

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

2011

Volume II
Part Three

*Report of the Commission
to the General Assembly
on the work
of its sixty-third session
(Addendum)*

UNITED NATIONS



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Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.*

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ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILO	International Labour Organization
IMCO	Inter-Governmental Maritime Consultative Organization
IMO	International Maritime Organization
ITU	International Telecommunication Union
OAS	Organization of American States
WCO	World Customs Organization
WTO	World Trade Organization

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AFDI	<i>Annuaire français de droit international</i>
AJIL	<i>American Journal of International Law</i>
BYBIL	<i>The British Yearbook of International Law</i>
<i>I.C.J. Reports</i>	International Court of Justice, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	Permanent Court of International Justice, <i>Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	Permanent Court of International Justice, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
<i>P.C.I.J., Series B</i>	Permanent Court of International Justice, <i>Collection of Advisory Opinions</i> (Nos. 1–18: up to and including 1930)
RGDIP	<i>Revue générale de droit international public</i>

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In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is <http://legal.un.org/ilc/>.

MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

Source

Pacific settlement of international disputes

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Treaty of Alliance against Bonaparte, between Austria, Great Britain, Prussia and Russia (Vienna, 25 March 1815)	<i>Ibid.</i> , p. 443.
Treaty of Paris of 1856 (Paris, 30 March 1856)	F. L. Israel (ed.), <i>Major Peace Treaties of Modern History, 1648–1967</i> , vol. II, New York, Chelsea House, 1967, p. 947.
Covenant of the League of Nations (Versailles, 28 June 1919)	League of Nations, <i>Official Journal</i> , No. 1, February 1920, p. 3.
General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (Paris, 27 August 1928)	<i>Ibid.</i> , <i>Treaty Series</i> , vol. XCIV, No. 2137, p. 57.
General Act of Arbitration (Pacific Settlement of International Disputes) (Geneva, 26 September 1928)	<i>Ibid.</i> , vol. XCIII, No. 2123, p. 343.
American Treaty on Pacific Settlement (Pact of Bogotá) (Bogotá, 30 April 1948)	United Nations, <i>Treaty Series</i> , vol. 30, No. 449, p. 55.
Revised General Act for the Pacific Settlement of International Disputes (Lake Success, New York, 28 April 1949)	<i>Ibid.</i> , vol. 71, No. 912, p. 101.
European Convention for the peaceful settlement of disputes (Strasbourg, 29 April 1957)	<i>Ibid.</i> , vol. 320, No. 4646, p. 243.

Privileges and immunities, diplomatic and consular relations, etc.

Convention on the privileges and immunities of the United Nations (New York, 13 February 1946)	United Nations, <i>Treaty Series</i> , vol. 1, No. 4, p. 15, and vol. 90, p. 327.
Convention on the privileges and immunities of the specialized agencies (New York, 21 November 1947)	<i>Ibid.</i> , vol. 33, No. 521, p. 261.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, No. 7310, p. 95.
Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality (Vienna, 18 April 1961)	<i>Ibid.</i> , No. 7311, p. 223.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	<i>Ibid.</i> , vol. 596, No. 8638, p. 261.
Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality (Vienna, 24 April 1963)	<i>Ibid.</i> , No. 8639, p. 469.
Convention on special missions (New York, 8 December 1969)	<i>Ibid.</i> , vol. 1400, No. 23431, p. 231.
European Convention on State Immunity (Basel, 16 May 1972)	<i>Ibid.</i> , vol. 1495, No. 25699, p. 181.
Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983)	United Nations, <i>Juridical Yearbook 1983</i> (Sales No. E.90.V.1), p. 139.

Human rights

Convention concerning Statistics of Wages and Hours of Work, 1938 (No. 63) (Geneva, 20 June 1938)	United Nations, <i>Treaty Series</i> , vol. 40, No. 638, p. 255.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	<i>Ibid.</i> , vol. 78, No. 1021, p. 277.
Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96) (Geneva, 1 July 1949)	<i>Ibid.</i> , vol. 96, No. 1340, p. 237.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952)	<i>Ibid.</i>
Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty (Strasbourg, 28 April 1983)	<i>Ibid.</i> , vol. 1496, No. 2889, p. 281.

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Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 22 November 1984)	<i>Ibid.</i> , vol. 1525, No. 2889, p. 195.
Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby (Strasbourg, 11 May 1994)	<i>Ibid.</i> , vol. 2061, No. 2889, p. 7.
Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (Vilnius, 3 May 2002)	<i>Ibid.</i> , vol. 2246, No. 2889, p. 110.
Social Security (Minimum Standards) Convention, 1952 (No. 102) (Geneva, 28 June 1952)	<i>Ibid.</i> , vol. 210, No. 2838, p. 131.
Convention against discrimination in education (Paris, 15 December 1960)	<i>Ibid.</i> , vol. 429, No. 6193, p. 93.
European Social Charter (Turin, 18 October 1961) and revised version (Strasbourg, 3 May 1996)	<i>Ibid.</i> , vol. 529, No. 7659, p. 89; revised version: Council of Europe, <i>European Treaty Series</i> , No. 163.
Equality of Treatment (Social Security) Convention, 1962 (No. 118) (Geneva, 28 June 1962)	United Nations, <i>Treaty Series</i> , vol. 494, No. 7238, p. 271.
European Code of Social Security (Strasbourg, 16 April 1964)	Council of Europe, <i>European Treaty Series</i> , No. 48.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965). Opened for signature at New York on 7 March 1966.	United Nations, <i>Treaty Series</i> , vol. 660, No. 9464, p. 195.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 993, No. 14531, p. 3.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171, and vol. 1057, p. 407.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, p. 171.
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (New York, 15 December 1989)	<i>Ibid.</i> , vol. 1642, p. 414.
European Convention on the adoption of children (Strasbourg, 24 April 1967)	<i>Ibid.</i> , vol. 634, No. 9067, p. 255.
Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128) (Geneva, 29 June 1967)	<i>Ibid.</i> , vol. 699, No. 10030, p. 185.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, No. 17955, p. 123.
European Convention on social security (Paris, 14 December 1972)	<i>Ibid.</i> , vol. 1710, No. 29575, p. 2.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	<i>Ibid.</i> , vol. 1015, No. 14861, p. 243.
Labour Relations (Public Service) Convention, 1978 (No. 151) (Geneva, 27 June 1978)	<i>Ibid.</i> , vol. 1218, No. 19653, p. 87.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, No. 20378, p. 13.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	<i>Ibid.</i> , vol. 1520, No. 26363, p. 217.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	<i>Ibid.</i> , vol. 1465, No. 24841, p. 85.
European Convention for the prevention of torture and inhuman or degrading treatment or punishment (Strasbourg, 26 November 1987)	<i>Ibid.</i> , vol. 1561, No. 27161, p. 363.
Convention on the rights of the child (New York, 20 November 1989)	<i>Ibid.</i> , vol. 1577, No. 27531, p. 3.
Optional Protocol to the Convention on the rights of the child on the sale of children, child prostitution and child pornography (New York, 25 May 2000)	<i>Ibid.</i> , vol. 2171, No. 27531, p. 227.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990)	<i>Ibid.</i> , vol. 2220, No. 39481, p. 3.
European Charter for Regional or Minority Languages (Strasbourg, 5 November 1992)	<i>Ibid.</i> , vol. 2044, No. 35358, p. 575.
Inter-American Convention on Forced Disappearance of Persons (Belém, 9 June 1994)	<i>International Legal Materials</i> , vol. 33, No. 6 (1994), p. 1534.

Source

Framework Convention for the protection of national minorities (Strasbourg, 1 February 1995)	United Nations, <i>Treaty Series</i> , vol. 2151, No. 37548, p. 243.
Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005)	<i>Ibid.</i> , vol. 2569, No. 45795, p. 33.
Convention on the Rights of Persons with Disabilities (New York, 13 December 2006)	<i>Ibid.</i> , vol. 2515, No. 44910, p. 3.

Refugees and stateless persons

Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930)	League of Nations, <i>Treaty Series</i> , vol. CLXXIX, No. 4137, p. 89.
Constitution of the International Refugee Organization (New York, 15 December 1946)	United Nations, <i>Treaty Series</i> , vol. 18, No. 283, p. 3.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
Protocol relating to the Status of Refugees (New York, 31 January 1967)	<i>Ibid.</i> , vol. 606, No. 8791, p. 267.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	<i>Ibid.</i> , vol. 360, No. 5158, p. 117.
Convention on the reduction of statelessness (New York, 30 August 1961)	<i>Ibid.</i> , vol. 989, No. 14458, p. 175.
Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality (Strasbourg, 6 May 1963)	<i>Ibid.</i> , vol. 634, No. 9065, p. 221.
European Convention on Nationality (Strasbourg, 6 November 1997)	<i>Ibid.</i> , vol. 2135, No. 37248, p. 213.
Council of Europe Convention on the avoidance of statelessness in relation to State succession (Strasbourg, 19 May 2006)	<i>Ibid.</i> , vol. 2650, No. 47197, p. 305.

Narcotic drugs and psychotropic substances

International Opium Convention, with Protocol (Geneva, 19 February 1925), amended by the Protocol of 1946 (Lake Success, New York, 11 December 1946)	League of Nations, <i>Treaty Series</i> , vol. LXXXI, No. 1845, p. 317; Protocol of amendment: United Nations, <i>Treaty Series</i> , vol. 12, No. 186, p. 180; Convention as amended: E/NT/2 (Sales No. 1947.XI.4).
Convention for limiting the Manufacture and regulating the Distribution of Narcotic Drugs (Geneva, 13 July 1931)	League of Nations, <i>Treaty Series</i> , vol. CXXXIX, No. 3219, p. 301.
Single Convention on Narcotic Drugs, 1961 (New York, 30 March 1961), as amended by the Protocol amending the Convention (with annexes) (New York, 8 August 1975)	United Nations, <i>Treaty Series</i> , vols. 520 and 976, Nos. 7515 and 14152, pp. 151 and 105.
Convention on psychotropic substances (Vienna, 21 February 1971)	<i>Ibid.</i> , vol. 1019, No. 14956, p. 175.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	<i>Ibid.</i> , vol. 1582, No. 27627, p. 95.

Health

WHO Framework Convention on Tobacco Control (Geneva, 21 May 2003)	United Nations, <i>Treaty Series</i> , vol. 2302, No. 41032, p. 166.
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International trade and development

General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, No. 814, p. 187.
Protocol of Provisional Application of the General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	<i>Ibid.</i> , vol. 55, No. 814, p. 308.
Customs Convention on the temporary importation of packings (Brussels, 6 October 1960)	<i>Ibid.</i> , vol. 473, No. 6861, p. 131.
Agreement establishing a Food and Fertilizer Technology Centre for the Asian and Pacific Region (Kawana, 11 June 1969)	<i>Ibid.</i> , vol. 704, No. 10100, p. 17.
Agreement establishing the Caribbean Development Bank (Kingston, 18 October 1969)	<i>Ibid.</i> , vols. 712 and 1401, No. 10232.
Agreement on the international carriage of perishable foodstuffs and on the special equipment to be used for such carriage (ATP) (with annexes) (Geneva, 1 September 1970)	<i>Ibid.</i> , vol. 1028, No. 15121, p. 121.

Source

International Convention on the simplification and harmonization of Customs procedures (revised) (Kyoto, 18 May 1973; Protocol of amendment, Brussels, 26 June 1999)	<i>Ibid.</i> , vol. 950, No. 13561, p. 269, and vol. 2370, p. 27.
United Nations Convention on contracts for the international sale of goods (Vienna, 11 April 1980)	<i>Ibid.</i> , vol. 1489, No. 25567, p. 3.
Convention on the limitation period in the international sale of goods (New York, 14 June 1974), as amended by the Protocol amending the Convention on the limitation period in the international sale of goods (Vienna, 11 April 1980)	<i>Ibid.</i> , vol. 1511, No. 26119, p. 99.
Agreement establishing the International Fund for Agricultural Development (Rome, 13 June 1976)	<i>Ibid.</i> , vol. 1059, No. 16041, p. 191.
Agreement establishing the African Development Bank, as amended (Lusaka, 7 May 1982)	<i>Ibid.</i> , vol. 1276, No. 21052, p. 3.
Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994)	<i>Ibid.</i> , vols. 1867–1869, No. 31874.
Agreement on Safeguards (annex 1A)	<i>Ibid.</i> , vol. 1869.
ASEAN Framework Agreement on Services (Bangkok, 15 December 1995)	<i>International Legal Materials</i> , vol. 35, No. 4 (1996), p. 1072.
Transport and communications	
Convention on road traffic (Geneva, 19 September 1949)	United Nations, <i>Treaty Series</i> , vol. 125, No. 1671, p. 22.
Convention concerning Customs Facilities for Touring (New York, 4 June 1954)	<i>Ibid.</i> , vol. 276, No. 3992, p. 191, and vol. 596, p. 542.
Additional Protocol to the above-mentioned Convention, relating to the importation of tourist publicity documents and material (New York, 4 June 1954)	<i>Ibid.</i> , vol. 276, p. 191.
Customs Convention on the Temporary Importation of Private Road Vehicles (New York, 4 June 1954)	<i>Ibid.</i> , vol. 282, No. 4101, p. 249.
Convention on the Contract for the International Carriage of Goods by Road (CMR) (with Protocol of Signature) (Geneva, 19 May 1956)	<i>Ibid.</i> , vol. 399, No. 5742, p. 189.
European Agreement on Road Markings (Geneva, 13 December 1957)	<i>Ibid.</i> , vol. 372, No. 5296, p. 159.
Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions (Geneva, 20 March 1958)	<i>Ibid.</i> , vols. 335, 516, 609, 1059 and 1891, No. 4789. See also UNECE, TRANS/WP.29/409.
Convention on Road Traffic (Vienna, 8 November 1968)	United Nations, <i>Treaty Series</i> , vol. 1042, No. 15705, p. 17.
Convention on road signs and signals (with annexes) (Vienna, 8 November 1968)	<i>Ibid.</i> , vol. 1091, No. 16473, p. 3.
European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR) (Geneva, 1 July 1970)	<i>Ibid.</i> , vol. 993, No. 14533, p. 143.
European Agreement supplementing the Convention on road signs and signals opened for signature at Vienna on 8 November 1968 (with annexes) (Geneva, 1 May 1971)	<i>Ibid.</i> , vol. 1142, No. 17935, p. 225.
Protocol on road markings, additional to the European Agreement supplementing the Convention on road signs and signals, opened for signature at Vienna on 8 November 1968 (Geneva, 1 March 1973)	<i>Ibid.</i> , vol. 1394, No. 23345, p. 263.
Customs Convention on containers, 1972 (Geneva, 2 December 1972)	<i>Ibid.</i> , vol. 988, No. 14449, p. 43.
Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) (with annexes) (Geneva, 14 November 1975)	<i>Ibid.</i> , vol. 1079, No. 16510, p. 89, and vol. 1142, p. 413.
Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) (Geneva, 6 February 1976)	ECE/TRANS/20.
Convention concerning International Carriage by Rail (Berne, 9 May 1980)	United Nations, <i>Treaty Series</i> , vol. 1397, No. 23353, p. 2.
International Convention on the harmonization of frontier controls of goods (Geneva, 21 October 1982)	<i>Ibid.</i> , vol. 1409, No. 23583, p. 3.
Convention on Customs Treatment of Pool Containers used in International Transport (Geneva, 21 January 1994)	<i>Ibid.</i> , vol. 2000, No. 34301, p. 289.

Source

Civil aviation

- Convention for the Unification of certain Rules Relating to International Carriage by Air (Warsaw, 12 October 1929) League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.
- Protocol to amend the Convention for the Unification of certain Rules Relating to International Carriage by Air (The Hague, 28 September 1955) United Nations, *Treaty Series*, vol. 478, No. 6943, p. 371.
- Convention on International Civil Aviation (Chicago, 7 December 1944) *Ibid.*, vol. 15, No. 102, p. 295.
- Multilateral Agreement on the liberalization of international air transport (Washington, D.C., 1 May 2001) *Ibid.*, vol. 2215, No. 39375, p. 33.

Navigation

- Convention on the International Maritime Organization (Geneva, 6 March 1948) United Nations, *Treaty Series*, vols. 289 and 1276, No. 4214, pp. 3 and 468, respectively.
- Convention relating to the unification of certain rules concerning collisions in inland navigation (Geneva, 15 March 1960) *Ibid.*, vol. 572, No. 8310, p. 133.
- Convention on the registration of inland navigation vessels (Geneva, 25 January 1965) *Ibid.*, vol. 1281, No. 21114, p. 111.
- International Convention for Safe Containers (CSC) (Geneva, 2 December 1972) *Ibid.*, vol. 1064, No. 16198, p. 3.
- Convention on a Code of Conduct for Liner Conferences (Geneva, 6 April 1974) *Ibid.*, vol. 1334, No. 22380, p. 14, and vol. 1365, p. 360.
- International Convention on Arrest of Ships, 1999 (Geneva, 12 March 1999) *Ibid.*, vol. 2797, No. 49196, p. 3.

Economic statistics

- International Convention relating to Economic Statistics (Geneva, 14 December 1928) League of Nations, *Treaty Series*, vol. CX, No. 2560, p. 171.
- Protocol amending the International Convention relating to Economic Statistics (Paris, 9 December 1948) United Nations, *Treaty Series*, vol. 20, No. 318, p. 229.

Educational and cultural matters

- Agreement on the importation of educational, scientific and cultural materials (Lake Success, New York, 22 November 1950) United Nations, *Treaty Series*, vol. 131, No. 1734, p. 25.
- Protocol to the Agreement on the importation of educational, scientific and cultural materials of 22 November 1950 (Nairobi, 26 November 1976) *Ibid.*, vol. 1259, No. 20669, p. 3.
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 26 October 1961) *Ibid.*, vol. 496, No. 7247, p. 43.
- European Convention on the protection of the archaeological heritage (London, 6 May 1969) *Ibid.*, vol. 788, No. 11212, p. 227.
- Statutes of the International Centre for Genetic Engineering and Biotechnology (Madrid, 13 September 1983) *Ibid.*, vol. 1763, No. 30673, p. 91.
- Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005) *Ibid.*, vol. 2440, No. 43977, p. 311.

Status of women

- Convention on the Political Rights of Women (New York, 31 March 1953) United Nations, *Treaty Series*, vol. 193, No. 2613, p. 135.
- Convention on the nationality of married women (New York, 20 February 1957) *Ibid.*, vol. 309, No. 4468, p. 65.
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (New York, 10 December 1962) *Ibid.*, vol. 521, No. 7525, p. 231.

Penal matters

- Convention on Extradition (Montevideo, 26 December 1933) League of Nations, *Treaty Series*, vol. CLXV, No. 3803, p. 45.
- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956) United Nations, *Treaty Series*, vol. 266, No. 3822, p. 3.

Source

European Convention on Extradition (Paris, 13 December 1957)	<i>Ibid.</i> , vol. 359, No. 5146, p. 273.
European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959)	<i>Ibid.</i> , vol. 472, No. 6841, p. 185.
Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters (The Hague, 15 November 1965)	<i>Ibid.</i> , vol. 658, No. 9432, p. 163.
European Convention on information on foreign law (London, 7 June 1968)	<i>Ibid.</i> , vol. 720, No. 10346, p. 147.
Additional Protocol to the European Convention on information on foreign law (Strasbourg, 15 March 1978)	<i>Ibid.</i> , vol. 1160, No. A-10346, p. 529.
Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973)	<i>Ibid.</i> , vol. 1035, No. 15410, p. 167.
European Convention on the legal status of children born out of wedlock (Strasbourg, 15 October 1975)	<i>Ibid.</i> , vol. 1138, No. 17868, p. 303.
European Agreement on the transmission of applications for legal aid (Strasbourg, 27 January 1977)	<i>Ibid.</i> , vol. 1137, No. 17827, p. 81.
European Convention on the service abroad of documents relating to administrative matters (Strasbourg, 24 November 1977)	<i>Ibid.</i> , vol. 1299, No. 21537, p. 3.
International Convention against the taking of hostages (New York, 17 December 1979)	<i>Ibid.</i> , vol. 1316, No. 21931, p. 205.
European Convention on the compensation of victims of violent crimes (Strasbourg, 24 November 1983)	<i>Ibid.</i> , vol. 1525, No. 26456, p. 37.
Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano, 16 September 1988)	<i>Ibid.</i> , vol. 1659, No. 28551, p. 13.
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	<i>Ibid.</i> , vol. 2051, No. 35457, p. 363.
Inter-American Convention against Corruption (Caracas, 29 March 1996)	<i>International Legal Materials</i> , vol. 35, 1996, p. 727.
Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Brussels, 26 May 1997)	<i>Official Journal of the European Communities</i> , vol. 40, No. C 195, 25 June 1997, p. 2.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, <i>Treaty Series</i> , vol. 2187, No. 38544, p. 3.
Criminal Law Convention on Corruption (Strasbourg, 27 January 1999)	<i>Ibid.</i> , vol. 2216, No. 39391, p. 225.
Convention on cybercrime (Budapest, 23 November 2001)	<i>Ibid.</i> , vol. 2296, No. 40916, p. 167.
United Nations Convention against Corruption (New York, 31 October 2003)	<i>Ibid.</i> , vol. 2349, No. 42146, p. 41.

Private international law

Convention on the Unification of the Law relating to Bills of Exchange and Promissory Notes (The Hague, 23 July 1912)	League of Nations, <i>International Conference for the Unification of the Law on Bills of Exchange, Promissory Notes and Cheques, Preparatory Documents</i> (C.234.M.83.1929.II), p. 42.
Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930)	League of Nations, <i>Treaty Series</i> , vol. CXLIII, No. 3313, p. 257.
Convention providing a Uniform Law for Cheques (Geneva, 19 March 1931)	<i>Ibid.</i> , No. 3316, p. 355.
Convention relating to the settlement of conflicts between the law of nationality and the law of domicile (The Hague, 15 June 1955)	Hague Conference on Private International Law, <i>Collection of Conventions (1951–1996)</i> , p. 24.
Convention concerning the recognition of the legal personality of foreign companies, associations and foundations (The Hague, 1 June 1956)	<i>Ibid.</i> , p. 28.
Convention abolishing the requirement of legalisation for foreign public documents (The Hague, 5 October 1961)	United Nations, <i>Treaty Series</i> , vol. 527, No. 7625, p. 189.
Convention concerning the powers of authorities and the law applicable in respect of the protection of infants (The Hague, 5 October 1961)	<i>Ibid.</i> , vol. 658, No. 9431, p. 143.

Source

Convention on the taking of evidence abroad in civil or commercial matters (The Hague, 18 March 1970)	<i>Ibid.</i> , vol. 847, No. 12140, p. 231.
Convention on the recognition of divorces and legal separations (The Hague, 1 June 1970)	<i>Ibid.</i> , vol. 978, No. 14236, p. 393.
Convention on the recognition and enforcement of foreign judgements in civil and commercial matters (The Hague, 1 February 1971)	<i>Ibid.</i> , vol. 1144, No. 17957, p. 257.
Convention on the recognition and enforcement of decisions relating to maintenance obligations (The Hague, 2 October 1973)	<i>Ibid.</i> , vol. 1021, No. 15001, p. 209.
Convention concerning the international administration of the estates of deceased persons (The Hague, 2 October 1973)	<i>Ibid.</i> , vol. 1856, No. 31585, p. 5.
Convention on the Law Applicable to Matrimonial Property Regimes (The Hague, 14 March 1978)	Hague Conference on Private International Law, <i>Collection of Conventions (1951–2009)</i> , p. 242.
Convention on Celebration and Recognition of the Validity of Marriages (The Hague, 14 March 1978)	<i>Ibid.</i> , p. 256.
Convention on the Law Applicable to Succession to the Estates of Deceased Persons (The Hague, 1 August 1989)	<i>Ibid.</i> , p. 358.
Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (The Hague, 29 May 1993)	United Nations, <i>Treaty Series</i> , vol. 1870, No. 31922, p. 167.
Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (The Hague, 19 October 1996)	<i>Ibid.</i> , vol. 2204, No. 39130, p. 95.
Convention on the international protection of adults (The Hague, 13 January 2000)	<i>Ibid.</i> , vol. 2600, No. 46241, p. 3.

Commodities

International Sugar Agreement, 1968 (opened for signature at New York, from 3 until 24 December 1968) (Geneva, 24 October 1968)	United Nations, <i>Treaty Series</i> , vol. 654, No. 9369, p. 3.
International Wheat Agreement, 1971: (a) Wheat Trade Convention, 1971 (opened for signature at Washington, D.C., from 29 March until 3 May 1971), (b) Food Aid Convention, 1971 (opened for signature at Washington, D.C., from 29 March until 3 May 1971)	<i>Ibid.</i> , vol. 800, No. 11400, p. 45.
International Sugar Agreement, 1977 (Geneva, 7 October 1977)	<i>Ibid.</i> , vol. 1064, No. 16200, p. 219.
International Tropical Timber Agreement, 1983 (with annexes) (Geneva, 18 November 1983)	<i>Ibid.</i> , vol. 1393, No. 23317, p. 67.
International Wheat Agreement, 1986: (a) Wheat Trade Convention, 1986 (London, 14 March 1986), (b) Food Aid Convention, 1986 (London, 13 March 1986)	<i>Ibid.</i> , vol. 1429, No. 24237, p. 71.

Maintenance obligations

Convention on the Recovery Abroad of Maintenance (New York, 20 June 1956)	United Nations, <i>Treaty Series</i> , vol. 268, No. 3850, p. 3, and vol. 649, p. 330.
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Law of the sea

Geneva Conventions on the Law of the Sea (Geneva, 29 April 1958)	
Convention on the High Seas	United Nations, <i>Treaty Series</i> , vol. 450, No. 6465, p. 11.
Convention on the Continental Shelf	<i>Ibid.</i> , vol. 499, No. 7302, p. 311.
Convention on the Territorial Sea and the Contiguous Zone	<i>Ibid.</i> , vol. 516, No. 7477, p. 205.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1833, No. 31363, p. 3.
Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994)	<i>Ibid.</i> , vol. 1836, No. 31364, p. 41.
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995)	<i>Ibid.</i> , vol. 2167, No. 37924, p. 3.

Source

Commercial arbitration

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.
- European Convention on International Commercial Arbitration (Geneva, 21 April 1961) *Ibid.*, vol. 484, No. 7041, p. 349.

Law of treaties

- Vienna Convention on the law of treaties (Vienna, 23 May 1969) United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
- Vienna Convention on succession of States in respect of treaties (Vienna, 23 August 1978) *Ibid.*, vol. 1946, No. 33356, p. 3.
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) A/CONF.129/15.

Fight against international terrorism

- European Convention on the suppression of terrorism (Strasbourg, 27 January 1977) United Nations, *Treaty Series*, vol. 1137, No. 17828, p. 93.
- International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997) *Ibid.*, vol. 2149, No. 37517, p. 256.
- International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999) *Ibid.*, vol. 2178, No. 38349, p. 197.
- Council of Europe Convention on the Prevention of Terrorism (Warsaw, 16 May 2005) *Ibid.*, vol. 2488, No. 44655, p. 129.
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing of Terrorism (Warsaw, 16 May 2005) Council of Europe, *European Treaty Series*, No. 198.

Telecommunications

- European Agreement on the protection of television broadcasts (Strasbourg, 22 June 1960) United Nations, *Treaty Series*, vol. 546, No. 7951, p. 247.
- Agreement relating to the International Telecommunications Satellite Organization (INTELSAT) (Washington, D.C., 20 August 1971) *Ibid.*, vol. 1220, No. 19677, p. 21.
- Agreement establishing the Asia-Pacific Institute for Broadcasting Development, amended (Kuala Lumpur, 12 August 1977) *Ibid.*, vols. 1216 and 1436, No. 19609.
- International Telecommunication Convention (Nairobi, 6 November 1982) *Ibid.*, vol. 1533, No. 26559, p. 2.
- European Convention on transfrontier television (Strasbourg, 5 May 1989) *Ibid.*, vol. 1966, No. 33611, p. 265.
- Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere, 18 June 1998) *Ibid.*, vol. 2296, No. 40906, p. 5.

Law applicable in armed conflict

- Geneva Convention of 22 August 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field (Geneva, 22 August 1864) ICRC, *International Red Cross Handbook*, 12th ed., Geneva, 1983, pp. 19 *et seq.*
- Hague Conventions respecting the Laws and Customs of War on Land: Convention for the Pacific Settlement of International Disputes (Convention I) (The Hague, 29 July 1899) J. B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford University Press, 1916.
- Convention (III) for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22, 1864 (The Hague, 29 July 1899) *Ibid.*
- International Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Geneva, 6 July 1906) ICRC, *International Red Cross Handbook*, 12th ed., Geneva, 1983.
- Convention (X) for the adaptation to maritime warfare of the principles of the Geneva Convention (The Hague, 18 October 1907) J. B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford University Press, 1916.
- Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919) *British and Foreign State Papers, 1919*, vol. CXII, London, HM Stationery Office, 1922, p. 1.

Source

Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, Nos. 970–973, pp. 31 <i>et seq.</i>
Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (Convention I)	<i>Ibid.</i> , vol. 75, No. 970, p. 31.
Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea (Convention II)	<i>Ibid.</i> , No. 971, pp. 85 <i>et seq.</i>
Geneva Convention relative to the Treatment of Prisoners of War (Convention III)	<i>Ibid.</i> , No. 972, p. 135.
Geneva Convention relative to the protection of civilian persons in time of war (Convention IV)	<i>Ibid.</i> , No. 973, p. 287.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977).	<i>Ibid.</i> , vol. 1125, Nos. 17512 and 17513, pp. 3 and 609.

Disarmament

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva, 17 June 1925)	League of Nations, <i>Treaty Series</i> , vol. XCIV, No. 2138, p. 65.
Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (Moscow, 5 August 1963)	United Nations, <i>Treaty Series</i> , vol. 480, No. 6964, p. 43.
Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (“Treaty of Tlatelolco”) (with annexed Additional Protocols I and II) (Mexico City, 14 February 1967)	<i>Ibid.</i> , vols. 634 and 1894, No. 9068, p. 281 and p. 335, respectively.
Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, D.C., 1 July 1968)	<i>Ibid.</i> , vol. 729, No. 10485, p. 161.
Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof (London, Moscow and Washington, D.C., 11 February 1971)	<i>Ibid.</i> , vol. 955, No. 13678, p. 115.
Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (London, Moscow and Washington, D.C., 10 April 1972)	<i>Ibid.</i> , vol. 1015, No. 14860, p. 163.
Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (with protocols) (Geneva, 10 October 1980)	<i>Ibid.</i> , vol. 1342, No. 22495, p. 137.
Protocol on prohibitions or restrictions on the use of mines, booby-traps and other devices (Protocol II)	<i>Ibid.</i> , vol. 1342, No. 22495, p. 168.
Protocol on prohibitions or restrictions on the use of incendiary weapons (Protocol III)	<i>Ibid.</i> , vol. 1342, No. 22495, p. 171.
Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (Paris, 13 January 1993)	<i>Ibid.</i> , vol. 1974, No. 33757, p. 45.
Comprehensive Nuclear-Test-Ban Treaty (New York, 10 September 1996)	A/50/1027, annex.

Liability

Convention on third party liability in the field of nuclear energy (Paris, 29 July 1960)	United Nations, <i>Treaty Series</i> , vol. 956, No. 13706, p. 251.
European Convention on Civil Liability for Damage caused by Motor Vehicles (Strasbourg, 14 May 1973)	Council of Europe, <i>European Treaty Series</i> , No. 79.
Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)	<i>Ibid.</i> , No. 150.

Environment

Convention on wetlands of international importance especially as waterfowl habitat (Ramsar (Iran), 2 February 1971)	United Nations, <i>Treaty Series</i> , vol. 996, No. 14583, p. 245.
Convention on international trade in endangered species of wild fauna and flora (Washington, D.C., 3 March 1973)	<i>Ibid.</i> , vol. 993, No. 14537, p. 243.
International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention) (London, 2 November 1973), as modified by the Protocol of 1978 (London, 17 February 1978)	<i>Ibid.</i> , vol. 1341, No. 22484, p. 3.

Source

Convention on the prohibition of military or any other hostile use of environmental modification techniques (New York, 10 December 1976)	<i>Ibid.</i> , vol. 1108, No. 17119, p. 151.
Convention on the conservation of migratory species of wild animals (with annexes) (Bonn, 23 June 1979)	<i>Ibid.</i> , vol. 1651, No. 28395, p. 333.
Convention on long-range transboundary air pollution (Geneva, 13 November 1979)	<i>Ibid.</i> , vol. 1302, No. 21623, p. 217.
Protocol to the 1979 Convention on long-range transboundary air pollution concerning the control of emissions of nitrogen oxides or their transboundary fluxes (Sofia, 31 October 1988)	<i>Ibid.</i> , vol. 1593, No. 27874, p. 287.
Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel, 22 March 1989)	<i>Ibid.</i> , vol. 1673, No. 28911, p. 57.
Convention on environmental impact assessment in a transboundary context (Espoo, 25 February 1991)	<i>Ibid.</i> , vol. 1989, No. 34028, p. 309.
Agreement on the conservation of small cetaceans of the Baltic and North Seas (New York, 17 March 1992)	<i>Ibid.</i> , vol. 1772, No. 30865, p. 217.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	<i>Ibid.</i> , vol. 2105, No. 36605, p. 457.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	<i>Ibid.</i> , vol. 1771, No. 30822, p. 107.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	<i>Ibid.</i> , vol. 1760, No. 30619, p. 79.
Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora (Lusaka, 8 September 1994)	<i>Ibid.</i> , vol. 1950, No. 33409, p. 35.
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 10 September 1998)	<i>Ibid.</i> , vol. 2244, No. 39973, p. 337.
Convention on the Protection of the Environment through Criminal Law (Strasbourg, 4 November 1998)	Council of Europe, <i>European Treaty Series</i> , No. 172.
Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001)	United Nations, <i>Treaty Series</i> , vol. 2256, No. 40214, p. 119.

Fiscal matters

Convention on mutual administrative assistance in tax matters (Strasbourg, 25 January 1988)	United Nations, <i>Treaty Series</i> , vol. 1966, No. 33610, p. 215.
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General international law

Constitution of the International Labour Organization (1919) (amended in 1922, 1945, 1946, 1953, 1962 and 1972)	Available from the ILO website (www.ilo.org).
Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties (Havana, 20 February 1928)	League of Nations, <i>Treaty Series</i> , vol. CXXXII, No. 3045, p. 301.
Articles of Agreement of the International Monetary Fund (Washington, D.C., 27 December 1945)	United Nations, <i>Treaty Series</i> , vol. 2, No. 20, p. 39.
European Convention on Establishment (Paris, 13 December 1955)	<i>Ibid.</i> , vol. 529, No. 7660, p. 141.
Statute of the International Atomic Energy Agency (New York, 26 October 1956)	<i>Ibid.</i> , vol. 276, No. 3988, p. 3.
Treaty establishing the European Economic Community (Rome, 25 March 1957)	<i>Ibid.</i> , vol. 294, No. 4300, p. 3. See also the consolidated version of the Treaty establishing the European Community, <i>Official Journal of the European Communities</i> , No. C 340, 10 November 1997, p. 173.
Treaty establishing the European Atomic Energy Community (EURATOM) (Rome, 25 March 1957)	United Nations, <i>Treaty Series</i> , vol. 295, No. 4301, p. 259.
Agreement establishing the Inter-American Development Bank (Washington, D.C., 8 April 1959)	<i>Ibid.</i> , vol. 389, No. 5593, p. 69.
Convention on the Organisation for Economic Co-operation and Development (Paris, 14 December 1960)	<i>Ibid.</i> , vol. 888, No. 12736, p. 179.
Declaration on the Neutrality of Laos (Geneva, 23 July 1962)	<i>Ibid.</i> , vol. 456, No. 6564, p. 301.

