UNITED NATIONS **A**

General Assembly

Distr.
LIMITED

A/CN.4/L.733/Add.1
28 July 2008

ENGLISH
Original: FRENCH

INTERNATIONAL LAW COMMISSION
Sixtieth session
Geneva, 5 May-6 June 2008 and
7 July-8 August 2008

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTIETH SESSION

Rapporteur: Ms. Paula ESCARAMEIA

CHAPTER VI

RESERVATIONS TO TREATIES

Addendum

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B. Consideration of the topic at the present session

1. At the present session, the Commission had before it the thirteenth report of the Special Rapporteur (A/CN.4/600) on reactions to interpretative declarations. The Commission also had before it a note by the Special Rapporteur on draft guideline 2.1.9, "Statement of reasons for reservations" (A/CN.4/586), which had been submitted at the end of the fifty-ninth session.

2. The Commission began by considering the note of the Special Rapporteur at its 2967th meeting on 27 May 2008. It decided at that same meeting to refer the new draft guideline 2.1.9 to the Drafting Committee.

3. The Commission considered the thirteenth report of the Special Rapporteur at its 2974th to 2978th meetings, from 7 to 15 July 2008.

4. At its 2978th meeting, on 15 July 2008, the Commission decided to refer draft guidelines 2.9.1 (including the second paragraph of draft guideline 2.9.3) to 2.9.10 to the Drafting Committee, while emphasizing that draft guideline 2.9.10 was without prejudice to the subsequent retention or otherwise of the draft guidelines on conditional interpretative declarations. The Commission also hoped that the Special Rapporteur would prepare draft guidelines on the form, statement of reasons for and communication of interpretative declarations.

5. At its 2970th meeting on 3 June 2008, the Commission considered and provisionally adopted draft guidelines 2.1.6 (Procedure for communication of reservations) (as amended[1]), 2.1.9 (Statement of reasons [for reservations]), 2.6.6 (Joint formulation [of objections to reservations]), 2.6.7 (Written form), 2.6.8 (Expression of intention to preclude the entry into force of the treaty), 2.6.9 (Procedure for the formulation of objections), 2.6.10 (Statement of reasons), 2.6.13 (Time period for formulating an objection), 2.6.14 (Conditional objections), 2.6.15 (Late objections), 2.7.1 (Withdrawal of objections to reservations), 2.7.2 (Form of withdrawal), 2.7.3 (Formulation and communication of the withdrawal of objections to reservations), 2.7.4 (Effect on reservation of withdrawal of an objection), 2.7.5 (Effective date of

[1] See A/62/10, para. 45.

withdrawal of an objection), 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation), 2.7.7 (Partial withdrawal of an objection), 2.7.8 (Effect of a partial withdrawal of an objection) and 2.7.9 (Widening of the scope of an objection to a reservation).

6. At its 2974th meeting, on 7 July 2008, the Commission considered and provisionally adopted draft guidelines 2.6.5 (Author [of an objection]), 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation), 2.6.12 (Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty) and 2.8 (Form of acceptances of reservations).

6bis. At its ... meeting on 30 July 2008, the Commission took note of draft guidelines 2.8.1 to 2.8.12 as provisionally adopted by the Drafting Committee.

7. At its ... and ... meetings, on … August 2008, the Commission adopted the commentaries to the draft guidelines above-mentioned.

8. The text of the draft guidelines and commentaries thereto is reproduced in section C.2 below.

1. Introduction by the Special Rapporteur of his thirteenth report

9. Introducing his thirteenth report, which deals with reactions to interpretative declarations and conditional interpretative declarations, the Special Rapporteur indicated what progress had been made on the topic of reservations to treaties. The slowness of his working methods, for which he had sometimes been criticized, was in fact due to the very nature of the instrument that the Commission was elaborating (a Guide to Practice, not a draft treaty), and to a deliberate choice to encourage careful thought and extensive debate. Although the Commission itself still had a large number of guidelines to discuss and adopt, it was reasonable to suppose that the second part of the Guide to Practice might be concluded at its sixty-first session.

