of this draft guideline. After careful consideration, the Drafting Committee came to the conclusion that such complexity was due to the variety of possible scenarios that may arise, in the context of a uniting of States, regarding reservations and their territorial scope. Thus, the Drafting Committee adopted, with a few modifications, the text proposed by the Special Rapporteur.

The main change concerns subparagraphs 1(a) and 2(b). The Drafting Committee deemed it appropriate to modify the formulation of these subparagraphs in order to draw attention to the fact that, according to the relevant provisions of the 1978 Vienna Convention, the extension of the territorial scope of a treaty following a uniting of States may only occur if the successor State makes a notification to that effect. Thus, the phrase “at the time of the extension of the territorial scope of the treaty” was replaced, for the sake of additional clarity, by the phrase “when making the notification extending the territorial scope of the treaty”.



Furthermore, in order to ensure consistency with the text of other draft guidelines, the Drafting Committee replaced, throughout the text of the guideline, the expression “as a result of the uniting of (two or more) States” by the expression “following a uniting of (two or more) States”.

A suggestion was made in the Drafting Committee to include, in subparagraph 2(a), the proviso enunciated in subparagraph 1(b). The idea behind that suggestion was that the extension of the territorial scope of application of an identical reservation, as envisaged in subparagraph 2(a), could not occur “if the nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States”. The Drafting Committee discussed the merit of that suggestion at length, and eventually recognized that the scenario to which it referred could indeed occur in the event of a uniting of more than two States; for, it might be that an identical reservation formulated by two of those States in respect of which the treaty was in force at the date of the succession of States cannot be extended, because of its nature or purpose, to the part of the territory of the successor State which belonged, prior to the uniting, to a third State in respect of which the treaty was not in force at the date of the succession of States. However, in order to avoid complicating further the text of this draft guideline, the Drafting Committee considered that it would be sufficient to mention in the commentary that the nature and purpose of the reservation might, in certain situations, prevent the extension of the territorial scope of an identical reservation as envisaged in subparagraph 2(a) of draft guideline 5.1.6.

### **Draft guideline 5.1.7**

Draft guideline 5.1.7 is entitled “Territorial scope of reservations of the successor State in cases of succession involving part of a territory”. Since no change to the corresponding guideline 5.6 presented by the Special Rapporteur had been suggested during the plenary debate, the Drafting Committee retained the text and title of the draft guideline as proposed by the Special Rapporteur.

### **Draft guideline 5.1.8**

Draft guideline 5.1.8, which corresponds to the original draft guideline 5.7, is entitled “Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State”, as initially proposed. Again, the Drafting Committee retained the text presented by the Special Rapporteur, including the cross-references that appeared in brackets and for which some members of the Commission had expressed their support during the plenary debate; these cross-references were adjusted in light of the renumbering of the draft guidelines. However, in order to align the text of this draft guideline with article 22, paragraph 3(a) of the 1969 and 1986 Vienna Conventions, the word “only” was inserted before the word “when” in the penultimate line. Furthermore, with a view to ensuring consistency with the text of the 1986 Vienna Convention and other guidelines, the expression “contracting international organization” was replaced by “contracting organization”.

Mention would be made in the commentary of the role of the depository in transmitting the relevant notification to the contracting States or contracting organizations.

### **Draft guideline 5.1.9**

Draft guideline 5.1.9, which corresponds to draft guideline 5.9 proposed by the Special Rapporteur, is now entitled “Late reservations formulated by a successor State”. The Drafting Committee decided to shorten the title of this draft guideline which, according to the original proposal, read “Reservations formulated by a successor State subject to the legal regime for late reservations”. Given that no modification had been suggested during the debate in plenary, the Drafting Committee retained the text of this draft guideline as proposed by the Special Rapporteur.

Mr. Chairman,

I shall now turn to the guidelines pertaining to **section 5.2**, entitled “Objections to reservations and succession of States”.