Source

Convention on the unification of certain points of substantive law on patents for invention (Strasbourg, 27 November 1963)	<i>Ibid.</i> , vol. 1249, No. 20401, p. 369.
Agreement establishing the Asian Development Bank (Manila, 4 December 1965)	<i>Ibid.</i> , vol. 571, No. 8303, p. 123.
International Convention on travel contracts (CCV) (Brussels, 23 April 1970)	<i>Ibid.</i> , vol. 1275, No. 21051, p. 540.
Statutes of the World Tourism Organization (Mexico City, 27 September 1970)	<i>Ibid.</i> , vol. 985, No. 14403, p. 350.
Convention on the Grant of European Patents (European Patent Convention) (Munich, 5 October 1973) and the Act revising the European Patent Convention (Munich, 29 November 2000)	<i>Ibid.</i> , vol. 1065, No. 16208, p. 199, and European Patent Office, <i>Special edition No. 1 of the Official Journal 2001</i> , p. 1.
European Outline Convention on transfrontier co-operation between territorial communities or authorities (Madrid, 21 May 1980)	United Nations, <i>Treaty Series</i> , vol. 1272, No. 20967, p. 61.
Agreement instituting the Order of the Caribbean Community (Port of Spain, 26 February 1991)	<i>Ibid.</i> , vol. 2247, No. 40015, p. 201.
Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992)	<i>Ibid.</i> , vol. 1757, No. 30615, p. 3.

Chapter IV

RESERVATIONS TO TREATIES (*concluded*)*

F. Text of the Guide to Practice on Reservations to Treaties, adopted by the Commission at its sixty-third session

1. TEXT OF THE GUIDELINES CONSTITUTING THE GUIDE TO PRACTICE, FOLLOWED BY AN ANNEX ON THE RESERVATIONS DIALOGUE

1. The text of the guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third session, followed by an annex on the reservations dialogue, is reproduced below.

GUIDE TO PRACTICE ON RESERVATIONS TO TREATIES

1. Definitions

1.1 Definition of reservations

1. “Reservation” means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

2. Paragraph 1 is to be interpreted as including reservations which purport to exclude or to modify the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation.

1.1.1 Statements purporting to limit the obligations of their author

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which its author purports to limit the obligations imposed on it by the treaty, constitutes a reservation.

1.1.2 Statements purporting to discharge an obligation by equivalent means

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from, but considered by the author of the statement to be equivalent to that imposed by the treaty, constitutes a reservation.

1.1.3 Reservations relating to the territorial application of the treaty

A unilateral statement by which a State purports to exclude the application of some provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, to a territory to which they would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 Reservations formulated when extending the territorial application of a treaty

A unilateral statement by which a State, when extending the application of a treaty to a territory, purports to exclude or to modify the legal effect of certain provisions of the treaty in relation to that territory constitutes a reservation.

1.1.5 Reservations formulated jointly

The joint formulation of a reservation by several States or international organizations does not affect the unilateral character of that reservation.

1.1.6 Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty with regard to the party that has made the statement, constitutes a reservation expressly authorized by the treaty.

1.2 Definition of interpretative declarations

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.

1.2.1 Interpretative declarations formulated jointly

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral character of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations

The character of a unilateral statement as a reservation or as an interpretative declaration is determined by the legal effect that its author purports to produce.

1.3.1 Method of determining the distinction between reservations and interpretative declarations

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, the statement should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying therefrom the intention of its author, in light of the treaty to which it refers.

1.3.2 Phrasing and name

The phrasing or name of a unilateral statement provides an indication of the purported legal effect.

1.3.3 Formulation of a unilateral statement when a reservation is prohibited

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect of those provisions

* See sections A–E and F.1 of this chapter in *Yearbook ... 2011*, vol. II (Part Two), paras. 51–75.

by a State or an international organization shall be presumed not to constitute a reservation. Such a statement nevertheless constitutes a reservation if it purports to exclude or modify the legal effect of certain provisions of the treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to its author.

1.4 *Conditional interpretative declarations*

1. A conditional interpretative declaration is a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof.

2. Conditional interpretative declarations are subject to the rules applicable to reservations.

1.5 *Unilateral statements other than reservations and interpretative declarations*

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations (including conditional interpretative declarations) are outside the scope of the present Guide to Practice.

1.5.1 *Statements of non-recognition*

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize is outside the scope of the present Guide to Practice, even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.5.2 *Statements concerning modalities of implementation of a treaty at the internal level*

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without affecting its rights and obligations towards the other contracting States or contracting organizations, is outside the scope of the present Guide to Practice.

1.5.3 *Unilateral statements made under a clause providing for options*

1. A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty permitting the parties to accept an obligation that is not otherwise imposed by the treaty, or permitting them to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in a statement by which a State or an international organization accepts, by virtue of a clause in a treaty, an obligation that is not otherwise imposed by the treaty does not constitute a reservation.

1.6 *Unilateral statements in respect of bilateral treaties*

1.6.1 *“Reservations” to bilateral treaties*

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty, does not constitute a reservation within the meaning of the present Guide to Practice.

1.6.2 *Interpretative declarations in respect of bilateral treaties*

Guidelines 1.2 and 1.4 are applicable to interpretative declarations in respect of both multilateral and bilateral treaties.

1.6.3 *Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party*

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes an authentic interpretation of that treaty.

1.7 *Alternatives to reservations and interpretative declarations*

1.7.1 *Alternatives to reservations*

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

(a) the insertion in the treaty of a clause purporting to limit its scope or application;

(b) the conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effect of certain provisions of the treaty as between themselves.

1.7.2 *Alternatives to interpretative declarations*

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

(a) the insertion in the treaty of provisions purporting to interpret the treaty;

(b) the conclusion of a supplementary agreement to the same end, simultaneously or subsequently to the conclusion of the treaty.

1.8 *Scope of definitions*

The definitions of unilateral statements included in the present Part are without prejudice to the validity and legal effects of such statements under the rules applicable to them.

2. *Procedure*

2.1 *Form and notification of reservations*

2.1.1 *Form of reservations*

A reservation must be formulated in writing.

2.1.2 *Statement of reasons for reservations*

A reservation should, to the extent possible, indicate the reasons why it is being formulated.

2.1.3 *Representation for the purpose of formulating a reservation at the international level*

1. Subject to the usual practices followed in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(a) that person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State or the international organization for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State for the purpose of formulating a reservation at the international level:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) representatives accredited by States to an international conference, for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted in that organization or organ;

(d) heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

1. The competent authority and the procedure to be followed at the internal level for formulating a reservation are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations for the purpose of invalidating the reservation.

2.1.5 *Communication of reservations*

1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. A reservation to a treaty in force which is the constituent instrument of an international organization must also be communicated to such organization.

2.1.6 *Procedure for communication of reservations*

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, the communication of a reservation to a treaty shall be transmitted:

(a) if there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(b) if there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

2. The communication of a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

3. The communication of a reservation to a treaty by means other than a diplomatic note or depositary notification, such as electronic mail or facsimile, must be confirmed within an appropriate period of time by such a note or notification. In such case, the reservation is considered as having been formulated at the date of the initial communication.

2.1.7 *Functions of depositaries*

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the international organization concerned.

2.2 *Confirmation of reservations*

2.2.1 *Formal confirmation of reservations formulated when signing a treaty*

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international

organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been formulated on the date of its confirmation.

2.2.2 *Instances of non-requirement of confirmation of reservations formulated when signing a treaty*

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by signature its consent to be bound by the treaty.

2.2.3 *Reservations formulated upon signature when a treaty expressly so provides*

Where the treaty expressly provides that a State or an international organization may formulate a reservation when signing the treaty, such a reservation does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

2.2.4 *Form of formal confirmation of reservations*

The formal confirmation of a reservation must be made in writing.

2.3 *Late formulation of reservations*

A State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation.

2.3.1 *Acceptance of the late formulation of a reservation*

Unless the treaty otherwise provides or the well-established practice followed by the depositary differs, the late formulation of a reservation shall only be deemed to have been accepted if no contracting State or contracting organization has opposed such formulation after the expiry of the twelve-month period following the date on which notification was received.

2.3.2 *Time period for formulating an objection to a reservation that is formulated late*

An objection to a reservation that is formulated late must be made within twelve months of the acceptance, in accordance with guideline 2.3.1, of the late formulation of the reservation.

2.3.3 *Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations*

A contracting State or a contracting organization cannot exclude or modify the legal effect of provisions of the treaty by:

(a) the interpretation of an earlier reservation; or

(b) a unilateral statement made subsequently under a clause providing for options.

2.3.4 *Widening of the scope of a reservation*

The modification of an existing reservation for the purpose of widening its scope is subject to the rules applicable to the late formulation of a reservation. If such a modification is opposed, the initial reservation remains unchanged.

2.4 *Procedure for interpretative declarations*

2.4.1 *Form of interpretative declarations*

An interpretative declaration should preferably be formulated in writing.

2.4.2 *Representation for the purpose of formulating interpretative declarations*

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

2.4.3 *Absence of consequences at the international level of the violation of internal rules regarding the formulation of interpretative declarations*

1. The competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations for the purpose of invalidating the declaration.

2.4.4 *Time at which an interpretative declaration may be formulated*

Without prejudice to the provisions of guidelines 1.4 and 2.4.7, an interpretative declaration may be formulated at any time.

2.4.5 *Communication of interpretative declarations*

The communication of written interpretative declarations should follow the procedure established in guidelines 2.1.5, 2.1.6 and 2.1.7.

2.4.6 *Non-requirement of confirmation of interpretative declarations formulated when signing a treaty*

An interpretative declaration formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.7 *Late formulation of an interpretative declaration*

Where a treaty provides that an interpretative declaration may be formulated only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently, unless none of the other contracting States and contracting organizations objects to the late formulation of the interpretative declaration.

2.4.8 *Modification of an interpretative declaration*

Unless the treaty otherwise provides, an interpretative declaration may be modified at any time.

2.5 *Withdrawal and modification of reservations and interpretative declarations*

2.5.1 *Withdrawal of reservations*

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2.5.2 *Form of withdrawal*

The withdrawal of a reservation must be formulated in writing.

2.5.3 *Periodic review of the usefulness of reservations*

1. States or international organizations which have formulated one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

2. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, consider the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

2.5.4 *Representation for the purpose of withdrawing a reservation at the international level*

1. Subject to the usual practices followed in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for

the purpose of withdrawing a reservation made on behalf of a State or an international organization if:

(a) that person produces appropriate full powers for the purpose of that withdrawal; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State or the international organization for such purpose without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of withdrawing a reservation at the international level on behalf of that State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted in that organization or organ;

(c) heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

2.5.5 *Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

1. The competent authority and the procedure to be followed at the internal level for withdrawing a reservation are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations for the purpose of invalidating the withdrawal.

2.5.6 *Communication of withdrawal of a reservation*

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.

2.5.7 *Effects of withdrawal of a reservation*

1. The withdrawal of a reservation entails the full application of the provisions to which the reservation relates in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

2. The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

2.5.8 *Effective date of withdrawal of a reservation*

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

2.5.9 *Cases in which the author of a reservation may set the effective date of withdrawal of the reservation*

The withdrawal of a reservation becomes operative on the date set by the State or international organization which withdraws the reservation, where:

(a) that date is later than the date on which the other contracting States or contracting organizations received notification of it; or

(b) the withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or contracting organizations.

2.5.10 *Partial withdrawal of a reservation*

1. The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, in the relations between the withdrawing State or international organization and the other parties to the treaty.

2. The partial withdrawal of a reservation is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions.

2.5.11 *Effect of a partial withdrawal of a reservation*

1. The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent provided by the new formulation of the reservation. An objection formulated to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

2. No new objection may be formulated to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

2.5.12 *Withdrawal of interpretative declarations*

An interpretative declaration may be withdrawn at any time by an authority considered as representing the State or international organization for that purpose, following the same procedure applicable to its formulation.

2.6 *Formulation of objections*

2.6.1 *Definition of objections to reservations*

“Objection” means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation.

2.6.2 *Right to formulate objections*

A State or an international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation.

2.6.3 *Author of an objection*

An objection to a reservation may be formulated by:

- (a) any contracting State or contracting organization; and
- (b) any State or international organization that is entitled to become a party to the treaty, in which case the objection does not produce any legal effect until the State or international organization has expressed its consent to be bound by the treaty.

2.6.4 *Objections formulated jointly*

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

2.6.5 *Form of objections*

An objection must be formulated in writing.

2.6.6 *Right to oppose the entry into force of the treaty vis-à-vis the author of the reservation*

A State or an international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the author of the reservation.

2.6.7 *Expression of intention to preclude the entry into force of the treaty*

When a State or an international organization formulating an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

2.6.8 *Procedure for the formulation of objections*

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

2.6.9 *Statement of reasons for objections*

An objection should, to the extent possible, indicate the reasons why it is being formulated.

2.6.10 *Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation*

An objection to a reservation formulated by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.6.11 *Confirmation of an objection formulated prior to the expression of consent to be bound by a treaty*

An objection formulated prior to the expression of consent to be bound by the treaty does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization was a signatory to the treaty when it formulated the objection; it must be confirmed if the State or international organization had not signed the treaty.

2.6.12 *Time period for formulating objections*

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation within a period of twelve months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.6.13 *Objections formulated late*

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.12 does not produce all the legal effects of an objection formulated within that time period.

2.7 *Withdrawal and modification of objections to reservations*

2.7.1 *Withdrawal of objections to reservations*

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

2.7.2 *Form of withdrawal of objections to reservations*

The withdrawal of an objection to a reservation must be formulated in writing.

2.7.3 *Formulation and communication of the withdrawal of objections to reservations*

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

2.7.4 *Effect on reservation of withdrawal of an objection*

A State or an international organization that withdraws an objection formulated to a reservation is presumed to have accepted that reservation.

2.7.5 *Effective date of withdrawal of an objection*

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

2.7.6 *Cases in which the author of an objection may set the effective date of withdrawal of the objection*

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notice of it.

2.7.7 *Partial withdrawal of an objection*

1. Unless the treaty otherwise provides, a State or an international organization may partially withdraw an objection to a reservation.

2. The partial withdrawal of an objection is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions.

2.7.8 *Effect of a partial withdrawal of an objection*

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent provided by the new formulation of the objection.

2.7.9 *Widening of the scope of an objection to a reservation*

1. A State or an international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.12.

2. Such a widening of the scope of the objection cannot have an effect on the existence of treaty relations between the author of the reservation and the author of the objection.

2.8 *Formulation of acceptances of reservations*

2.8.1 *Forms of acceptance of reservations*

The acceptance of a reservation may arise from a unilateral statement to this effect or from silence of a contracting State or contracting organization during the periods specified in guideline 2.6.12.

2.8.2 *Tacit acceptance of reservations*

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.12.

2.8.3 *Express acceptance of reservations*

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

2.8.4 *Form of express acceptance of reservations*

The express acceptance of a reservation must be formulated in writing.

2.8.5 *Procedure for formulating express acceptance of reservations*

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 apply *mutatis mutandis* to express acceptances.

2.8.6 *Non-requirement of confirmation of an acceptance formulated prior to formal confirmation of a reservation*

An express acceptance of a reservation formulated by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.8.7 *Unanimous acceptance of reservations*

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such acceptance, once obtained, is final.

2.8.8 *Acceptance of a reservation to the constituent instrument of an international organization*

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

2.8.9 *Organ competent to accept a reservation to a constituent instrument*

Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to:

- (a) decide on the admission of a member to the organization; or
- (b) amend the constituent instrument; or
- (c) interpret this instrument.

2.8.10 *Modalities of the acceptance of a reservation to a constituent instrument*

1. Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

2. For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

2.8.11 *Acceptance of a reservation to a constituent instrument that has not yet entered into force*

In the case set forth in guideline 2.8.8 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation within a period of twelve months after they were notified of that reservation. Such a unanimous acceptance, once obtained, is final.

2.8.12 *Reaction by a member of an international organization to a reservation to its constituent instrument*

Guideline 2.8.10 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

2.8.13 *Final nature of acceptance of a reservation*

The acceptance of a reservation cannot be withdrawn or amended.

2.9 *Formulation of reactions to interpretative declarations*

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 reaction 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 formulated in that declaration.

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 reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization disagrees with the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

2.9.3 *Recharacterization of an interpretative declaration*

1. "Recharacterization" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization purports to treat the declaration as a reservation.

2. A State or an international organization that intends to treat an interpretative declaration as a reservation should take into account guidelines 1.3 to 1.3.3.

2.9.4 *Right to formulate approval or opposition, or to recharacterize*

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

2.9.5 *Form of approval, opposition and recharacterization*

An approval, opposition or recharacterization in respect of an interpretative declaration should preferably be formulated in writing.

2.9.6 *Statement of reasons for approval, opposition and recharacterization*

An approval, opposition or recharacterization in respect of an interpretative declaration should, to the extent possible, indicate the reasons why it is being formulated.

2.9.7 *Formulation and communication of approval, opposition or recharacterization*

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to an approval, opposition or recharacterization in respect of an interpretative declaration.

2.9.8 *Non-presumption of approval or opposition*

1. An approval of, or an opposition to, an interpretative declaration shall not be presumed.

2. Notwithstanding guidelines 2.9.1 and 2.9.2, an approval of an interpretative declaration or an opposition thereto may be inferred, in exceptional cases, from the conduct of the States or international organizations concerned, taking into account all relevant circumstances.

2.9.9 *Silence with respect to an interpretative declaration*

An approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization.

3. *Permissibility of reservations and interpretative declarations*

3.1 *Permissible reservations*

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3.1.1 *Reservations prohibited by the treaty*

A reservation is prohibited by the treaty if it contains a provision:

- (a) prohibiting all reservations;
- (b) prohibiting reservations to specified provisions to which the reservation in question relates; or
- (c) prohibiting certain categories of reservations including the reservation in question.

3.1.2 *Definition of specified reservations*

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

3.1.3 *Permissibility of reservations not prohibited by the treaty*

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.4 *Permissibility of specified reservations*

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.5 *Incompatibility of a reservation with the object and purpose of the treaty*

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d'être* of the treaty.

3.1.5.1 *Determination of the object and purpose of the treaty*

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.

3.1.5.2 *Vague or general reservations*

A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty.

3.1.5.3 *Reservations to a provision reflecting a customary rule*

The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision.

3.1.5.4 *Reservations to provisions concerning rights from which no derogation is permissible under any circumstances*

A State or an international organization may not formulate a reservation to a treaty provision concerning rights from which no derogation is permissible under any circumstances, unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

3.1.5.5 *Reservations relating to internal law*

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific rules of the internal law of that State or of specific rules of that organization in force at the time of the formulation of the reservation may be formulated only insofar as it does not affect an essential element of the treaty nor its general tenor.

3.1.5.6 *Reservations to treaties containing numerous interdependent rights and obligations*

To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenor of the treaty, and the extent of the impact that the reservation has on the treaty.

3.1.5.7 *Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty*

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

- (a) the reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or
- (b) the reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

3.2 *Assessment of the permissibility of reservations*

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- (a) contracting States or contracting organizations;
- (b) dispute settlement bodies;
- (c) treaty monitoring bodies.

3.2.1 *Competence of the treaty monitoring bodies to assess the permissibility of reservations*

1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

3.2.2 *Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations*

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations.

3.2.3 *Consideration of the assessments of treaty monitoring bodies*

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations.

3.2.4 *Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body*

When a treaty establishes a treaty monitoring body, the competence of that body is without prejudice to the competence of the contracting States or contracting organizations to assess the permissibility of reservations to that treaty, or to that of dispute settlement bodies competent to interpret or apply the treaty.

3.2.5 *Competence of dispute settlement bodies to assess the permissibility of reservations*

When a dispute settlement body is competent to adopt decisions binding upon the parties to a dispute, and the assessment of the permissibility of a reservation is necessary for the discharge of such competence by that body, such assessment is, as an element of the decision, legally binding upon the parties.

3.3 *Consequences of the non-permissibility of a reservation*

3.3.1 *Irrelevance of distinction among the grounds for non-permissibility*

A reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and purpose of the treaty is

impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

3.3.2 *Non-permissibility of reservations and international responsibility*

The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not engage the international responsibility of the State or international organization which has formulated it.

3.3.3 *Absence of effect of individual acceptance of a reservation on the permissibility of the reservation*

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not affect the impermissibility of the reservation.

3.4 *Permissibility of reactions to reservations*

3.4.1 *Permissibility of the acceptance of a reservation*

Acceptance of a reservation is not subject to any condition of permissibility.

3.4.2 *Permissibility of an objection to a reservation*

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

- (a) the provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and
- (b) the objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

3.5 *Permissibility of an interpretative declaration*

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty.

3.5.1 *Permissibility of an interpretative declaration which is in fact a reservation*

If a unilateral statement which appears to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.5.7.

3.6 *Permissibility of reactions to interpretative declarations*

An approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

4. *Legal effects of reservations and interpretative declarations*

4.1 *Establishment of a reservation with regard to another State or international organization*

A reservation formulated by a State or an international organization is established with regard to a contracting State or a contracting organization if it is permissible and was formulated in accordance with the required form and procedures, and if that contracting State or contracting organization has accepted it.

4.1.1 *Establishment of a reservation expressly authorized by a treaty*

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and contracting organizations, unless the treaty so provides.

2. A reservation expressly authorized by a treaty is established with regard to the other contracting States and contracting organizations if it was formulated in accordance with the required form and procedures.

4.1.2 *Establishment of a reservation to a treaty which has to be applied in its entirety*

When it appears, from the limited number of negotiating States and organizations and the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation to this treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if all the contracting States and contracting organizations have accepted it.

4.1.3 *Establishment of a reservation to a constituent instrument of an international organization*

When a treaty is a constituent instrument of an international organization, a reservation to this treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if it has been accepted in conformity with guidelines 2.8.8 to 2.8.11.

4.2 *Effects of an established reservation*

4.2.1 *Status of the author of an established reservation*

As soon as a reservation is established in accordance with guidelines 4.1 to 4.1.3, its author becomes a contracting State or contracting organization to the treaty.

4.2.2 *Effect of the establishment of a reservation on the entry into force of a treaty*

1. When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation is established.

2. The author of the reservation may, however, be included at a date prior to the establishment of the reservation in the number of contracting States and contracting organizations required for the treaty to enter into force, if no contracting State or contracting organization is opposed.

4.2.3 *Effect of the establishment of a reservation on the status of the author as a party to the treaty*

The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States and contracting organizations in respect of which the reservation is established if or when the treaty is in force.

4.2.4 *Effect of an established reservation on treaty relations*

1. A reservation established with regard to another party excludes or modifies for the reserving State or international organization in its relations with that other party the legal effect of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation.

2. To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.

3. To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation.

4.2.5 *Non-reciprocal application of obligations to which a reservation relates*

Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.

4.2.6 *Interpretation of reservations*

A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.

4.3 *Effect of an objection to a valid reservation*

Unless the reservation has been established with regard to an objecting State or international organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or international organization.

4.3.1 *Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation*

An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, except in the case mentioned in guideline 4.3.5.

4.3.2 *Effect of an objection to a reservation that is formulated late*

If a contracting State or a contracting organization to a treaty objects to a reservation whose late formulation has been unanimously accepted in accordance with guideline 2.3.1, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

4.3.3 *Entry into force of the treaty between the author of a reservation and the author of an objection*

The treaty enters into force between the author of a valid reservation and the objecting contracting State or contracting organization as soon as the author of the reservation has become a contracting State or a contracting organization in accordance with guideline 4.2.1 and the treaty has entered into force.

4.3.4 *Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required*

If the establishment of a reservation requires the acceptance of the reservation by all the contracting States and contracting organizations, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.

4.3.5 *Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect*

An objection by a contracting State or a contracting organization to a valid reservation precludes the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, if the objecting State or organization has definitely expressed an intention to that effect in accordance with guideline 2.6.7.

4.3.6 *Effect of an objection on treaty relations*

1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

2. To the extent that a valid reservation purports to exclude the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates.

3. To the extent that a valid reservation purports to modify the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions of the treaty as intended to be modified by the reservation.

4. All the provisions of the treaty other than those to which the reservation relates shall remain applicable as between the reserving State or organization and the objecting State or organization.

4.3.7 *Effect of an objection on provisions other than those to which the reservation relates*

1. A provision of the treaty to which the reservation does not relate, but which has a sufficient link with the provisions to which the reservation does relate, is not applicable in the treaty relations between the author of the reservation and the author of an objection formulated in accordance with guideline 3.4.2.

2. The reserving State or international organization may, within a period of twelve months following the notification of an objection which has the effect referred to in paragraph 1, oppose the entry into force of the treaty between itself and the objecting State or organization. In the absence of such opposition, the treaty shall apply between the author of the reservation and the author of the objection to the extent provided by the reservation and the objection.

4.3.8 *Right of the author of a valid reservation not to comply with the treaty without the benefit of its reservation*

The author of a valid reservation is not required to comply with the provisions of the treaty without the benefit of its reservation.

4.4 *Effect of a reservation on rights and obligations independent of the treaty*

4.4.1 *Absence of effect on rights and obligations under other treaties*

A reservation, acceptance of a reservation or objection to a reservation neither modifies nor excludes any rights and obligations of their authors under other treaties to which they are parties.

4.4.2 *Absence of effect on rights and obligations under customary international law*

A reservation to a treaty provision which reflects a rule of customary international law does not of itself affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule.

4.4.3 *Absence of effect on a peremptory norm of general international law (jus cogens)*

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

4.5 *Consequences of an invalid reservation*

4.5.1 *Nullity of an invalid reservation*

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 any legal effect.

4.5.2 *Reactions to a reservation considered invalid*

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

2. Nevertheless, a State or an international organization which considers that a reservation is invalid should formulate a reasoned objection as soon as possible.

4.5.3 *Status of the author of an invalid reservation in relation to the treaty*

1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty.

2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation.

3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation.

4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.

4.6 *Absence of effect of a reservation on the relations between the other parties to the treaty*

A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

4.7 *Effect of interpretative declarations*

4.7.1 *Clarification of the terms of the treaty by an interpretative declaration*

1. An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

2. 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.

4.7.2 *Effect of the modification or the withdrawal of an interpretative declaration*

The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.

4.7.3 *Effect of an interpretative declaration approved by all the contracting States and contracting organizations*

An interpretative declaration that has been approved by all the contracting States and contracting organizations may constitute an agreement regarding the interpretation of the treaty.

5. *Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases of succession of States*

5.1 *Reservations in cases of succession of States*

5.1.1 *Newly independent States*

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a

notification of succession, it shall be 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 of States 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.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

4. For the purposes of this Part of the Guide to Practice, “newly independent State” means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

5.1.2 *Uniting or separation of States*

1. Subject to the provisions of guideline 5.1.3, a successor State which is a party to a treaty as the result of a uniting or separation of States shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses its intention not to maintain one or more reservations of the predecessor State at the time of the succession.

2. A successor State which is a party to a treaty as the result of a uniting or separation of States may neither formulate a new reservation nor widen the scope of a reservation that is maintained.

3. When a successor State formed from a uniting or separation of States makes a notification whereby it establishes its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, that State shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses a contrary intention when making the notification or formulates a reservation which relates to the same subject matter as that reservation. That successor State may formulate a new reservation to the treaty.

4. A successor State may formulate a reservation in accordance with paragraph 3 only if the reservation is one the formulation of which would not be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1. The relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

5.1.3 *Irrelevance of certain reservations in cases involving a uniting of States*

When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

5.1.4 *Maintenance of the territorial scope of reservations formulated by the predecessor State*

Subject to the provisions of guideline 5.1.5, a reservation considered as being maintained in conformity with guideline 5.1.1, paragraph 1, or guideline 5.1.2, paragraph 1 or 3, shall retain the territorial scope that it had at the date of the succession of States, unless the successor State expresses a contrary intention.

5.1.5 *Territorial scope of reservations in cases involving a uniting of States*

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of

the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:

(a) the successor State expresses a contrary intention when making the notification extending the territorial scope of the treaty; or

(b) 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.

2. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:

(a) an identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;

(b) the successor State expresses a different intention when making the notification extending the territorial scope of the treaty; or

(c) a contrary intention otherwise becomes apparent from the circumstances surrounding that State’s succession to the treaty.

3. A notification purporting to extend the territorial scope of a reservation in accordance with paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.

4. The provisions of paragraphs 1 to 3 apply *mutatis mutandis* to reservations considered as being maintained by a successor State that is a contracting State, following a uniting of States, to a treaty which was not in force for any of the uniting States at the date of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

5.1.6 *Territorial scope of reservations of the successor State in cases of succession involving part of territory*

When, as a result of a succession of States involving part of the territory of a State, a treaty to which the successor State is a contracting State becomes applicable to that territory, any reservation to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:

(a) the successor State expresses a contrary intention; or

(b) it appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a part of this territory.

5.1.7 *Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State*

The non-maintenance, in conformity with guideline 5.1.1 or 5.1.2, by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or a contracting organization only when notice of it has been received by that State or organization.

5.1.8 *Late formulation of a reservation by a successor State*

A reservation shall be considered as late if it is formulated:

(a) by a newly independent State after it has made a notification of succession to the treaty;

(b) by a successor State other than a newly independent State after it has made a notification establishing its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or

(c) by a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.

5.2 *Objections to reservations in cases of succession of States*

5.2.1 *Maintenance by the successor State of objections formulated by the predecessor State*

Subject to the provisions of guideline 5.2.2, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting organization, unless it expresses a contrary intention at the time of the succession.

5.2.2 *Irrelevance of certain objections in cases involving a uniting of States*

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any of those States in respect of which the treaty was not in force on the date of the succession of States shall not be maintained.

2. When, following a uniting of two or more States, the successor State is a contracting State to a treaty to which it has maintained reservations in conformity with guideline 5.1.1 or 5.1.2, objections to a reservation made by another contracting State or a contracting organization shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.

5.2.3 *Maintenance of objections to reservations of the predecessor State*

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, any objection to that reservation formulated by another contracting State or by a contracting organization shall be considered as being maintained in respect of the successor State.

5.2.4 *Reservations of the predecessor State to which no objections have been made*

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, a State or an international organization that had not formulated an objection to the reservation in respect of the predecessor State may not object to it in respect of the successor State, unless:

(a) the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period; or

(b) the territorial extension of the reservation radically changes the conditions for the operation of the reservation.

5.2.5 *Right of a successor State to formulate objections to reservations*

1. When making a notification of succession establishing its status as a contracting State, a newly independent State may, in accordance with the relevant guidelines, formulate an objection to reservations formulated by a contracting State or a contracting organization, even if the predecessor State made no such objection.

2. A successor State, other than a newly independent State, shall also have the right provided for in paragraph 1 when making a notification establishing its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

3. The right referred to in paragraphs 1 and 2 is nonetheless excluded in the case of treaties falling under guidelines 2.8.7 and 4.1.2.

5.2.6 *Objections by a successor State other than a newly independent State in respect of which a treaty continues in force*

A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States may not formulate an objection to a reservation to which the predecessor State had not objected, unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

5.3 *Acceptances of reservations in cases of succession of States*

5.3.1 *Maintenance by a newly independent State of express acceptances formulated by the predecessor State*

When a newly independent State establishes, by a notification of succession, its status as a contracting State to a treaty, it shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization, unless it expresses a contrary intention within twelve months of the date of the notification of succession.

5.3.2 *Maintenance by a successor State other than a newly independent State of express acceptances formulated by the predecessor State*

1. A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization.

2. When making a notification of succession establishing its status as a contracting State to a treaty which, on the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or a contracting organization, unless it expresses a contrary intention within twelve months of the date of the notification of succession.

5.3.3 *Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State*

The non-maintenance, in conformity with guideline 5.3.1 or guideline 5.3.2, paragraph 2, by the successor State of the express acceptance by the predecessor State of a reservation formulated by a contracting State or a contracting organization becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

5.4 *Legal effects of reservations, acceptances and objections in cases of succession of States*

1. Reservations, acceptances and objections considered as being maintained pursuant to the guidelines contained in this Part of the Guide to Practice shall continue to produce their legal effects in conformity with the provisions of Part 4 of the Guide.

2. Part 4 of the Guide to Practice is also applicable, *mutatis mutandis*, to new reservations, acceptances and objections formulated by a successor State in conformity with the provisions of the present Part of the Guide.

5.5 *Interpretative declarations in cases of succession of States*

1. A successor State should clarify its position concerning interpretative declarations formulated by the predecessor State. In the absence of such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

2. Paragraph 1 is without prejudice to cases in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.

ANNEX

Conclusions on the reservations dialogue

The International Law Commission,

Recalling the provisions on reservations to treaties contained in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,

Taking into account the seventeenth report¹ presented by the Special Rapporteur on the topic “Reservations to treaties”, which addresses the question of the reservations dialogue,

Bearing in mind the need to achieve a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein,

Recognizing the role that reservations to treaties may play in achieving this balance,

Concerned at the number of reservations that appear incompatible with the limits imposed by the law of treaties, in particular article 19 of the Vienna Conventions on the Law of Treaties,

Aware of the difficulties raised by the assessment of the validity of reservations,

Convinced of the usefulness of a pragmatic dialogue with the author of a reservation,

Welcoming the efforts made in recent years, including within the framework of international organizations and human rights treaty bodies, to encourage such a dialogue,

I. Considers that:

1. States and international organizations intending to formulate reservations should do so as precisely and narrowly as possible, consider limiting their scope and ensure that they are not incompatible with the object and purpose of the treaty to which they relate;

2. In formulating a unilateral statement, States and international organizations should indicate whether it amounts to a reservation and, if so, explain why the reservation is deemed necessary and the effect it will have on the fulfilment by its author of its obligations under the treaty;

3. Statements of reasons by the author of a reservation are important for the assessment of the validity of the reservation, and States and international organizations should state the reason for any modification of a reservation;

4. States and international organizations should periodically review their reservations with a view to limiting their scope or withdrawing them where appropriate;

5. The concerns about reservations that are frequently expressed by States and international organizations, as well as monitoring bodies, may be useful for the assessment of the validity of reservations;

6. States and international organizations, as well as monitoring bodies, should explain to the author of a reservation the reasons for their concerns about the reservation and, where appropriate, request any clarification that they deem useful;

7. States and international organizations, as well as monitoring bodies, if they deem it useful, should encourage the withdrawal of reservations, the reconsideration of the need for a reservation or the gradual reduction of the scope of a reservation through partial withdrawals;

8. States and international organizations should address the concerns and reactions of other States, international organizations and monitoring bodies and take them into account, to the extent

possible, with a view to reconsidering, modifying or withdrawing a reservation;

9. States and international organizations, as well as monitoring bodies, should cooperate as closely as possible in order to exchange views on reservations in respect of which concerns have been raised and coordinate the measures to be taken; and

II. Recommends that:

The General Assembly call upon States and international organizations, as well as monitoring bodies, to initiate and pursue such a reservations dialogue in a pragmatic and transparent manner.

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY

2. The text of the Guide to Practice on Reservations to Treaties, comprising an introduction, the guidelines and commentaries thereto, an annex on the reservations dialogue and a bibliography, is reproduced below.

GUIDE TO PRACTICE ON
RESERVATIONS TO TREATIES(a) *Introduction*

(1) The Guide to Practice on Reservations to Treaties consists of guidelines that have been adopted by the Commission² and are reproduced below, accompanied by commentaries. Although they do not have the same weight as the guidelines themselves, the commentaries are an integral part of the Guide and an indispensable supplement to the guidelines, which they expand and explain. In such a highly technical and particularly complex area, it is impossible to address all the questions that might arise or provide all the explanations that might be helpful to practitioners in any concise provisions, however numerous they might be.³

(2) As its name indicates, the purpose of the Guide to Practice is to provide assistance to practitioners of international law, who are often faced with sensitive problems concerning, in particular, the validity and effects of reservations to treaties—a matter on which the rules contained in the Vienna Convention on the law of treaties (hereinafter the “1969 Vienna Convention”), the Vienna Convention on succession of States in respect of treaties (hereinafter the “1978 Vienna Convention”) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”)⁴ have gaps and are often unclear—and, to a lesser extent, interpretative declarations in respect of treaty provisions, of which these Conventions make no mention whatsoever. The purpose of this Guide is not—or, in any case, not only—to offer the reader a guide to past (and often uncertain) practice in this area, but rather to direct the user towards solutions that are consistent with existing rules (where they exist) or to the solutions that seem most appropriate for the progressive development of such rules.

