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Reservations to treaties

Statement of the Chairman of the Drafting Committee

27 July 2010

Mr. Chairman,

It is my pleasure, today, to introduce the fifth 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.3.

The report concerns 9 draft guidelines which were referred by the Commission to the Drafting Committee at the 3067th meeting on 20 July 2010. Two of these draft guidelines, which had already been proposed by the Special Rapporteur in its tenth report (A/CN.4/458/Add.2), are to be included in Part 3 of the Guide to Practice, dealing with the permissibility of reservations. The other seven draft guidelines, proposed by the Special Rapporteur in his fifteenth report (A/CN.4/624/Add.1 and 2), pertain to Part 4 of the Guide to Practice, which addresses the effects of reservations and interpretative declarations. All these draft guidelines were adopted by the Drafting Committee in three meetings on 20, 21 and 22 July 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,

I shall start by introducing draft guidelines 3.3.3 and 3.3.4, dealing with acceptance of an impermissible reservation.

Draft guideline 3.3.3

Draft guideline 3.3.3 as provisionally adopted by the Drafting Committee is entitled "Effect of individual acceptance of an impermissible reservation". It states that acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation. The Drafting Committee made only minor changes to the text proposed by the Special Rapporteur.

A first change that was introduced is the replacement, in the title, of the term "invalid" by the term "impermissible" to qualify the reservation, and the addition, for the sake of clarity, of the word "impermissible" before "reservation" in the first line of the text. This change in terminology is due to the fact that draft guidelines 3.3.3 and 3.3.4 are to be included in Part 3 of the Guide to Practice, dealing with the substantive conditions for the validity of a reservation. In this regard, I should recall that the approach adopted by the Commission at its fifty-eighth session, and followed ever since, is to use, in the English version of the draft guidelines, the term "permissibility" "to denote the substantive validity of reservations that fulfil[…] the requirements of article 19 of the Vienna Conventions" [*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 327, para. (7) of the general commentary to sect. 3 of the Guide to Practice].

The Drafting Committee introduced another change to the title of this draft guideline, by replacing the expression “unilateral acceptance”, originally proposed by Special Rapporteur, by the expression “individual acceptance”. The Committee was of the view that the term “individual” reflects more adequately the relationship between this draft guideline, which refers to acceptance by *a* contracting State or *a* contracting organization, and the following draft guideline 3.3.4 which, as its title indicates, concerns the *collective* acceptance of an impermissible reservation. Moreover, the expression “individual acceptance” is already used the Guide to Practice, namely in draft guideline 2.8.9 which concerns the modalities of the acceptance of a reservation to the constituent instrument of an international organization.

Furthermore, in order to bring the English text closer to the French, the expression “cure the nullity” was retained instead of “change the nullity”, which were considered ambiguous by some members of the Drafting Committee.

Finally, in order to bring about consistency with the text of other draft guidelines and of the 1986 Vienna Convention, the expression “contracting international organization” was replaced by “contracting organization”.

Draft guideline 3.3.4

Draft guideline 3.3.4 is now entitled “Effect of collective acceptance of an impermissible reservation”. Apart from the replacement of the word “invalid” by “impermissible”, as in draft guideline 3.3.3, the Drafting Committee introduced a number of changes to the text of draft guideline 3.3.4, including the deletion of the second paragraph that appeared in the text proposed by the Special Rapporteur.

Following a suggestion made during the debate in plenary, the Drafting Committee decided to replace the expression "may be formulated by a State or an international organization" – referring to the reservation which is prohibited by the treaty or which is incompatible with its object and purpose – by the expression "shall be deemed permissible". This formulation was considered more appropriate in order to describe the situation envisaged in this draft guideline, which is the following:

A reservation prohibited by the treaty or incompatible with its object and purpose is formulated and notified by the depositary to the contracting States and contracting organizations; thereafter, a contracting State or a contracting organization, which considers the reservation to be impermissible, requests that its position be communicated by the depositary to the other contracting States and contracting organizations. After having been expressly informed thereof by the depositary, no contracting State or contracting organization objects to the reservation on the basis of its alleged impermissibility. In such cases, the reservation shall be "deemed permissible" in light of its collective acceptance by all contracting States and contracting organizations.