### **Draft guideline 5.2.1**

Draft guideline 5.2.1 is entitled “Maintenance by the successor State of objections formulated by the predecessor State”, as originally proposed. The Drafting Committee retained the text of the corresponding draft guideline 5.10 presented by the Special Rapporteur, while adjusting the cross-reference in the first line and deleting the word “international” between the words “contracting” and “organization” so as to ensure consistency with the terminology of the 1986 Vienna Convention and with the text of other draft guidelines. For the sake of clarity, the commentary would indicate that the presumption enunciated in draft guideline 5.2.1 does not apply to the case where a successor State which does not succeed *ipso jure* to a treaty chooses to become a contracting State or a party to that treaty through other means than by notifying its succession – for example by acceding to the treaty.

### **Draft guideline 5.2.2**

Draft guideline 5.2.2, which is entitled “Irrelevance of certain objections in cases involving a uniting of States”, corresponds to the original draft guideline 5.11. Apart from adjusting, in paragraph 2, the cross-references which appeared in brackets and which were retained, and from replacing the expression “contracting international organization” by “contracting organization”, the Drafting Committee did not introduce any modification to the text and title of this guideline, which had not given rise to comments during the debate in plenary.

### **Draft guideline 5.2.3**

Draft guideline 5.2.3 is now entitled “Maintenance of objections to reservations of the predecessor State”. Again, the Drafting Committee adopted the text of the corresponding draft guideline 5.12 proposed by the Special Rapporteur, while retaining and adjusting the cross-references, and deleting, once again, the word “international” between the words “contracting” and “organization”. However, the Drafting Committee decided to simplify the title of this draft guideline by deleting the words “formulated by another State or international organizations”, which were not deemed necessary.

### **Draft guideline 5.2.4**

Draft guideline 5.2.4 corresponds to the initial draft guideline 5.13. It is entitled “Reservations of the predecessor State to which no objections have been made”, as originally proposed.

The main change introduced by the Drafting Committee is the inclusion, at the end of the text, of a sentence enunciating an additional exception to the principle according to which a contracting State or a contracting organization may not object to a reservation maintained by the successor State if it had not done so *vis-à-vis* the predecessor State.

You may recall that, during the debate in plenary, the view was expressed that the solution retained in this draft guideline might be too strict in the event of a uniting of States where, in certain cases, the significance for the other contracting States or contracting organizations of a reservation maintained by the successor State might change. It was therefore suggested that, in such cases, a contracting State or a contracting organization should be allowed to object to the reservation even if it had not done so *vis-à-vis* the predecessor State. In the Drafting Committee, the Special Rapporteur indicated that he was ready to follow that suggestion, provided that this additional exception was circumscribed to those cases in which, as a result of an extension of the territorial scope of the treaty which might follow a uniting of States, the conventional equilibrium would be compromised by a reservation maintained by the successor State. According to a different opinion expressed in the Drafting Committee, this potential problem would have seemed to concern the extension of the territorial scope of the treaty itself, rather than the reservation as such; thus, no change to the text of the draft guideline would have been necessary. After careful consideration, the Drafting Committee decided to include this additional exception, while formulating it in a restrictive way. Thus, draft guideline 5.2.4 as provisionally adopted by the Drafting Committee allows the formulation of an objection to a reservation maintained by the successor State and to which the contracting State or contracting organization had not objected *vis-à-vis* the predecessor State, not only when the time period for the formulation of an objection had not expired at the date of the succession of States, but also in the event that “the territorial extension of the treaty radically changes the conditions for the operation of the reservation”. In order to facilitate the reading of this draft guideline, the Drafting Committee deemed it preferable to address the two different scenarios in separate subparagraphs (a) and (b).

Furthermore, the Drafting Committee retained and adjusted the cross-references to guidelines 5.1.1 and 5.1.2, replaced the expression “contracting international organization” by “contracting organization”, and the expression “shall not have capacity to” by the more concise formulation “may not” in the chapeau.

### **Draft guideline 5.2.5**

Draft guideline 5.2.5 is entitled “Capacity of a successor State to formulate objections to reservations”, as originally proposed. The Drafting Committee introduced only minor modifications to the text of this draft guideline, which corresponds to draft guideline 5.14 proposed by the Special Rapporteur.