10. The thirteenth report, which was in fact a continuation of the twelfth report (A/CN.4/584), aimed to extend the consideration of the questions of formulation and procedure. Any line of reasoning concerning reactions to interpretative declarations must take account of two observations. The first was that the Vienna Conventions on the Law of Treaties were totally

silent on the question of interpretative declarations, which had been mentioned only rarely during the *travaux préparatoires*. The second was that reservations, on the one hand, and interpretative declarations and conditional interpretative declarations as defined in guidelines 1.2 and 1.2.1, on the other, served different purposes. Consequently, the rules applicable to reservations could not simply be transposed to cover interpretative declarations; they could, however, be looked to for inspiration, given the lack of reference to interpretative declarations in legal texts and the dearth of practice relating to them.

11. The Special Rapporteur distinguished four sorts of reactions to interpretative declarations: approval, disapproval, silence and reclassification, the latter being when the State concerned expressed the view that an interpretative declaration was in fact a reservation.

12. Explicit approval of an interpretative declaration did not raise any particular problems; an analogy could be drawn with the "subsequent agreement between the parties regarding the interpretation of the treaty" which, under article 31, paragraph 3 (a), of the Vienna Conventions, must be taken into account. Even so, approval of an interpretative declaration could not be assimilated to acceptance of a reservation inasmuch as acceptance of a reservation could render the treaty relationship binding or alter the effects of the treaty as between the reserving and the accepting State. The wording of draft guideline 2.9.1[2] was intended to preserve that distinction.

13. The Special Rapporteur also pointed out that, like objections to reservations, which were more frequent than cases of express acceptance, negative reactions to interpretative declarations were more frequent than expressions of approval. To reactions intended simply to indicate

[2] Draft guideline 2.9.1 reads:

2.9.1 Approval of an interpretative declaration

"Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation proposed in that declaration.

rejection of the interpretation proposed should be added cases in which the State or organization concerned expressed opposition by putting forward an alternative interpretation. Draft guideline 2.9.2[3] reflected those two possibilities.

14. At all events, reactions to interpretative declarations had different effects from those produced by reactions to reservations, if only because the former had no consequences with regard to the entry into force of the treaty or the nexus of treaty relations. The Special Rapporteur therefore preferred to use the terms “approval” and “opposition” to denote reactions to interpretative declarations, as distinct from the terms “acceptance” and “objection” employed in the case of reactions to reservations. The question of the effects of interpretative declarations and reactions to them would be taken up in the third part of the Guide to Practice.

15. Provision had also to be made for a further reaction: “reclassification”, defined in draft guideline 2.9.3,[4] whereby the State or international organization indicated that a declaration presented by its author as interpretative was in fact a reservation. That relatively common practice was based on the usual criteria for distinguishing between reservations and interpretative

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[3] Draft guideline 2.9.2 reads:

2.9.2 Opposition to an interpretative declaration

“Opposition” to an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation proposed in the interpretative declaration or proposes an interpretation other than that contained in the declaration with a view to excluding or limiting its effect.

[4] Draft guideline 2.9.3 reads:

2.9.3 Reclassification of an interpretative declaration

“Reclassification” means a unilateral statement made by a State or an international organization in response to a declaration in respect of a treaty formulated by another State or another international organization as an interpretative declaration, whereby the former State or organization purports to regard the declaration as a reservation and to treat it as such.

declarations. The Special Rapporteur thus considered that the draft guideline could usefully refer to draft guidelines 1.3 to 1.3.3, leaving it to the Commission to determine how emphatic the reference should be.