It should be noted that the expression "shall be deemed permissible" is without prejudice to the possibility that the reservation might, at a later stage, be found impermissible – for example on grounds of its incompatibility with *jus cogens* – by a body which is competent to adopt binding decisions on the matter; this point would be addressed in the commentary.

The final phrase "at the request of a contracting State or a contracting organization" was inserted by the Drafting Committee in order to clarify that, pursuant to this draft guideline, the depositary is not expected to take any initiative in matters concerning the permissibility of reservations. In the text

proposed by the Special Rapporteur, reference was made to the depositary's role in conducting consultations regarding the permissibility of a reservation. In response to doubts raised in the Drafting Committee concerning the competence of the depositary to conduct consultations with contracting States or contracting organizations, the Committee decided to replace the word "consulted" by the terms "informed thereof".

In the same spirit, the Drafting Committee decided to delete the second paragraph of the text proposed by the Special Rapporteur. That paragraph called upon the depositary to draw attention to the signatory or contracting States or organizations and, where appropriate, to the competent organ of the organization concerned, to the nature of the legal problems raised by an impermissible reservation. It will be recalled that some members of the Commission had expressed their disagreement with such an approach during the debate on this draft guideline which took place in 2006. Similar concerns were expressed by several members of the Drafting Committee, who were of the view that paragraph 2 of the original text went too far in that it purported to confer on the depositary a substantive role in matters of reservations that exceeded the nature of its functions. Hence, the Drafting Committee decided to delete that paragraph.

The question of the time period within which a reaction should be expected by a contracting State or a contracting organization was raised by some members in the Drafting Committee. It was agreed that this point would be addressed in the commentary, which would specify that the reaction should intervene within a reasonable time period, the duration of which should be determined in light of the relevant circumstances. While allowing for the necessary flexibility in this regard, the commentary would also draw attention

to the 12-month deadline which is set out in the Vienna Conventions with respect to objections to reservations.

Furthermore, in order to ensure consistency with the text of other draft guidelines, the words “explicitly or implicitly” were deleted before the word “prohibited”. The commentary would recall the fact that the prohibition of a reservation by the treaty may be explicit or implicit.

Mr. Chairman,

I shall now turn to the draft guidelines pertaining to **section 4.5**, which is now entitled “Consequences of an invalid reservation”. You will recall that the original title proposed by the Special Rapporteur for this section was “Effects of an invalid reservation”. However, following a suggestion made during the plenary debate, the Drafting Committee decided to modify the title of this section by replacing the word “effects” by “consequences”. It was felt that the use of the word “effects” in the title of this section appeared to be problematic, since the whole assumption of this section is that an invalid reservation is devoid of legal effect.

As a general remark, I should also mention that the draft guidelines in section 4.5 – contrary to draft guidelines 3.3.3 and 3.3.4 – refer in general terms to the validity, or rather the invalidity, of a reservation, and not only to its permissibility or impermissibility. An invalid reservation within the meaning of these draft guidelines is, either a reservation that does not meet the formal requirements enunciated in Part 2 of the Guide to Practice, or a reservation that does not fulfil the substantive requirements for permissibility as set out in Part 3 of the Guide. The use of the term “validity/invalidity” in this broad sense is in line with the approach adopted by the Commission at its fifty-eighth session, whereby it was decided that the expression “validity of reservations” was to be

assigned a general meaning – covering both formal validity and permissibility – so as "to describe the intellectual operation consisting in determining whether a unilateral statement made by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation" (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 324, para. (2) of the general commentary to sect. 3 of the Guide to Practice).

Draft guideline 4.5.1

Draft guideline 4.5.1 as provisionally adopted by the Drafting Committee is entitled "Nullity of an invalid reservation". This provision results from the merging of the draft guidelines 4.5.1 and 4.5.2 originally proposed by the Special Rapporteur. In so doing, the Drafting Committee followed a suggestion made by some members of the Commission during the plenary debate. Thus, the current draft guideline 4.5.1 states that a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect.

According to a view expressed during the debate in plenary, the formulation of draft guidelines 4.5.1 and 4.5.2 proposed by the Special Rapporteur raised some problems since the consequences envisaged therein would actually apply only in respect of those contracting States or contracting organizations that would regard the reservation as invalid. However, since a large majority of the members of the Commission who took the floor during the debate expressed their support for the content and formulation of the original

draft guidelines 4.5.1 and 4.5.2, the Drafting Committee retained and combined the original text of those two draft guidelines.