² See *Yearbook ... 2011*, vol. II (Part Two), para. 61.

³ The present Guide contains 179 guidelines.

⁴ The 1986 Vienna Convention is not yet in force.

¹ A/CN.4/647 and Add.1, paras. 2–68.

(3) In that connection, it should be stressed that while the Guide to Practice, as an instrument—or “formal source”—is by no means binding, the various provisions in the guidelines cover a wide range of obligatoriness and have very different legal values:⁵

– some of them simply reproduce provisions of the Vienna Conventions which set out customary norms that were either uncontroversial⁶ at the time of their inclusion in the Conventions⁷ or have since become so;⁸ as such, while not peremptory in nature, they are nevertheless binding on all States or international organizations, whether or not they are parties to the Conventions;

– other rules contained in the Vienna Conventions are binding on the parties thereto, but their customary nature is open to question;⁹ reproducing them in the Guide to Practice should contribute to their crystallization as customary rules;

– in some cases, guidelines included in the Guide supplement Convention provisions that are silent on modalities for their implementation but these rules are themselves indisputably customary in nature¹⁰ or are required for obvious logical reasons;¹¹

– in other cases, the guidelines address issues on which the Conventions are silent but set out rules the customary nature of which is hardly in doubt;¹²

– at times, the rules contained in the guidelines are clearly set out *de lege ferenda*¹³ and, in some cases, are

⁵ This range is too great, and the distribution of guidelines among the various categories is too imprecise, to make it possible to follow a frequent suggestion—made, *inter alia*, during discussions in the Sixth Committee of the General Assembly—that a distinction should be made between guidelines reflecting *lex lata* and those formulated *de lege ferenda*.

⁶ This is the case, for example, of the fundamental rule that a State or international organization may not formulate a reservation that is incompatible with the object and purpose of the treaty; it is set out in article 19 (c) of the 1969 and 1986 Vienna Conventions and reproduced in guideline 3.1.

⁷ See, for example, guidelines 2.5.1 (Withdrawal of reservations), 2.5.2 (Form of withdrawal) and 2.7.2 (Form of withdrawal of objections to reservations), which reproduce the rules set out in article 22, paragraph 1, and article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions.

⁸ The rule set out in guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), which reproduces, *mutatis mutandis*, article 23, paragraph 2, of the Vienna Conventions, appears to have acquired customary status since the adoption of the 1969 Vienna Convention.

⁹ This is largely true of guidelines 2.1.3 (Representation for the purpose of formulating a reservation at the international level) or 2.1.5 (Communication of reservations), which reproduce, *mutatis mutandis*, the wording of articles 7 and 23 of the 1986 Vienna Convention; and guideline 2.6.12 (Time period for formulating objections).

¹⁰ The definition of “specified reservations” in guideline 3.1.2 may be said to have acquired customary status. See also guideline 3.1.5.7 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty).

¹¹ See, for example, guideline 2.8.7 (Unanimous acceptance of reservations), which draws the obvious conclusion from article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions.

¹² See, for example, guideline 4.4.2 (Absence of effect on rights and obligations under customary international law).

¹³ See, for example, guidelines 1.2.1 (Interpretative declarations formulated jointly) and 3.4.2 (Permissibility of an objection to a reservation).

based on practices that have developed in the margins of the Vienna Conventions;¹⁴

– other rules are simply recommendations and are meant only to encourage.¹⁵

(4) This last category of the guidelines highlights one of the key characteristics of the Guide to Practice. Such provisions would not have been included in a traditional set of draft articles intended to be transformed, if appropriate, into a treaty: treaties are not drafted in the conditional tense.¹⁶ But the problem here is somewhat different: as the title and the word “guidelines” indicate, it is not a binding instrument but a *vade mecum*, a “toolbox” in which the negotiators of treaties and those responsible for implementing them should find answers to the practical questions raised by reservations, reactions to reservations and interpretative declarations, on the understanding that, under positive law, these answers may be more or less certain depending on the question, and that the commentaries indicate doubts that may exist as to the certainty or appropriateness of a solution.

(5) In light of these characteristics, it goes without saying that the rules set out in the Guide to Practice in no way prevent States and international organizations from setting aside, by mutual agreement, those that they consider inappropriate to the purposes of a given treaty. The rules set out in the Guide are, at best, residual rules. In any event, since none of them has a peremptory *jus cogens* nature, a derogation to which all interested States (or international organizations) consent is always an option.

(6) In a consensus decision reached in 1995 and never subsequently challenged, the Commission considered that there was no reason to modify or depart from the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions¹⁷ in drafting the Guide to Practice, which incorporates all of them. But this also had implications for the very concept of the Guide and, in particular, for the commentaries to the guidelines.

(7) Insofar as the intent is to preserve and apply the Vienna rules, it was necessary to clarify them. For this reason, the commentaries describe extensively the *travaux préparatoires* to the three Conventions, which help clarify their meaning and explain the gaps contained therein.

(8) Generally speaking, the commentaries are long and detailed. In addition to an analysis of the *travaux préparatoires* to the Vienna Conventions, they include a description of the relevant jurisprudence, practice

¹⁴ See, for example, guidelines 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty) and 4.3.7 (Effect of an objection on provisions other than those to which the reservation relates).

¹⁵ These are always drafted in the conditional tense; see, for example, guidelines 2.1.2 (Statement of reasons for reservations) and 2.5.3 (Periodic review of the usefulness of reservations).

¹⁶ There may be exceptions to this (see article 7 of the 1971 Convention on wetlands of international importance especially as waterfowl habitat, concluded in Ramsar (Islamic Republic of Iran), and article 16 of the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade), although they are rarely justified.

¹⁷ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487.

and writings, and explanations of the wording that was ultimately adopted; the commentaries provide numerous examples. Their length, which has often been criticized, appears necessary in light of the highly technical and complex nature of the issues raised. The Commission hopes that practitioners will indeed find answers to any questions that may arise.¹⁸

(9) The Guide to Practice is divided into five Parts (numbered 1 to 5), which follow a logical order:

– Part 1 is devoted to the definition of reservations and interpretative declarations and to the distinction between these two types of unilateral statement; it also includes an overview of various unilateral statements, made in connection with a treaty, that are neither reservations nor interpretative declarations, and of possible alternatives to both; as expressly stated in guideline 1.8, “[these definitions] ... are without prejudice to the validity and legal effects” of the statements covered by Part 1;

– Part 2 sets out the form and procedure to be used in formulating reservations and interpretative declarations and reactions thereto (objections to and acceptances of reservations and approval or recharacterization of, or opposition to, interpretative declarations);

– Part 3 concerns the permissibility of reservations and interpretative declarations and reactions thereto and sets out the criteria for the assessment of permissibility; these are illustrated by examples, with commentary, of the types of reservations that most often give rise to differences of opinion among States regarding their permissibility. Some guidelines also specify the modalities for assessing the permissibility of reservations and the consequences of their impermissibility;

– Part 4 is devoted to the legal effects produced by reservations and interpretative declarations, depending on whether they are valid (in which case a reservation is “established” if it has been accepted) or not; this Part also analyses the effects of objections to and acceptances of reservations;

– Part 5 supplements the only provision of the 1978 Vienna Convention on succession of States in respect of treaties that deals with reservations—article 20 on the fate of reservations in the case of succession of States by a newly independent State—and extrapolates and adapts solutions for cases of uniting or separation of States; this last Part also covers the issues raised by objections to or acceptances of reservations and by interpretative declarations in relation to succession of States;

– lastly, the text of the conclusions and a recommendation adopted by the Commission on the reservations dialogue is reproduced in an annex to the Guide to Practice. A bibliography is also attached to the Guide.

(10) Within each part, the guidelines are divided into sections (introduced by a two-digit number where the

first represents the Part and the second the section within that Part).¹⁹ In principle, the guidelines carry a three-digit number within each section.²⁰

(b) *Text of the guidelines with commentaries thereto*

1. Definitions

1.1 Definition of reservations

1. “Reservation” means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

2. Paragraph 1 is to be interpreted as including reservations which purport to exclude or to modify the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation.

Commentary

(1) Paragraph 1 of guideline 1.1 contains the definition of reservations adopted by the Commission. It is no more than a composite text of the definitions contained in the Vienna Conventions of 1969, 1978 and 1986, to which no changes have been made. Paragraph 2 reflects the extensive interpretation which has been given to this definition in practice.

(2) Article 2, paragraph 1 (d), of the 1969 Vienna Convention gives the following definition of reservations:

“Reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

(3) This definition reproduces the text adopted by the Commission in 1966 in its final draft articles on the law of treaties,²¹ and did not give rise to lengthy discussion

¹⁹ For example, section 3.4 deals with the “Permissibility of reactions to reservations”; the number 3 indicates that it falls under Part 3 and the number 4 refers to section 4 of that Part. Where a section is introduced by a guideline of a very general nature that covers its entire content, that guideline has the same title and the same number as the section itself (this is true, for example, of guideline 3.5 (Permissibility of an interpretative declaration)).

²⁰ In the exceptional case of the guidelines designed to illustrate, through examples, the question of the incompatibility of a reservation with the object and purpose of the treaty (the subject of guideline 3.1.5), these illustrative guidelines have a four-digit number. Thus, in the case of guideline 3.1.5.1 (Determination of the object and purpose of the treaty), the number 3 refers to Part 3; the first number 1 refers to section 1 of this Part (Permissible reservations); the number 5 refers to the more general guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty) and the second number 1 indicates that this is the first example illustrating that general guideline.

²¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part Two), p. 187.

¹⁸ It is also for this reason that the Commission did not hesitate to allow a certain amount of repetition to remain in the commentaries in order to facilitate consultation and use of the Guide to Practice.

either within the Commission²² or during the United Nations Conference on the Law of Treaties. The text of the definition was reproduced in the 1978 and 1986 Vienna Conventions²³ and gave rise to hardly any discussion.

(4) It should be noted, however, that article 2, paragraph 1 (j), of the 1978 Vienna Convention and article 2, paragraph 1 (d), of the 1986 Vienna Convention do not purely and simply reproduce the text of article 2, paragraph 1 (d), of the 1969 definition. Each of them includes a clarification made necessary by the respective purposes of the two instruments:

(a) The 1978 Vienna Convention specifies that a reservation can be made by a State “when making a notification of succession to a treaty”;

(b) The 1986 Vienna Convention adds that an international organization can make a reservation when it expresses its consent to be bound by a treaty by an act of formal confirmation.

(5) It is these differences that made it necessary to establish for the purposes of the Guide to Practice a composite text, including the additions made in 1978 and 1986, rather than purely and simply to reproduce the 1969 text.

(6) This definition, embodied in judicial decisions²⁴ and used in practice by States when making reservations or reacting to reservations made by other contracting States, has met with general approval in the writings of legal scholars, even though some authors have criticized it on specific points and have suggested certain additions or amendments.²⁵

²² See the definitions proposed by Mr. Briery (Yearbook ... 1950, vol. II, document A/CN.4/23, pp. 238–239), Sir Gerald Fitzmaurice (Yearbook ... 1956, vol. II, document A/CN.4/101, p. 110) and Sir Humphrey Waldock (Yearbook ... 1962, vol. II, document A/CN.4/144 and Add.1, pp. 31–32) and the proposals of the Drafting Committee of 1962 (Yearbook ... 1962, vol. I, 666th meeting, p. 239) and 1965 (Yearbook ... 1965, vol. I, 820th meeting, p. 308).

²³ During the Commission’s elaboration of the draft articles on this topic, a simplification of the definition was proposed in order to avoid a lengthy enumeration of the moments when a reservation may be made in accordance with the 1969 definition (see Yearbook ... 1974, vol. II (Part One), document A/9610/Rev.1, p. 295). In 1981, however, the Commission reverted to a text based on the 1969 text (see Yearbook ... 1981, vol. II (Part Two), pp. 121 and 123).

²⁴ See, for example, the arbitral decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (Mer d’Iroise case)*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII, United Nations publication (Sales No. E/F.80.V.7), pp. 39–40, paras. 54–55 (the Court of Arbitration had taken note of the parties’ agreement to consider that article 2, paragraph 1 (d), of the 1969 Vienna Convention, to which they were not parties, correctly defined the reservations, and had drawn the necessary conclusions) or the Decision of 5 May 1982 of the European Commission of Human Rights, *Case concerning Temeltasch v. Switzerland*, Application no. 9116/80, *Decisions and Reports*, vol. 31, Strasbourg, 1983, pp. 146–149, paras. 69–82. See also the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock attached to the *Judgment of 20 December 1974* issued in the case concerning *Nuclear Tests (Australia v. France)*, *Judgment, I.C.J. Reports 1974*, p. 253, at pp. 349–350, para. 83).

²⁵ See, in particular, the definitions proposed by P.-H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1978, p. 18, and M. Whiteman, *Digest of International Law*, vol. 14 (1970), p. 137. See also F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5 (1988), p. 83.

(7) It has been said that this definition combined elements that were purely definitional with others that were more closely identified with the legal regime of reservations, particularly with regard to the moment when a reservation may be formulated. Illogical though it may appear in the abstract, the idea of including time limits on the possibility of making reservations in the definition of reservations itself has progressively gained ground,²⁶ given the magnitude of the drawbacks in terms of stability of legal relations of a system that would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta sunt servanda* itself which would be called into question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question.

(8) The fact nonetheless remains that criticisms have been levelled at the restrictive listing in the Vienna Conventions of the moments at which formulation of a reservation can take place. On the one hand, it has been felt that it was incomplete, *inter alia*, in that it did not initially take into account the possibility of formulating a reservation on the occasion of a succession of States;²⁷ but the 1978 Vienna Convention on succession of States in respect of treaties remedied this omission. Moreover, many authors have pointed out that, in some cases, reservations could validly be formulated at moments other than those provided for in the Vienna definition,²⁸ and in particular that a treaty may make express provision for the possibility of formulating a reservation at a moment other than the time of signature or of expression of consent to be bound by the treaty.²⁹

(9) Express consideration of this possibility in the Guide to Practice does not, however, appear to be useful: it is indeed true that a treaty may provide for such an eventuality, but this is then a treaty rule, a *lex specialis* that constitutes a derogation from the general principles established by the Vienna Conventions, which are only intended to substitute for an absence of will, and present no impediment to derogations of this kind. The Guide to Practice on Reservations to Treaties is of the same nature, and it does not seem appropriate to recall under each of its headings that States and international organizations may depart from it by including in the treaties that they conclude reservations clauses which institute special rules in that respect.

²⁶ The oldest definitions of reservations did not generally include this element *ratione temporis* (see, for example, those proposed by D. H. Miller, *Reservations to Treaties: Their Effect and the Procedure in Regard Thereto*, Washington, D.C., 1919, p. 76; D. Anzilotti, *Corso di diritto internazionale*, 4th ed., Padua, CEDAM, 1955, vol. I (*Cours de droit international*, French translation by G. Gidel, Paris, Sirey, vol. I, 1929, p. 399); and R. Genet, “Les ‘réserves’ dans les traités”, *Revue de droit international et des sciences diplomatiques et politiques*, 1932, p. 103).

²⁷ See R. Szafarz, “Reservations to multilateral treaties”, *Polish Yearbook of International Law*, vol. 3 (1970), p. 295.

²⁸ See Szafarz (previous footnote) and G. Gaja, “Unruly treaty reservations”, in *Le droit international à l’heure de sa codification—Études en l’honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, pp. 310–313; D. W. Greig, “Reservations: equity as a balancing factor?”, *Australian Year Book of International Law*, vol. 16 (1995), pp. 28–29; Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above); and P. Reuter, *Introduction au droit des traités*, 3rd rev. ed. (P. Cahier), Paris, Presses Universitaires de France, 1995, p. 71.

²⁹ See, in particular, Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 12.

(10) On the other hand, even if one confines oneself to general international law, it appears that the list of cases in which the formulation of a reservation can take place, as laid down in article 2, paragraph 1, of the Vienna Conventions, does not cover all the means of expressing consent to be bound by a treaty. Yet the spirit of this provision is indeed that a State may formulate (or confirm) a reservation when it expresses its consent, and that it can do so only at that moment. Too much importance must not therefore be attached to the letter of this enumeration, which is incomplete and, moreover, does not correspond to that appearing in article 11 of the 1969 and 1986 Vienna Conventions.³⁰

(11) The Commission had moreover clearly perceived the problem when it discussed the draft articles on the law of treaties between States and international organizations or between international organizations, in that initially, on the proposal of its Special Rapporteur, Mr. Reuter, it had simplified the definition of reservations and intended to say only that they could be made by “a State or by an international organization when signing or consenting ... to be bound by a treaty”,³¹ which was an implicit reference to article 11 of the future Convention. However, out of a concern to depart as little as possible from the 1969 text, the Commission finally modelled its draft on it, thus abandoning the idea of a useful simplification.³²

(12) The differences in wording between article 2, paragraph 1 (d), and article 11 of the 1969 and 1986 Vienna Conventions lie in the omission from the former of these provisions of two possibilities contemplated in the latter: “exchange of instruments constituting a treaty” and “any other means if so agreed”. It is rather improbable that a general multilateral treaty could consist of an exchange of letters. Nevertheless, the possibility cannot be entirely ruled out; nor can the development of means of expressing consent to be bound by a treaty other than those expressly listed in articles 2, paragraph 1 (d), and 11 of the Vienna Conventions.

(13) It was also suggested that the definition of reservations should be supplemented by a mention of the requirement that reservations must be made in writing and that it should be made clear that a reservation could—in fact could only—seek to limit the legal effect of the provisions in respect of which it is made.

(14) These gaps and ambiguities do not constitute sufficient grounds to call into question the Vienna

definition as derived from a combination of the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions. To the extent necessary, this definition is supplemented and clarified in the Guide to Practice, since that is the very purpose and *raison d'être* of the Guide.³³

(15) Taken literally, the Vienna definition which the Commission has included in paragraph 1 appears to exclude from the general category of reservations unilateral statements that concern not one specific provision or a number of provisions of a treaty, but the entire text. Such an interpretation would have the effect of excluding from the definition of reservations the well-established practice of across-the-board reservations, which guideline 1.1, paragraph 2, seeks to take into account.

(16) The wording used by the authors of the Vienna Conventions takes care to make it clear that the objective of the author of the reservation is to exclude or to modify the *legal effect* of certain provisions of the treaty to which the reservation applies and not the provisions themselves.³⁴ A criticism of the wording relates to the use of the expression “certain provisions”. It has been noted that this expression was justified “out of the very commendable desire to exclude reservations that are too general and imprecise and that end up annulling ... the binding character of the treaty”,³⁵ a consideration regarding which it might be queried whether it “should be placed in article 2. In fact, it relates to the validity of reservations. However, it is not because a statement entails impermissible consequences that it should not be considered a reservation ... Moreover, practice provides numerous examples of perfectly valid reservations that do not focus on specific provisions: they exclude the application of the treaty as a whole under certain well-defined circumstances”.³⁶

(17) Care should be taken not to confuse, on the one hand, a general reservation characterized by the lack of precision and general nature of its content and, on the other, an across-the-board reservation concerning the way in which the State or the international organization formulating it intends to apply the treaty as a whole, but which cannot necessarily be criticized for lack of precision, since it relates to a specific aspect of the treaty.

(18) Across-the-board reservations are a standard practice and, as such, have not raised particular objections.

³⁰ Article 11 of the 1986 Vienna Convention reads as follows:

“1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

“2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.”

See also P. Gautier, “1969 Vienna Convention. Article 2: Use of terms”, in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I, Oxford University Press, 2011, p. 46, para. 34.

³¹ *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, p. 294; see also the commentary on the draft article in question, *ibid.*, pp. 295–297.

³² See footnote 23 above.

³³ See, in particular, guidelines 1.1.1, 2.1.1 and 2.3.

³⁴ The wording of article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions is more open to question, in that it defines the legal effects of reservations as amendments to *the provisions* to which they refer.

³⁵ Imbert, *Les réserves aux traités multilatéraux* (see footnote 25 above), p. 14. See also K. Zemanek, “Alain Pellet’s definition of a reservation”, *Austrian Review of International and European Law*, vol. 3 (1998), pp. 295–299. [The references included in the footnote omitted from the quote from Imbert are the following: “Observation of the Government of Israel on the first draft of the International Law Commission (*Yearbook ... 1965*, vol. II, [document A/CN.4/177 and Add.1–2.] p. 15) or the statement by the representative of Chile at the first session of the [1968] Vienna Conference [(*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 4th plenary meeting, para. 5)]”].

³⁶ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 14–15. Similarly, see, for example, Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 296.

The same is true of reservations that exclude or limit the application of a treaty:

- to certain categories of persons;³⁷
- or of objects, especially vehicles;³⁸
- or to certain situations;³⁹
- or to certain territories;⁴⁰
- or in certain specific circumstances;⁴¹
- or for special reasons relating to the international status of their author;⁴²

³⁷ See, for example, the reservation of the United Kingdom concerning the application of the International Covenant on Civil and Political Rights to members of the armed forces and prisoners (*Multilateral Treaties Deposited with the Secretary-General*, available from <http://treaties.un.org/>, chap. IV.4) or that of Guatemala concerning the application of the Customs Convention on the Temporary Importation of Private Road Vehicles of 4 June 1954, to natural persons only (*ibid.*, chap. XI.A.8).

³⁸ See, for example, the reservation of Yugoslavia to the effect that the provisions of the Convention relating to the unification of certain rules concerning collisions in inland navigation of 15 March 1960 shall not apply to vessels exclusively employed by the public authorities (*ibid.*, chap. XII.3) or that of the Federal Republic of Germany to the effect that the Convention on the registration of inland navigation vessels of 25 January 1965 would not apply to vessels navigating on lakes and belonging to the German Federal Railways (*ibid.*, chap. XII.4).

³⁹ See, for example, the reservation of Argentina to the 1982 International Telecommunication Convention (United Nations, *Treaty Series*, vol. 1533, p. 122) with regard to the possible increase in its contribution and the possibility that the other parties would not observe their obligations under the Convention (reply by Argentina to the Commission's questionnaire on reservations to treaties); or the reservation of France on signature, in 1985, of the *Final Acts of the Regional Administrative Conference for the Planning of the Maritime Radionavigation Service (Radiobeacons) in the European Maritime Area* (International Telecommunication Union publication, Geneva, 1986, p. 32), concerning the requirements for the adequate operation of the French maritime radio-navigation service using the multifrequency phase metering system (reply by France to the same questionnaire on reservations to treaties) prepared by the Special Rapporteur pursuant to a decision of the Commission reflected in paragraph 489 of its report on the work of its forty-seventh session (1995), *Yearbook ... 1995*, vol. II (Part Two), p. 108: the questionnaires sent to Member States and international organizations are reproduced in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annexes II and III.

⁴⁰ See also guideline I.1.3.

⁴¹ See the reservation of France to the General Act of Arbitration (Pacific Settlement of International Disputes) of 26 September 1928 to the effect that "in future [the said accession to the Act] shall not extend to disputes relating to any events that may occur in the course of a war in which the French Government is involved" (*Multilateral Treaties ...* (footnote 37 above), chap. II.29) (similar reservations were made by the United Kingdom and New Zealand) (*ibid.*). See also the reservations of the majority of States parties to the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 1925, whereby that instrument would cease to be binding for the Government of the State making a reservation with regard to any enemy State whose armed forces or whose allies did not respect the prohibitions which were the object of the Protocol (*Status of Multilateral Arms Regulation and Disarmament Agreements*, 4th ed., 1992, vol. 1 (United Nations publication, Sales No. E.93.IX.11), pp. 11–21).

⁴² See, for example, the reservations of Austria and Switzerland to the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction of 10 April 1972, with regard to preserving their status of neutrality (Swiss reply to the questionnaire on reservations) (United Nations, *Treaty Series*, vol. 1015, pp. 236–238) or the similar reservation of Austria to the Convention on the prohibition of military

- or to the author's national laws;⁴³ etc.

(19) Some of these reservations have given rise to objections on grounds of their general nature and lack of precision,⁴⁴ and it may be that some of them are tainted by impermissibility for one of the reasons specified in article 19 of the 1969 and 1986 Vienna Conventions. But this impermissibility stems from the legal regime of the reservations and is a separate problem from that of their definition.⁴⁵ Furthermore, the inclusion of across-the-board reservations in the category of reservations constitutes an indispensable prerequisite to assessing their validity under the rules relating to the legal regime governing reservations; an impermissible reservation (*a*) is still a reservation and (*b*) cannot be declared impermissible unless it is a reservation.

(20) Another element that supports a non-literal interpretation of the Vienna definition relates to the fact that some treaties prohibit across-the-board reservations or certain categories of such reservations, in particular general reservations.⁴⁶ Such a provision would be superfluous (and inexplicable) if unilateral statements designed to modify the legal effect of a treaty as a whole, at least with respect to certain specific aspects, did not constitute reservations.

(21) The abundance and coherence of the practice of across-the-board reservations (which are not always imprecise and general reservations) and the absence of objections in principle to this type of reservations indicate a practical need that it would be absurd to challenge in the name of abstract legal logic. Moreover, the interpretation of rules of law should not be static; article 31, paragraph 3, of the 1969 Vienna Convention invites the interpreter of treaty rules to take into account, "together

or any other hostile use of environmental modification techniques of 10 October 1976 (*Multilateral Treaties ...* (footnote 37 above), chap. XXVI.1).

⁴³ See, for example, the reservations of the United States of America, Italy and Japan to the effect that those countries would apply the International Wheat Agreement, 1986 of 14 March 1986, "provisionally within the limitations of internal legislation" (United Nations, *Treaty Series*, vol. 1429, pp. 167 and 206) or the reservation of Canada to the Convention on the Political Rights of Women of 31 March 1953 "in respect of rights within the legislative jurisdiction of the provinces" (*Multilateral Treaties ...* (footnote 37 above), chap. XVI.1).

⁴⁴ See, for example, the objections of numerous countries to the reservations made by Maldives to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 concerning the Islamic Shariah (*ibid.*, chap. IV.8) and also the reservations made by Egypt to the same Convention (*ibid.*). See, in this respect, A. Jenefsky, "Permissibility of Egypt's reservations to the Convention on the Elimination of All Forms of Discrimination against Women", *Maryland Journal of International Law and Trade*, vol. 15, No. 2 (1991), pp. 199–233, and R. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", *Virginia Journal of International Law*, vol. 30 (1990), pp. 643–716. See also the objections of certain countries to the reservation of the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, relating to the Constitution of the United States (*Multilateral Treaties ...* (footnote 37 above), chap. IV.1).

⁴⁵ See also guideline 1.8 and commentary thereto.

⁴⁶ This is so in the case of article 57, paragraph 1 (formerly article 64, paragraph 1), of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) or article XIX of the Inter-American Convention on Forced Disappearance of Persons.

with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”, and, as the International Court of Justice has stressed, a legal principle must be interpreted in the light of “the subsequent development of international law”.⁴⁷

(22) In order to remove any ambiguity and avoid any controversy, it consequently appears reasonable and useful to establish, in the Guide to Practice, the broad interpretation that States actually give to the apparently restrictive formula of the Vienna definition.

(23) Furthermore, in order to avoid any confusion with declarations relating to the implementation of a treaty at the internal level, which is the subject of guideline 1.5.2, or even with other unilateral declarations,⁴⁸ the Commission decided not to include any reference to “the way in which the State or international organization intends to implement the treaty as a whole”. It confined itself to using the actual text of the Vienna definition, according to which, when it formulates a reservation, a State or international organization “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization”, specifying, however, that the same may also apply if the reservation relates to “the treaty as a whole with respect to certain specific aspects”. The addition of the words “with respect to certain specific aspects” after the words “or of the treaty as a whole” is designed to avoid an interpretation that implies that a reservation might relate to the treaty as a whole, which could go so far as to void it of any substance.

(24) The wording that was retained has the advantage of highlighting the objective pursued by the author of the reservation, which lies at the heart of the definition of reservations adopted in the 1969 and 1986 Vienna Conventions⁴⁹ and on which the guidelines relating to the definition of interpretative declarations and other unilateral declarations formulated with regard to a treaty⁵⁰ are also based.

(25) It was pointed out, not without justification, that reservations could relate only to certain particular aspects of specific provisions, and that could constitute a third hypothesis to be added to reservations that purport “to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization”, a hypothesis directly covered by paragraph 1, and those that purport “to exclude or modify the legal effect of specific aspects of the treaty as a whole”, in other words, the across-the-board reservations

which are the subject of paragraph 2. It cannot be denied that the authors of reservations frequently purport to exclude or modify the legal effect of certain provisions of a treaty only with respect to certain specific aspects,⁵¹ but this possibility is covered by the general definition of paragraph 1 and, more specifically, by the word “modify”, which necessarily implies that the reservation relates only to certain aspects of the provisions in question.

(26) Given that the definition used in the Guide to Practice is, from the outset, the one that stems from the Vienna Conventions, the commentary to article 2, paragraph (1) (d), of the Commission’s draft article, which was reproduced in the Vienna Convention, retains all its relevance:

The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State’s position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.⁵²

(27) This explanation brings out clearly the function of the definitions contained in this first Part of the Guide to Practice: the aim is to distinguish between reservations and other unilateral statements made with respect to a treaty (the largest group of which is that of interpretative declarations), since the two are subject to different legal regimes.

(28) One should also be aware of the limitations of an endeavour of this kind: however much care is taken to define reservations and to distinguish them from other unilateral statements which have certain elements in common with them, some degree of uncertainty inevitably remains. This is inherent in the application of any definition, which is an exercise in interpretation that depends in part upon the circumstances and context and inevitably brings into play the subjectivity of the interpreter.

1.1.1 *Statements purporting to limit the obligations of their author*

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which its author purports to limit the obligations imposed on it by the treaty, constitutes a reservation.

Commentary

(1) There is no doubt that the expression “to modify the legal effect of certain provisions of the treaty”, as contained

⁴⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16, at p. 31, para. 52.

⁴⁸ See, in particular, the case of general statements of policy (paragraphs (12)–(17) of the commentary to guideline 1.5).

⁴⁹ See also D. Müller, “1969 Vienna Convention. Article 21: Legal effects of reservations and of objections to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 539, para. 2; see also M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Nijhoff, 2009, p. 89, para. 36.

⁵⁰ See guidelines 1.2, 1.3.1, 1.4, 1.5 and 1.5.1 to 1.5.3.

⁵¹ See, among very numerous examples, the reservations of Canada, the United States of America, Laos, Thailand and Turkey to the Convention on the privileges and immunities of the United Nations (*Multilateral Treaties ...* (footnote 37 above), chap. III.1), that of Malta to the 1954 Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the importation of tourist publicity documents and material (*ibid.*, chap. XI.A.7) and that of the European Community to articles 6 and 7 of the 1994 Convention on Customs Treatment of Pool Containers used in International Transport (*ibid.*, chap. XI.A.18).

⁵² *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part Two), pp. 189–190 (paragraph (11) of the commentary to article 2).

in the “Vienna definition” used in guideline 1.1, refers to reservations which *limit* or *restrict* this effect and, at the same time, to the reserving State’s obligations under the treaty “because ‘restricting’ is a way of ‘modifying’”.⁵³ Moreover, nearly all reservations are intended to limit the obligations which are in principle incumbent on the author under the treaty.

(2) This is in all probability why the amendments proposed during the United Nations Conference on the Law of Treaties for the addition of the words “limit” and “restrict” to the list of the legal effects intended by reservations⁵⁴ were not adopted: they would not have added anything to the final text.⁵⁵

(3) The Commission nevertheless considers that the preparation of a Guide to Practice does not impose the same constraints as the drafting of a convention: such a Guide can contain a statement of the obvious that would not belong in a treaty.

(4) However, guideline 1.1.1 also serves a more substantial purpose. In the Commission’s view, its inclusion in the Guide to Practice, together with guideline 1.1.2, helps to shed light on a question that arises constantly in connection with reservations to treaties, that is, whether there is any such thing as “extensive reservations”, of which there is no generally accepted definition,⁵⁶ as may be noted from the outset.

(5) The Commission does not intend to enter into a purely theoretical debate, which would be out of place in a Guide to Practice, and it has refrained from using that ambiguous term, but it notes that, when a State or an international organization formulates a unilateral statement by which it intends to limit the obligations the treaty would impose on it in the absence of such a statement, its intention at the same time is inevitably to increase its own rights at the expense of those that the other contracting

States or organizations would have under the treaty if the treaty was applied in its entirety; in other words, the obligations of the other contracting States and contracting organizations are increased accordingly. To this extent, “limitative” reservations—in other words, the majority of reservations—may appear to be “extensive reservations”.

(6) A distinction should, however, be drawn between two types of statement which are related only in appearance:

– statements which, because they are designed to exempt their author from certain obligations under the treaty, restrict, by correlation, the rights of the other contracting States or organizations; and

– statements designed to impose new obligations, not provided for by the treaty, on the other parties to it.

(7) Guideline 1.1.1 relates only to statements in the first of these categories; those in the second are not reservations.⁵⁷

(8) Certain reservations by which a State or an international organization intends to limit its obligations under the treaty have sometimes been presented as “extensive reservations”. This is, for example, the case of the statement by which the German Democratic Republic indicated its intention to bear its share of the expenses of the Committee against Torture only insofar as they arose from activities within its competence as recognized by the German Democratic Republic.⁵⁸ It was questioned whether such a reservation was permissible,⁵⁹ but it is not because it would have the consequence of increasing the financial burden on the other parties that it should not be described as a reservation or that it would, by its nature, differ from the usual “modifying” reservations.

(9) This seems to apply too in the case of another example of reservations described as “extensive” on the ground that “the reserving State simply widens its rights (and not its obligations), increasing by the same token the obligations of its partners”:⁶⁰ the reservations formulated by Poland and several socialist countries to article 9 of the Convention on the High Seas, under which “the rule expressed in article 9 [relating to the immunity of State vessels] applies to all ships owned or operated by a State”⁶¹ would constitute “extensive reservations” because the reserving State widens its rights, increasing by the same token the obligations of its partners. Once again, there is in fact nothing special about this: such a reservation “operates” like any limitative reservation; the State which formulates it modulates the rule laid down in the treaty so as to limit its treaty obligations.⁶²

⁵³ Horn, *Reservations and Interpretative Declarations ...* (see footnote 25 above), p. 80.

⁵⁴ See the amendments proposed by Sweden (add the word “limit” after the word “exclude”) and Viet Nam (add words “to restrict” after the word “exclude”) (Report of the Committee of the Whole on its work at the first session of the Conference (A/CONF.39/14, para. 35), in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5)*, p. 112).

⁵⁵ See Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 80.

⁵⁶ For example, J. M. Ruda defines “extensive reservations” as “declarations or statements purporting to enlarge the obligations included in the treaty” and he includes “unilateral declarations whereby the State assumes obligations, without receiving anything in exchange, because the negotiations for the adoption of the treaty have already been closed”, J. M. Ruda, “Reservations to treaties”, *Collected Courses of the Hague Academy of International Law, 1975-III*, vol. 146 (1977), p. 107); Horn makes a distinction between “commissive declarations”, by which the State making the declaration undertakes more than the treaty requires, and “extensive reservations proper”, whereby “a State will strive to impose wider obligations on the other parties, assuming correspondingly wider rights for itself” (Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 90); Imbert considers that “there are no ‘extensive reservations’” (Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 15); see also the discussion between two members of the Commission, Mr. Derek Bowett and Mr. Christian Tomuschat, in 1995 (*Yearbook ... 1995*, vol. I, 2401st meeting, pp. 154–155, paras. 3–9 and 11).