In paragraph 1, the proviso “and subject to paragraph 3 of the present guideline” was deemed superfluous by the Drafting Committee and therefore deleted. Also and once again, for the sake of consistency with the terminology of the 1986 Vienna Convention, the expression “contracting international organization” was replaced by “contracting organization”. Furthermore, the Drafting Committee completed, at the end of paragraph 3, the cross-reference to the draft guideline of the Guide to Practice that reproduces article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions.

### **Draft guideline 5.2.6**

Draft guideline 5.2.6 – the last of this section – is entitled “Objections by a successor State other than a newly independent State in respect of which a treaty continues in force”, as originally proposed. Except for the replacement of the expression “shall not have capacity to” by the simpler formulation “may not”, the Drafting Committee retained the text of the original draft guideline 5.15, on which no suggestion had been made during the debate in plenary.

Mr. Chairman,

I shall now turn to the draft guidelines belonging to section 5.3, entitled “Acceptances of reservations and succession of States”.

### **Draft guideline 5.3.1**

Draft guideline 5.3.1 is entitled “Maintenance by a newly independent State of express acceptances formulated by the predecessor State”, as originally proposed. Apart from the deletion of the word “international” before “organization” in the penultimate line, in order to ensure consistency with the terminology of the 1986 Vienna Convention, the Drafting Committee retained the text of the corresponding draft guideline 5.16*bis* presented by the Special Rapporteur, to which no change had been suggested during the debate in plenary.

### **Draft guideline 5.3.2**

Draft guideline 5.3.2 is entitled “Maintenance by a successor State other than a newly independent State of the express acceptances formulated by the predecessor State”, as originally proposed. It corresponds to draft guideline 5.17 presented by the Special Rapporteur, to which the Drafting Committee introduced only minor changes. In the English text, the expression “for which a treaty remains in force”, in paragraph 1, was replaced by the expression “in respect of which a treaty continues in force” in order to follow the wording of the 1978 Vienna Convention; and the expression “contracting party”, in paragraph 2, was replaced by “contracting State” to bring about consistency with the French text. Furthermore, as in other draft guidelines, the expression “contracting organization” was retained, in paragraphs 1 and 3, instead of the expression “contracting international organization”.

### **Draft guideline 5.3.3**

Draft guideline 5.3.3 is entitled “Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State”, as originally proposed. Since the corresponding draft guideline 5.18 presented by the Special Rapporteur had been well received in Plenary, the Drafting Committee introduced only minor changes to its text. Thus, for the sake of consistency with other draft guidelines, the expression “in accordance with” was replaced by “in conformity with” in the first line, and the expression “contracting international organization” was replaced by “contracting organization”. Also, in the English text, in order to align the wording with that of draft guideline 5.1.8, the words “shall take effect for” were replaced by “becomes operative in relation to”, and the last phrase “when that State or that organization has received the notification thereof” was replaced by the phrase “only when notice of it has been received by that State or that organization”. Furthermore, the cross-references were retained and adjusted in light of the renumbering of the draft guidelines.

Mr. Chairman,

I shall now turn to the last section of Part 5 of the Guide to Practice, *i.e.* **section 5.4** entitled “Interpretative declarations and succession of States”. This section comprises only one provision, namely **draft guideline 5.4.1**.

This draft guideline, which corresponds to draft guideline 5.19 proposed by the Special Rapporteur, is now entitled “Interpretative declarations formulated by the predecessor State”. During the debate in plenary, a suggestion had been made to supplement the text proposed by the Special Rapporteur by the enunciation of a presumption according to which a successor State, in the absence of any



clarification on its part, shall be considered as maintaining the interpretative declarations formulated by the predecessor State. The Drafting Committee decided to follow that suggestion, to which the Special Rapporteur had reacted favourably. A sentence to that effect was therefore added to paragraph 1 of the draft guideline. As a result of this addition, the Drafting Committee felt that this provision should have a broader title than originally proposed. Thus, the words “clarification of the status of” were omitted from the title, which now refers in general terms to interpretative declarations formulated by the predecessor State.

Mr. Chairman,

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