The only modification introduced by the Drafting Committee to the text of the draft guideline concerns the English text, which was aligned with the French through the replacement of the words “permissibility and validity” by the words “formal validity and permissibility”. This change was also intended to make it clear that the draft guideline refers both to the formal (or procedural) conditions for the formulation of a reservation as set out in Part 2 of the Guide to Practice, and to the conditions for its permissibility which are specified in Part 3 of the Guide to Practice.

Draft guideline 4.5.2

Draft guideline 4.5.2, which corresponds to the original draft guideline 4.5.3, is now entitled “Status of the author of an invalid reservation in relation to the treaty”.

You will recall that, during the debate in plenary, some members expressed their opposition to establishing a presumption of severability of an invalid reservation; they emphasized the role of consent in treaty relations and, in particular, the fact that a reservation should be regarded as a condition of the consent of its author to be bound by the treaty. However, the majority of the members who took the floor during the debate favoured the presumption of severability enunciated in draft guideline 4.5.3. Therefore, the Drafting Committee decided to work on that basis.

Paragraph 1 as provisionally adopted by the Drafting Committee states that “when an invalid reservation has been formulated, the reserving State or the reserving international organization is considered a contracting State or a

contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State or organization can be identified". While the substance of the text proposed by the Special Rapporteur was retained, a number of changes were introduced to it by the Drafting Committee.

A first change is the deletion of the words "in respect of one or more provisions of a treaty, or of certain specific aspects of the treaty as a whole" which had qualified the reservation in the original text and which were considered superfluous by the Drafting Committee.

A second change is the replacement of the original phrase "the treaty applies to the reserving State or the reserving international organization, notwithstanding the reservation" by a wording that was deemed more accurate and more precise. Thus, the new formulation refers to the reserving State or the reserving international organization's being "considered a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation". It was felt, in particular, that the expression "the treaty applies" did not adequately reflect the fact that paragraph 1 states only a presumption. Furthermore, the expression "notwithstanding the reservation" was regarded as ambiguous by some members of the Drafting Committee, as it did not clearly indicate whether or not the reservation applied in those situations.

At the end of paragraph 1, the word "established" was replaced, in the English text, by the word "identified". Some members were of the view that the term "established" would have made the presumption of severability of the invalid reservation too strong. It was also observed that the English word

"established" seemed to presuppose a degree of clarity which was not necessarily implied by the elements listed in paragraph 2.

The commentary would indicate that the "contrary intention" of the reserving State or the reserving international organization that is referred to at the end of paragraph 1 is the intention of that State or international organization not to be bound by the treaty at all, should the reservation be deemed invalid. If such an intention can be identified, the presumption set out in paragraph 1 is overturned.

Paragraph 2 of draft guideline 4.5.3 provides a list of factors that shall be taken into consideration in order to identify the intention of the author of the reservation. Some changes were introduced to this paragraph by the Drafting Committee.

As in paragraph 1, the word "established" was replaced by "identified" in the chapeau of paragraph 2. Moreover, in order to capture in an adequate manner the various elements that are listed in this paragraph, the chapeau now refers to "all factors that may relevant to that end" (*i.e.* to the establishment of the intention of the author of the reservation), instead of "all available information" as originally proposed. This new formulation purports to indicate that the factors that are listed in paragraph 2 shall be taken into consideration only to the extent that they are relevant in identifying the intention of the reserving State or the reserving international organization; this point will be clarified in the commentary. Although the Drafting Committee deleted, at the end of the chapeau, the words "*inter alia*" after the word "including", the commentary would emphasize that the list contained in paragraph 2 is to be regarded as non-exhaustive.

The Drafting Committee decided to modify the order in which the various factors are listed in paragraph 2, so as to mention, first, the wording of the reservation; then, statements by, or subsequent conduct of, the author of the reservation, as well as reactions of other contracting States and contracting organizations; and finally, two factors of a more general nature, which are now listed in separate bullet points, namely the provision or provisions to which the reservation relates, and the object and purpose of the treaty.