16. Draft guideline 2.9.4[5] covered the time at which it was possible to react to an interpretative declaration, and who could react. As regards the question of time, the Special Rapporteur justified the proposal that a reaction could be formulated at any time not merely out of a concern for symmetry with what draft guideline 2.4.3 specified in the case of interpretative declarations themselves, but also because there were no formal rules governing such declarations, which the States or organizations concerned sometimes learned of long after they had been made. As for who could react, the possibility should be left open to all contracting States and organizations and all States and organizations entitled to become parties. There was no need, in his view, to apply to reactions to interpretative declarations the restriction imposed by draft guideline 2.6.5 on the author of an objection to a reservation. Whereas an objection had effects on the treaty relation, reactions to interpretative declarations were no more than indications, and there was no reason why they should be taken into consideration only once their authors had become parties to the treaty.

17. Recalling the advisory opinion given by the International Court of Justice on the *International status of South-West Africa*,[6] the Special Rapporteur emphasized that reactions to

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[In formulating a reclassification, States and international organizations shall [take into account] [apply] draft guidelines 1.3 to 1.3.3.]

[5] Draft guideline 2.9.4 reads:

2.9.4 Freedom to formulate an approval, protest or reclassification

An approval, opposition or reclassification in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.

[6] "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument" (Advisory opinion of 11 July 1950, *I.C.J. Reports 1950*, pp. 135-136).

interpretative declarations were intended to produce legal effects. It was therefore important for them to be explained and to be formulated in writing so that other States or international organizations that were or might become parties to the treaty could be made aware of them. That was not, however, a legal obligation. It would be hard to justify making it so, for that would make reactions to interpretative declarations subject to stricter formal and procedural requirements than interpretative declarations themselves.

18. Any draft guidelines which the Commission decided to devote to the form of and procedure governing reactions to interpretative declarations should therefore take the form of recommendations, which was consistent with the drafting of a Guide to Practice. Draft guidelines 2.9.5,[7] 2.9.6[8] and 2.9.7[9] were put forward in that light in the thirteenth report. In the Special Rapporteur's view, in the light of those guidelines the Commission should also consider whether it was necessary to remedy the absence of equivalent provisions governing interpretative declarations themselves. Among the possible ways of doing so, he suggested dealing with the matter in the commentaries, setting it aside until the second reading, or that he himself should present some draft guidelines on that question.

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[7] Draft guideline 2.9.5 reads:

2.9.5 Written form of approval, opposition and reclassification

An approval, opposition or reclassification in respect of an interpretative declaration shall be formulated in writing.

[8] Draft guideline 2.9.6 reads:

2.9.6 Statement of reasons for approval, opposition and reclassification

Whenever possible, an approval, opposition or reclassification in respect of an interpretative declaration should indicate the reasons why it is being made.

[9] Draft guideline 2.9.7 reads:

2.9.7 Formulation and communication of an approval, opposition or reclassification

An approval, opposition or reclassification in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

19. In the Special Rapporteur's view, another very important distinction was to be drawn between reactions to reservations and reactions to interpretative declarations. Under the Vienna regime, silence on the part of the States concerned was presumed to indicate acceptance of a reservation. Nothing of the sort could be inferred from silence in response to an interpretative declaration unless it was to be argued that there was an obligation - unknown in practice - on States to respond to such declarations. Draft guideline 2.9.8[10] reflected the absence of any such presumption.

20. Approval of an interpretative declaration could nevertheless result from silence on the part of States or international organizations if they could legitimately be expected expressly to voice their opposition to the interpretation put forward. The rather general wording of draft guideline 2.9.9[11] was intended to cover that eventuality without embarking on the unreasonable task of including in the Guide to Practice the entire set of rules concerning acquiescence under international law.

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[10] Draft guideline 2.9.8 reads:

2.9.8 Non-presumption of approval or opposition

Neither approval of nor opposition to an interpretative declaration shall be presumed.

[11] Draft guideline 2.9.9 reads:

2.9.9 Silence in response to an interpretative declaration

Consent to an interpretative declaration shall not be inferred from the mere silence of a State or an international organization in response to an interpretative declaration formulated by another State or another international organization in respect of a treaty.

In certain specific circumstances, however, a State or an international organization may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be.