⁵⁷ See guideline 1.5 and in particular paragraphs (9)–(10) of the commentary thereto.

⁵⁸ See *Multilateral Treaties ...* (footnote 37 above), chap. IV.9.

⁵⁹ See R. W. Edwards, Jr., “Reservations to treaties”, *Michigan Journal of International Law*, vol. 10 (1989), pp. 392–393.

⁶⁰ Szafarz, “Reservations to multilateral treaties” (see footnote 27 above), pp. 295–296.

⁶¹ *Multilateral Treaties ...* (see footnote 37 above) chap. XXI.2.

⁶² The examples of “limitative reservations” of this kind are extremely numerous, since, in this case, the modulation of the effect of the treaty may be the result of (a) the substitution by the reserving State of provisions of its internal law for provisions contained in the

(10) The fact is that the reserving State must not take the opportunity offered by the treaty to try, by means of a reservation, to acquire more rights than those to which it could claim to be entitled under general international law. In such a case, a unilateral statement formulated by a State or an international organization comes not within the category of reservations, as provided for in the guideline under consideration, but under that of unilateral statements purporting to add further elements to a treaty.⁶³

(11) According to the definition of reservations itself, reservations cannot be described as such unless they are made “when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty”.⁶⁴ To the extent that unilateral statements purporting to limit the obligations of the State or the international organization formulating them are reservations, this temporal element comes into play and they are obviously subject to this temporal limitation.

(12) Taking this reasoning to its logical conclusion would probably also mean reproducing the entire list of cases in which a reservation may be formulated, as contained in guideline 1.1. However, not only is such a list incomplete,⁶⁵ but its inclusion in guideline 1.1.1 would render its wording unduly cumbersome. The Commission considered that a general reminder would be enough; this is the purpose of the expression “when that State or that organization expresses its consent to be bound”.

1.1.2 *Statements purporting to discharge an obligation by equivalent means*

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which that State or that organization

treaty: “The Argentine Government states that the application of the second part of article 15 of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in article 18 of the Argentine National Constitution” (“interpretative declaration” by Argentina concerning the International Covenant on Civil and Political Rights, *Multilateral Treaties ...* (footnote 37 above), chap. IV.4); (b) the substitution of obligations stemming from other international instruments for provisions of the treaty to which the reservation is attached: “Articles 19, 21 and 22 in conjunction with article 2, paragraph 1, of the Covenant shall be applied within the scope of article 16 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms” (reservation No. 1 by the German Democratic Republic to the same Covenant, *ibid.*); or (c) a different formulation, devised for the occasion by the reserving State, regardless of any pre-existing rule: “Article 14 (3) (d) of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing” (reservation No. 2 by the German Democratic Republic, *ibid.*).

⁶³ It may actually be difficult to tell the difference between the two, since everything depends on whether the State or the international organization intends, by its statement, to grant itself more rights than it has under general international law, and that depends on the interpretation both of the statement itself and of the customary rule to which the declarant is referring. Thus, in the example of the Polish statement given above in paragraph (9) of this commentary, it must be regarded as a reservation if it is considered that there is a customary rule by virtue of which all State vessels, *lato sensu*, benefit from immunity. See also guideline 1.5 above and in particular paragraphs (11)–(12) of the commentary thereto.

⁶⁴ See guideline 1.1 above.

⁶⁵ See paragraph (10) of the commentary to guideline 1.1.

purports to discharge an obligation pursuant to the treaty in a manner different from, but considered by the author of the statement to be equivalent to that imposed by the treaty, constitutes a reservation.

Commentary

(1) The rather specific case dealt with in guideline 1.1.2 may be illustrated by the Japanese reservation to the Food Aid Convention, 1971. Under article II of that treaty, the parties agreed to contribute as food aid to developing countries wheat and other grains in specified annual amounts. In the statement it made when signing, Japan reserved

the right to discharge its obligations under article II by providing assistance in the form of rice, not excluding rice produced in non-member developing countries, or, if requested by recipient countries, in the form of agricultural materials.⁶⁶

(2) Such a statement purports to modify the legal effect of some provisions of the treaty in their application to its author⁶⁷ and thus falls within the definition of reservations.

(3) It is quite unlikely that it would take effect without the acceptance of the other parties (at least the recipients of the assistance, in the case of the Japanese reservation), but this is the case of reservations resulting from article 20 of the 1969 and 1986 Vienna Conventions.

(4) The specificity of the reservations referred to in this guideline derives from the expression “in a manner different from, but ... equivalent to”. In accordance with the general principles of public international law, this equivalence can be assessed only by each contracting State or organization insofar as it is concerned. If the obligation assumed is less than that provided for by the treaty, the case is covered by guideline 1.1.2, and the unilateral declaration constitutes a reservation; if it is heavier, it is a statement purporting to undertake unilateral commitments, which is not a reservation.⁶⁸ Where assessments differ, the usual rules relating to peaceful settlement of disputes apply.

(5) The temporal element is, of course, essential in this case: if the “substitution” takes place after the entry into force of the treaty for its author, it will at best be a collateral agreement (if the other contracting States and organizations accept it) and, at worst, a violation of the treaty. However, this is true for all unilateral statements formulated “late”.⁶⁹

1.1.3 *Reservations relating to the territorial application of the treaty*

A unilateral statement by which a State purports to exclude the application of some provisions of a treaty, or of the treaty as a whole with respect to certain specific

⁶⁶ United Nations, *Treaty Series*, vol. 800, p. 197.

⁶⁷ On the understanding that, in the above-mentioned example, things are slightly less clear, since article II does not strictly limit the grains to be supplied to wheat, although for the sake of argument it may be assumed that it does.

⁶⁸ See paragraphs (9)–(10) of the commentary to guideline 1.5.

⁶⁹ See also section 2.3 (Late formulation of reservations).

aspects, to a territory to which they would be applicable in the absence of such a statement constitutes a reservation.

Commentary

(1) As its title indicates, this guideline concerns unilateral statements by which a State⁷⁰ purports to exclude the application of certain provisions of a treaty *ratione loci*: the State consents to the application of the treaty as a whole *ratione materiae* except in respect of one or more territories to which the excluded provisions of the treaty would otherwise apply under article 29 of the Vienna Conventions.⁷¹

(2) In State practice it is quite common, for various reasons, to exclude or modify the application of certain provisions of a treaty in respect of a part of the territory of the State to which, in the absence of such a declaration, the provisions in question would otherwise apply.⁷² The reservation formulated by the Netherlands to the International Covenant on Economic, Social and Cultural Rights is of particular interest in this regard:

The Kingdom of the Netherlands does not accept this provision in the case of the Netherlands Antilles with regard to the latter's central and local government bodies. [The Kingdom of the Netherlands] clarify that although it is not certain whether the reservation ... is necessary, [it] has preferred the form of a reservation to that of a declaration. In this way the Kingdom of the Netherlands wishes to ensure that the relevant obligation under the Covenant does not apply to the Kingdom as far as the Netherlands Antilles is concerned.⁷³

(3) Such unilateral statements constitute reservations within the meaning of the Vienna definition: when formulated on one of the occasions specified, they purport to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the author of the statement. In the absence of such a statement, the treaty would apply to the State's entire territory, pursuant to the provisions of article 29 of the 1969 and 1986 Vienna Conventions. Such statements are genuine reservations because they purport the partial exclusion or modification

⁷⁰ For obvious reasons, this situation generally does not apply to international organizations, although cases could arise in which an organization with territorial competence might formulate a reservation of this type.

⁷¹ Article 29 of the 1986 Vienna Convention stipulates: "Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory."

⁷² See, for example, the reservations of the United Kingdom formulated on signing the International Covenant on Economic, Social and Cultural Rights: "The Government of the United Kingdom declare that, in relation to article 8 of the Covenant, they must reserve the right not to apply sub-paragraph (b) of paragraph 1 in Hong Kong in so far as it may involve the right of trade unions not engaged in the same trade or industry to establish federations or confederations" (*Multilateral Treaties ...* (footnote 37 above), chap. IV.3). See also the reservations formulated upon ratification by which the United Kingdom "reserve[s] the right to postpone the application" of various provisions of the Covenant to various territories (*ibid.*) or those formulated by the Netherlands (concerning the non-application of article 20, paragraph 1, to the Netherlands Antilles) and by the United Kingdom with regard to the International Covenant on Civil and Political Rights (*ibid.*, chap. IV.4).

⁷³ *Ibid.*, chap. IV.3.

of the treaty's application, which constitutes the very essence of a reservation.

(4) It seems self-evident that a territorial reservation must be made, at the latest, by the time the State expresses its consent to be bound by the treaty, if it purports to totally exclude the application of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects to a given territory, and on this point there is no ground on which to differentiate the definition of territorial reservations from the general definition of reservations.

(5) While at first glance it might seem that a declaration by which a State purports to exclude the application of the treaty *as a whole* to all⁷⁴ or part of its territory could also be considered as purporting to exclude or modify the application of the legal effect of the treaty, such declarations are not necessarily⁷⁵ reservations within the meaning of guideline 1.1 but rather the expression of a "different intention" in the sense of article 29 of the Vienna Conventions. The State is not excluding the legal effect of the treaty in respect of a particular territory but is identifying "its territory", in the sense of article 29 of the Vienna Conventions, where the treaty is applied. The legal effect of the provisions of the treaty remain intact within its territorial scope.

(6) Although, in 1964, Sir Humphrey Waldock did not rule out the possibility that the intention of a State not to apply a treaty to part of its territory could be "contained in a reservation",⁷⁶ draft article 25 (which became article 29) as adopted by the Commission in 1966 refrained from qualifying such declarations of territorial application. In the commentary, the Commission explained:

⁷⁴ For an example of total exclusion in respect of the entire territory of a State, see the reservation of the United States of America to the Agreement on the international carriage of perishable foodstuffs and on the special equipment to be used for such carriage (ATP) of 1 September 1970 (and the objections elicited by this reservation) (*Multilateral Treaties ...* (footnote 37 above), chap. XI.B.22).

⁷⁵ For example, in the case of the Convention on the privileges and immunities of the United Nations, adopted on 13 February 1946, and the Convention on the privileges and immunities of the specialized agencies, adopted on 21 November 1947, the position of principle of the Secretary-General in the exercise of his functions as depositary consists of considering any declaration that seeks to exclude the application of those instruments to certain territories as a "territorial reservation" and drawing them as such to the attention of the contracting States and, where appropriate, the specialized agency. This way of looking at things is justified by the fact that "in view of their nature the Conventions should be regarded as automatically applying to the Territories for the international relations of which the acceding States were responsible" (*Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (United Nations publication, Sales No. E/F.94.V.15, document ST/LEG/7/Rev.1), p. 83, para. 274). The Secretary-General goes on to say: "When one State made a declaration concerning the non-application to certain of its non-metropolitan Territories of the Convention on the Privileges and Immunities of the Specialized Agencies, the Secretary-General advised States parties to the Convention and the specialized agencies that the instrument had been transmitted for deposit accompanied by a territorial reservation. Since the Administrative Committee on Coordination of the specialized agencies and several States parties expressed objections, the Secretary-General did not treat the instrument as having been deposited and he invited the State that had transmitted the instrument to reconsider its reservation" (*ibid.*, para. 275).

⁷⁶ *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1-3, p. 12 (draft article 58).

One Government proposed that a second paragraph should be added to the article providing specifically that a State, which is comprised of distinct autonomous parts, should have the right to declare to which of the constituent parts of the State a treaty is to apply. Under this proposal the declaration was not to be considered a reservation but a limitation of the consent to certain parts only of the State. The Commission was of the opinion that such a provision, however formulated, might raise as many problems as it would solve. It further considered that the words “unless a different intention appears from the treaty or is otherwise established” in the text now proposed give the necessary flexibility to the rule to cover all legitimate requirements in regard to the application of treaties to territory.⁷⁷

(7) The practice of the Secretary-General likewise sheds little light on the subject of the qualification of such a declaration that purports to exclude the application of the treaty as a whole in respect of a particular territory:

When neither the nature of the treaty nor other special circumstances (e.g., the fact that the treaty is the constitutive act of an international organization) mandate the non-acceptance of the instrument containing a declaration as to the limited application or non-application of a treaty to Territories, the Secretary-General has been guided by the general principles of resolution 598 (VI), which he has deemed to apply, *mutatis mutandis*, to “reservations” as to the applicability to Territories. Accordingly, he has accepted instruments containing reservations as to the limited application or non-application to Territories, leaving it to the other parties to draw the legal consequences of such declaration that they may see fit.⁷⁸

(8) It was maintained that it would be difficult to place such territorial declarations under the general legal regime of reservations and, in particular, to formulate objections to them. However, the impossibility of objecting to such a declaration would appear to derive not from its territorial nature but from its status as a reservation “authorized” by the treaty.

(9) On reflection, it would hardly seem possible to consider such declarations purporting to exclude the application of a treaty as a whole to a particular territory as actual reservations.⁷⁹ In fact, it was noted that such an assimilation would deprive a State representing a Non-Self-Governing Territory at the international level from becoming a party to a treaty prohibiting reservations for as long as the Territory was unable, for one reason or another, to undertake the same commitments.

(10) It was for this reason that the Commission decided not to include in guideline 1.1.3 cases of declarations that purport to exclude the application of a treaty as a whole to a particular territory. In principle, these are not reservations in the sense of the Vienna Convention.

1.1.4 Reservations formulated when extending the territorial application of a treaty

A unilateral statement by which a State, when extending the application of a treaty to a territory, purports to exclude or to modify the legal effect of certain provisions of the treaty in relation to that territory constitutes a reservation.

⁷⁷ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 213, paragraph (4) of the commentary.

⁷⁸ *Summary of Practice of the Secretary-General ...* (see footnote 75 above), p. 83, para. 277.

⁷⁹ In this regard, see also S. Karagiannis, “1969 Vienna Convention. Article 29: Territorial scope of treaties”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 737–739, paras. 19–24.

Commentary

(1) Whereas guideline 1.1.3 deals with the scope *ratione loci* of certain reservations, guideline 1.1.4 concerns the time element in the definition: the moment at which “certain reservations concerning the territorial application” of a treaty can be made.

(2) Generally speaking, a State makes a reservation upon signing the treaty or when it expresses its consent to be bound by it. This is in fact the only time at which a reservation can be made if that reservation purports to modify the legal effect of a provision of the treaty or of the treaty as a whole with respect to certain specific aspects.⁸⁰ That may not, however, be the case for reservations that seek to exclude or modify the legal effect of some provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to a territory not previously covered by the treaty.

(3) The territorial application of a treaty may indeed vary across time, either because a State decides to extend the application of a treaty to a territory under its jurisdiction that was not previously covered by the treaty, or because the territory came under its jurisdiction after the entry into force of the treaty, or for any other reason not covered by the provisions concerning reservations to the treaty. In such cases, the State responsible for the territory’s international relations may purely and simply extend the treaty to that territory, but it may also choose to do so only partially; in the latter case, upon notifying the depositary of the extension of the territorial application of the treaty, the State also includes in the notification any new reservations specific to that territory. There is no reason to attempt to prevent it from doing so: such a restriction would make it more difficult to extend the territorial application of the treaty and is quite unnecessary provided that the unilateral statement is made in accordance with the legal regime of reservations and is therefore permissible only if it meets the conditions for validity of reservations⁸¹ and, in particular, is compatible with the object and purpose of the treaty.

(4) By way of examples of reservations made on such occasion, one could mention the reservations made by the United Kingdom on 19 March 1962 upon extending application of the Convention relating to the Status of Stateless Persons of 28 September 1954 to Fiji, the West Indies and Singapore⁸² or the reservations made by the Netherlands in extending the Convention relating to the Status of Refugees of 28 July 1951 to Suriname on 29 July 1971.⁸³

(5) There are recent examples of reservations made upon notification of territorial application: on 27 April 1993, Portugal notified the Secretary-General of the United Nations of its intention to extend to Macau the application of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights of 1966; that notification included

⁸⁰ See paragraphs (9)–(14) of the commentary to guideline 1.1.

⁸¹ See Part 3 of the Guide to Practice.

⁸² *Multilateral Treaties ...* (see footnote 37 above), chap. V.3.

⁸³ *Ibid.*, chap. V.2.

reservations concerning the territory.⁸⁴ On 14 October 1996, the United Kingdom notified the Secretary-General of its decision to apply the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 to Hong Kong, with a certain number of reservations.⁸⁵ Those reservations caused no reaction or objection on the part of other contracting States.

(6) It would therefore seem wise to make clear, as has in fact been suggested in the writings of legal scholars,⁸⁶ that a unilateral statement made by a State in the context of notification of territorial application constitutes a reservation if it meets the relevant conditions set out by the Vienna definition thus supplemented. This precision does not of course in any way prejudice issues related to the validity of such reservations.⁸⁷

1.1.5 Reservations formulated jointly

The joint formulation of a reservation by several States or international organizations does not affect the unilateral character of that reservation.

Commentary

(1) One of the fundamental characteristics of reservations is that they are unilateral statements.⁸⁸ This element of the Vienna definition is not subject to exceptions even if, from a formal standpoint, nothing prevents a number of States or international organizations from formulating a reservation jointly, that is to say in a single instrument addressed to the depositary of a multilateral treaty in the name of a number of parties.

(2) The practice of concerted reservations is well established: it is accepted practice for States sharing common or similar traditions, interests or ideologies to act in concert with a view to formulating identical or similar reservations to a treaty. That was often done by the Eastern European States which pledged allegiance to socialism,⁸⁹ the Nordic countries⁹⁰ and the States members of the Council of Europe or the European Communities (subsequently the European

Union).⁹¹ However, each of these reservations was still formulated individually by each of the States or international organizations concerned, and this thus poses no problem in relation to the Vienna definition.

(3) Nevertheless, during the discussion of the draft which was to become article 2, paragraph 1 (d), of the 1969 Vienna Convention, one member of the Commission pointed out that a reservation could be not only concerted, but also joint in the sense that it is formulated by one or more States or international organizations in a single instrument.⁹² At the time, this remark elicited no response, and, in practice, it does not appear that States have to date had recourse to joint reservations.⁹³ The possibility of joint reservations cannot, however, be excluded. It is all the more probable in that, though there are no joint reservations, there are nowadays fairly frequent cases of:

(a) joint formulation of objections to reservations entered by other parties;⁹⁴

(b) joint formulation of interpretative declarations (which, moreover, are not always easy to distinguish from reservations *stricto sensu*).⁹⁵

(4) That the problem may arise in the future cannot then be ruled out, and the Commission felt that it would be wise to anticipate that possibility in the Guide to Practice.

(5) The Commission felt that there could be nothing against the joint formulation of a reservation by a number of States or international organizations: it is hard to see what could prevent them from doing together what they can without any doubt do separately and in the same terms. This flexibility is all the more necessary in that, with the proliferation of common markets and of customs and economic unions, the precedents constituted by the joint objections and interpretative declarations referred to

⁸⁴ *Ibid.*, chap. IV.3 and 4.

⁸⁵ *Ibid.*, chap. IV.8.

⁸⁶ See Szafarz, "Reservations to multilateral treaties" (footnote 27 above), p. 295.

⁸⁷ See also guideline 1.8.

⁸⁸ Although in the past some authors have had a "contractual" conception of reservations (see C. Rousseau, *Principes généraux du droit international public*, Paris, Pedone, 1944, vol. 1, pp. 290–291; see also the definition proposed by Mr. Briery in 1950, *Yearbook ... 1950*, vol. II, document A/CN.4/23, pp. 238–239, para. 84). The adoption of the 1969 Vienna Convention silenced the controversies over this point. See also Villiger, *Commentary on the 1969 Vienna Convention ...* (footnote 49 above), p. 88, para. 34.

⁸⁹ See, for example, the reservations by the Byelorussian Soviet Socialist Republic, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Romania and the Union of Soviet Socialist Republics to section 30 of the Convention on the privileges and immunities of the United Nations of 13 February 1946; some of these reservations have been withdrawn since 1989 (*Multilateral Treaties ...* (footnote 37 above), chap. III.1).

⁹⁰ See, for example, the reservations of Finland and Sweden to articles 35 and 58 of the Vienna Convention on Consular Relations of 24 April 1963 (*ibid.*, chap. III.6) and those of Denmark, Finland, Iceland and Sweden to article 10 of the International Covenant on Civil and Political Rights of 16 December 1966 (*ibid.*, chap. IV.4).

⁹¹ See, for example, the reservations by Austria (No. 5), Belgium (No. 1), France (No. 6) and the Federal Republic of Germany (No. 1) to the same 1966 Covenant (*ibid.*) and the "declarations" by all the States members of the European Community made *in that capacity* to the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (*ibid.*, chap. XXVI.3).

⁹² Statement by Mr. Paredes at the 651st meeting of the Commission, 25 May 1962 (*Yearbook ... 1962*, vol. I, p. 146, para. 87).

⁹³ The reservations formulated by an international organization are attributable to the organization and not to its member States; thus they cannot be termed "joint reservations".

⁹⁴ Thus, the European Community and its (then) nine member States objected, by means of a single instrument, to the "declarations" made by Bulgaria and the German Democratic Republic with respect to article 52, paragraph 3, of the Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) of 14 November 1975, which contemplated the possibility of customs or economic unions becoming contracting parties (see *Multilateral Treaties ...* (footnote 37 above), chap. XI.A.16). See also guideline 2.6.4 (Objections formulated jointly).

⁹⁵ See the declarations made by the "European Community and its member States", or by the latter alone, with respect, for example, to the United Nations Framework Convention on Climate Change of 9 May 1992 (*ibid.*, chap. XXVII.7), the Convention on Biological Diversity of 5 June 1992 (*ibid.*, chap. XXVII.8) and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995 (*ibid.*, chap. XXI.7). See also guideline 1.2.1 (Interpretative declarations formulated jointly).

above will in all probability recur with respect to reservations, given that such institutions often share competence with their member States, and it would be highly artificial to require the latter to act separately from the institution to which they belong. Moreover, in theoretical terms, such a practice would certainly not be contrary to the practice of the Vienna definition: a single act on the part of a number of States can be regarded as unilateral if its addressee or addressees are not parties to it.⁹⁶

(6) In practical terms, such joint reservations will also possess the great advantage of simplifying the task of the depositary—which would be able to address the text of the jointly formulated reservation to the other parties without having to increase the number of notifications—and of those other parties, which could if they wished react to it by means of a single instrument.

(7) The Commission considered the advisability of going further and envisaging the possibility of collective reservations, by which a group of States or international organizations would undertake not only to formulate the reservation jointly, but also to withdraw or modify it exclusively as a group. This would also imply that the other parties would have to accept it or object to it uniformly. However, this course seemed to present more drawbacks than advantages:

– in practical terms, it would constitute an obstacle to the withdrawal of reservations, which is often considered a “necessary evil”,⁹⁷ by making the withdrawal of a joint reservation contingent upon the agreement of all the States or international organizations which formulated it;

– in theoretical terms, it would imply that a group of parties could impose upon the others the rules on reservations agreed upon by them, which is hardly compatible with the principle of the relative effect of treaties; in other words, it was possible that a number of States or international organizations might agree to consider that the reservation formulated collectively by them could only be withdrawn or modified collectively, but such an agreement would be *res inter alios acta* with regard to the other contracting States or organizations to the treaty to which the reservation related.

(8) These are the reasons for which the Commission, while envisaging the possibility of jointly formulated reservations, decided to specify that such reservations were nonetheless subject to the general regime of reservations, governed largely by their “unilateral” nature, which cannot be affected by such joint formulation.

(9) Moreover, it should be specified that the coordinating conjunction “or” used in guideline 1.1.5⁹⁸ in no way excludes the possibility of reservations formulated jointly by one or more States *and* by one or more international organizations, and should be understood to mean “and/

⁹⁶ This is a case of what may be termed “multi-partite unilateral acts”; on this point, see the first report on unilateral acts of States by Mr. Rodríguez Cedeño, Special Rapporteur (*Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486, paras. 79 and 133).

⁹⁷ See the statement made by Mr. Ago at the 797th meeting of the Commission, 8 June 1965 (*Yearbook ... 1965*, vol. I, p. 151, para. 38).

⁹⁸ “by several States *or** international organizations”.

or”. Nevertheless, the Commission considered that this formulation would make the text too cumbersome.

1.1.6 Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty with regard to the party that has made the statement, constitutes a reservation expressly authorized by the treaty.

Commentary

(1) According to a widely accepted definition, an exclusionary or opting-out (or contracting-out) clause is a treaty provision by which a State will be bound by rules contained in the treaty unless it expresses its intent not to be bound, within a certain period of time, by some of those provisions.⁹⁹

(2) Such exclusionary clauses (opting- or contracting-out clauses) are quite common. Examples can be found in the conventions adopted under the auspices of the Hague Conference on Private International Law,¹⁰⁰ the Council of Europe,¹⁰¹ the International Labour Organization (ILO)¹⁰² and in various other conventions. Among the latter, one may cite by way of example article 14, paragraph 1, of the

⁹⁹ See B. Simma, “From bilateralism to community interest in international law”, *Collected Courses of the Hague Academy of International Law, 1994-VI*, vol. 250, p. 329; see also C. Tomuschat, “Obligations arising for States without or against their will”, *Collected Courses of the Hague Academy of International Law, 1993-IV*, vol. 241, p. 264.

¹⁰⁰ See article 8, paragraph 1, of the Convention relating to the settlement of conflicts between the law of nationality and the law of domicile of 15 June 1955: “Each contracting State, on signing or ratifying the present Convention or on adhering hereto, may declare that it excludes from the application of the present Convention conflicts of laws relating to certain matters”; see also article 9 of the Convention concerning the recognition of the legal personality of foreign companies, associations and foundations of 1 June 1956.

¹⁰¹ See article 34, paragraph 1, of the European Convention for the peaceful settlement of disputes of 29 April 1957: “On depositing its instrument of ratification, any one of the High Contracting Parties may declare that it will not be bound by: (a) Chapter III relating to arbitration; or (b) Chapters II and III relating to conciliation and arbitration”; see also article 7, paragraph 1, of the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality of 6 May 1963: “Each Contracting Party shall apply the provisions of Chapters I and II. It is however understood that each Contracting Party may declare, at the time of ratification, acceptance or accession, that it will apply the provisions of Chapter II only. In this case the provisions of Chapter I shall not be applicable in relation to that Party”; and article 25, paragraph 1, of the European Convention on Nationality of 6 November 1997: “Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, that it will exclude Chapter VII from the application of this Convention”, etc. For other examples, see S. S. Åkermark, “Reservation clauses in treaties concluded within the Council of Europe”, *International and Comparative Law Quarterly*, vol. 48 (1999), pp. 504–505.

¹⁰² See article 2, paragraph 1, of the ILO Convention concerning Statistics of Wages and Hours of Work, 1938 (No. 63): “1. Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude from its acceptance of the Convention: (a) any one of Parts II, III or IV; or (b) Parts II and IV; or (c) Parts III and IV.”

International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention):

A State may, at the time of signing, ratifying, accepting, approving or acceding to the present Convention, declare that it does not accept any one or all of Annexes III, IV and V (hereinafter referred to as "Optional Annexes") of the present Convention. Subject to the above, Parties to the Convention shall be bound by any Annex in its entirety.¹⁰³

(3) The question of whether or not statements made in application of such exclusionary clauses are reservations is controversial. The strongest argument that they are not reservations derives no doubt from the consistently strong opposition of the ILO to such an assimilation, even though that organization regularly resorts to the opting-out procedure.¹⁰⁴ In its reply to the Commission's questionnaire, the ILO wrote:

It has been the consistent and long-established practice of the ILO not to accept for registration instruments of ratification of international labour Conventions when accompanied with reservations. As has been written, "this basic proposition of refusing to recognize any reservations is as old as ILO itself" (see W. P. Gormley, "The Modification of Multilateral Conventions by Means of Negotiated Reservations and Other Alternatives: A Comparative Study of the ILO and Council of Europe", *Fordham Law Review*, 1970, p. 65). The practice is not based on any explicit legal provision of the Constitution, the Conference Standing Orders, or the international labour Conventions, but finds its logical foundation in the specificity of labour Conventions and the tripartite structure of the Organization. Reference is usually made to two Memoranda as being the primary sources for such firm principle: first, the 1927 Memorandum submitted by the ILO Director to the Council of the League of Nations on the Admissibility of Reservations to General Conventions, and second, the 1951 Written Statement of the International Labour Organization in the context of the ICJ proceedings concerning the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

In his Memorandum to the Committee of Experts for the Codification of International Law, the ILO Director General wrote with respect to labour Conventions:

"these agreements are not drawn up by the Contracting States in accordance with their own ideas: they are not the work of plenipotentiaries, but of a conference which has a peculiar legal character and includes non-Government representatives. Reservations would still be inadmissible, even if all the States interested accepted them; for the rights which the treaties have conferred on non-Governmental interests in regard to the adoption of international labour Conventions would be overruled if the consent of the Governments alone could suffice to modify the substance and detract from the effect of the Conventions" (see League of Nations, *Official Journal*, 1927, at p. [882]).

In the same vein, the ILO Memorandum, submitted to the ICJ in 1951, read in part:

"international labour conventions are adopted and enter into force by a procedure which differs in important respects from the procedure applicable to other international instruments. The special features of this procedure have always been regarded as making international labour conventions intrinsically incapable of being ratified subject to any reservation ... It has been the consistent view of the International Labour Organization, since its establishment, that reservations are not admissible. This view is based upon and supported by the consistent practice of the International Labour Organization and by the practice of the League of Nations during

the period from 1920–1946 when the League was responsible for the registration of ratifications of international labour conventions" (see *I.C.J. Pleadings, 1951*, at pp. 217, 227–228).

Wilfred Jenks, Legal Adviser of the ILO, addressing in 1968 the United Nations Vienna Conference on the Law of Treaties, stated the following:

"reservations to international labour Conventions are incompatible with the object and purpose of these Conventions. The procedural arrangements concerning reservations are entirely inapplicable to the ILO by reason of its tripartite character as an organization in which, in the language of our Constitution, 'representatives of employers and workers' enjoy 'equal status with those of governments'. Great flexibility is of course necessary in the application of certain international labour Conventions to widely varying circumstances, but the provisions regarded by the collective judgement of the International Labour Conference as wise and necessary for this purpose are embodied in the terms of the Conventions and, if they prove inadequate for the purpose, are subject to revision by the Conference at any time in accordance with its regular procedures. Any other approach would destroy the international labour code as a code of common standards."

In brief, with relation to international labour Conventions, a member State of the ILO must choose between ratifying without reservations and not ratifying. Consistent with this practice, the Office has on several occasions declined proffered ratifications which would have been subject to reservations (for instance, in the 1920s, the Governments of Poland, India and Cuba were advised that contemplated ratifications subject to reservations were not permissible; see *Official Bulletin*, vol. II, p. 18, and vol. IV, pp. 290–297). Similarly, the Organization refused recognition of reservations proposed by Peru in 1936. In more recent years, the Office refused to register the ratification of Convention No. 151 by Belize as containing two true reservations (1989). In each instance, the reservation was either withdrawn or the State was unable to ratify the Convention.

It is interesting to note that, in the early years of the Organization, the view was taken that ratification of a labour Convention might well be made subject to the specific condition that it would only become operative if and when certain other States would have also ratified the same Convention (see International Labour Conference, 3rd session, 1921, at p. 220). In the words of the ILO Director General in his 1927 Memorandum to the Council of the League of Nations,

"these ratifications do not really contain any reservation, but merely a condition which suspends their effect; when they do come into force, their effect is quite normal and unrestricted. Such conditional ratifications are valid, and must not be confused with ratifications subject to reservation which modify the actual substance of conventions adopted by the International Labour Conference" (for examples of ratifications subject to suspensive conditions, see Written Statement of the ILO in *Genocide Case, I.C.J. Pleadings, 1951*, pp. 264–265).

There is no record of recent examples of such a practice. In principle, all instruments of ratification take effect 12 months after they have been registered by the Director General.

Notwithstanding the prohibition of formulating reservations, ILO member States are entitled, and, at times, even required, to attach declarations—optional and compulsory accordingly. A compulsory declaration may define the scope of the obligations accepted or give other essential specifications. In some other cases a declaration is needed only where the ratifying State wishes to make use of permitted exclusions, exceptions or modifications. In sum, compulsory and optional declarations relate to limitations *authorized* by the Convention itself, and thus do not amount to reservations in the legal sense. As the Written Statement of the ILO in the *Genocide Case* read, "they are therefore a part of the terms of the convention as approved by the Conference when adopting the convention and both from a legal and from a practical point of view are in no way comparable to reservations" (see *I.C.J. Pleadings, 1951*, at p. 234). Yet for some, these flexibility devices have "for all practical purposes the same operational effect as reservations" (see Gormley, *op. cit., supra*, at p. 75).¹⁰⁵

¹⁰³ The above provisions are cited by way of example and in no way exhaust the list of exclusionary clauses of conventions adopted in these forums. For other examples, see, in general, Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 171–172.

¹⁰⁴ See also G. Raimondi, "Réserves et conventions internationales du travail", in J. Javillier and B. Gernigon (eds.), *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*, Geneva, International Labour Office, 2004, pp. 527–539.

¹⁰⁵ Reply to the questionnaire, pp. 3–5 (reproduced in *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4, pp. 172–173). See footnote 39 above with regard to the text of the questionnaire.

(4) While this reasoning reflects a respectable tradition, it is somewhat less than convincing:

– first, while international labour conventions are obviously adopted under very specific circumstances, they are nevertheless treaties between States, and the participation of non-governmental representatives in their adoption does not modify their legal nature;

– secondly, the possibility that the International Labour Conference might revise a convention that proved to be inadequate proves nothing about the legal nature of unilateral statements made in application of an exclusionary clause: the revised convention could not be imposed against their will on States that had made such statements when becoming parties to the original convention, and it matters little in such cases whether or not those statements were reservations;

– lastly, and most importantly, the position traditionally taken by the ILO reflects a restrictive view of the concept of reservations which is not reflected in the Vienna Conventions nor in the present Guide to Practice.

(5) In fact, the Vienna Conventions do not exclude that reservations may be made, not by virtue of an authorization implicit in the general international law of treaties, as codified in articles 19–23 of the 1969 and 1986 Vienna Conventions, but on the basis of specific treaty provisions. This is clear from article 19 (b) of the Conventions, which concerns treaties that provide “that only *specified** reservations ... may be made”, or article 20, paragraph 1, which stipulates that “a reservation *expressly authorized** by a treaty does not require any subsequent acceptance ...”.

(6) The fact that a unilateral statement purporting to exclude or modify the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects in their application to its author¹⁰⁶ is specifically provided for by a treaty is not sufficient to characterize such a statement as either being or not being a reservation. This is precisely the object of “reservation clauses” that can be defined as “treaty provisions [... setting] limits within which States should^[107] formulate reservations and even the content of such reservations”.¹⁰⁸

(7) In fact, exclusionary clauses are clearly related to reservation clauses, and the resulting unilateral statements are related to the “specified” reservations “expressly authorized” by a treaty, including international labour conventions.¹⁰⁹ They are indeed unilateral

statements made at the time consent to be bound¹¹⁰ is expressed and purporting to exclude the legal effect of certain provisions of the treaty as they apply to the State or the international organization making the statement, all of which corresponds exactly to the definition of reservations, and, at first glance at least, it would seem that they are not and need not be subject to a separate legal regime.