While this revised order intends to suggest a logical sequence in considering these factors with a view to establishing the intention of the author of the reservation, it does not purport to suggest that certain factors should, as general rule, be given more weight than others in establishing that intention; this point would be clarified in the commentary.

A few changes were also made to the wording of some bullet points in paragraph 2. In the second bullet point, reference is now made to “statements” by the author of the reservation, instead of “declarations”. Also, the phrase “or otherwise expressing its consent to be bound by the treaty” was added in order to cover the various modalities of the expression of the consent to be bound by a treaty which are recognized in Article 11 of the 1969 and 1986 Vienna Conventions. In the third bullet point, the word “attitude” was replaced by “conduct”, which is intended to cover both acts and omissions, in line with the approach followed in Article 2 of the Commission’s articles on Responsibility of States for internationally wrongful acts, annexed to General Assembly resolution 56/83 of 12 December 2001.

During the debate in the plenary, a suggestion was made to include in this draft guideline a reference to the nature, or the character, of the treaty. According to that suggestion, which was reiterated in the Drafting Committee,

the nature of the treaty could be relevant in identifying the intention of the author of an invalid reservation concerning the severability of that reservation, and possibly also in determining the way in which the presumption of severability set out in paragraph 1 should operate. The Drafting Committee decided not to follow that suggestion, as the majority of its members were opposed to the idea of categorizing treaties, in particular human rights treaties *vs.* other types of treaties. However, this minority view, according to which the nature of the treaty is relevant in determining the severability of an invalid reservation, would also be reflected in the commentary.

Finally, the Drafting Committee considered a suggestion made during the plenary debate, and reiterated in the Committee, according to which the draft guideline should state the right of the author of the reservation to withdraw from the treaty in the event that its reservation is regarded as invalid. The point was made that recognizing such a possibility in the Guide to Practice would not contradict the Vienna Conventions, which were silent on that issue. However, other members were of the view that following that suggestion would contradict Article 56 of the 1969 and 1986 Vienna Conventions, which regulates the conditions for the withdrawal from a treaty, as well as Article 42, paragraph 2, of these conventions, according to which the withdrawal from a treaty may take place only as a result or the application of the provisions of the treaty or of the Vienna Conventions. The Drafting Committee eventually decided not to include, in the draft guideline, a reference to a right of withdrawal from the treaty by the author of an invalid reservation. However, the commentary would mention that such a proposal was made and was supported by some members of the Commission.

Draft guideline 4.5.3

Draft guideline 4.5.3, which corresponds to the original draft guideline 4.5.4, is now entitled “Reactions to an invalid reservation”. Paragraph 1 states that the nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization. Nevertheless, according to paragraph 2, a contracting State or a contracting organization which considers a reservation to be invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible. While the substance of the draft guideline proposed by the Special Rapporteur was retained, the Drafting Committee introduced a number of changes to its text.

Given that section 4.5 refers both to the permissibility and to the formal validity of a reservation, the Drafting Committee replaced, in the title and in the text of guideline 4.5.3, the term “impermissible” by the term “invalid”, which also appears in the other draft guidelines of this section.

In paragraph 1, reference is now made to the “nullity” of an invalid reservation, and not to the “effect of the nullity” as in the original text, since an invalid reservation is devoid of legal effect. Furthermore, for the sake of additional clarity, the general reference to a *reaction* to a reservation was replaced, in paragraph 1, by a more explicit reference to the *objection* to, or the *acceptance* of, the reservation by a contracting State or a contracting organization – it being understood that reference is made here to a contracting State or a contracting organization other than the author of the reservation. The commentary would explain the close relationship between this provision and draft guideline 3.3.3, which states that acceptance of an impermissible reservation shall not cure the nullity of the reservation. It would also indicate that the 12-month period for the formulation of an objection is not applicable in

the case of invalid reservations. Furthermore, the commentary would explain the difference between the situation envisaged in draft guideline 4.5.3 and the case of collective acceptance of an impermissible reservation, which is addressed in draft guideline 3.3.4.