21. Last, draft guideline 2.9.10[12] dealt with reactions to conditional interpretative declarations. While the purpose of such declarations was to interpret the treaty, they purported to produce effects on treaty relations. Reactions to conditional interpretative declarations were thus more akin to acceptances of or objections to a reservation than to reactions to a simple interpretative declaration. Accordingly, draft guideline 2.9.10 referred back to sections 2.6, 2.7 and 2.8 of the Guide to Practice without qualifying the reactions concerned. The Special Rapporteur stressed that the draft guideline was being presented as a provisional solution, like all those concerning conditional interpretative declarations, and that the Commission would take a final decision on the subject once it was sure that conditional interpretative declarations had the same effects as reservations.

2. Summary of debate

22. Several Commission members spoke in favour of considering interpretative declarations and reactions to them since, among other reasons, a simple transposition of the regime applicable to reservations such as the Commission had settled upon in adopting draft guidelines 1.2 and 1.2.1 was not possible. Besides, interpretative declarations were especially important in practice, for instance in the case of treaties which prohibited reservations. Others argued that while, on the whole, the remarks and proposals made in the thirteenth report were persuasive, it was not clear that it was really necessary to tackle the question of reactions to interpretative declarations in a Guide to Practice devoted to reservations.

23. Several members applauded the division of possible reactions to interpretative declarations into several categories, and the choice of terms used to distinguish them from reactions to reservations. It was commented that the examples given in the thirteenth report nevertheless showed that interpretative declarations were not always easy to understand or to assign to any particular category.

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[12] Draft guideline 2.9.10 reads:

> **2.9.10 Reactions to conditional interpretative declarations**
>
> Guidelines 2.6 to 2.8.12 shall apply, *mutatis mutandis*, to reactions of States and international organizations to conditional interpretative declarations.

24. Several members supported draft guideline 2.9.1 and the choice of the term “approval”. Regret was expressed that the effect of approval was not specified. A reference to article 31, paragraph 3 (a), of the Vienna Conventions was also advocated.

25. Draft guideline 2.9.2 received support from several members, although doubts were expressed about the final reference to the “effect” of the interpretation being challenged, which narrowed the distinction between opposition to an interpretative declaration and objection to a reservation. Some members argued that the form in which the reasons for opposing an interpretation were stated was a matter that should be left to the State or organization concerned, not covered in a draft guideline. Others were of the view that draft guideline 2.9.2 should also cover cases in which the other parties were unwilling to accept an interpretative declaration on the grounds that it gave rise to additional obligations or expanded the scope of existing obligations. In that connection it was emphasized that declarations purporting to enlarge the scope of application of the treaty should be regarded as reservations, needing to be accepted before they could produce effects.

26. On the subject of draft guideline 2.9.3, several members drew attention to the topical and specific nature of the reclassification of interpretative declarations, as for example in the case of treaties on the protection of the person. Although, in practice, reclassification was often associated with an objection, there was a need for specific procedural rules to govern reclassification. Care must be taken to avoid giving the impression that a State other than the author State had the right to determine the nature of a declaration. Certainly the reclassifying State should apply the reservations regime to the reclassified declaration; but that unilateral interpretation could not prevail over the position of the State which had made the declaration. It was also emphasized that practitioners and depositaries needed guidance on the form, timing and legal effects of reactions to what might be called “disguised reservations”.

27. Another view expressed was that reclassification was a particular kind of opposition, and did not need to be assigned to a special category since its consequences were no different from those of other kinds of opposition; including reclassification as one case within draft guideline 2.9.2 would suffice.

28. There was widespread support for the retention of the second paragraph in draft guideline 2.9.3, and several members also expressed a preference for the wording “apply” rather than “take into account”. But it was also argued that the paragraph was unnecessary, and that the expression “take into account” should be the one used if the paragraph was retained.

29. Several members considered that there was good reason for draft guideline 2.9.4 to allow for States and international organizations entitled to become parties to the treaty to react, as the declarations concerned would have no effect on the entry into force of the treaty.