(8) Except for the absence of the word “reservation”, there appears to be little difference between the aforementioned exclusionary clauses¹¹¹ and what are indisputably reservation clauses, such as article 16 of the Convention on Celebration and Recognition of the Validity of Marriages (The Hague, 14 March 1978),¹¹² article 33 of the Convention on the taking of evidence abroad in civil or commercial matters, concluded on 18 March 1970 in the context of the Hague Conference on Private International Law,¹¹³ and article 35, entitled “Reservations”, of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment,¹¹⁴ of 21 June 1993. It is thus apparent that, in both their form and their effects,¹¹⁵ statements made by virtue of exclusionary clauses when expressing consent to be bound are in all respects comparable to reservations when provision is made for the latter, with restrictions, by reservation clauses.¹¹⁶

(9) The fact that a State party cannot formulate an objection to a statement made under such an exclusionary clause does not rule out the classification of such a statement as a reservation. However, this is no doubt true of every reservation formulated under a reservation clause: once a reservation is expressly authorized by a treaty, the contracting States and organizations know what to expect; they have accepted in advance the reservation or reservations concerned in the treaty itself. This is not in fact a problem of definition, but one of legal regime.¹¹⁷

(10) In reality, exclusionary clauses take the form of “negotiated reservations”, as the term is currently (and erroneously) accepted in the context of the Hague Conference on Private International Law and further

¹¹⁰ With regard to statements made in application of an exclusionary clause but subsequent to its author’s expression of consent to be bound, see paragraph (17) of the commentary below.

¹¹¹ See paragraph (2) of the commentary above.

¹¹² “A Contracting State may reserve the right to exclude the application of Chapter I” (article 28 provides for the possibility of “reservations”).

¹¹³ “A State may, at the time of signature, ratification or accession, exclude, in whole or in part, the application of the provisions of paragraph 2 of article 4 and of chapter II. No other reservation shall be permitted.”

¹¹⁴ “Any signatory may declare, at the time of signature or when depositing its instrument of ratification, acceptance or approval, that it reserves the right: ... (c) not to apply article 18.”

¹¹⁵ See W. P. Gormley, “The modification of multilateral conventions by means of ‘negotiated reservations’ and other ‘alternatives’: a comparative study of the ILO and Council of Europe”, Part I, *Fordham Law Review*, vol. 39 (1970–1971), pp. 75–76.

¹¹⁶ See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 169, and Åkermark, “Reservation clauses in treaties ...” (footnote 101 above), pp. 505–506.

¹¹⁷ See also guideline 4.1.1 (Establishment of a reservation expressly authorized by a treaty).

¹⁰⁶ See guideline 1.1.

¹⁰⁷ It would be more accurate to use the word “may”.

¹⁰⁸ Imbert, *Les réserves aux traités multilatéraux* (see footnote 25 above), p. 12.

¹⁰⁹ At the same time, there is little doubt that a practice accepted as law has developed in the ILO. Under this practice, any unilateral statement seeking to limit the application of the provisions of international labour conventions that is not explicitly stipulated is inadmissible. This is also clearly the case with regard to the conventions adopted by The Hague Conference on Private International Law (see G. A. L. Droz, “Les réserves et les facultés dans les Conventions de La Haye de droit international privé”, *Revue critique de droit international privé*, vol. 58, No. 3 (1969), pp. 388–392). However, this is an altogether different question from that of defining reservations.

developed in the context of the Council of Europe.¹¹⁸ “Strictly speaking, this means that it is the *reservation*—and not only the right to make one—that is the subject of the negotiations.”¹¹⁹ These, then, are not “reservations” at all in the proper sense of the term, but *reservation clauses* that impose limits and are precisely defined when the treaty is negotiated.

(11) It is true that, in some conventions (at least those of the Council of Europe), exclusionary *and* reservation clauses are present at the same time.¹²⁰ This is probably more a reflection of terminological vagueness than a deliberate distinction.¹²¹ Moreover, it is striking that, in its reply to the Commission’s questionnaire, the ILO should mention among the problems encountered in the areas of reservations those relating to article 34 of the European Convention for the peaceful settlement of disputes, since the word “reservation” does not even appear in this standard exclusionary clause.¹²²

(12) The case covered in guideline 1.1.6 is the same as that dealt with in article 17, paragraph 1, of the 1969 and 1986 Vienna Conventions:

Without prejudice to articles 19 to 23, the consent of a State [or of an international organization] to be bound by part of a treaty is effective only if the treaty so permits ...

(13) This provision, which was adopted without change by the 1968–1969 United Nations Conference on the Law of Treaties,¹²³ is contained in Part II, section 1, of the Convention (Conclusion of treaties) and creates a link with articles 19 to 23 dealing specifically with reservations. It is explained by the Commission as follows in its final report of 1966 on the draft articles on the law of treaties:

Some treaties expressly authorize States to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, acceptance, approval or accession is admissible. But in the absence of such a provision, the established rule is that the

¹¹⁸ See Droz, “Les réserves ...” (footnote 109 above), pp. 385–388; H. Golsong, “Le développement du droit international régional”, in *Société française pour le droit international*, X Colloquium, Bordeaux I, *Régionalisme et universalisme dans le droit international contemporain*, 1976, Paris, Pedone, 1977, p. 228; and Åkermark, “Reservation clauses in treaties ...” (footnote 101 above), pp. 489–490.

¹¹⁹ Imbert, *Les réserves aux traités multilatéraux* (see footnote 25 above), p. 196. The term is used in the Council of Europe in a broader sense, seeking to cover the “*procedure*” intended to enumerate either in the body of the Convention itself or, in an annex, the limits of the options available to States in formulating a reservation” (Golsong, “Le développement du droit international régional” (see previous footnote), p. 228; see also Åkermark, “Reservation clauses in treaties ...” (footnote 101 above), p. 498; see also pp. 489–490).

¹²⁰ See articles 7 (footnote 101 above) and 8 of the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality, and the examples given by Åkermark, “Reservation clauses in treaties ...” (footnote 101 above), p. 506, footnote 121.

¹²¹ Likewise, the fact that certain multilateral conventions prohibit any reservations while allowing some statements that may be equated with exclusionary clauses (see article 124 of the Rome Statute of the International Criminal Court of 17 July 1998) is not in itself decisive; it, too, is doubtless more the result of terminological vagueness than of an intentional choice aimed at achieving specific legal effects.

¹²² See footnote 101 above.

¹²³ See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), Report of the Committee of the Whole on its work at the first session of the Conference, pp. 129–130, paras. 156–157.

ratification, accession etc. must relate to the treaty as a whole. Although it may be admissible to formulate reservations to selected provisions of the treaty under the rule stated in article 16 [19 in the text of the Convention], it is inadmissible to subscribe only to selected parts of the treaty. Accordingly, paragraph 1 of the article lays down that, without prejudice to the provisions of articles 16 to 20 [19 to 23] regarding reservations to multilateral treaties, an expression of consent by a State to be bound by part of a treaty is effective only if the treaty or the other contracting States authorize such a partial consent.¹²⁴

(14) The expression “without prejudice to articles 19 to 23” in article 17 of the 1969 and 1986 Vienna Conventions implies that, in some cases, options amount to reservations.¹²⁵ Conversely, it would appear that this provision is drafted so as not to imply that all clauses that offer parties a choice between various provisions of a treaty *are* reservation clauses.

(15) This is certainly true of statements made under an optional clause, as indicated in guideline 1.5.3. However, one might ask whether it is not also true of certain statements made under certain exclusionary clauses, which, while having the same or similar effects as reservations, are not reservations in the strict sense of the term, as defined in the Vienna Conventions and the Guide to Practice.

(16) It so happens that some treaties allow the parties to exclude, by means of a unilateral statement, the legal effect of certain of the treaty’s provisions in their application to the author of the statement, not (or not only) at the time of expression of consent to be bound, but after the treaty enters into force for them. For example:

– article 82 of the ILO Social Security (Minimum Standards) Convention, 1952 (No. 102) authorizes a member State that has ratified the Convention to denounce, 10 years after the entry into force of the Convention, either the entire Convention or one or more of Parts II–X;

– article 22 of the Convention on the recognition of divorces and legal separations of 1 June 1970 authorizes contracting States, “*from time to time*”, [to] declare that certain categories of persons having their nationality need not be considered their nationals for the purposes of this Convention”;¹²⁶

– article 30 of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons of 1 August 1989 stipulates as follows:

A State Party to this Convention may denounce it, *or only Chapter III of the Convention**, by a notification in writing addressed to the depositary[;]

– article X of the ASEAN Framework Agreement on Services of 15 December 1995 authorizes a member State to modify or withdraw any commitment in its schedule of specific commitments, subject to certain conditions, at any time after three years from the date on which that commitment entered into force.

¹²⁴ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 201–202.

¹²⁵ See Åkermark, “Reservation clauses in treaties ...” (footnote 101 above), p. 506.

¹²⁶ Concerning the circumstances under which this provision was adopted, see Droz, “Les réserves ...” (footnote 109 above), pp. 414–415. This, typically, is a “negotiated reservation” in the sense referred to in paragraph (10) of the commentary.

(17) Unilateral statements made under provisions of this type are certainly not reservations.¹²⁷ In this respect, the fact that they are formulated (or may be formulated) at a time other than the time of consent to be bound is perhaps not in itself absolutely decisive insofar as nothing prevents negotiators from departing from the provisions of the Vienna Conventions, which are merely residual in nature. Nevertheless, statements made under these exclusionary clauses after the entry into force of the treaty are very different from reservations in that they do not place conditions on the accession of the State or the international organization which makes them. Reservations are an element of the conclusion and entry into force of a treaty, as is demonstrated by the inclusion of articles 19 to 23 of the Vienna Conventions in Part II of those instruments, entitled “Conclusion and entry into force of treaties”. They are partial acceptances of the provisions of the treaty to which they relate, and that is why it seems logical to consider statements made at the time of expressing consent to be bound as being reservations. On the other hand, statements made after the treaty has been in force for a certain period of time in respect of their author are partial denunciations which, in their spirit, are much more closely related to Part V of the Vienna Conventions concerning invalidity, termination and suspension of the operation of treaties. They may also be linked to article 44, paragraph 1, which does not exclude the right of a party to withdraw partially from a treaty if the treaty so provides.

(18) Such statements are expressly excluded from the scope of guideline 1.1.6 by the words “when that State or organization expresses its consent to be bound”.

1.2 Definition of interpretative declarations

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.

Commentary

(1) Notwithstanding the silence of the 1969 and 1986 Vienna Conventions on this phenomenon, States have always felt that they could attach to their expression of consent to be bound by a multilateral treaty declarations whereby they indicate the spirit in which they agree to be bound; such declarations do not, however, seek to modify or exclude the legal effect of certain provisions of the treaty (or of the treaty as a whole with respect to certain specific aspects) and thus do not constitute reservations, but interpretative declarations.¹²⁸

¹²⁷ Significantly, article 22 (previously cited) of the Convention on the recognition of divorces and legal separations of 1970 is omitted from the list of reservation clauses given in article 25.

¹²⁸ The long-standing practice of such declarations had been in existence since multilateral treaties themselves first appeared. Generally speaking, it dates back to the Final Act of the Congress of Vienna in 1815, which brought together “in a general instrument” all treaties concluded in the wake of Napoleon’s defeat. With this initial appearance of the multilateral format came both a reservation and an interpretative declaration. The latter came from Great Britain, which, when the instruments of ratification were exchanged, declared that article VIII of the Treaty of Alliance concluded with Austria, Prussia and Russia, which invited France to join the Alliance, must be “understood as binding

(2) It is often difficult to distinguish between such unilateral declarations and, on the one hand, reservations as defined in guideline 1.1 and, on the other hand, other types of unilateral declarations which are made in respect of a treaty, but which are neither reservations nor interpretative declarations and examples of which are provided in section 1.5 of the present Guide to Practice. This distinction is of great practical importance, however, because it affects the legal regime applicable to each of these declarations.

(3) For a long time, reservations and interpretative declarations were not clearly distinguished in State practice or in writings. In the writings, the dominant view simply grouped them together, and authors who made a distinction generally found themselves embarrassed by it.¹²⁹

(4) A number of elements help to blur the necessary distinction between reservations and interpretative declarations:

- the terminology is not used consistently;
- the practice of States and international organizations is uncertain; and
- the declarants’ objectives are not always unambiguous.

(5) The terminological uncertainty is underscored by the definition of reservations itself, since, according to the 1969, 1978 and 1986 Vienna Conventions, a reservation is “a unilateral statement, *however phrased or named*”.¹³⁰ This “negative precision” eschews any nominalism and focuses instead on the actual content of declarations and on the effect they seek to produce, but—and here is the reverse side of the coin—this decision to give precedence to substance over form runs the risk, at best, of encouraging States not to pay attention to the name they give to their declarations, thereby sowing confusion or unfortunate ambiguity; at worst, it allows them to play with names in order to create uncertainty as to the real nature of their intentions.¹³¹ By giving the name “declarations” to instruments that are unquestionably genuine reservations, they

the Contracting Parties ... to a common effort against the power of Napoleon Bonaparte ..., but is not to be understood as binding His Britannic Majesty to prosecute the War, with a view of imposing upon France any particular Government”, *British and Foreign State Papers, 1814–1815*, vol. II, p. 450. Today, interpretative declarations are very frequent, as shown by the replies of States and, to a lesser extent, of international organizations to the Commission’s questionnaire on reservations (see footnote 39 above).

¹²⁹ See the survey of writings prior to 1969 made by Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 229; see also D. M. McRae, “The legal effect of interpretative declarations”, *BYBIL 1978*, vol. 49, p. 156; R. Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali*, Milan, Giuffrè, 1996, pp. 69–82 (prior to the Second World War) and pp. 117–122 (post-1945); or I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester University Press, 1984, pp. 52–53.

¹³⁰ Article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and article 2, paragraph 1 (j), of the 1978 Vienna Convention.

¹³¹ As Denmark points out in its reply to the Commission’s questionnaire on reservations: “There even seems to be a tendency among States to cast their reservations in terms of interpretative statements either because the treaty does not allow for reservations proper or because it looks ‘nicer’ with an interpretative declaration than a real reservation.” See footnote 39 above with regard to the questionnaires.

hope not to arouse the vigilance of the other States parties while attaining the same objectives; conversely, to give greater weight to declarations that clearly have no legal effect on the provisions of a treaty, they label them “reservations”, even though under the terms of the Vienna definition they are not.

(6) Instruments having the same objective can be called “reservations” by one party and “interpretative declarations” by another.¹³² Sometimes, instruments having the same objective can be called “reservations” by some States, “interpretations” by others and nothing at all by still others.¹³³ In some cases, a State will employ various expressions that make it difficult to tell whether they are being used to formulate reservations or interpretative declarations and whether they have different meanings or scope.¹³⁴ Thus, the same words can, in the view of the very State employing them, cover a range of legal meanings.¹³⁵ It sometimes happens that, faced with an instrument entitled “declaration”, the other contracting States and organizations view it in different ways and treat it either as such or as a “reservation” or that, conversely, objections to a “reservation” refer to it as a “declaration”;¹³⁶ and, at the limit of this terminological confusion, there are even occasions when States make interpretative declarations by means of a specific reference to the provisions of a convention on reservations.¹³⁷

¹³² For example, France and Monaco have used identical terms to spell out the way in which they interpret article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, yet Monaco submitted this interpretation as a reservation, while France formally announced that its intention was merely to place on record its interpretation of that provision (*Multilateral Treaties ...* (see footnote 37 above) chap. IV.2). Poland and the Syrian Arab Republic declared in the same terms that they did not consider themselves bound by the provisions of article 13, paragraph 1, of the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, but the former expressly called this statement a “reservation”, while the latter labelled it a “declaration” (*ibid.*, chap. XVIII.7).

¹³³ See, in this connection, the comments by Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 294, on the subject of declarations made in respect of the 1966 International Covenant on Civil and Political Rights.

¹³⁴ That was the case of France, for example, when it acceded to the 1966 International Covenant on Civil and Political Rights:

“The Government of the Republic considers that”;

“The Government of the Republic enters a reservation concerning”;

“The Government of the Republic declares that”;

“The Government of the Republic interprets”;

with all of these formulas appearing under the heading “Declarations and reservations” (example given by Sapienza, *Dichiarazioni interpretative unilaterali ...* (footnote 129 above), pp. 154–155; complete text in *Multilateral Treaties ...* (footnote 37 above), chap. IV.4).

¹³⁵ In accepting the Convention on the International Maritime Organization, Cambodia twice used the word “declares” to explain the scope of its acceptance. In response to a request for clarification from the United Kingdom, Norway and Greece, Cambodia explained that the first part of its declaration was “a political declaration” but that the second part was a reservation (*ibid.*, chap. XII.1).

¹³⁶ For example, while several of the “Eastern bloc” countries identified their statements of opposition to article 11 of the Vienna Convention on Diplomatic Relations (which deals with size of missions) as “reservations”, the countries that objected to those statements sometimes called them “reservations” (Federal Republic of Germany and the United Republic of Tanzania) and sometimes “declarations” or “statements” (Australia, Belgium, Canada, Denmark, France, the Netherlands, New Zealand, Thailand and the United Kingdom) (*ibid.*, chap. III.3).

¹³⁷ Such was the case of a “declaration” made by Malta with regard to article 10 of the European Convention on Human Rights which

(7) The confusion is made worse by the fact that, while in French one encounters few terms other than “réserves” and “déclarations”,¹³⁸ English terminology is much more varied, since certain English-speaking States, particularly the United States of America, use not only “reservation” and “(interpretative) declaration”, but also “statement”, “understanding”, “proviso”, “interpretation”, “explanation” and so forth. The advantage of this variety of terms, although not based on strict distinctions,¹³⁹ is that it shows that all unilateral declarations formulated in respect of or on the occasion of a treaty are not necessarily either reservations or interpretative declarations; guidelines 1.5 to 1.5.3 describe some of these other types of unilateral declarations, which, in the view of the Commission, are neither reservations nor interpretative declarations as understood in the Guide to Practice.

(8) It goes without saying that the elements listed above are not in themselves likely to facilitate the search for an independent criterion for distinguishing between reservations and interpretative declarations. It should be possible to seek it empirically, however, by starting, as is generally done,¹⁴⁰ with the definition of reservations in order to extract, by means of comparison, the definition of interpretative declarations. At the same time, this also makes it possible to distinguish both interpretative declarations

referred to former article 64 (now article 57) of that instrument (example cited by W. Schabas, commentary on article 64: “Article 64”, in L. E. Pettiti, E. Decaux and P.-H. Imbert (eds.), *La Convention européenne des droits de l’homme—Commentaire article par article*, Paris, Economica, 1995, p. 926).

¹³⁸ This would seem to hold true in general for all the Romance languages: in Spanish, the distinction is made between “reserva” and “declaración (interpretativa)”, in Italian between “riserva” and “dichiarazione (interpretativa)”, in Portuguese between “reserva” and “declaração (interpretativa)” and in Romanian between “rezervă” and “declarație (interpretativ)”. The same holds true for Arabic, German and Greek.

¹³⁹ M. M. Whiteman describes United States practice this way: “The term ‘understanding’ is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than a substantive reservation ... The terms ‘declaration’ and ‘statement’ are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty.” Whiteman, *Digest of International Law* (see footnote 25 above), pp. 137–138; see also the letter dated 27 May 1980 from Mr. A. W. Rovine, Assistant Legal Adviser for Treaties in the United States Department of State, to Mr. R. F. Stowe, Chairman of the Air and Space Law Committee of the International Law Section of the American Bar Association, reproduced in M. Nash Leich (ed.), *Digest of United States Practice in International Law*, Washington, D.C., Office of the Legal Adviser, Department of State, 1980, pp. 397–398. These various names can have a legal impact on some domestic legislation; they seem not to in the area of international law, and it is not certain that the distinctions are categorical, even at the internal level. Thus during the debate in the United States Senate on the Convention on the Organisation for Economic Co-operation and Development, when the Chairman of the Foreign Affairs Committee asked what the difference between a “declaration” and an “understanding” was, the Under-Secretary of State for Economic Affairs replied: “Actually the difference between a declaration and an understanding, I think, is very subtle, and I am not sure that it amounts to anything” (quoted by Whiteman, *Digest of International Law* (see footnote 25 above), p. 192). In Chinese, Russian and the Slavic languages in general, it is possible to draw distinctions between several types of “interpretative” declarations.

¹⁴⁰ See Sapienza, *Dichiarazioni interpretative unilaterali ...* (footnote 129 above), p. 142, or Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 236.

and reservations from other unilateral declarations that fall into neither of these categories.

(9) That was the position of Sir Gerald Fitzmaurice, third Special Rapporteur on the law of treaties, who, in his first report in 1956, defined interpretative declarations negatively in contrast with reservations, stating that the term “reservation”

does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty.¹⁴¹

However, that was a “negative”, “hollow” definition, which clearly showed that reservations and interpretative declarations were distinct legal instruments but did not positively define what was meant by “interpretative declaration”. Furthermore, the formulation ultimately used, which, it may be assumed, probably related to the “conditional interpretative declarations” defined in guideline 1.4, was lacking in precision, to say the least.

(10) This second shortcoming was corrected in part by Sir Humphrey Waldock, fourth Special Rapporteur on the law of treaties, who, in his first report, submitted in 1962, removed some of the ambiguity brought about by the last part of the definition proposed by his predecessor, but once again proposed a purely negative definition:

An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation.¹⁴²

(11) In the view of the Commission, this procedure makes it possible to know what an interpretative declaration is not; it is of little use in defining what it is, a question in which the International Law Commission lost interest during the drafting of the 1969 Vienna Convention.¹⁴³ Yet it is important to determine “positively” whether or not a unilateral declaration made in respect of a treaty constitutes an interpretative declaration because it gives

¹⁴¹ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 110.

¹⁴² *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 31–32.

¹⁴³ However, paragraph (11) of the commentary to draft article 2, paragraph 1 (d), points out that the declaration which is a mere “clarification of the State’s position” does not “amount to a reservation” (*Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 190). Moreover, in its comments on the draft articles on the law of treaties adopted on first reading, Japan attempted to bridge that gap by noting “that not infrequently a difficulty arises in practice of determining whether a statement is in the nature of a reservation or of an interpretative declaration” and by suggesting that “a new provision should be inserted ... in order to overcome this difficulty” (fourth report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 46–47). However, the Government of Japan confined itself to making provision for the addition of a paragraph to draft article 18 (which became article 19): “A reservation, in order to qualify as such under the provisions of the present articles, must be formulated in writing, and expressly stated as [a] reservation” (comments transmitted by a *note verbale* dated 4 February 1964 (A/CN.4/175, p. 78; see also pp. 70–71; see also *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 301 *et seq.*, in particular p. 305)); here again, this was not a “positive” definition of interpretative declarations, and the insertion proposed was more a matter for the legal regime of reservations than their definition. Moreover, this proposal is incompatible with the definition of reservations eventually retained, which consists in eliminating all nominalism (“however phrased or named”).

rise to specific legal consequences which are described in Part 4 of the Guide to Practice.

(12) An empirical observation of practice helps to determine in a reasonably precise manner how interpretative declarations are similar to reservations and how they differ, and to arrive at a positive definition of the former.

(13) There seems to be little point in dwelling on the fact that an interpretative declaration is most certainly a unilateral declaration¹⁴⁴ in the same way as a reservation.¹⁴⁵ It is in fact this shared feature which is at the origin of the entire difficulty of drawing a distinction: they look the same; in form, virtually nothing¹⁴⁶ distinguishes them.

(14) The second point in common between reservations and interpretative declarations has to do with the irrelevance of the phrasing or name chosen by their author.¹⁴⁷ This element, which automatically stems, *a fortiori*, from the very definition of reservations,¹⁴⁸ is confirmed by the practice of States and international organizations, which, when faced with unilateral declarations submitted as interpretative declarations by their authors, do not hesitate to object to them by expressly considering them to be reservations.¹⁴⁹ Similarly, nearly all the writers who have

¹⁴⁴ On the possibility of jointly formulating interpretative declarations, see guideline 1.2.1 and commentary thereto.

¹⁴⁵ See Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 236.

¹⁴⁶ Unlike reservations, interpretative declarations can be formulated orally, although this is not desirable (see guideline 2.4.1 (Form of interpretative declarations)).

¹⁴⁷ See M. Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen*, Berlin, Duncker & Humblot, 2005, pp. 34–37.

¹⁴⁸ See guideline 1.1.

¹⁴⁹ There are countless examples of this phenomenon. To mention only a few that relate to recent conventions, there are:

The objection of the Netherlands to the interpretative declaration of Algeria concerning paragraphs 3 and 4 of article 13 of the International Covenant on Economic, Social and Cultural Rights (*Multilateral Treaties ...* (footnote 37 above), chap. IV.3); the reactions of many States to the declaration by the Philippines in respect of the United Nations Convention on the Law of the Sea of 1982 (*ibid.*, chap. XXI.6); the objection of Mexico, which considered that the third declaration, formally called interpretative, of the United States of America to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 constituted a modification of the Convention contrary to the objective of the latter (*ibid.*, chap. VI.19); or the reaction of Germany to a declaration by which the Government of Tunisia indicated that it would not adopt, in implementation of the Convention on the rights of the child of 20 November 1989, “any legislative or statutory decision that conflicts with the Tunisian Constitution” (*ibid.*, chap. IV.11).

It also happens that “reacting” States contemplate both solutions and express their reactions in accordance with whether the text is a reservation or an interpretative declaration, again regardless of the term used by the author to designate it. Germany, the United Kingdom and the United States of America reacted to an interpretative declaration by Yugoslavia concerning the Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof by considering it first as an actual interpretative declaration (which they rejected) and then as a reservation (which they considered to be late and inconsistent with the object and purpose of the Treaty) (example cited by L. Migliorino, “Declarations and reservations to the 1971 Seabed Treaty”, *The Italian Yearbook of International Law*, vol. 6 (1985), p. 110). In the same spirit, the Federal Republic of Germany and the Netherlands objected to declarations made by the countries of Eastern Europe with regard to “the definition

(Continued on next page.)

recently looked into this fine distinction between reservations and interpretative declarations give numerous examples of unilateral declarations which are presented as interpretative declarations by the States formulating them, but which they themselves regard as reservations, and vice versa.¹⁵⁰

(15) It follows that, like reservations, interpretative declarations are unilateral statements formulated by a State or an international organization, it being unnecessary to be concerned about how they are phrased or named by the author.¹⁵¹ The two instruments are, however, very different in terms of the objective pursued by the author.

(16) As the definition of reservations makes clear, they aim “to exclude or to modify the legal effect of certain provisions of the treaty in their application” to their author¹⁵² or to certain specific aspects of the treaty as a whole.¹⁵³ As their name indicates, interpretative declarations have a different objective: they are aimed at *interpreting* the treaty as a whole or certain of its provisions.

(17) This can—and must—constitute the central element of their definition, yet it poses difficult problems¹⁵⁴ nonetheless, the first of which is determining what is meant by “interpretation”, a highly complex concept, the elucidation of which would far exceed the scope of the present Guide.¹⁵⁵

(Footnote 149 continued.)

of piracy as given in the Convention on the High Seas *insofar as the said declarations are to be qualified as reservations*” (*Multilateral Treaties ...* (footnote 37 above), chap. XXI.2). Likewise, several States questioned the real nature of the (late) “declarations” by Egypt concerning the 1989 Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (see, in particular, the reaction of Finland: “Without taking any stand on the content of the declarations, which appear to be reservations in nature ...” (*ibid.*, chap. XXVII.3); see also paragraph (6) of the commentary above).

Judges and arbitrators also do not hesitate to question the true nature of unilateral declarations formulated by a State in respect of a treaty and, as appropriate, to call it something else; see the examples given below in the commentary to guideline 1.3.2 (Phrasing and name).

¹⁵⁰ See, for example: D. W. Bowett, “Reservations to non-restricted multilateral treaties”, *BYBIL 1976–1977*, p. 68; Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 278–324; McRae “The legal effect of interpretative declarations” (footnote 129 above), p. 162, footnote 1; Migliorino, “Declarations and reservations ...” (footnote 149 above), pp. 106–123; Sapienza, *Dichiarazioni interpretative unilaterali ...* (footnote 129 above), pp. 154–176; or R. Riquelme Cortado, *Las reservas a los tratados, lagunas y ambigüedades del Regimen de Viena*, University of Murcia (Spain, 2004), pp. 380–381.

¹⁵¹ This does not mean that the phrasing or name chosen has no impact whatsoever on the distinction. As may be seen from guideline 1.3.2, they may give an indication as to the purported legal effect.

¹⁵² Guideline 1.1, paragraph 1.

¹⁵³ *Ibid.*, paragraph 2.

¹⁵⁴ See also Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), pp. 37–38.

¹⁵⁵ Regarding the concept of interpretation, see, in particular, the reports by Sir Hersch Lauterpacht at the Institute of International Law, “De l’interprétation des traités”, *Annuaire de l’Institut de droit international*, vol. 43-II (1950), pp. 366–423, and *ibid.*, vol. 44 (1952), vol. I, pp. 197–223, and vol. II, pp. 359–406; see also V. D. Degan, *L’interprétation des accords en droit international*, The Hague, Nijhoff, 1963; M. S. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of Agreements and World Public Order*, New Haven, Connecticut, Yale University Press, 1967, and Dordrecht, Nijhoff, 1993; S. Sur, *L’interprétation en droit international public*, Paris, Librairie générale de droit et de jurisprudence, 1974; M. K. Yasseen,

(18) Suffice it to say, in a phrase often recalled by the International Court of Justice, that “the expression ‘to construe’ [“*interprétation*” in French] must be understood as meaning to give a precise definition of the meaning and scope” of a binding legal instrument,¹⁵⁶ in this case a treaty. What is essential is that interpreting is not revising.¹⁵⁷ While the aim of reservations is to modify, if not the text of the treaty, at least the legal effect of its provisions, interpretative declarations are in principle limited to clarifying the meaning and the scope that their author attributes to the treaty or to certain of its provisions. Since the phrase “purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions” paraphrases the commonly accepted definition of the word “interpretation”, the Commission considered that it would be tautological to include the term “to interpret” in the body of guideline 1.2.

(19) The expression “the meaning or scope attributed by the declarant to the treaty” introduces a subjective element into the definition of interpretative declarations, although any unilateral interpretation is imbued with subjectivity.¹⁵⁸ Moreover, in accordance with the very spirit of the definition of reservations, they may be distinguished from other unilateral declarations made with regard to a treaty by the legal effect *aimed at* by the declarant, in other words, by its *intention* (inevitably subjective). There is no reason to depart from the spirit of this definition as far as interpretative declarations are concerned.¹⁵⁹

(20) In accordance with an extremely widespread practice, the interpretation that is the subject of such declarations may relate either to certain provisions of a treaty or to the treaty as a whole.¹⁶⁰ The gap in the 1969, 1978

“L’interprétation des traités d’après la Convention de Vienne sur le droit des traités”, *Collected Courses of The Hague Academy of International Law, 1976-III*, vol. 151, pp. 1–114; or M. Bos, “Theory and practice of treaty interpretation”, *Netherlands International Law Review*, vol. 27 (1980), pp. 3–38 and 135–170; A. Aust, *Modern Treaty Law and Practice*, 2nd ed., Cambridge University Press, 2007, pp. 230–233; U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Dordrecht, Springer, 2007, pp. 10–13; R. K. Gardiner, *Treaty Interpretation*, Oxford University Press, 2008, pp. 26–33; A. Orakhelashvili, “The recent practice on the principles of treaty interpretation”, in A. Orakhelashvili and S. Williams (eds.), *40 Years of the Vienna Convention on the Law of Treaties*, London, British Institute of International and Comparative Law, 2010, p. 117; P. Merkouris, “Introduction: interpretation is a science, is an art, is a science”, in M. Fitzmaurice, O. Elias and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, Leiden, Martinus Nijhoff, 2010, pp. 1–13.

¹⁵⁶ See *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11 of 16 December 1927, *P.C.I.J., Series A, No. 13*, p. 10; see also *Request for interpretation of the Judgment of November 20th, 1950, in the asylum case, Judgment of 27 November 1950*, *I.C.J. Reports 1950*, pp. 395 *et seq.*, in particular at p. 402.

¹⁵⁷ See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, *Advisory Opinion of 18 July 1950*, *I.C.J. Reports 1950*, pp. 221 *et seq.*, in particular at p. 229; or *Case concerning Rights of Nationals of the United States of America in Morocco, Judgment of 27 August 1952*, *I.C.J. Reports 1952*, p. 176, at p. 196.

¹⁵⁸ An agreement on interpretation constitutes an authentic (supposedly “objective”) interpretation of the treaty (see guideline 1.6.3).

¹⁵⁹ Heymann, *Einseitige Interpretationserklärungen ...* (see footnote 147 above), p. 87.

¹⁶⁰ Among a great many examples, see the interpretative declaration of Thailand concerning the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties ...* (footnote 37

and 1986 Vienna Conventions on that point, which led the Commission to insert paragraph 2 into guideline 1.1 on “across-the-board” reservations in order to take account of the practice actually followed by States and international organizations, was thus remedied by the wording adopted for guideline 1.2.

(21) The Commission considered whether the temporal element which is present in the definition of reservations¹⁶¹ ought to be included in the definition of interpretative declarations. However, it determined that the practical considerations which were based on the concern to avoid abuses and which led the framers of the 1969, 1978 and 1986 Vienna Conventions to adopt that solution¹⁶² do not arise with the same force in respect of interpretative declarations,¹⁶³ at least those which the declarant formulates without making the proposed interpretation a condition for its participation.¹⁶⁴

(22) In any event, such temporal limitations are not justified with respect to interpretative declarations.¹⁶⁵ And it is not without relevance that the rules relating to reservations and those devoted to the interpretation of treaties appear in separate parts of the 1969 and 1986 Vienna Conventions: the former in Part II, relating to the conclusion and entry into force of treaties, and the latter in Part III, where they are found side-by-side with the provisions relating to the observance and application of treaties.¹⁶⁶

(23) This is to say that interpretative declarations formulated unilaterally by States or international organizations concerning the meaning or scope of the provisions of a treaty are and can be only some of the elements of the interpretation of such provisions. They coexist with other simultaneous, prior or subsequent interpretations which may be made by other contracting States or contracting organizations or third bodies entitled to give an interpretation that is authentic and binding on the parties.

(24) Thus, even if an instrument made by a party “in connection with the conclusion of a treaty” can, under

above), chap. IV.8) or that of New Zealand to the 1976 Convention on the prohibition of military or any other hostile use of environmental modification techniques (*ibid.*, chap. XXVI.1); see also the declaration by the United Kingdom cited in footnote 128 above.

¹⁶¹ “‘Reservation’ means a unilateral statement ... made by a State or an international organization *when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty*” (guideline 1.1, para. 1).

¹⁶² See paragraphs (7)–(12) of the commentary to guideline 1.1.

¹⁶³ See guideline 2.4.4 and commentary thereto.

¹⁶⁴ See guideline 1.4 and commentary thereto.

¹⁶⁵ See guideline 2.4.4 (Time at which an interpretative declaration may be formulated).

¹⁶⁶ In fact, there is no gap between the formation and the application of international law or between interpretation and application: “The implementation of rules implies that they have already been interpreted. Implementation may be explicit or implicit, in which case it may become confused with measures of application” (S. Sur, in J. Combacau and S. Sur, *Droit international public*, 9th ed., Paris, Montchrestien, 2010, p. 169). Some have even gone so far as to affirm that “the rule of law, from the moment of its creation to the moments of its application to individual cases, is a matter of interpretation” (A. J. Arnaud, “Le médium et le savant—signification politique de l’interprétation juridique”, *Archives de philosophie du droit*, 1972, p. 165) (quoted by D. Simon in *L’interprétation judiciaire des traités d’organisations internationales*, Paris, Pedone, 1981, p. 7).

certain conditions, be considered for the purposes of interpreting the treaty to be part of the “context”, as expressly provided in article 31, paragraph 2 (b), of the 1969 and 1986 Vienna Conventions, this does not imply any exclusivity *ratione temporis*. Moreover, paragraph 3 of article 31 expressly invites the interpreter to take “into account, together with the context”, any subsequent agreement between the parties and any subsequent practice followed. Such subsequent agreements or practices may be supported by interpretative declarations that may be formulated at any time in the “life” of the treaty: at its conclusion, at the time a State or international organization expresses its consent to be bound, or during the application of the treaty.¹⁶⁷

(25) This was the position taken by Sir Humphrey Waldock in his fourth report on the law of treaties, in which he pointed out that a declaration could have been made

during the negotiations; or at the time of signature, ratification, etc., or afterwards in the “subsequent practice”.¹⁶⁸

(26) Independently of these general considerations, to confine the formulation of interpretative declarations to a limited period of time, as the definition of reservations does, would have the serious drawback of being inconsistent with practice. Even if it is quite often at the moment they express their consent to be bound that States and international organizations formulate such declarations, that is not always the case.