Paragraph 2, which now begins with the word “nevertheless”, states that a contracting State or a contracting organization which considers a reservation to be invalid should, if it deems it appropriate, formulate a reasoned objection to the reservation as soon as possible. The commentary would emphasize the recommendatory nature of this paragraph. The qualifier “if it deems it appropriate” was included by the Drafting Committee in response to concerns raised by some of its members who were of the opinion that the original formulation of the recommendation was too strong. The point was also made that there could be various considerations that may, in a given case, discourage a State from raising an objection to a reservation which it considers to be invalid. Furthermore, while the words “as soon as possible” were retained at the end of paragraph 2, the commentary would emphasize that these words are merely recommendatory, as there is no deadline for the formulation of an objection to an invalid reservation.

You may also recall that, during the plenary debate, a suggestion was made to include a reference to the reservations dialogue in the text of paragraph 2. However, the Drafting Committee considered that it would not be appropriate to refer to a concept which does not appear anywhere else in the text of the Guide to Practice. In this regard, the Special Rapporteur indicated that he intended to cover the issue of the reservations dialogue in his final report, to be presented to the Commission next year, and that he was likely to propose that the issue be addressed in an annex to the Guide to Practice. That said, the commentary to draft guideline 4.5.3 would explain that the purpose of

the recommendation contained in paragraph 2 is to encourage the reservations dialogue.

Draft guideline 4.6

Draft guideline 4.6, which is now entitled "Absence of effect of a reservation on the relations between the other parties to the treaty", states that a reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

You will recall that the Special Rapporteur had presented two options regarding the text of this draft guideline. According to the first option, the guideline would have simply reproduced the text of article 21, para. 2 of the Vienna Convention, while, according to the second option, the provision would have included the opening phrase "without prejudice to any agreement between the parties as to its application". Given that a slight preference was expressed for the first option during the debate in plenary, the Drafting Committee decided to retain that option. Thus, draft guideline 4.6 as provisionally adopted by the Drafting Committee reproduces the exact wording of Article 21, para. 2 of the Vienna Conventions.

Mr. Chairman,

I shall now turn to the draft guidelines pertaining to **section 4.7**, which is entitled "Effect of an interpretative declaration". The title of this section corresponds to the title of the draft guideline 4.7 that had been originally proposed by the Special Rapporteur, except that the word "effect" now appears in the singular.

Draft guideline 4.7.1

Draft guideline 4.7.1 is entitled “Clarification of the terms of the treaty by an interpretative declaration”, as was the original draft guideline 4.7.1 proposed by the Special Rapporteur. However, draft guideline 4.7.1 as provisionally adopted by the Drafting Committee is the result of a partial merging of draft guidelines 4.7 and 4.7.1 proposed by the Special Rapporteur.

The text of paragraph 1 of draft guideline 4.7.1 is based on the text of paragraph 1 of the original draft guideline 4.7 proposed by the Special Rapporteur. A number of modifications were, however, introduced to the text. In the English version of this draft guideline, the words “may not modify” were replaced by the words “does not modify”, in order to align the English text with the French. Furthermore, also in the English text, the expression “some of its provisions” was replaced by the words “certain provisions thereof” for the sake of consistency with the definition of an interpretative declaration provided for in draft guideline 1.2.

The word “accordingly”, in the second part of the second sentence of paragraph 1, was replaced by the expression “as appropriate”, which purports to indicate that whether, or the extent to which, an interpretative declaration may constitute an element to be taken into account in interpreting the treaty would depend on a variety of factors, including, *inter alia*, the nature of the declaration and the circumstances in which it was formulated.

The final phrase of paragraph 1, which reads “in accordance with the general rule of interpretation of treaties”, is taken from paragraph 1 of the original draft guideline 4.7.1, which also contained further details on treaty interpretation. That paragraph was deleted by the Drafting Committee on the suggestion of several members who were of the view that the Guide to Practice

should not deal with the modalities of treaty interpretation. Thus, a reference to the general rule of treaty interpretation was deemed sufficient in this context.

Paragraph 2 of draft guideline 4.7.1 is a simplified version of paragraph 2 of the draft guideline 4.7.1 that had been proposed by the Special Rapporteur. It states that, in interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting States or contracting organizations. The words "as appropriate" were added by the Drafting Committee in order to convey the idea that the relevance and the weight to be recognized, in interpreting a treaty, to an approval of, or an opposition to, an interpretative declaration need to be assessed in the light of the relevant circumstances.