30. It was suggested that draft guidelines 2.9.5, 2.9.6 and 2.9.7 were unnecessary. Others felt that, some editorial details notwithstanding, those draft guidelines provided useful clarifications. Several members called for the drafting of equivalent provisions to govern interpretative declarations themselves. It was pointed out that the reference in draft guideline 2.9.7 to draft guideline 2.1.6 should be deleted, since it related to a time limit that did not apply to interpretative declarations.

31. The absence of presumption set forth in draft guideline 2.9.8 won the approval of several members. Others considered the guideline unnecessary inasmuch as it added nothing to the provisions of draft guideline 2.9.9.

32. Draft guideline 2.9.9 provoked a far-ranging discussion. Some members felt it important to emphasize that, in the case of an interpretative declaration, silence did not betoken consent since there was no obligation to react expressly to such a declaration. It was pointed out that the notion of acquiescence was apposite in treaty law, even if the circumstances in which the “conduct” referred to in article 45 of the Vienna Conventions might betoken consent could not be determined beforehand. Several members expressed the view that draft guideline 2.9.9 offered a nuanced solution and should be retained, since it gave helpful indications as to how silence should be interpreted.

33. Other members, however, called for the draft guideline to be deleted altogether, since it was very general and appeared to contradict the absence of presumption of approval or opposition set forth in draft guideline 2.9.8, the text of and commentary to which could provide all necessary clarification. At the very least, if the second paragraph of draft guideline 2.9.9 was

to be retained, instances should be given of the certain specific circumstances in which a State or international organization could be considered to have acquiesced in an interpretative declaration.

34. Some members felt that, in the absence of any indication as to the “specific circumstances” in which silence on the part of the State betokened acquiescence, the two paragraphs of the guideline might contradict each other. There was thus a need to spell out the relationship between silence and conduct. The Special Rapporteur was right to flag the role which silence could play in determining the existence of conduct amounting to acquiescence; but silence alone could not betoken acquiescence. Acquiescence depended in particular on the legitimate expectations of the States and organizations concerned and the setting in which silence occurred.

35. Another view expressed was that the draft guideline should make it clear that consent could not be inferred from the conduct of the State in question unless the State had persistently failed to react although fully aware of the implications of the interpretative declaration, as in cases when the meaning of the declaration was quite plain.

36. Lastly, it was suggested that the second paragraph of draft guideline 2.9.9 might be worded as a “without prejudice” clause. Doing so would allow the possible consequences of silence, as an element in acquiescence, to be mentioned without placing undue emphasis on acquiescence.

37. Support was expressed for the distinction drawn by the Special Rapporteur between conditional and simple interpretative declarations. Some members still voiced doubts about the relevance of the category of conditional interpretative declarations, which purported to modify the legal effects of treaty provisions and should thus be assimilated to reservations. There would thus be just two categories, interpretative declarations and reservations, conditional interpretative declarations being a special form of reservation. It was also emphasized that the classification of an act was determined by its legal effects, not by how it was described.

38. Other members did not consider it prudent for the time being to draw an analogy between the regime of conditional interpretative declarations and the regime of reservations: reservations were intended to modify the legal effects of a treaty, whereas conditional declarations made participation in the treaty subject to a particular interpretation. At all events, pending a decision

by the Commission on the desirability of dealing specifically with the case of conditional interpretative declarations, the terminological precautions taken by the Special Rapporteur in draft guideline 2.9.10 were welcome.

3. Special Rapporteur's concluding remarks

39. The Special Rapporteur observed that his report had not aroused much opposition. Most of the comments related to the second paragraph of draft guideline 2.9.9. First, however, he wished to react to the comments made on draft guideline 2.9.10. He continued to believe that declarations as defined in draft guideline 1.2.1 which purported to impose a particular interpretation on the treaty were not reservations, since they did not seek to exclude or modify the legal effect of certain treaty provisions. The Commission had decided in 2001 not to review draft guideline 1.2.1 on the definition of conditional interpretative declarations, which were a "hybrid" category resembling both reservations and interpretative declarations. Since then, it and the Special Rapporteur had realised that the regime of conditional interpretative declarations was very similar, if not identical, to that of reservations. But the Commission was not yet ready to go back on its 2001 decision and delete the guidelines on conditional interpretative declarations, replacing them by a single guideline assimilating such declarations to reservations. It was still too early to make an unqualified pronouncement that the two regimes were absolutely identical; meanwhile the Commission had decided, if only provisionally, to adopt guidelines on conditional interpretative declarations which it might later replace with a single guideline acknowledging that they and reservations came under a single legal regime.