(27) It is indeed striking to note that States tend to get around the *ratione temporis* limitation of the right to formulate reservations by submitting them, occasionally out of time, as interpretative declarations. This was the case, for example, of the “declaration” made by Yugoslavia in respect of the 1971 Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof¹⁶⁹ or of the declaration made by Egypt regarding the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal.¹⁷⁰ In these two cases, the “declarations” elicited protests on the part of the other contracting States, who were motivated by the fact that the declarations were actually reservations and, in the second case, the fact that article 26 of the Basel Convention (which prohibits reservations) authorizes States to formulate declarations, within certain limits, only “when signing, ratifying, accepting, approving, ... confirming or acceding to this Convention”. One can conclude *a contrario* that, if true interpretative declarations had been involved (and if the

¹⁶⁷ This last possibility was recognized by the International Court of Justice in its *Advisory Opinion of 11 July 1950, International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 128 *et seq.*, in particular at pp. 135–136: “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”; in fact, the Court based itself on declarations made by South Africa in 1946 and 1947 on the interpretation of its mandate over South-West Africa, an agreement that had been concluded in 1920.

¹⁶⁸ *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 49, para. 2.

¹⁶⁹ See footnote 149 above.

¹⁷⁰ See *Multilateral Treaties ...* (footnote 37 above), chap. XXVII.3.

Basel Convention had not set any time limits), the declarations could have been formulated at a time other than the moment of signature or consent to be bound.

(28) This is in fact quite normal in practice. It should be pointed out, as Professor Greig does, that when they formulate objections to reservations or react to interpretative declarations formulated by other contracting States or contracting organizations, States and international organizations often go on to propose their own interpretation of the treaty's provisions.¹⁷¹ There is no *prima facie* reason not to consider such "counterproposals" as veritable interpretative declarations, at least when they seek to clarify the meaning and scope of the treaty in the eyes of the declarant;¹⁷² however, they are by definition formulated after the time at which the formulation of a reservation is possible.

(29) Under these circumstances, it would hardly seem possible to include in a general definition of interpretative declarations a specification of the time at which such a declaration is to be made.

(30) The Commission wishes to make it clear, however, that the fact that guideline 1.2 is silent about the moment at which an interpretative declaration may be made, out of concern not to limit unduly the freedom of action of States and international organizations and not to go against a well-established practice, should not be seen as encouragement to formulate such declarations at inappropriate times. Even though "simple" interpretative declarations¹⁷³ are not binding on the other contracting States or contracting organizations, such an attitude could lead to abuse and create difficulties. By way of a remedy, it might be expedient for the parties to a treaty to try to avoid undesirable interpretative declarations by specifying in a limitative manner when such declarations may be made, as is done in the 1982 United Nations Convention on the Law of the Sea¹⁷⁴ and the 1989 Basel Convention on the control of transboundary movements of hazardous wastes and their disposal.¹⁷⁵

¹⁷¹ In this connection, see Greig, "Reservations: equity as a balancing factor?" (footnote 28 above), pp. 24 and 42–45. See, in particular, the example cited by this author (p. 43) of the reactions of the Netherlands to the reservations of Bahrain and Qatar to article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations or the "counter-interpretation" of articles I and II of the Treaty on the Non-Proliferation of Nuclear Weapons made by the United States of America in reaction to point 8 of the declaration made by Italy concerning that Treaty (United Nations, *Treaty Series*, vol. 729, p. 287).

¹⁷² See also guideline 2.9.2 and commentary thereto.

¹⁷³ As opposed to conditional interpretative declarations, which are the subject of guideline 1.4.

¹⁷⁴ Article 310: "Article 309 [which excludes reservations] does not preclude a State, when signing, ratifying or acceding to this Convention*, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State."

¹⁷⁵ Article 26: "1. No reservation or exception may be made to this Convention. 2. Paragraph 1 of this article does not preclude a State or political and/or economic integration organization, when signing, ratifying, accepting, approving, formally confirming or acceding to this Convention*, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided

(31) The silence of guideline 1.2 on the moment when an interpretative declaration may be formulated should not lead one to conclude, however, that an interpretative declaration may in all cases be formulated at any time:

– for one thing, this might be formally prohibited by the treaty itself;¹⁷⁶

– furthermore, it would seem to be out of the question that a State or international organization could formulate a *conditional* interpretative declaration¹⁷⁷ at any time in the life of the treaty: this would cast an unacceptable doubt on the existence and scope of the treaty obligations;

– and, lastly, even simple interpretative declarations can be formulated at any time and be modified only to the extent that they have not been expressly accepted by the other contracting States or contracting organizations to the treaty or have created an estoppel in their favour.

(32) These are questions that are clarified in Part 2 of the Guide to Practice, on the formulation of reservations and interpretative declarations.¹⁷⁸

(33) It goes without saying that this definition in no way prejudices the validity or the effect of such declarations and that the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them.

(34) In the light of this comment, the definition in guideline 1.2 has, in the Commission's view, the dual advantage of making it possible to distinguish clearly between interpretative declarations and reservations, on the one hand, and, on the other, between interpretative declarations and other unilateral statements made in respect of a treaty, while being sufficiently general to encompass different categories of interpretative declarations.¹⁷⁹

1.2.1 Interpretative declarations formulated jointly

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral character of that interpretative declaration.

Commentary

(1) Like reservations, interpretative declarations may be formulated jointly by two or more States or international organizations. Guideline 1.1.5, which acknowledges this possibility in respect of reservations, nonetheless appears to be an element of progressive development of

that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State."

¹⁷⁶ See the examples given in footnotes 174 and 175 above. See also guideline 3.5 and commentary thereto.

¹⁷⁷ See guideline 1.4 and commentary thereto.

¹⁷⁸ See, in particular, guideline 2.4.4 (Time at which an interpretative declaration may be formulated) and commentary thereto.

¹⁷⁹ On ways of applying this distinction, see guidelines 1.3–1.3.3.

international law, since there is no clear precedent in this regard.¹⁸⁰ The same is not true with regard to interpretative declarations, the joint formulation of which comes under the heading of *lex lata*.

(2) Indeed, as in the case of reservations, it is not uncommon for several States to consult one another before formulating identical or quite similar declarations. This was the case, for example, with several interpretative declarations formulated by the “Eastern bloc” countries prior to 1990,¹⁸¹ with those made by the Nordic countries in respect of several conventions,¹⁸² or with the declarations made by 13 States members of the European Community when signing the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction and confirmed upon ratification, which stated:

As a Member State of the European Community, [each State] will implement the provisions of the Convention on the Prohibition of Chemical Weapons, in accordance with its obligations arising from the rules of the Treaties establishing the European Communities to the extent that such rules are applicable.¹⁸³

(3) At the same time, and contrary to what has occurred thus far in reservations, there have also been truly joint declarations, formulated in a single instrument, by “the European Community [now the European Union] and its Member States” or by the latter alone. This occurred in the case of:

– the examination of the possibility of accepting annex C.1 of the 1976 Protocol to the Agreement on the importation of educational, scientific and cultural materials of 22 November 1950;¹⁸⁴

– the implementation of the United Nations Framework Convention on Climate Change of 9 May 1992;¹⁸⁵

– the implementation of the Convention on Biological Diversity of 5 June 1992;¹⁸⁶

– the implementation of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995;¹⁸⁷

– the implementation of the World Health Organization Framework Convention on Tobacco Control of 21 May 2003.¹⁸⁸

(4) These are real precedents which justify *a fortiori* the adoption of a guideline on interpretative declarations similar to guideline 1.1.5 on reservations.

(5) As with reservations, it must be understood, first, that this possibility of joint formulation of interpretative declarations cannot undermine the legal regime applicable to such declarations, governed largely by “unilateralism”¹⁸⁹ and, secondly, that the conjunction “or” used in guideline 1.2.1¹⁹⁰ does not exclude the possibility that interpretative declarations may be formulated jointly by one or more States or by one or more international organizations, and should be understood to mean “and/or”. Nevertheless, the Commission considered that this formulation would make the text too cumbersome.¹⁹¹

(6) The similarity between the wording of guidelines 1.1.5 and 1.2.1 does not mean that the same legal regime is applicable to interpretative declarations formulated jointly, on the one hand, and to reservations formulated jointly, on the other. In particular, the fact that the former may be formulated orally while the latter may not could have an effect on that regime. This problem relates to the substance of the applicable law, however, and not to the definition of interpretative declarations.

(7) The Commission also considered whether there might be reason to envisage the possibility of all of the contracting States or contracting organizations formulating an interpretative declaration jointly, and whether in such a situation the proposed interpretation would not lose the character of a unilateral act and become a genuinely collective act. The Commission concluded that this is not the case: the word “several” in guideline 1.2.1 precludes such a possibility, which in any case is covered by article 31, paragraphs 2 (a) and 3 (a), of the 1969 and 1986 Vienna Conventions concerning collateral agreements relating to the interpretation or application of the treaty.

1.3 Distinction between reservations and interpretative declarations

The character of a unilateral statement as a reservation or as an interpretative declaration is determined by the legal effect that its author purports to produce.

Commentary

(1) A comparison of guidelines 1.1 and 1.2 shows that interpretative declarations are distinguished from reservations principally by the objective pursued by the author State or international organization: in formulating a reservation, the State or organization purports to exclude or modify the legal effect upon itself of certain provisions of a treaty (or of the treaty as a whole with respect to certain specific aspects); in making an interpretative declaration, it intends to specify or clarify the meaning or scope that it attributes to a treaty or to certain of its provisions.

¹⁸⁰ See paragraph (3) of the commentary to guideline 1.1.5.

¹⁸¹ See, for example, the declarations by Belarus, Bulgaria, Hungary, Mongolia, Romania, the Russian Federation and Ukraine concerning articles 48 and 50 of the Vienna Convention on Diplomatic Relations (Cuba formulated an express reservation; the wording of the declaration of Viet Nam is ambiguous) (*Multilateral Treaties ...* (footnote 37 above), chap. III.3) or those of Albania, Belarus, Bulgaria, Poland, Romania, the Russian Federation and Ukraine concerning article VII of the Convention on the Political Rights of Women (*ibid.*, chap. XVI.1).

¹⁸² See, for example, the declarations by Denmark, Finland, Iceland, Norway and Sweden concerning article 22 of the Vienna Convention on Consular Relations (*ibid.*, chap. III.6).

¹⁸³ *Ibid.*, chap. XXVI.3.

¹⁸⁴ *Ibid.*, chap. XIV.5.

¹⁸⁵ *Ibid.*, chap. XXVII.7.

¹⁸⁶ *Ibid.*, chap. XXVII.8.

¹⁸⁷ *Ibid.*, chap. XXI.7.

¹⁸⁸ *Ibid.*, chap. IX.4.

¹⁸⁹ See paragraph (8) of the commentary to guideline 1.1.5.

¹⁹⁰ “by several States or international organizations”.

¹⁹¹ See paragraph (9) of the commentary to guideline 1.1.5.

(2) In other words,

– the character of a unilateral statement as a reservation depends on whether its object is to exclude or modify the legal effect of the provisions of the treaty in their application to the author State or international organization; and

– the character of a unilateral statement as an interpretative declaration depends on whether its object is to specify or clarify the meaning or scope attributed by its author to a treaty or to certain of its provisions.

(3) This is confirmed in the jurisprudence. For example, in the *Belilos v. Switzerland* case, “[l]ike the Commission and the Government, the [European] Court [of Human Rights] recognizes that it is necessary to ascertain the *original intention** of those who drafted the declaration”.¹⁹² Likewise, in the *Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, the Anglo-French Arbitral Tribunal held that, in order to determine the nature of the reservations and declarations made by France regarding the 1958 Convention on the Continental Shelf, “[t]he question [was] one of the *respective intentions** of the French Republic and the United Kingdom in regard to their legal relations under the Convention”.¹⁹³

(4) This distinction is fairly clear as to its principle, yet it is not easily put into practice, particularly since States and international organizations seldom explain their intentions, even taking pains at times to disguise them, and since the terminology used does not constitute an adequate criterion for distinguishing them. The objective of this section of the Guide to Practice is to provide some information regarding the substantive rules that should be applied in order to distinguish between reservations and interpretative declarations.

(5) These guidelines may be transposed, *mutatis mutandis*, to the equally important distinction between simple interpretative declarations and conditional interpretative declarations which, as guideline 1.4 shows, is also based on the intention of the author. In both cases, the author of the declaration seeks to interpret the treaty, but in the first case it does not make its interpretation a condition for participation in the treaty, whereas in the second case its interpretation cannot be dissociated from the expression of its consent to be bound.

1.3.1 Method of determining the distinction between reservations and interpretative declarations

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, the statement should be interpreted in good faith in accordance with the ordinary meaning

¹⁹² European Court of Human Rights, *Belilos v. Switzerland*, Judgment of 29 April 1988, *Series A: Judgments and Decisions*, vol. 132, pp. 23–24, para. 48.

¹⁹³ Arbitral decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), p. 28, para. 30.

to be given to its terms, with a view to identifying therefrom the intention of its author, in light of the treaty to which it refers.

Commentary

(1) The object of this guideline is to indicate the *method* that should be adopted to determine whether a unilateral statement is a reservation or an interpretative declaration. This question is of considerable importance when, in keeping with the definition of such instruments,¹⁹⁴ all “nominalism” is excluded.

(2) As guideline 1.3 makes clear, the decisive criterion for drawing the distinction is the legal effect that the State or international organization making the unilateral statement purports to produce. Hence, there can be no doubt that the author’s intention when formulating it should be established: did the author purport to exclude or modify the legal effect upon it of certain provisions of the treaty (or of the treaty as a whole in respect of certain aspects), or did it intend to specify or clarify the meaning or scope it attributes to the treaty or certain of its provisions? In the first case it is a reservation; in the second, it is an interpretative declaration.¹⁹⁵

(3) It was asked whether, in the writings, in order to answer these questions, it was appropriate to apply a “subjective test” (what did the author *want* to say?) or “objective” or “material” test (what did the author *do*?). In the Commission’s view, this is a spurious alternative. The expression “purports to”, which appears in the definition both of reservations and of interpretative declarations, simply means that the legal effect sought by the author cannot be achieved for various reasons (impermissibility, objections by other contracting States and organizations); but this does not in any way mean that the subjective test alone is applicable: only an objective analysis of the potential effects of the statement can determine the purpose sought. In determining the legal nature of a statement formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement has (or would have). If it results (or would result) in modifying or excluding the legal effect of the treaty or certain of its provisions, it is a reservation “however phrased or named”; if the statement simply clarifies the meaning or scope that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration.

(4) The point of departure should be the principle that the intended purpose is reflected in the text of the statement. The problem is therefore a conventional one of interpretation. “Discerning the real substance of the often complex statements made by States upon ratification of, or accession to, a multilateral treaty is a matter of construction and must be solved through the ordinary rules of interpretation.”¹⁹⁶

¹⁹⁴ See guidelines 1.1 and 1.2, which expressly define them independently of their phrasing or name. The fact remains, however, that the latter are of no utility in drawing the distinction (see guideline 1.3.2).

¹⁹⁵ See also Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), pp. 88–92, and Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 37–39.

¹⁹⁶ M. Coccia, “Reservations to multilateral treaties on human rights”, *California Western International Law Journal*, vol. 15 (1985), p. 10.

(5) Some international courts have not hesitated to apply the general rules of interpretation of treaties to reservations.¹⁹⁷ However, in the Commission's view, while these rules provide useful indications, they cannot be purely and simply transposed to reservations and interpretative declarations because of their special nature. The rules applicable to *treaty* instruments cannot be applied to *unilateral* instruments without some care.¹⁹⁸

(6) This was pointed out recently by the International Court of Justice in connection with declarations of acceptance of its compulsory jurisdiction:

The régime relating to the interpretation of declarations made under article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties ... The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction.¹⁹⁹

(7) The Commission is aware that the statements in question are of a different nature from those of reservations and declarations. Formulated unilaterally in connection with a treaty text, they nonetheless have important common features, and it would seem necessary to take account of the Court's warning in interpreting unilateral statements made by a State or an international organization in connection with a treaty with a view to determining its legal nature. Bearing these considerations in mind, the Commission did not purely and simply refer to the "General rule of interpretation" and the "Supplementary means of interpretation" set out in articles 31 and 32 of the 1969 and 1986 Vienna Conventions.²⁰⁰

(8) This remark notwithstanding, the fact remains that these provisions constitute useful guidance and, in particular, like a treaty, a unilateral statement relating to the provisions of a treaty

must be interpreted by examining its text in accordance with the ordinary meaning which must be attributed to the terms in which it has been formulated within the general context of the treaty ... This approach must be followed except when the resultant interpretation would leave the meaning ambiguous or obscure or would lead to a result which is manifestly absurd or unreasonable.²⁰¹

(9) Even though doctrine has barely contemplated the problem from this standpoint,²⁰² jurisprudence is unanimous in considering that priority must be given to the actual text of the declaration:

¹⁹⁷ See Inter-American Court of Human Rights, *Restrictions to the Death Penalty (arts. 4(2) and 4(4) of the American Convention on Human Rights)*, Advisory Opinion OC-3/83 of 8 September 1983, Series A: Judgments and Opinions, No. 3, para. 62.

¹⁹⁸ On the interpretation of reservations in general, see guideline 4.2.6.

¹⁹⁹ See *Judgment of 4 December 1998 in Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1998, pp. 432 *et seq.*, at para. 46; see also the *Judgment of 11 June 1998 in Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment*, I.C.J. Reports 1998, p. 275, at para. 30.

²⁰⁰ See guideline 4.2.6 (Interpretation of reservations) and commentary thereto; see also Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), p. 89.

²⁰¹ Inter-American Court of Human Rights, *Restrictions to the Death Penalty*, Advisory Opinion of 8 September 1983 (see footnote 197 above), para. 63.

²⁰² See, however, Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 33 and 263–272 and, for a clearer and more concise account, Greig, "Reservations: equity as a balancing factor?" (footnote 28 above), p. 26.

This condition [imposed by the third French reservation to article 6 of the Convention on the Continental Shelf], *according to its terms**, appears to go beyond a mere interpretation ... the Court, ... accordingly, concludes that this "reservation" is to be considered a "reservation" rather than an "interpretative declaration".²⁰³

In the instant case, the Commission will interpret the intention of the respondent Government by taking account both of *the actual terms of the above-mentioned interpretative declaration** and the *travaux préparatoires* which preceded Switzerland's ratification of the [European] Convention [on Human Rights].

The Commission considers that the *terms used, taken by themselves**, already show an intention by the Government to prevent ...

...

*In the light of the terms used** in Switzerland's interpretative declaration ... and the above-mentioned *travaux préparatoires* taken as a whole, the Commission accepts the respondent Government's submission that it intended to give this interpretative declaration the effect of a formal reservation.²⁰⁴

In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine *the substantive content**.²⁰⁵

If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration. In the present case, the statement entered by the French Government upon accession to the [International] Covenant [on Civil and Political Rights] is clear: it seeks to exclude the application of article 27 to France and emphasizes this exclusion semantically with the words: "is not applicable".²⁰⁶

(10) More rarely, international courts which have had to rule on problems of this type, to supplement their reasoning, have based themselves on the preparatory work of the unilateral declarations under consideration. In the *Belilos* case, for example, the European Court of Human Rights, after admitting that "the wording of the original French text" of the Swiss declaration, "though not altogether clear, can be understood as constituting a reservation",²⁰⁷ "[l]ike the Commission and the Government, ... recognises that it is necessary to ascertain the original intention of those who drafted the declaration" and, in order to do so, takes into account the preparatory work on the declaration,²⁰⁸ as the Commission had done in the same case and in the *Temeltasch* case.²⁰⁹

²⁰³ Arbitral decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), p. 40, para. 55.

²⁰⁴ European Commission of Human Rights, Decision of 5 May 1982, *Temeltasch v. Switzerland* (see footnote 24 above), pp. 131–132, paras. 74, 75 and 82.

²⁰⁵ European Court of Human Rights, Judgment of 29 April 1988, *Belilos v. Switzerland* (see footnote 192 above), p. 24, para. 49. In the same case, the Commission reached a different conclusion, also basing itself "both on the wording of the declaration and on the preparatory work" (*ibid.*, p. 21, para. 41); the Commission, more clearly than the Court, gave priority to the terms used in the Swiss declaration (*ibid.*, annex, p. 38, para. 93 of the Commission's report; see the commentary by I. Cameron and F. Horn, "Reservations to the European Convention on Human Rights: the *Belilos* Case", *German Yearbook of International Law*, vol. 33 (1990), pp. 71–74).

²⁰⁶ Human Rights Committee, Communication No. 220/1987, Decision of 8 November 1989, *T.K. v. France*, Report of the Human Rights Committee to the General Assembly, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. II, annex X, para. 8.6.

²⁰⁷ Judgment of 29 April 1988, *Belilos v. Switzerland* (see footnote 192 above), p. 22, para. 44.

²⁰⁸ *Ibid.*, p. 23, para. 48.

²⁰⁹ European Commission of Human Rights, Decision of 5 May 1982, *Temeltasch v. Switzerland* (see footnote 24 above), pp. 147–148, paras. 76–80.

(11) In the Commission's view, some caution is required in this regard. As has been noted, "[s]ince a reservation is a unilateral act by the party making it, evidence from that party's internal sources regarding the preparation of the reservation is admissible to show its intention in making the reservation".²¹⁰ Still, in the everyday life of the law it would appear difficult to recommend that the preparatory work be consulted regularly in order to determine the nature of a unilateral declaration relating to a treaty: it is not always made public,²¹¹ and in any case it would be difficult to require foreign Governments to consult it.

(12) This is the reason why guideline 1.3.1 does not reproduce the text of article 32 of the 1969 and 1986 Vienna Conventions and, without alluding directly to the preparatory work, merely calls for account to be taken of the intention of the author of the statement. This wording draws directly on that used by the International Court of Justice in the case concerning *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court*:

The Court will ... interpret the relevant words of a declaration including a reservation contained therein in a natural and responsible way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court.²¹²

(13) Guideline 1.3.1 also specifies that, for the purpose of determining the legal nature of a statement formulated in respect of a treaty, it shall be interpreted "in light of the treaty to which it refers". This constitutes, in these circumstances, the principal element of the "context" mentioned in the general rule of interpretation set out in article 31 of the 1969 and 1986 Vienna Conventions;²¹³ whereas a reservation or an interpretive declaration constitutes a unilateral instrument, separate from the treaty to which it relates, it is still closely tied to it and cannot be interpreted in isolation.

(14) The method indicated in guideline 1.3.1 can be transposed to the distinction between simple interpretative declarations and conditional interpretative declarations.²¹⁴ In this case, too, it is the intention of the State or international organization making the declaration that has to be determined, and this should be done above all by interpreting it in good faith in accordance with the ordinary meaning to be given to its terms.

1.3.2 Phrasing and name

The phrasing or name of a unilateral statement provides an indication of the purported legal effect.

²¹⁰ *Oppenheim's International Law*, 9th ed., Sir R. Y. Jennings and Sir A. D. Watts (eds.), Harlow, Longman, 1992, vol. I, *Peace*, p. 1242. The authors cite in support the Judgment of the International Court of Justice of 19 December 1978 in the *Aegean Sea Continental Shelf* case, *Judgment, I.C.J. Reports 1979*, p. 3, at p. 32.

²¹¹ In the *Belilos v. Switzerland* case, the representative of the Swiss Government referred to the internal debates within the Government, but took cover behind their confidential nature (see Cameron and Horn, "Reservations to the European Convention ..." (see footnote 205 above), p. 84).

²¹² *Judgment of 4 December 1998, Fisheries Jurisdiction ...* (see footnote 199 above), para. 49.

²¹³ In this regard, see the Advisory Opinion of the Inter-American Court of Human Rights in the case *Restrictions to the Death Penalty ...* (footnote 197 above).

²¹⁴ See guideline 1.4 and commentary thereto.

Commentary

(1) The general rule making it possible to determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration is set out in guideline 1.3.1. Guidelines 1.3.2 and 1.3.3 supplement this general rule by taking into consideration certain specific, frequently encountered situations which may facilitate the determination. They are therefore subsidiary to the general rule set out in guideline 1.3.1, not as a rule of interpretation but as a method for determining whether a unilateral statement constitutes a reservation or an interpretative declaration.

(2) As guidelines 1.3 and 1.3.1 make clear, it is not the phrasing or name of a unilateral statement formulated in respect of a treaty that determines its legal nature, but the legal effect it purports to produce. In fact, the result of the definition of reservations, given by the Vienna Conventions of 1969, 1978 and 1986 and reproduced in guideline 1.1, and of the definition of interpretative declarations found in guideline 1.2 is that:

– on the one hand, the character of both is imparted by the objective pursued by the author: excluding or modifying the legal effect of certain provisions of the treaty in their application to its author in the first instance, and specifying or clarifying the meaning or scope attributed by the author of the declaration to the treaty or to certain of its provisions, in the second instance;

– and, on the other, the second point that reservations and interpretative declarations have in common has to do with the irrelevance of the phrasing or name given to them by the author.²¹⁵

(3) This indifference to the terminology chosen by the State or international organization formulating the statement has been criticized by some authors who believe that it would be appropriate to "take States at their word" and to consider as reservations those unilateral declarations which have been so titled or worded by their authors, and as interpretative declarations those which they have proclaimed to be such.²¹⁶ This position has the dual merit of simplicity (an interpretative declaration is whatever States declare is one) and of conferring "morality" on the practice followed in the matter by preventing States from "playing around" with the names they give to the declarations they make with a view to side-stepping the rules governing reservations or misleading their partners.²¹⁷

(4) In the opinion of the Commission, however, this position runs up against two decisive objections:

²¹⁵ In both cases, this results from the formulation "however phrased or named".

²¹⁶ See, for example, the declaration made by France when signing the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean ("Treaty of Tlatelolco") in 1973 and the analysis thereof by H. Gros Espiell ("La signature du Traité de Tlatelolco par la Chine et la France", *AFDI*, vol. 19 (1973), p. 141). However, the author also bases himself on other parameters. This was also the position taken by Japan in 1964 in its observations on the draft articles on the law of treaties adopted by the Commission on first reading (see the commentary to guideline 1.2, footnote 143 above).

²¹⁷ See paragraph (5) of the commentary to guideline 1.2.

– first, it is incompatible with the Vienna definition itself: if a unilateral declaration can be a reservation “however phrased or named”, this of necessity means that simple “declarations” (even those expressly qualified as interpretative by their author) may constitute true reservations, but it also and necessarily implies that terminology is not an absolute criterion that can be used in defining interpretative declarations; and

– secondly, it runs counter to the practice of States, jurisprudence and the position of most doctrine.²¹⁸

(5) It should be noted in particular that judges, international arbitrators and bodies monitoring the implementation of human rights treaties refrain from any nominalism and do not dwell on the appellation of the unilateral statements accompanying States’ consent to be bound but endeavour to discover the true intention as it emerges from the substance of the declaration, or even the context in which it has been made.

(6) For example, the arbitral tribunal responsible for deciding the Anglo-French case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* carefully examined the argument of the United Kingdom that the third French reservation to article 6 of the 1958 Convention on the Continental Shelf was, in reality, a simple interpretative declaration.²¹⁹ Similarly, in the *Temeltasch* case, the European Commission of Human Rights, relying on article 2, paragraph 1 (d), of the 1969 Vienna Convention, agreed

on this point with the majority of legal writers and considers that where a State makes a declaration, presenting it as a condition of its consent to be bound by the Convention and intending to exclude or alter the legal effect of some of its provisions, such a declaration, *whatever it is called**, must be assimilated to a reservation²²⁰.

This position was also taken by the European Court of Human Rights in the *Belilos* case: Switzerland accompanied its instrument ratifying the European Convention on Human Rights by a unilateral statement which it entitled “interpretative declaration”; the Court nevertheless considered it to be a true reservation.

Like the Commission and the Government, the Court recognizes that it is necessary to ascertain the original intention of those who drafted the declaration ...

In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content.²²¹

The Human Rights Committee took the same line in its decision of 8 November 1989 in the case of *T.K. v. France*: on the basis of article 2, paragraph 1 (d), of the 1969 Vienna Convention, it decided that a communication concerning the failure of France to respect article 27 of the International Covenant on Civil and Political Rights

was inadmissible because the French Government, on acceding to the Covenant, had declared that “in the light of article 2 of the Constitution of the French Republic, ... article 27 is not applicable so far as the Republic is concerned”. The Committee observed that

in this respect that it is not the formal designation but the effect the statement purports to have that determines its nature.²²²

(7) Nevertheless, this indifference to nominalism is not as radical as it might appear at first sight, since, in the *Belilos* case, the European Commission of Human Rights had maintained that

if a State made both reservations and interpretative declarations at the same time, the latter could only exceptionally be equated with the former.²²³

(8) From these observations the following conclusion may be drawn: while the phrasing and name of a unilateral declaration do not constitute part of the definition of an interpretative declaration any more than they do of the definition of a reservation, they nonetheless form an element of appraisal which must be taken into consideration and which can be viewed as being of particular (although not necessarily vital) significance when a State

²²² Communication No. 220/1987, decision adopted on 8 November 1989; *T.K. v. France* case, Report of the Human Rights Committee to the General Assembly, *Official Records ...* (see footnote 206 above), p. 130, para. 8.6 (with regard to the declaration made by the Government of France when acceding to the Covenant, see *Multilateral Treaties ...* (footnote 37 above), chap. IV.4).

See also, to the same effect, the decisions *M.K. v. France*, of the same date, Communication No. 222/1987 (Report of the Human Rights Committee to the General Assembly, *Official Records ...* (footnote 206 above), pp. 127–134), and *S.G. v. France* of 1 November 1991 (No. 347/1988), *G.B. v. France* of 1 November 1991 (No. 348/1989) and *R.L.M. v. France* of 6 April 1992 (No. 363/1989), Report of the Human Rights Committee to the General Assembly, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, United Nations, New York, annex X, pp. 346–371. In an individual opinion which she attached to the decision on *T.K. v. France*, Mrs. Higgins criticized the Committee’s position, pointing out that, in her view:

“the matter [was not] disposed of by invocation of article 2 (1) ([d]) of the Vienna Convention on the Law of Treaties, which emphasizes that intent, rather than nomenclature, is the key.

“An examination of the notification of 4 January 1982 shows that the Government of the Republic of France was engaged in two tasks: listing certain reservations and entering certain interpretative declarations. Thus in relation to articles 4 (1), 9, 14 and 19, it uses the phrase ‘enters a reservation’. In other paragraphs it declares how terms of the Covenant are in its view to be understood in relation to the French Constitution, French legislation, or obligations under the European Convention on Human Rights. To note, by reference to article 2 (1) (d) of the Vienna Convention, that it does not matter how a reservation is phrased or named, cannot serve to turn these interpretative declarations into reservations. Their content is clearly that of declarations. Further, the French notification shows that deliberately different language was selected to serve different legal purposes. There is no reason to suppose that the contrasting use, in different paragraphs, of the phrase ‘reservation’ and ‘declaration’ was not entirely deliberate, with its legal consequence well understood by the Government of the Republic.” (*T.K. v. France*, Report of the Human Rights Committee to the General Assembly, *Official Records ...* (see footnote 206 above), annex X, appendix II, p. 125).

²²³ See the judgment of the Court in the *Belilos v. Switzerland* case (footnote 192 above) of 29 April 1988, p. 21, para. 41. For its part, the Court observed that one of the things that made it difficult to reach a decision in the case was the fact that “the Swiss Government have made both ‘reservations’ and ‘interpretative declarations’ in the same instrument of ratification”, although the Court did not draw any particular conclusion from that observation (*ibid.*, p. 24, para. 49). See also the individual opinion of Mrs. Higgins in the *T.K. v. France* case before the Human Rights Committee (see previous footnote).

²¹⁸ *Ibid.*, paragraphs (4)–(8).

²¹⁹ Arbitral decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), pp. 39–40, paras. 54–55.

²²⁰ Decision of 5 May 1982, *Temeltasch v. Switzerland* (see footnote 24 above), paras. 69–82, in particular at para. 73.

²²¹ Judgment of 29 April 1988, *Belilos v. Switzerland* (see footnote 192 above), pp. 23–24, paras. 48–49.

formulates both reservations and interpretative declarations in respect of a single treaty at the same time.

(9) This observation is consistent with the more general position taken by writers that “there is a potential for inequity in this aspect [‘however phrased or named’] of the definition”. “Under the Vienna Convention, the disadvantages of determining that a statement is a reservation are ... imposed over the other parties to the treaty ... It would be unfortunate in such circumstances if the words ‘however phrased or named’ were given an overriding effect. In exceptional circumstances it might be possible for a party to rely upon an estoppel against a State which attempts to argue that its statement is a reservation ... While this is a matter of interpretation rather than the application of equitable principles, it is in keeping with notions of fairness and good faith which underlie the treaty relations of States.”²²⁴

(10) Without reopening the debate on the principle posed by the 1969 Vienna Convention with regard to the definition of reservations, a principle which extends to the definition of interpretative declarations,²²⁵ it would seem legitimate, then, to spell out the extent to which it is possible to remain indifferent to the nominalism implied by the expression “however phrased or named”. This is the purpose of guideline 1.3.2, which acknowledges that the name a State gives to its declaration is nevertheless an indication of what it is, although it does not constitute an irrebuttable presumption.

(11) This indication, while still rebuttable, is reinforced when a State simultaneously formulates reservations and interpretative declarations and designates them respectively as such.

1.3.3 *Formulation of a unilateral statement when a reservation is prohibited*

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect of those provisions by a State or an international organization shall be presumed not to constitute a reservation. Such a statement nevertheless constitutes a reservation if it purports to exclude or modify the legal effect of certain provisions of the treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to its author.

Commentary

(1) Guideline 1.3.3 has been worded in the same spirit as the preceding guideline and its purpose is to make it easier to say whether a unilateral statement formulated in respect of a treaty should be classified as a reservation or as an interpretative declaration when the treaty prohibits reservations in general,²²⁶ or to certain of its provisions.²²⁷

²²⁴ Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), pp. 27–28; see also p. 34.

²²⁵ See guideline 1.2.

²²⁶ As, for example, in the case of article 309 of the United Nations Convention on the Law of the Sea.

²²⁷ As, for example, in the case of article 12 of the Convention on the Continental Shelf, which deals with reservations to articles 1–3. See the arbitral decision of 30 June 1977 (footnote 24 above) handed

(2) It seems to the Commission that, in such situations, statements made in respect of provisions to which any reservation is prohibited must be deemed to constitute interpretative declarations. “This would comply with the presumption that a State would intend to perform an act permitted, rather than one prohibited, by a treaty and protect the State from the possibility that the impermissible reservation would have the effect of invalidating the entire act of acceptance of the treaty to which the declaration was attached.”²²⁸ In a more general context, this presumption of permissibility is consonant with the “well-established general principle of law that bad faith is not presumed”.²²⁹

(3) It goes without saying, however, that the presumption referred to in guideline 1.3.3 is not irrebuttable and that if the statement actually purports to exclude or modify the legal effect of the provisions of the treaty and not simply to interpret them, then it must be considered to be a reservation and the consequence of article 19, subparagraphs (a) and (b), of the 1969 and 1986 Vienna Conventions is that such a reservation is impermissible and must be treated as such. This is consistent with the principle of the irrelevance, in principle, of the phrasing or name of unilateral statements formulated in respect of a treaty, as embodied in the definition of reservations and interpretative declarations.²³⁰

(4) It is apparent from both the title of the guideline and its wording that the guideline’s purpose is not to determine whether unilateral declarations formulated in the circumstances in question constitute interpretative declarations or unilateral statements other than reservations or interpretative declarations as defined in section 1.5 of the present chapter. This guideline draws attention to the principle that there can be no presumption that a declaration made in respect of treaty provisions to which a reservation is prohibited is a reservation.