Draft guideline 4.7.2

Draft guideline 4.7.2 is now entitled "Effect of the modification or the withdrawal of an interpretative declaration in respect of its author". The draft guideline originally proposed by the Special Rapporteur stated that "[t]he author of an interpretative declaration or a State or international organization having approved it may not invoke an interpretation contrary to that put forward in the declaration". You will recall that, during the debate in plenary, several members expressed the view that the proposed formulation of that guideline was too strict. In particular, it was suggested that this guideline include a reference to the right of the author of an interpretative declaration to modify or withdraw it in conformity with draft guidelines 2.4.9 or 2.5.12. The Special Rapporteur agreed on the need to seek a more nuanced formulation of this draft guideline.

It was generally felt in the Drafting Committee that, while the right of a State or an international organization to modify or withdraw an interpretative

declaration ought to be acknowledged, there was also a need to protect the interests of other contracting States or contracting organizations that could have relied on the initial declaration. In that spirit, the Drafting Committee agreed on the following formulation: "[t]he modification or the withdrawal of an interpretative declaration may not produce the effects provided for in draft guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration". To the extent that it refers to the idea of reliance by other contracting States or contracting organizations, this text is inspired from the wording on Guiding Principle No. 10 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted by the Commission in 2006.

The assumption is that the effects envisaged in draft guideline 4.7.1 may be also attached to the modification or the withdrawal of an interpretative declaration; in other words, the modification or the withdrawal of an interpretative declaration are elements that may be taken into account, as appropriate, in interpreting a treaty in accordance with the general rule of interpretation of treaties. However, such interpretative effects may not be attached to the withdrawal or the modification of an interpretative declaration to the extent that other contracting States or contracting organizations have relied on that declaration. The commentary would emphasize the role of the principle of good faith and the potential relevance of *estoppel* in this context. It would also elaborate on the notion of reliance as well as other criteria that are mentioned in the Guiding Principle No. 10 referred to above and in the commentary thereto.

After careful consideration, the Drafting Committee decided not to include, in the text of this draft guideline, a reference to draft guidelines 2.4.9 and 2.5.12. The majority of the members considered that such a reference was

not necessary in a provision which addresses *the effects* of the modification or withdrawal of an interpretative declaration, as opposed to the procedure to be followed in modifying or withdrawing an interpretative declaration. However, the commentary would include a reference to draft guidelines 2.4.9 and 2.5.12.

Furthermore, contrary to the text originally proposed by the Special Rapporteur, the draft guideline provisionally adopted by the Drafting Committee does not refer to the case of a State or an international organization which, having approved an interpretative declaration, intends to put forward a different interpretation of the treaty. Some doubts were raised in the Drafting Committee as to whether such State or international organization should be treated in the same way as the author of the interpretative declaration. The case of a State or an international organization that has approved an interpretative declaration would be addressed in the commentary; as a relevant factor, reference would be made to the extent to which other contracting States or contracting organizations have relied on the initial declaration and/or on the approval thereof.

Draft guideline 4.7.3

Draft guideline 4.7.3 is now entitled “Effect of an interpretative declaration approved by all the contracting States and contracting organization”. The term “effect” in the title was put in the singular for the sake of consistency with other draft guidelines.

The Drafting Committee retained the text of this draft guideline as originally proposed by the Special Rapporteur, with the exception of the replacement of the expression “constitutes an agreement” by the words “may constitute an agreement”. It was felt that the original wording was too affirmative and that the word “may” would adequately express the need that the

relevant circumstances be taken into consideration in assessing the existence of an agreement regarding the interpretation of the treaty. It was suggested in the Drafting Committee that the words “between the parties”, which appear in Article 31 para. 3(a) of the Vienna Conventions, be included in order to qualify the agreement regarding the interpretation of the treaty to which reference is made in this draft guideline. However, the Drafting Committee did not follow that suggestion. The Drafting Committee considered that the text of the draft guideline was sufficiently clear; moreover, such an addition could have conveyed the wrong impression that the scope of the draft guideline should be limited to the situation envisaged in Article 31 para. 3(a) of the Vienna Conventions.

Mr. Chairman,

This concludes my introduction of the fifth 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.

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