40. It was in that spirit that he had suggested referring draft guideline 2.9.10 to the Drafting Committee; as with similar cases in the past, the draft guideline could be provisionally adopted, thereby confirming the Commission's cautious attitude on the matter. He had nevertheless taken note of the comment admonishing him for failing to distinguish clearly between conditional and "simple" interpretative declarations, and would try to put the matter right in the relevant commentaries.

41. Turning to the various opinions expressed during the discussion, he believed that reclassification belonged in a separate category and was a different operation from opposition: it was a first step towards, but not identical to, opposition. He also favoured the expression "conditional approval" to describe some kinds of approval.

42. He observed that several members were concerned about the possible effects of approval as defined in draft guideline 2.9.1. He wished to reiterate that the effects of reservations themselves and of all declarations relating to reservations would be discussed comprehensively in the fourth part of the Guide to Practice.

43. With regard to draft guideline 2.9.3, he noted that most members who had spoken about it were in favour of keeping the second paragraph; the whole text would, of course, be referred to the Drafting Committee.

44. Most members were also in favour of referring draft guidelines 2.9.4 to 2.9.7 to the Drafting Committee.

45. The Special Rapporteur was pleased to note that the reference in draft guideline 2.9.4 to "any State or any international organization that is entitled to become a party to the treaty" had not aroused reactions comparable to those provoked by the corresponding phrase in guideline 2.6.5, it being clear that the two cases were completely different.

46. As all the members who had spoken on the matter had asked him to prepare draft guidelines on the form of, reasons for and communication of interpretative declarations themselves, he was willing, if the Commission endorsed the idea, to do so at the current session or at the next session.

47. He pointed out that the question of silence was the thorniest problem. It was his impression that the relationship between guidelines 2.9.8 and 2.9.9 was still not very clearly understood; the second paragraph of draft guideline 2.9.9 had also been criticized.

48. To his mind, both guideline 2.9.8 and guideline 2.9.9 were necessary. The first established the principle that, in contrast to reservations, acceptance of an interpretative declaration could not be presumed, while the second qualified it by saying that silence in itself did not necessarily indicate acquiescence. In certain circumstances, silence could be regarded as acquiescence. Hence the principle was not rigid: exceptions were possible.

49. Most of the criticism directed at the second paragraph of draft guideline 2.9.9 concerned the failure to identify the “specific circumstances” it mentioned. It would, however, be hard to be more explicit in a draft guideline without incorporating a long treatise on acquiescence. He drew attention to a study on the subject produced by the Secretariat in 2006.

50. An attempt could be made to define those “specific circumstances”, but the entire theory of acquiescence could not be expounded in a draft guideline on reservations. He would be prepared to include some concrete examples in the commentary, but he was not optimistic about finding any. If he could not, he would use hypothetical examples. But he still believed that international case law offered several instances in which a treaty had been interpreted or modified by acquiescence in the form of silence (the Eritrea-Ethiopia Boundary Commission, the ICJ *Temple of Preah Vihear* case, the *Taba* decision, the *Filleting within the Gulf of St. Lawrence* arbitral award).

51. He thus agreed that silence was one aspect of conduct underlying consent. The second paragraph of draft guideline 2.9.9 could be reworked in the Drafting Committee to capture that idea more faithfully. Thought could also be given to a saving clause. He hoped that all the draft guidelines could be referred to the Drafting Committee, with due regard given to his conclusions.