(5) If this is not the case, it is for the interpreter of the declaration in question, which may be either an interpretative declaration or a declaration under section 1.5, to classify it positively on the basis of guidelines 1.2 and 1.5.1–1.5.3.

1.4 *Conditional interpretative declarations*

1. A conditional interpretative declaration is a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof.

down in the *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), pp. 32–33, paras. 38–39; see also the individual opinion of H. W. Briggs (*ibid.*, p. 123).

²²⁸ Greig, “Reservations: equity as a balancing factor?” (see footnote 28 above), 1995, p. 25.

²²⁹ Arbitral decision of 16 November 1957, *Lac Lanoux* case, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 305.

²³⁰ See guidelines 1.1 and 1.2.

2. Conditional interpretative declarations are subject to the rules applicable to reservations.

Commentary

(1) In accordance with the definition given in guideline 1.2, interpretative declarations can be seen as “offers” of interpretation, governed by the fundamental principle of good faith, but lacking any inherent authentic or binding character. However, their authors frequently endeavour to broaden their scope, so that they come closer to being a reservation without actually becoming one. This is what happens when a State or international organization not merely proposes an interpretation but makes its interpretation a condition of its consent to be bound by the treaty.

(2) The Commission has recognized the existence of such a practice, which was not systematized in the legal doctrine until relatively recently,²³¹ while continuing to explore the exact legal nature of such unilateral statements.

(3) It is not uncommon for a State, when formulating a declaration, to state expressly that its interpretation constitutes the *sine qua non* to which its consent to be bound is subordinate. For example, France attached to its signature²³² of Additional Protocol II of the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (“Treaty of Tlatelolco”) a four-point interpretative declaration, stipulating:

In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States.

²³¹ The distinction between these two types of interpretative declaration was clearly and authoritatively drawn by McRae in an important article published in 1978. Exploring the effect of interpretative declarations, he noted that “two situations have to be considered. The first is where a State attaches to its instrument of acceptance a statement that simply purports to offer an interpretation of the treaty or part of it. This may be called a ‘simple interpretative declaration’ [They are referred to as ‘mere declaratory statements’ by [I.] Detter, *Essays on the Law of Treaties*, 1967, pp. 51–52]. The second situation is where a State makes its ratification of or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty. This may be called a ‘qualified interpretative declaration’. In the first situation the State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected ... If, on the other hand, the declaring State wishes to assert its interpretation regardless of what a subsequent tribunal might conclude, that is, the State when making the declaration has ruled out the possibility of a subsequent inconsistent interpretation of the treaty, a different result should follow. This is a ‘qualified interpretative declaration’. The State is making its acceptance of the treaty subject to or conditional upon acquiescence in its interpretation” (McRae, “The legal effect of interpretative declarations” (see footnote 129 above), pp. 160–161). The expression “qualified interpretative declaration” has little meaning in English. This distinction is reflected in the works of a number of authors; for example, see Cameron and Horn, “Reservations to the European Convention ...” (footnote 205 above), p. 77, or Sapienza, *Dichiarazioni interpretative unilaterali ...* (see footnote 129 above), pp. 205–206, or Heymann, *Einseitige Interpretationserklärungen ...* (see footnote 147 above), pp. 70–87.

²³² The declaration was confirmed upon ratification on 22 March 1974; see United Nations, *Treaty Series*, vol. 936, p. 419.

The conditional nature of the French declaration here is indisputable. However, through the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, the Latin American States requested the French Government to withdraw the part of the French interpretative declaration that referred to the possibility of using nuclear weapons in the event of armed attack. Those States were of the opinion that such an interpretation did not comply with the requirements of necessity and proportionality inherent in the notion of self-defence under international law. France has not yet withdrawn this part of its interpretative declaration, but has repeatedly expressed its intention to remain a State party to the Additional Protocols to the Treaty of Tlatelolco.

(4) Although it is drafted less categorically, the same can surely be said of the “understanding” recorded by the Islamic Republic of Iran in connection with the United Nations Convention on the Law of the Sea:

The main objective [of the Government of the Islamic Republic of Iran] for submitting these declarations is the avoidance of eventual future interpretation of the following articles in a manner incompatible with the original intention and previous positions or in disharmony with national laws and regulations.²³³

(5) In other cases, the conditional nature of the declaration can be deduced from its drafting. For example, its categorical wording leaves little doubt that the interpretative declaration made by Israel upon signing the International Convention against the taking of hostages of 17 December 1979 should be considered a conditional interpretative declaration:

It is the understanding of Israel that the Convention implements the principle that hostage taking is prohibited in all circumstances and that any person committing such an act shall be either prosecuted or extradited pursuant to article 8 of this Convention or the relevant provisions of the Geneva Conventions of 1949 or their Additional Protocols, without any exception whatsoever.²³⁴

(6) The same holds true for the interpretative declaration made by Turkey in respect of the 1976 Convention on the prohibition of military or any other hostile use of environmental modification techniques:

In the opinion of the Turkish Government the terms “widespread”, “long-lasting” and “severe effects” contained in the Convention need to be clearly defined. So long as this clarification is not made the Government of Turkey will be compelled to interpret itself the terms in question and consequently it reserves the right to do so as and when required.²³⁵

(7) Conversely, a declaration such as the one made by the United States of America when signing the 1988 Protocol to the 1979 Convention on long-range transboundary air pollution concerning the control of emissions of nitrogen oxides or their transboundary fluxes is clearly a simple interpretative declaration:

The Government of the United States of America understands that nations will have the flexibility to meet the overall requirements of the protocol through the most effective means.²³⁶

²³³ *Multilateral Treaties ...* (footnote 37 above), chap. XXI.6.

²³⁴ *Ibid.*, chap. XVIII.5.

²³⁵ *Ibid.*, chap. XXVI.1.

²³⁶ *Ibid.*, chap. XXVII.1.c.

(8) It is in fact only rarely that the conditional nature of an interpretative declaration is clearly apparent from the wording used.²³⁷ In such situations the distinction between “simple” and “conditional” interpretative declarations poses problems similar to those posed by the distinction between reservations and interpretative declarations, and these problems must be solved in accordance with the same principles.²³⁸

(9) Moreover, it is not uncommon for the true nature of interpretative declarations to become clear when they are contested by other contracting States or contracting organizations. This is demonstrated by some famous examples, such as the declaration that India attached to its instrument of ratification of the Convention on the Inter-Governmental Maritime Consultative Organization (IMCO), subsequently the International Maritime Organization (IMO)²³⁹ or the declaration of Cambodia

²³⁷ Most often, the declaring State or international organization simply says that it “considers that ...” (for examples (of which there are a great many), see the declarations made by Brazil when signing the United Nations Convention on the Law of the Sea (*ibid.*, chap. XXI.6), the third declaration made by the European Community when signing the 1991 Convention on environmental impact assessment in a transboundary context (*ibid.*, chap. XXVII.4), or those made by Bulgaria to the Vienna Convention on Consular Relations of 1963 (*ibid.*, chap. III.6) or to the 1974 Convention on a Code of Conduct for Liner Conferences (*ibid.*, chap. XII.6)), “considers that ...” (see the declaration made by Sweden concerning the Convention on the International Maritime Organization (*ibid.*, chap. XII.1)), or “declares that ...” (see the second and third declarations made by France concerning the 1966 International Covenant on Economic, Social and Cultural Rights (*ibid.*, chap. IV.3)) or that made by the United Kingdom when signing the 1989 Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (*ibid.*, chap. XXVII.3), or that it “interprets” a particular provision in a particular way (see the declarations made by Algeria or Belgium in respect of the International Covenant on Economic, Social and Cultural Rights (*ibid.*, chap. IV.3), the declaration made by Ireland in respect of article 31 of the 1954 Convention relating to the Status of Stateless Persons (*ibid.*, chap. V.3) or the first declaration made by France when signing the 1992 Convention on Biological Diversity (*ibid.*, chap. XXVII.8)), or that, “according to its interpretation”, a particular provision has a certain meaning (see the declarations by the Netherlands concerning the 1980 Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects of 10 October 1980 (*ibid.*, chap. XXVI.2) or those made by Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu in respect of the 1992 United Nations Framework Convention on Climate Change (*ibid.*, chap. XXVII.7)) or that it “understands that ...” (see the declarations made by Brazil when ratifying the United Nations Convention on the Law of the Sea (*ibid.*, chap. XXI.6)).

²³⁸ See guideline 1.3.1.

²³⁹ The text of the declaration appears in *Multilateral Treaties ...* (footnote 37 above), chap. XII.1. India summed up this episode in its response to the questionnaire on reservations (see footnote 39 above):

“When the Secretary-General notified the Inter-Governmental Maritime Consultative Organization (IMCO) [the name has been changed to “International Maritime Organization (IMO)”] of the instrument of ratification of India subject to the declaration, it was suggested that in view of the condition which was ‘in the nature of a reservation’ the matter should be put before the IMCO Assembly. The Assembly resolved to have the declaration circulated to all IMCO members but until the matter had been decided, India was to participate in IMCO without vote. France and the Federal Republic of Germany lodged objections against the declaration made by India, France on the ground that India was asserting a unilateral right to interpret the Convention and Germany on the ground that India might in the future take measures that would be contrary to the Convention.

“In resolution 1452 (XIV) adopted on 7 December 1959, the General Assembly of the United Nations, noting the statement made on behalf of India at the 614th meeting of its Sixth Committee (Legal) explaining that the Indian declaration on IMCO was a declaration of policy and that it

with regard to the same Convention.²⁴⁰ These precedents confirm that there is a discrepancy between some declarations, in which the State or international organization formulating them does no more than explain its interpretation of the treaty, and others in which the authors seek to impose their interpretation on the other contracting States or contracting organizations.

(10) This discrepancy is of great practical significance. Unlike reservations, simple interpretative declarations place no conditions on the expression by a State or international organization of its consent to be bound; they simply attempt to anticipate any dispute that may arise concerning the interpretation of the treaty. The declarant “sets a date”, in a sense; it gives notice that, should a dispute arise, its interpretation will be such, but it does not make that point a condition for its participation in the treaty. Conversely, conditional declarations are closer to reservations in that they seek to produce a legal effect on the application of the provisions of the treaty, which the State or international organization accepts only on condition that the provisions are interpreted in a specific way.

(11) Case law reflects the ambivalent nature of conditional interpretative declarations:

– in the *Belilos* case, the European Court of Human Rights considered the validity of the interpretative declaration of Switzerland “from the standpoint of” the rules applicable to reservations, without assimilating one to the other;²⁴¹

did not constitute a reservation, expressed the hope ‘that, in the light of the above-mentioned statement of India an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India’.

“By a resolution adopted on 1 March 1960, the Council of the Inter-Governmental Maritime Consultative Organization, taking note of the statement made on behalf of India referred to in the foregoing resolution and noting, therefore, that the declaration of India has no legal effect with regard to the interpretation of the Convention ‘considers India to be a member of the Organization’.”

With regard to this episode, see, in particular, McRae, “The legal effect of interpretative declarations” (footnote 129 above), pp. 163–165; Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 301–302; and Sapienza, *Dichiarazioni interpretative unilaterali ...* (footnote 129 above), pp. 108–113.

²⁴⁰ The text appears in *Multilateral Treaties ...* (footnote 37 above), chap. XII.1. Several Governments stated “that they assumed that it was a declaration of policy and did not constitute a reservation; and that it had no legal effect with regard to the interpretation of the Convention”. Accordingly, “[i]n a communication addressed to the Secretary-General on 31 January 1962, the Government of Cambodia stated that ‘... the Royal Government agrees that the first part of the declaration which it made at the time of the acceptance of the Convention is of a political nature. It therefore has no legal effect regarding the interpretation of the Convention. The statements contained [in the third paragraph of the declaration], on the other hand, constitute a reservation to the Convention by the Royal Government of Cambodia’” (*ibid.*). With regard to this episode, see, in particular, McRae, “The legal effect of interpretative declarations” (footnote 129 above), pp. 165–166, and Sapienza, *Dichiarazioni interpretative unilaterali ...* (footnote 129 above), pp. 177–178.

²⁴¹ Although it did not formally reclassify the interpretative declaration of Switzerland in issue as a reservation, the Court examined “the validity of the interpretative declaration in question, as in the case of a reservation*” (Judgment of 29 April 1988, *Belilos v. Switzerland* (see footnote 192 above), p. 24, para. 49). In the *Temeltasch* case, the European Commission of Human Rights was less cautious: completely (and intentionally) adhering to McRae’s position (“The legal effect of interpretative declarations” (footnote 129 above), p. 160), it “assimilated”

– likewise, in a text that is admittedly rather obscure, the Arbitral Tribunal that settled the dispute between France and the United Kingdom regarding the *Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* considered that the third reservation by France concerning article 6 of the 1958 Convention on the Continental Shelf constituted “a specific condition imposed by the French Republic on its acceptance of the delimitation régime provided for in article 6”, adding: “This condition, according to its terms, appears to go beyond mere interpretation.”²⁴² This would seem to establish *a contrario* that it could have been a conditional interpretative declaration and not a reservation in the strict sense of the term.

(12) The fact remains that, even if it cannot be entirely “assimilated” to a reservation, a conditional interpretative declaration does come quite close, for as Reuter has written: “[l]’essence de la ‘réserve’ est de poser une condition: l’État ne s’engage qu’à la condition que certains effets juridiques du traité ne lui soient pas appliqués, que ce soit par l’exclusion ou la modification d’une règle ou par l’interprétation de celle-ci” (“the essence of ‘reservations’ is to stipulate a condition: the State will commit itself only on condition that certain legal effects of the treaty are not applied to it, either by excluding or modifying a rule or by interpreting it”).²⁴³ There is support for this position in doctrine.²⁴⁴

(13) It follows that, as the Commission noted following detailed consideration of the matter, while conditional interpretative declarations do not have the same definition as reservations, they are subject to the same rules of form and substance as those applying to reservations. This is stated in the second paragraph of guideline 1.4. Consequently, it is unnecessary to mention conditional interpretative declarations in the remainder of this Guide: the legal regime of reservations is applicable to them.

(14) The Commission considered whether, instead of reproducing the long list of times at which a reservation (and, by extension, a conditional interpretative declaration) may be formulated, as in guideline 1.1, it might not be simpler and more elegant to use a general phrase such as “at the time of expression of consent to be bound”. It does not seem possible to adopt this solution, however, since interpretative declarations, like reservations, may

the notions of conditional interpretative declarations and reservations (Decision of 5 May 1982, *Temeltasch v. Switzerland* (see footnote 24 above), paras. 72–73).

²⁴² Arbitral decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), p. 40, para. 55.

²⁴³ Reuter, *Introduction au droit des traités* (footnote 28 above), p. 71. The inherent conditional character of reservations is stressed in numerous doctrinal definitions, including that of the Harvard Law School (Research in International Law of the Harvard Law School, “Draft Convention on the Law of Treaties”, AJIL, 1935, Supplement No. 4, p. 843; see also Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 35, and the examples cited). The definition proposed by Sir Humphrey Waldock in 1962 also specifically included conditionality as an element in the definition of reservations (see footnote 142 above); it was subsequently abandoned under circumstances that are not clear.

²⁴⁴ See McRae, “The legal effect of interpretative declarations” (footnote 129 above), p. 172.

be formulated at the time of signature, even in the case of treaties in solemn form. In this case, however, and just as for reservations, conditional interpretative declarations must be confirmed at the time of expression of consent to be bound. There would appear to be no logical reason for a different solution as between reservations and conditional interpretative declarations to which the other States and international organizations must be in a position to react where necessary. Moreover, it will be noted that, in general, States wishing to make their participation in a treaty subject to a specified interpretation of the treaty generally confirm their interpretation at the time of expression of consent to be bound, when it has been formulated at the time of signature or at any earlier point in the negotiations.²⁴⁵

1.5 Unilateral statements other than reservations and interpretative declarations

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations (including conditional interpretative declarations) are outside the scope of the present Guide to Practice.

Commentary

(1) Guideline 1.5 may be regarded as a “general exclusionary clause” purporting to limit the scope of the Guide to Practice to reservations, on the one hand, and to interpretative declarations *stricto sensu* (whether “simple” or “conditional”²⁴⁶), to the exclusion of other unilateral statements of any kind which are formulated in relation to a treaty, but which generally do not have as close a relationship with the treaty.

(2) As practice indicates, States and international organizations often take the opportunity, when signing or expressing their consent to be bound by a treaty, to make statements which relate to the treaty but seek neither to exclude or modify the legal effect of certain of its provisions (or of the treaty as a whole with respect to certain specific aspects) in their application to their author nor to interpret the treaty, and which are thus neither reservations nor interpretative declarations, whether “simple” or conditional.

(3) The United Nations online publication *Multilateral Treaties Deposited with the Secretary-General* contains numerous examples of such statements, concerning the

²⁴⁵ See the confirmation by the Federal Republic of Germany and the United Kingdom of their declarations formulated upon signing the 1989 Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (see *Multilateral Treaties ...* (footnote 37 above), chap. XXVII.3); see also the practice followed by Monaco upon signing and then ratifying the 1966 International Covenant on Civil and Political Rights (*ibid.*, chap. IV.4); by Austria in the case of the European Convention on the protection of the archaeological heritage of 6 May 1969 (United Nations, *Treaty Series*, vol. 788, p. 240) or the European Community in regard to the Convention on environmental impact assessment in a transboundary context (*Multilateral Treaties ...* (footnote 37 above), chap. XXVII.4). See also the declarations by Italy or the United Kingdom concerning the 1992 Convention on Biological Diversity (*ibid.*, chap. XXVII.8).

²⁴⁶ On this distinction, see guideline 1.4.

legal nature of which the Secretary-General takes no position.²⁴⁷ Instead, he simply notes that they have been made and leaves their legal assessment—an extremely important operation, as it determines the legal regime applicable to them—to the user.

(4) This publication reproduces only those unilateral statements which are formulated when signing or expressing consent to be bound, ratifying, etc., a treaty deposited with the Secretary-General, but which may in fact be neither reservations nor interpretative declarations. This is obviously because these are the only statements communicated to the Secretary-General, but there is no doubt that this fact is of major practical importance: statements made in the above circumstances raise the most problems as far as distinguishing them from reservations or conditional interpretative declarations is concerned, since *by definition* they may be formulated only “when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty”.²⁴⁸

(5) However, although it is true that in practice most of these statements are made at the time of signature or of expression of consent to be bound by the treaty, it is nevertheless possible for them to be made at a different time, even after the entry into force of the treaty for their author. However, it would not be useful for the Commission to take a firm position on this point, as the purpose of guideline 1.5 is precisely to exclude such statements from the scope of the Guide to Practice.

(6) Similarly, and for the same reason, although it might seem *prima facie* that such unilateral statements fall within the general category of unilateral acts of States,²⁴⁹ the Commission does not intend to take any decision regarding the legal regime applicable to them. It has simply endeavoured, in each of the guidelines in this section of the Guide to Practice, to provide, in as legally neutral a manner as possible, a definition of these different categories of unilateral statements which is sufficient to help distinguish them from reservations and interpretative declarations.

(7) Unilateral statements formulated by States or international organizations in respect of or in relation to a treaty are so numerous and so diverse that it is probably futile to try to make an exhaustive listing of them, and this section does not attempt to do so. The Commission has identified a number of such statements but has drawn up specific guidelines only for those statements that are of the greatest practical importance owing to the frequency with which they are made or the risk of their being confused with reservations or interpretative declarations. The classification contained in the guidelines below is, accordingly, merely illustrative.

²⁴⁷ As attested by the wording of the heading introducing these instruments: “Declarations [with no other indication] and reservations”.

²⁴⁸ See guidelines 1.1 and 1.4. On the other hand, “simple” interpretative declarations may, in the Commission’s view, be formulated at any time; see guideline 1.2 and paragraphs (21)–(32) of the commentary thereto.

²⁴⁹ See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations adopted by the Commission at its fifty-eighth session, *Yearbook ... 2006*, vol. II (Part Two), paras. 176–177.

(8) On the other hand, the Commission considered it unnecessary to draw up specific guidelines for other statements that are less frequently made or present only a slight risk of being confused with reservations or interpretative declarations. Such is the case for:

- “extensive” statements or statements purporting to undertake unilateral commitments;
- unilateral statements purporting to add further elements to a treaty;
- statements concerning the territorial application of a treaty; or
- general statements of policy.

However, statements of non-recognition, statements concerning modalities of implementation of a treaty at the internal level and unilateral statements made under an optional clause are covered by specific guidelines,²⁵⁰ but this differential treatment in the Guide to Practice has no special meaning insofar as their nature or legal status are concerned.

“Extensive” statements or statements purporting to undertake unilateral commitments

(9) A well-known example of an “extensive” reservation that was given by Mr. Brierly in his first report on the law of treaties is provided by the statement which South Africa made when it signed the General Agreement on Tariffs and Trade (GATT) in 1948: “As the article reserved against stipulates that the agreement ‘shall not apply’ as between parties which have not concluded tariff negotiations with each other and which do not consent to its application, the effect of the reservation is to enlarge rather than restrict the obligations of South Africa.”²⁵¹ Mr. Manfred Lachs also relied on that example in asserting the existence of cases “where a reservation, instead of restricting, extended the obligations assumed by the party in question”.²⁵²

(10) The South African statement gave rise to considerable controversy,²⁵³ but can hardly be regarded as a reservation: this kind of statement cannot have the effect of modifying the legal effect of the treaty or of some of its provisions. Admittedly, such undertakings entered into

²⁵⁰ Guidelines 1.5.1, 1.5.2 and 1.5.3, respectively.

²⁵¹ *Yearbook ... 1950*, vol. II, p. 239, para. 85.

²⁵² *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142, para. 49. See also Villiger, *Commentary on the 1969 Vienna Convention ...* (footnote 49 above), p. 89, para. 36.

²⁵³ Mr. Brierly, in keeping with his general definition of reservations, regarded it as a “proposal of reservation”, since it involved an “offer” made to the other parties which they had to accept for it to become a valid reservation (*Yearbook ... 1950*, vol. II, p. 239); Lachs regarded it purely and simply as an example of an extensive reservation (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142); Horn saw it as a mere declaration of intent without any legal significance (Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 89); and Imbert considered that “the statement of the South African Union could only have the effect of increasing the obligations of that State. Accordingly*, it did not constitute a reservation, which would necessarily* restrict the obligations under the treaty” (Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 15).

at the time of expression of consent to be bound by the treaty have no effect on the treaty, and could have been formulated at any time without resulting in a modification of their legal effects. In other words, it may be considered that whereas reservations are “non-autonomous unilateral acts”,²⁵⁴ such statements impose autonomous obligations on their authors and constitute unilateral legal acts which are subject to the legal rules applicable to that type of instrument²⁵⁵ and not to the regime of reservations.

Unilateral statements purporting to add further elements to a treaty

(11) The same holds true for unilateral statements purporting to add further elements to a treaty. There is in fact nothing to prevent a party to a treaty from proposing an extension of the scope or purpose of the treaty to its partners. In the Commission’s view, this is how the statement whereby the Government of Israel made known its wish to add the Shield of David to the Red Cross emblems recognized by the Geneva Conventions for the protection of war victims of 12 August 1949 may be seen.²⁵⁶ Such a statement actually seeks not to exclude or modify the effect of the provisions of the treaties in question (which in fact remain unchanged), but to add a provision to those treaties.

(12) While such statements are relatively uncommon, they nevertheless do occur. Apart from the example of the statement by Israel adding the Shield of David to the list of Red Cross emblems,²⁵⁷ one can think of cases of unilateral statements which are submitted as reservations but which, instead of limiting themselves to excluding (negatively) the legal effect of certain treaty provisions, actually seek to increase (positively) the obligations of other contracting States or contracting organizations as

compared with those arising for them under general international law.²⁵⁸ Since they are neither reservations nor “simple” or “conditional” interpretative declarations within the meaning of the present Guide to Practice, such unilateral statements fall outside its scope.

Statements concerning the territorial application of a treaty

(13) Some States also formulate statements concerning the territorial application of a treaty in order to prevent the treaty being applied to a territory for which the author of the statement is the international representative²⁵⁹ or to extend the treaty’s application to territories to which it did not previously apply, whether because of a statement having been made to that effect or implicitly.²⁶⁰ While statements of territorial exclusion may initially appear to be similar to reservations *ratione loci*, they serve as the expression of a “different intention” within the meaning of article 29 of the Vienna Conventions; the State does not purport to exclude application of the treaty but is establishing the scope of its application *ratione loci* by defining what is meant by “its entire territory” within the meaning of article 29.²⁶¹ Similarly, statements and notifications of extension of territorial application do not constitute reservations or interpretative declarations within the meaning of the present Guide to Practice; their authors do not purport to limit application of the treaty or to interpret its terms, but rather to extend its application to a territory to which the treaty did not previously apply. A notification of territorial extension therefore appears to be an expression of consent to be bound by the treaty with respect to a given territory. There is nothing to prevent a State from accompanying a notification of territorial extension with true reservations applying to the territory in question.²⁶²

General statements of policy

(14) It also frequently happens that, on the occasion of the signing of a treaty or the expression of its consent to be bound, a State expresses its opinion, positive or negative, with regard to the treaty and even sets forth

²⁵⁴ On this concept, see P. Daillier, M. Forteau and A. Pellet, *Droit international public (N. Quoc Dinh)*, 8th ed., Paris, Librairie générale de droit et de jurisprudence, 2009, pp. 398–400.

²⁵⁵ In this connection, see Ruda, *Collected Courses of the Hague Academy ...* (footnote 56 above), p. 107. See also the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (footnote 249 above).

²⁵⁶ Legal scholars are divided on this point. See J. Pictet, *Les Conventions de Genève du 12 août 1949—Commentaire*, International Committee of the Red Cross (ICRC), Geneva, vol. I, pp. 330–341, or Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 82–83 (who doubt whether it is a reservation), and S. Rosenne, “The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David”, *Israel Yearbook on Human Rights*, vol. 5 (1975), pp. 9–54, or Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 361–362 (who take the contrary view).

²⁵⁷ See *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. I, Federal Political Department, Berne, [1950], p. 348. Turkey had proceeded in the same way to have the Red Crescent accepted among the Red Cross emblems under the Conventions of 1899 (III) and 1907 (X) for the adaptation to maritime warfare of the principles of the Geneva Convention [of 22 August 1864 and 6 July 1906] (see J. B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., New York, Oxford University Press, 1918, pp. 181 and 256; see also *The International Peace Conference, The Hague, May 18–July 29, 1899*, Ministry for Foreign Affairs/Martinus Nijhoff, The Hague, 1907, pp. 23–25, 387–391, 453–454 and 461; *Actes de la Conférence de Révision réunie à Genève du 11 juin au 6 juillet 1906*, Geneva, Imprimerie Henri Jarrys, 1906, pp. 17, 63, 160–163, 175, 260, 271, 286 and 292; J. B. Scott (ed.), *The Proceedings of the Hague Peace Conferences*, vol. I, New York, Oxford University Press, 1920, pp. 63–65, 651 and 702; and *ibid.*, vol. III, New York, Oxford University Press, 1921, pp. 292, 296–299 and 560–563).

²⁵⁸ This would be the case with the “reservations” of the socialist countries to article 9 of the 1958 Convention on the High Seas mentioned in the commentary to guideline 1.1.1 (paragraphs (9)–(10) and footnote 61), considering that the scope given by those countries to State vessels on the high seas went further than that recognized by the applicable customary rules.

²⁵⁹ See, for example, the practice of New Zealand concerning Tokelau (*Multilateral Treaties ...* (footnote 37 above), Historical Information (New Zealand)), and the declarations of territorial exclusion made in relation to the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality (*ibid.*, chap. III.4); and in relation to the Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality (*ibid.*, chap. III.7); see also the practice of the United Kingdom concerning a number of its territories (for example, the territorial exclusion in respect of the Isle of Man resulting implicitly from the notification of the application of the Convention on the rights of the child to that territory (and others) (*ibid.*, chap. IV.11) and the complex practice of China with regard to the territories of Hong Kong and Macao (*ibid.*, Historical Information (China)).

²⁶⁰ See, among many examples, the declaration of territorial extension made by the United Kingdom in relation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*ibid.*, chap. IV.9) and the Convention on the rights of the child (*ibid.*, chap. IV.11).

²⁶¹ See also paragraphs (5)–(10) of the commentary to guideline 1.1.3.

²⁶² See guideline 1.1.4 and commentary thereto.

improvements that it feels ought to be made to the treaty, as well as ways of making them, without purporting to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application between it and the other contracting States or contracting organizations, or to interpret it. Hence, these are neither reservations nor interpretative declarations, but simple general statements of policy formulated in relation to the treaty or relating to the area which it covers.

(15) Declarations by several States regarding the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects of 10 October 1980 afford some notable examples.²⁶³ These are simple observations regarding the treaty which reaffirm or supplement some of the positions taken during its negotiation, but which have no effect on its application.²⁶⁴

²⁶³ This is the case, for example, with the declarations formulated by China (“1. The Government of the People’s Republic of China has decided to sign the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects adopted at the United Nations Conference held in Geneva on 10 October 1980. 2. The Government of the People’s Republic of China deems that the basic spirit of the Convention reflects the reasonable demand and good intention of numerous countries and peoples of the world regarding prohibitions or restrictions on the use of certain conventional weapons which are excessively injurious or have indiscriminate effects. This basic spirit conforms to China’s consistent position and serves the interest of opposing aggression and maintaining peace. 3. However, it should be pointed out that the Convention fails to provide for supervision or verification of any violation of its clauses, thus weakening its binding force. The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices fails to lay down strict restrictions on the use of such weapons by the aggressor on the territory of his victim and to provide adequately for the right of a State victim of an aggression to defend itself by all necessary means. The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons does not stipulate restrictions on the use of such weapons against combat personnel. Furthermore, the Chinese texts of the Convention and Protocol are not accurate or satisfactory enough. It is the hope of the Chinese Government that these inadequacies can be remedied in due course.”) or by France (“After signing the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, the French Government, as it has already had occasion to state – through its representative to the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons in Geneva, during the discussion of the proposal concerning verification arrangements submitted by the delegation of the Federal Republic of Germany and of which the French Government became a sponsor, and at the final meeting on 10 October 1980; – on 20 November 1980 through the representative of the Netherlands, speaking on behalf of the nine States members of the European Community in the First Committee at the thirty-fifth session of the United Nations General Assembly; regrets that thus far it has not been possible for the States which participated in the negotiation of the Convention to reach agreement on the provisions concerning the verification of facts which might be alleged and which might constitute violations of the undertakings subscribed to. It therefore reserves the right to submit, possibly in association with other States, proposals aimed at filling that gap at the first conference to be held pursuant to article 8 of the Convention and to utilize, as appropriate, procedures that would make it possible to bring before the international community facts and information which, if verified, could constitute violations of the provisions of the Convention and the Protocols annexed thereto.”) (*Multilateral Treaties ...* (see footnote 37 above), chap. XXVI.2; see also the declarations made by the United States of America, Italy and Romania (*ibid.*)).

²⁶⁴ See also, for example, the long declaration made by the Holy See in 1985 when ratifying the two Protocols additional to the Geneva Conventions of 12 August 1949 (United Nations, *Treaty Series*, vol. 1419,

(16) This is also the case when a State makes a declaration in which it calls on all or some other States to become parties to a treaty²⁶⁵ or to implement it effectively.²⁶⁶

(17) The same is true when a State takes the opportunity afforded by its signature of a treaty or its expression of consent to be bound by it to recall certain aspects of its policy with regard to the subject area of the treaty, as China did when it signed the Comprehensive Nuclear-Test-Ban Treaty adopted by the United Nations General Assembly on 10 September 1996²⁶⁷ or the Holy See when it became a party to the Convention on the rights of the child.²⁶⁸

(18) In the same spirit, some declarations made in the instruments of ratification of the 1971 Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof, notably those of Canada and India, concerning types of weapons other than nuclear weapons, do not purport to modify the rights and obligations ensuing from the Treaty or to interpret it; as was noted, “[t]heir main purpose is to avoid that the Treaty prejudice the positions of States making the declaration with respect to certain issues of the law of the sea on which States have different positions and views”.²⁶⁹

(19) What the diverse declarations analysed briefly above have in common is that the treaty in respect of which they are made is simply a pretext, and they bear no legal relationship to it: they could have been made under any circumstances, they have no effect on the

pp. 394–396; text attached to the reply from the Holy See to the Commission’s questionnaire on reservations to treaties). With regard to the questionnaire, see footnote 39 above).

²⁶⁵ See the declaration by the United States of America concerning the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects of 10 October 1980: “The United States Government welcomes the adoption of this Convention, and hopes that all States will give the most serious consideration to ratification or accession” (*Multilateral Treaties ...* (footnote 37 above), chap. XXVI.2), or the one by Japan concerning the Treaty on the Non-Proliferation of Nuclear Weapons: “The Government of Japan hopes that as many States as possible, whether possessing a nuclear explosive capability or not, will become parties to this Treaty in order to make it truly effective. In particular, it strongly hopes that the Republic of France and the People’s Republic of China, which possess nuclear weapons but are not parties to this Treaty, will accede thereto” (United Nations, *Treaty Series*, vol. 1035, pp. 342–343).

²⁶⁶ See the declaration by China concerning the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (Paris, 13 January 1993): “III. States Parties that have abandoned chemical weapons on the territories of other States Parties should implement in earnest the relevant provisions of the Convention and undertake the obligation to destroy the abandoned chemical weapons” (*Multilateral Treaties ...* (footnote 37 above), chap. XXVI.3, pp. 890–891).

²⁶⁷ “1. China has all along stood for the complete prohibition and thorough destruction of nuclear weapons and the realization of a nuclear-weapon-free world ...” (*ibid.*, chap. XXVI.4).

²⁶⁸ “By acceding to the Convention on the Rights of the Child, the Holy See intends to give renewed expression to its constant concern for the well-being of children and families ...” (*ibid.*, chap. IV.11); see also the aforementioned declaration (footnote 264 above) by the Holy See on the subject of the 1977 Protocols additional to the Geneva Conventions of 12 August 1949: “Finally, the Holy See reasserts, on this occasion, its strong conviction as to the fundamentally inhumane nature of war ...”.

²⁶⁹ Migliorino, “Declarations and reservations ...” (footnote 149 above), p. 107; see also pp. 115–119.

treaty's implementation, nor do they seek to. They are thus neither reservations nor interpretative declarations. What is more, they are not even governed by the law of treaties, which in turn offers no help in assessing their validity (which is dependent on other rules of international law, both general and specialized), and this justifies the fact that they, like the other categories of unilateral declarations defined in section 1.5, are excluded from the latter's scope.

1.5.1 Statements of non-recognition

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize is outside the scope of the present Guide to Practice, even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

Commentary

(1) States frequently accompany the expression of their consent to be bound by a treaty with a statement in which they indicate that such consent does not imply recognition of one or more of the other contracting States or, in a more limited way, of certain situations, generally territorial, relating to one or more of the other parties. Such statements are often called "reservations relating to non-recognition"; this is a convenient but misleading heading that covers some very diverse situations.

(2) The term in fact applies to two types of statements which have the common feature of specifying that the State formulating them does not recognize another entity that is (or wishes to become) a party to the treaty, but which seek to produce very different legal effects: in some cases, the author of the statement is simply taking a "precautionary step" by pointing out that, in accordance with a well-established practice, its participation in a treaty to which an entity that it does not recognize as a State is a party does not amount to recognition; in other cases, the State making the statement expressly excludes the application of the treaty between itself and the non-recognized entity.

(3) In this regard, we may, for example, compare the reactions of Australia and the Federal Republic of Germany to the accession of certain States to the Geneva Conventions for the protection of war victims of 12 August 1949. While repeating its non-recognition of the German Democratic Republic, the Democratic People's Republic of Korea, the Democratic Republic of Viet Nam and the People's Republic of China, Australia nevertheless states that it "has taken note of their acceptance of the provisions of the Conventions and their intention to apply them".²⁷⁰

²⁷⁰ United Nations, *Treaty Series*, vol. 314, pp. 334–336. See the ICRC document entitled "Geneva Conventions of 12 August 1949 for the Protection of War Victims—Reservations, declarations and communications made at the time of or in connection with ratification, accession or succession" (DDM/JUR/91/1719-CRV/1), p. 13; see also, for example, the statement of the Syrian Arab Republic at the time of signature of the Agreement establishing the International Fund for Agricultural Development: "It is understood that the ratification of this Agreement by the Syrian Arab Republic does not mean in any way recognition of Israel by the Syrian Arab Republic" (*Multilateral Treaties ...* (see footnote 37 above), chap. X.8), or the first,

The Federal Republic of Germany, however, excludes any treaty relations with South Viet Nam:

... the Federal Government does not recognize the Provisional Revolutionary Government as a body empowered to represent a State and ... accordingly is not able to consider the Provisional Revolutionary Government as a Party to the Geneva Conventions of 12 August 1949.²⁷¹

(4) In the first case, there can be no doubt that the statements in question are not reservations. They add nothing to existing law, since it is generally accepted that participation in the same multilateral treaty does not signify mutual recognition, even implicit.²⁷² Even if that were not the case,²⁷³ it would still not mean that the statements were reservations: these unilateral statements do not purport to have an effect on the treaty or on its provisions.

(5) Categorizing a unilateral statement whereby a State expressly excludes the application of the treaty between itself and the entity it does not recognize is an infinitely more delicate matter. Unlike "precautionary" statements, a statement of this type clearly purports to have (and does have) a legal effect on the application of the treaty, which is entirely excluded, but only in the relations between the declaring State and the non-recognized entity. Now, the definition of reservations does not preclude a reservation from having an effect *ratione personae*,²⁷⁴ moreover, in accordance with the provisions of article 20, paragraph 4 (b), of the 1969 Vienna Convention, through an objection, accompanied by a clearly worded refusal to be bound by the treaty with respect to the reserving State, an objecting State can prevent the entry into force of the treaty as between itself and the reserving State.

albeit slightly more ambiguous, statement made by the Syrian Arab Republic in respect of the Vienna Convention on Diplomatic Relations (*ibid.*, chap. III.3): "The Syrian Arab Republic does not recognize Israel and will not enter into dealings with it." The statement made by Argentina on acceding to the Convention relating to the Status of Stateless Persons of 28 September 1954 is not in the least ambiguous: "The application of this Convention in territories whose sovereignty is the subject of discussion between two or more States, irrespective of whether they are parties to the Convention, cannot be construed as an alteration, renunciation or relinquishment of the position previously maintained by each of them" (*ibid.*, chap. V.3); this is an example of non-recognition of a situation (see also the statements of Spain concerning the 1958 Geneva Conventions on the Law of the Sea in respect of Gibraltar (*ibid.*, chaps. XXI.1, XXI.2, XXI.3 and XXI.4).

²⁷¹ United Nations, *Treaty Series*, vol. 954, p. 459. ICRC document DDM/JUR/91/1719-CRV/1 (see previous footnote), p. 6. See also the statement by the Kingdom of Saudi Arabia on signing the Agreement establishing the International Fund for Agricultural Development: "The participation of the Kingdom of Saudi Arabia in the Agreement shall in no way imply recognition of Israel and shall not lead to entry into dealings with Israel under this Agreement" (*Multilateral Treaties ...* (footnote 37 above), chap. X.8); see also the statements of Iraq and Kuwait, couched in similar terms (*ibid.*).

²⁷² See J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine*, Paris, Pedone, 1975, pp. 429–431. Kuwait clearly reaffirms this in the statement which it made on acceding to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid: "It is understood that the accession of the State of Kuwait ... does not mean in any way recognition of Israel by the State of Kuwait" (*Multilateral Treaties ...* (footnote 37 above), chap. IV.7).

²⁷³ That is, if participation in the same multilateral treaty did imply mutual recognition.

²⁷⁴ See, however, Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 109.

(6) However, according to most legal writers, “[i]t is questionable whether a statement on this subject, even when designated as a reservation, constitutes a reservation as generally understood since it does not purport, in the usual circumstances, to amend or modify any substantive provision of the treaty”.²⁷⁵

(7) There are several reasons for not categorizing a statement of non-recognition as a reservation, even if it purports to exclude the application of the treaty in the relations between the State formulating it and the non-recognized entity. These reasons are both practical and theoretical.

(8) In practice, it seems to be actually very difficult, if not impossible, to apply the reservations regime to statements of non-recognition:

- objections to such statements are hardly likely to be made and would, in any event, be incapable of having any real effect;

- it would hardly be reasonable to conclude that such statements are prohibited under article 19 (a) and (b) of the 1969 and 1986 Vienna Conventions if the treaty in question prohibits, or permits only certain types of, reservations; and

- it must be acknowledged that recognizing them as reservations would hardly be compatible with the letter of the Vienna definition, since the cases in which such statements may be made cannot be limited to those covered by article 2, paragraph 1 (d), of the 1969 Vienna Convention.

(9) Moreover, from a more theoretical point of view, statements of this kind, unlike reservations, do not concern the legal effect of the treaty itself or its provisions, but rather the capacity of the non-recognized entity to be bound by the treaty.²⁷⁶

(10) Neither are such statements interpretative declarations, since their aim is not to *interpret* the treaty but to exclude its application in the relations between two parties thereto.

(11) The Commission intentionally avoided specifying the nature of the non-recognized entity. Whether it is a State, a Government or any other entity (a national liberation movement, for example), the problem is posed in identical terms. *Mutatis mutandis*, the same holds true for statements concerning the non-recognition of certain situations (in particular territorial ones). In all these cases, the two categories of statements of non-recognition

²⁷⁵ Whiteman, *Digest of International Law* (footnote 25 above), p. 158; it should be recalled that, according to the definition given in guideline 1.1, a reservation purports to modify not the provisions of the treaty, but their effects. See also B. R. Bot, *Non-Recognition and Treaty Relations*, Leyden, Sijthoff, 1968, pp. 30–31, 132–139 and 252–254; M. Lachs, “Recognition and modern methods of international cooperation”, *BYBIL 1959*, pp. 252–259; H. Lauterpacht, *Recognition in International Law*, Cambridge, Cambridge University Press, 1947, pp. 369–374; or Verhoeven, *La reconnaissance internationale dans la pratique ...* (footnote 272 above), pp. 428–448.

²⁷⁶ See Verhoeven, *La reconnaissance internationale dans la pratique ...* (footnote 272 above), p. 431, footnote 284.

referred to above²⁷⁷—“precautionary statements”²⁷⁸ and “statements of exclusion”²⁷⁹—can be found.

(12) The problem appears to be a marginal one insofar as international organizations are concerned; it could, however, arise in the case of some international integration organizations such as the European Union. In that event, there would be no reason not to extend the solution adopted for statements by States, *mutatis mutandis*, to statements which international organizations might be required to formulate. The Commission nevertheless feels that this possibility is too hypothetical at present to warrant making a specific reference to it in guideline 1.5.1.

(13) In adopting guideline 1.5.1, the Commission was guided by the fundamental consideration that the central problem here is that of non-recognition, which is peripheral to the right to enter reservations. The Commission felt that it was essential to mention this particular category of statements, which play a major role in contemporary international relations; as for all unilateral statements that are neither reservations nor interpretative declarations, however, it chose to focus on what it saw as strictly necessary to make a distinction between them and refrained from “spilling over” into issues relating to the recognition of States.

1.5.2 *Statements concerning modalities of implementation of a treaty at the internal level*

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without affecting its rights and obligations towards the other contracting States or contracting organizations, is outside the scope of the present Guide to Practice.

Commentary

(1) “Informative declarations”, whereby a State informs its partners, for example, of the internal authorities that will be responsible for implementing the treaty, regardless of how it will discharge its obligations or how it will

²⁷⁷ See paragraphs (2)–(3) above.

²⁷⁸ See the statement made by Cameroon concerning the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water of 5 August 1963: “Under no circumstances could the signing by the Federal Republic of Cameroon have the effect of entailing recognition by Cameroon of Governments or regimes which, prior to such signing, had not yet been recognized by the Federal Republic of Cameroon according to the normal traditional procedures established by international law.” Similarly, see the statement by Benin in connection with the same Treaty (*Status of Multilateral Arms Regulation and Disarmament Agreements*, Fifth Edition, 1996 (United Nations publication, Sales No. E.97.IX.3, p. 40)) or the one made by the Republic of Korea when it signed the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (*ibid.*, p. 176).

²⁷⁹ See the statement by the United States concerning its participation in the Convention for limiting the Manufacture and regulating the Distribution of Narcotic Drugs, signed in Geneva on 13 July 1931, which “does not involve any contractual obligation on the part of the United States of America to a country represented by a régime or entity which the Government of the United States of America does not recognize as the Government of that country until such country has a government recognized by the Government of the United States of America” (*Multilateral Treaties ...* (footnote 37 above), chap. VI.8.a).

exercise its rights under the treaty, are outside the scope of the present Guide to Practice.

(2) The practice of this type of unilateral declaration seems particularly developed in the United States of America, where three categories have been noted: “Statements initiated by the Senate may authorize the President to issue more concrete instructions for the implementation of the treaty obligations on the internal level, or by means of agreements of a specific kind with the other parties, or they may let certain measures of implementation pend later authorization by Congress.”²⁸⁰

(3) Thus, authorization to ratify the Statute of the International Atomic Energy Agency was given by the United States Senate

subject to the interpretation and understanding which is hereby made a part and condition of the resolution of ratification, that (1) any amendment to the Statute shall be submitted to the Senate for its advice and consent, as in the case of the Statute itself, and (2) the United States will not remain a member of the Agency in the event of an amendment to the Statute being adopted to which the Senate by a formal vote shall refuse its advice and consent.²⁸¹

(4) This declaration was attached to the instrument of ratification of the United States of America (the State party called it an “interpretation and understanding”), with the following explanation:

The Government of the United States of America considers that the above statement of interpretation and understanding pertains only to United States constitutional procedures and is of a purely domestic character.²⁸²

(5) As widespread as this practice is on the part of the United States, the latter is not the only country to use it. For example, in ratifying the United Nations Convention on the Law of the Sea, Greece declared that it

secures all the rights and assumes all the obligations deriving from the Convention.

[It] shall determine when and how it shall exercise these rights, according to its national strategy. This shall not imply that Greece renounces these rights in any way.²⁸³

(6) Occasionally, however, the distinction between an informative declaration and an interpretative declaration may be unclear, as Sweden notes in its reply to the Commission’s questionnaire on reservations:²⁸⁴ “It should be noted that some of the declarations referred to include purely informative as well as interpretative elements. Only the latter are being dealt with here, although the distinction may sometimes be vague.” By way of example, Sweden, explaining the reasons for the declaration attached to its instrument of ratification of the 1980 European Outline Convention on transfrontier co-operation between territorial communities or authorities, stated that:

²⁸⁰ Horn, *Reservations and Interpretative Declarations ...* (see footnote 25 above), p. 104.

²⁸¹ Text in Whiteman, *Digest of International Law* (see footnote 25 above), p. 191; see also the “interpretation and explanation” attached to the instrument of ratification of the Convention on the Organisation for Economic Co-operation and Development (*ibid.*, p. 192).

²⁸² *Ibid.*, pp. 191–192.

²⁸³ *Multilateral Treaties ...* (footnote 37 above), chap. XXI.6.

²⁸⁴ Reply to question 3.1. With regard to the questionnaire, see footnote 39 above.

“The reason for the declaration ... was not only to provide information on which Swedish authorities and bodies would fall within the scope of the Convention, but also to convey that its application would be confined to those indicated; e.g. to exclude other bodies such as parishes which under Swedish law are local public entities.” Here one can probably say that this is really a reservation by means of which the author purports to exclude the application of the treaty to certain types of institution to which it might otherwise apply. At the very least, it might be a simple interpretative declaration explaining how Sweden understands the treaty.

(7) This is not, however, the case with purely informative declarations, which, like those of the United States cited earlier,²⁸⁵ do not purport to have any international effect and concern only relations between Congress and the President. The problem arose in connection with a declaration of this type made by the United States in respect of the implementation on its territory of the Treaty relating to the uses of the waters of the Niagara River concluded with Canada in 1950. The Senate would only authorize ratification through a “reservation” that specifically identified the competent national authorities for the American side;²⁸⁶ this reservation was transmitted to Canada, which accepted it, stating that it did so “because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada’s rights or obligations under the Treaty”.²⁸⁷ Following an internal dispute, the District of Columbia Court of Appeal ruled, in a judgment dated 20 June 1957, that the “reservation” had not modified the treaty in any way and that, as it related only to the expression of purely domestic concerns, it did not constitute a true reservation in the sense of international law.²⁸⁸ This reasoning is further upheld²⁸⁹ by the fact that the declaration did not purport to produce any effect at the international level.

(8) For the same reasons, it would be difficult to call such a unilateral declaration “an interpretative declaration”: it does not interpret one or more of the provisions of the treaty, but is directed only at the internal modalities of its implementation. It can also be seen from United States practice that such declarations are not systematically attached to the instrument by which the country expresses

²⁸⁵ Paragraphs (2)–(4).

²⁸⁶ This famous declaration is known as the “Niagara reservation”; see L. Henkin, “The treaty makers and the law makers: the Niagara reservation”, *Columbia Law Review*, vol. 56 (1956), pp. 1151–1182. With regard to the Treaty relating to the uses of the waters of the Niagara River, signed in Washington, D.C., on 27 February 1950, see United Nations, *Treaty Series*, vol. 132, No. 1762, p. 223.

²⁸⁷ Quoted by Whiteman, *Digest of International Law* (footnote 25 above), p. 168.

²⁸⁸ *Power of Authority of the State of New York v. Federal Power Commission*, 247 F.2d 538–544 (D.C. Cir. 1957); for a fuller account of the case, see Whiteman, *Digest of International Law* (footnote 25 above), pp. 165–169; W. W. Bishop, Jr., “Reservations to treaties”, *Collected Courses of the Hague Academy of International Law, 1961-II*, vol. 103, pp. 317–322; or Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 107–108.

²⁸⁹ The fact that the “Niagara reservation” was formulated in the context of a bilateral treaty does not weaken this reasoning; quite the contrary: while a “reservation” to a bilateral treaty can be viewed as an offer to renegotiate (see guideline 1.6.1), which, in this case, Canada accepted, it is quite significant that the Court of Appeals held that it had no international scope. It would in fact be difficult to see how Canada could have “objected” to a declaration that did not concern it.

its consent to be bound by a treaty,²⁹⁰ and this clearly demonstrates that they are exclusively domestic in scope.

(9) Accordingly, it would appear that declarations which simply give indications of the manner in which the State that formulates them will implement the treaty at the internal level are not interpretative declarations, even though they bear a definite relationship to the treaty.

(10) The above comments may also apply to certain unilateral declarations formulated by an international organization in relation to a treaty. For example, the European Community made the following declaration when depositing the instrument of approval of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions: “As regards the Community competences described in the Declaration pursuant to article 27(3)(c) of the Convention, the Community is bound by the Convention and will ensure its due implementation. It follows that the Member States of the Community which are party to the Convention in their mutual relations apply the provisions of the Convention in accordance with the Community’s internal rules and without prejudice to appropriate amendments being made to these rules.”²⁹¹

(11) The Commission considers that the expression “at the internal level” is not excessive as regards unilateral declarations of this type formulated by international organizations, there no longer being any doubt as to the existence of an “internal” law peculiar to each international organization.²⁹²

(12) The words “without affecting” inserted in guideline 1.5.2 are intended to draw attention to the fact that States and international organizations which

formulate unilateral declarations do not have the objective of affecting the rights and obligations of the declarant in relation to the other contracting States and contracting organizations, but that it cannot be excluded that those declarations may have such effects, in particular through estoppel or, more generally, owing to the application of the principle of good faith. Moreover, if, as is sometimes asserted, unilateral declarations made in respect of the manner in which their authors will implement their obligations under the treaty at the internal level may constitute genuine reservations (especially in the field of human rights), these declarations must clearly be treated as such; but this is true of all the unilateral declarations listed in this section.

1.5.3 *Unilateral statements made under a clause providing for options*

1. A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty permitting the parties to accept an obligation that is not otherwise imposed by the treaty, or permitting them to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in a statement by which a State or an international organization accepts, by virtue of a clause in a treaty, an obligation that is not otherwise imposed by the treaty does not constitute a reservation.

Commentary

(1) Paragraph 1 of guideline 1.5.3 covers two cases in which a statement is made under an express treaty provision that offers contracting States and contracting organizations an element of choice: the first concerns an optional clause that the author of the statement is free to choose or not, while the second involves a clause that permits the contracting State or contracting organization to accept only certain obligations²⁹³ from among several specified in the treaty.

(2) The unilateral statements referred to in the first case covered by guideline 1.5.3 may seem similar to those mentioned in guideline 1.1.6 (which constitute reservations): that is, statements made under a clause expressly authorizing the exclusion or the modification of certain provisions of a treaty. In both cases, the treaty expressly provides for such statements, which contracting States and contracting organizations are free to make in order to modify the obligations imposed on them by the treaty. However, they are also very different in nature: while statements made under an exclusionary clause (or an opting-out or contracting-out clause) purport to exclude or modify the legal effect of certain provisions of the treaty as they apply to their authors and must therefore be viewed as genuine reservations, those made under optional clauses have the effect of increasing the declarant’s obligations beyond what is normally expected of the parties under the treaty and do not affect its entry into force in their case.

²⁹⁰ See Miller, *Reservations to Treaties ...* (footnote 26 above), pp. 170–171, or Whiteman, *Digest of International Law* (footnote 25 above), pp. 186 *et seq.*

²⁹¹ United Nations, *Treaty Series*, vol. 2440, p. 426; the text of the declaration is also available from the website of the United Nations Educational, Scientific and Cultural Organization: <http://unesdoc.unesco.org/images/0015/001516/151669e.pdf> or in the *Official Journal of the European Communities*, No. L 201 of 25 July 2006, annex 2, p. 30. Along the same lines, see the declaration made by the European Community when signing the Convention on environmental impact assessment in a transboundary context of 25 February 1991: “It is understood that the Community Member States, in their mutual relations, will apply the Convention in accordance with the Community’s internal rules, including those of the EURATOM Treaty, and without prejudice to appropriate amendments being made to those rules” (*Multilateral Treaties ...* (footnote 37 above), chap. XXVII.4). See also similar declarations by the European Community in respect of the United Nations Convention on the Law of the Sea of 1982 (*ibid.*, chap. XXI.6) and the United Nations Framework Convention on Climate Change (*ibid.*, chap. XXVII.7).

²⁹² See, for example, P. Reuter, “Principes de droit international public”, *Collected Courses of the Hague Academy of International Law, 1961-II*, vol. 103, particularly pp. 526–530; C. W. Jenks, *The Proper Law of International Organizations*, London, Stevens, 1962, p. 282; P. Cahier, “Le droit interne des organisations internationales”, *RGDIP*, 1963, pp. 563–602; or G. Balladore-Pallieri, “Le droit interne des organisations internationales”, *Collected Courses of the Hague Academy of International Law, 1969-II*, vol. 127, pp. 1–138; or C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed., Cambridge University Press, 2005, pp. 15–45. See also the text of the draft articles on the responsibility of international organizations adopted by the Commission on second reading at its 2011 session, in particular, article 2, subparagraph (b), and paragraphs (16)–(19) of the commentary thereto, in paragraph 88 of the present report (*Yearbook ... 2011*, vol. II (Part Two), pp. 46 *et seq.*).

²⁹³ Or at least one of the treaty obligations.

(3) The purpose of optional clauses or opting-in (or contracting-in) clauses, which may be defined as provisions stipulating that the parties to a treaty may accept obligations which, in the absence of explicit acceptance, would not be automatically applicable to them, is not to reduce, but to increase, the obligations arising from the treaty for the author of the unilateral statement.²⁹⁴

(4) The most famous optional clause is certainly Article 36, paragraph 2, of the Statute of the International Court of Justice,²⁹⁵ but there are many others; such clauses are either drawn up on the same model and result in the acceptance of the competence of a certain mode of settlement of disputes or of monitoring by an organ created by the treaty, as contemplated in article 41, paragraph 1, of the 1966 International Covenant on Civil and Political Rights,²⁹⁶ or are exclusively prescriptive in nature, as in the case, for example, of article 25 of the Convention on the recognition and enforcement of decisions relating to maintenance obligations of 2 October 1973.²⁹⁷

²⁹⁴ According to M. Virally, these are clauses “to which the parties accede only through special acceptance as distinct from accession to the treaty as a whole” (“Des moyens utilisés dans la pratique pour limiter l’effet obligatoire des traités”, in *Les clauses échappatoires en matière d’instruments internationaux relatifs aux droits de l’homme*, Catholic University of Louvain, fourth symposium of the Department of Human Rights, Brussels, Bruylant, 1982, p. 13).

²⁹⁵ “The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. The interpretation of a treaty; b. Any question of international law; c. The existence of any fact which, if established, would constitute a breach of an international obligation; d. The nature or extent of the reparation to be made for the breach of an international obligation.”

²⁹⁶ “A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant ...”; see also the former articles 25 (Acceptance of the right to address individual petitions to the Commission) and 46 (Acceptance of inter-State declarations) of the Convention for the Protection of Human Rights and Fundamental Freedoms (these articles have been modified, to provide for automatic compulsory jurisdiction, by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby of 11 May 1994, and correspond to current article 34) or article 45, paragraph 1, of the American Convention on Human Rights: “Pact of San José, Costa Rica”: “Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.”

²⁹⁷ “Any Contracting State may, at any time, declare that the provisions of this Convention will be extended, in relation to other States making a declaration under this article, to an official deed (*acte authentique*) drawn up by or before an authority or public official and directly enforceable in the State of origin insofar as these provisions can be applied to such deeds”; see also articles 16 and 17, paragraph 2, of the Convention on the taking of evidence abroad in civil or commercial matters of 18 March 1970, or article 15 of the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters of 15 November 1965, or article 4, paragraphs 2 and 4, of the Equality of Treatment (Social Security) Convention, 1962 (No. 118) (see also the examples given in “Written statement of the International Labour Organization”, a memorandum presented by the ILO (*I.C.J., Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Pleadings, oral arguments, documents*, pp. 216 *et seq.*, in particular at p. 232 (*Advisory Opinion, I.C.J. Reports 1959*, p. 15) or article 4, paragraph 2 (g), of the United Nations Framework Convention on Climate Change of 9 May 1992).

(5) Despite some academic opinions to the contrary,²⁹⁸ statements made under such clauses actually have little in common at the technical level with reservations, apart from the (important) fact that they both purport to modify the application of the effects of the treaty, and it is quite clear that “opt-out clauses seem to be much closer to reservations than opt-in clauses”.²⁹⁹ Indeed, not only can

(a) statements made under optional clauses be formulated, in most cases, at any time, but also;

(b) optional clauses “start from a presumption that parties are not bound by anything other than what they have explicitly chosen”,³⁰⁰ while exclusionary clauses, like the mechanism for reservations, start from the opposite assumption; and

(c) statements made under optional clauses purport not to “exclude or to modify the legal effect of certain provisions of [a] treaty in their application” to their author³⁰¹ or to limit the obligations imposed on [the author] by the treaty,³⁰² but, instead, to increase them, while the mere entry into force of the treaty for the author does not have this effect.

(6) Here again, to a certain degree, the complex problems associated with “extensive reservations”³⁰³ arise. The only difference between these extensive reservations and those under consideration here is that the former are formulated solely on the initiative of the author, while the latter are made under a treaty.

(7) If the treaty so provides or, given the silence of the treaty, if it is not contrary to the object and purpose of the provision in question,³⁰⁴ there is nothing to prevent such a statement, in turn, from being accompanied by restrictions aimed at limiting the legal effect of the obligation thereby accepted. This is the case with the “reservations” frequently made by States when they accept the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Court’s Statute.³⁰⁵

²⁹⁸ See Gormley, “The modification of multilateral conventions ...” (footnote 115 above), Part I, pp. 68 and 75, and Part II, pp. 413 *et seq.*

²⁹⁹ Åkermark, “Reservation clauses in treaties ...” (see footnote 101 above), pp. 479–514, in particular p. 505.

³⁰⁰ *Ibid.*

³⁰¹ See guideline 1.1.

³⁰² See guideline 1.1.1.

³⁰³ See paragraphs (9)–(10) of the commentary to guideline 1.5.

³⁰⁴ In the *Loizidou v. Turkey* case, the European Court of Human Rights held that “having regard to the object and purpose of the [European] Convention [on Human Rights]”, the consequences of restrictions on its competence “for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for. However, no such provision exists in either Article 25 or Article 46” (on these provisions, see footnote 296 above) (*Loizidou v. Turkey* (Preliminary Objections, Application no. 15318/89), Judgment of 23 March 1995, Series A no. 310, para. 75; also available in *Revue universelle des droits de l’homme*, vol. 7, Nos. 4–6 (1995), p. 139, para. 75).

³⁰⁵ Although the Statute is silent on the possibility of optional declarations under Article 36, paragraph 2, being accompanied by reservations other than the condition of reciprocity, this power, which is well established in practice and was confirmed by Committee IV/I of Commission IV of the United Nations Conference on International Organization (see *Documents of the United Nations Conference on*

(8) While no purpose would be served by deciding whether a distinction needs to be drawn between “reservations” and “conditions”,³⁰⁶ it is sufficient to state that:

These reservations have nothing in common with reservations encountered in multilateral treaties (...) Since the whole transaction of accepting the compulsory jurisdiction is *ex definitione* unilateral and individualized and devoid of any multilateral element or element of negotiation, the function of reservations in a declaration cannot be to exclude or vary the legal effect of some existing provision in relation to the State making the declaration. Their function, together with that of the declaration itself, is to define the terms on which that State unilaterally accepts the compulsory jurisdiction—to indicate the disputes which are included within that acceptance, in the language of the *Right of Passage (Merits)* case.³⁰⁷

(9) These observations are consistent with the jurisprudence of the International Court of Justice and, in particular, its judgment of 4 December 1998 in the *Fisheries Jurisdiction* case between Spain and Canada:

Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State’s acceptance of the compulsory jurisdiction of the Court ... All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court’s jurisdiction are to be interpreted as a unity ...³⁰⁸

(10) The same is true for the reservations which States attach to statements made under other optional clauses, such as those resulting from acceptance of the jurisdiction of the International Court of Justice under article 17 of the General Act of Arbitration, in respect of which the Court has stressed “the close and necessary link that always exists between a jurisdictional clause and reservations to it”.³⁰⁹

(11) It is therefore impossible simply to equate reservations appearing in the unilateral statements by which a State or an international organization accepts a provision of a treaty under an optional clause with reservations to a multilateral treaty. It is undoubtedly true that their ultimate objective is to limit the legal effect of the provision which the author of the statement thereby recognizes as being applicable to it. However, the reservation in question cannot be separated from the statement and does not in itself constitute a unilateral statement.

(Footnote 305 continued)

International Organization (San Francisco, 1945), vol. XIII-IV/7, p. 39), is quite clear. See S. Rosenne, *The Law and Practice of the International Court, 1920–2005*, 4th ed., vol. II, *Jurisdiction*, Leiden, Martinus Nijhoff, 2006, pp. 737–744; see also the dissenting opinion of Judge Bedjaoui attached to the judgment of the International Court of Justice of 4 December 1998 in the case concerning *Fisheries Jurisdiction (Spain v. Canada)* (footnote 199 above), at p. 533, para. 42, and *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction of the Court, Judgment of 21 June 2000*, *I.C.J. Reports 2000*, p. 12, at pp. 29–30, paras. 37–38.

³⁰⁶ Rosenne makes a distinction between these two concepts (*ibid.*, pp. 737 and 740).

³⁰⁷ *Ibid.*, pp. 737–738. See *Case concerning Right of Passage over Indian Territory, Merits, Judgment of 12 April 1960*, *I.C.J. Reports 1960*, p. 6, at p. 34.

³⁰⁸ *Fisheries Jurisdiction (Spain v. Canada)* (see footnote 199 above), para. 44. See also paragraph 47: “Therefore, declarations and reservations are to be read as a whole.”

³⁰⁹ *Judgment of 19 December 1978 in the Aegean Sea Continental Shelf* case (see footnote 210 above), at p. 33, para. 79.

(12) By means of the phrase “or permitting them to choose between two or more provisions of the treaty”, guideline 1.5.3 also covers the separate case in which the treaty requires States to choose between certain of its provisions, on the understanding, as shown by the examples given below, that the expression “two or more provisions of the treaty” is taken to cover not only articles and subparagraphs, but also chapters, sections and parts of a treaty and even annexes forming an integral part of it.

(13) This case is expressly dealt with in article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions. While paragraph 1 concerns the partial exclusion of the provisions of a treaty under an exclusionary clause, paragraph 2 relates to the conceptually different case in which the treaty contains a clause allowing a choice between several of its provisions:

The consent of a State [or an international organization] to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

(14) The commentary to this provision, reproduced without change by the United Nations Conference on the Law of Treaties,³¹⁰ is concise but sufficiently clear about the case covered:

Paragraph 2 takes account of a practice which is not very common but which is sometimes found, for example, in the General Act for the Pacific Settlement of International Disputes and in some international labour conventions. The treaty offers each State a choice between differing provisions of the treaty.³¹¹

(15) As has been noted,³¹² it is not accurate (or, at all events, it is no longer accurate) to say that such a practice is, today, “not very common”. It is actually fairly widespread, at least in the apparently rather vague sense given to it by the Commission in 1966, but this, in turn, includes two different hypotheses which do not fully overlap.

(16) The first is illustrated, for example, by the statements made under the 1928 General Act of Arbitration (Pacific Settlement of International Disputes), article 38, paragraph 1, of which provides:

Accessions to the present General Act may extend:

A. Either to all the provisions of the Act (chapters I, II, III and IV);

B. Or to those provisions only which relate to conciliation and judicial settlement (chapters I and II), together with the general provisions dealing with these procedures (chapter IV).³¹³

³¹⁰ See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ... (A/CONF.39/11/Add.2)* (footnote 54 above), Report on the proceedings of the Committee of the Whole at the first session of the Conference, pp. 129–130, paras. 156–157.

³¹¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 202, paragraph (3) of the commentary to article 14 (which became article 17 in 1969).

³¹² Åkermark, “Reservation clauses in treaties ...” (see footnote 101 above), p. 504.

³¹³ The Revised General Act for the Pacific Settlement of International Disputes of 1949 adds a third possibility: “C. Or to those provisions only which relate to conciliation (chapter I), together with the general provisions concerning that procedure (chapter IV).”

The same is true of several ILO conventions. This technique, often used subsequently,³¹⁴ was first employed in the ILO Social Security (Minimum Standards) Convention, 1952 (No. 102), article 2 of which provides:

Each Member for which this Convention is in force:

- (a) shall comply with:
 - (i) Part I;
 - (ii) at least three of Parts II, III, IV, V, VI, VII, VIII, IX and X, including at least one of Parts IV, V, VI, IX and X;
 - (iii) the relevant provisions of Parts XI, XII and XIII; and
 - (iv) Part XIV.

Along the same lines, mention may be made of the European Social Charter of 18 October 1961, article 20, paragraph 1, of which provides for an optional partial acceptance system:³¹⁵

Each of the Contracting Parties undertakes:

(a) to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that Part;

(b) to consider itself bound by at least five of the following Articles of Part II of this Charter: Articles 1, 5, 6, 12, 13, 16 and 19;

(c) ... to consider itself bound by such a number of Articles or numbered paragraphs of Part II of the Charter as it may select, provided that the total number of Articles or numbered paragraphs by which it is bound is not less than 10 Articles or 45 numbered paragraphs.³¹⁶

(17) The same is true of statements made under the second category of treaty clauses which, even more clearly, offer a choice between the provisions of a treaty because they oblige the parties to choose a given provision (or a given set of provisions) or, *alternatively*, another provision (or another set of provisions). The question is no longer one of choosing *among* the provisions of a treaty, but of choosing *between them*, on the understanding that, in contrast to the previous case, there can be no accumulation,³¹⁷ and the acceptance of a treaty is not partial (even if the obligations deriving from it may be more or less binding depending on the option selected).

³¹⁴ See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 172.

³¹⁵ H. Wiebringhaus, "La Charte sociale européenne: vingt ans après la conclusion du Traité", AFDI, vol. 28 (1982), p. 936.

³¹⁶ This complex system was used again in article A, paragraph 1, of the revised European Social Charter of 3 May 1996. See also articles 2 and 3 of the 1964 European Code of Social Security and article 2 of the European Charter for Regional or Minority Languages of 5 November 1992: "1. Each Party undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definition in Article 1. 2. In respect of each language specified at the time of ratification, acceptance or approval, in accordance with Article 3, each Party undertakes to apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13."

³¹⁷ Article 287 of the 1982 United Nations Convention on the Law of the Sea falls midway between the two approaches: States must choose one or more binding procedures for the settlement of disputes leading to binding decisions, failing which the arbitral procedure provided for in annex VII applies. But there may be an accumulation of different procedures.

(18) These "alternative clauses" are less common than those analysed above. They nevertheless exist, as demonstrated by, for example, article 2 of the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96):³¹⁸

1. Each Member ratifying this Convention shall indicate in its instrument of ratification whether it accepts the provisions of Part II of the Convention, providing for the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies, or the provisions of Part III, providing for the regulation of fee-charging employment agencies including agencies conducted with a view to profit.

2. Any Member accepting the provisions of Part III of the Convention may subsequently notify the Director-General that it accepts the provisions of Part II; as from the date of the registration of such notification by the Director-General, the provisions of Part III of the Convention shall cease to be applicable to the Member in question and the provisions of Part II shall apply to it.³¹⁹

(19) As has been observed, "[o]ptional commitments ought to be distinguished from authorized reservations, although they in many respects resemble such reservations".³²⁰ Moreover, the silence of article 17, paragraph 2, of the Vienna Conventions, which differs greatly from the reference in paragraph 1 to articles 19–23 on reservations,³²¹ constitutes, in contrast with unilateral statements made under an exclusionary clause, an indication of the clear dividing line between reservations and these alternative commitments.

(20) In the two forms which they may take, these statements are clearly alternatives to reservations in that they constitute procedures which modify the application of a treaty on the basis of the preferences of the parties (even if those preferences are strongly indicated in the treaty). In addition, like reservations, they take the form of unilateral statements made at the time of signature or of expression of consent to be bound (even if they may subsequently be modified, although, under certain conditions, reservations, too, may be modified).³²² And the fact that provision must be made for them in the treaty to which they apply does not constitute a factor differentiating them from reservations, since reservations may also be provided for in a restrictive way by a reservation clause.

(21) Yet there are striking differences between these statements and reservations, for, unlike a reservation, a statement made under a clause providing for options is the condition *sine qua non* of the participation of the author of the statement in the treaty, contrary to a statement made

³¹⁸ Imbert stresses that this is the "best example" of the type of clause allowing States to make a choice in the restrictive sense (Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 172); see also Horn, *Reservations and Interpretative Declarations ... (ibid.)*, p. 134.

³¹⁹ See also section 1 of article XIV of the Articles of Agreement of the International Monetary Fund (amended in 1978), whereby: "Each member shall notify the Fund whether it intends to avail itself of the transitional arrangements in Section 2 of this Article [Exchange restrictions], or whether it is prepared to accept the obligations of Article VIII, Sections 2, 3 and 4 [General obligations of member States]. A member availing itself of the transitional arrangements shall notify the Fund as soon thereafter as it is prepared to accept these obligations."

³²⁰ Horn, *Reservations and Interpretative Declarations ... (footnote 25 above)*, p. 133.

³²¹ See paragraphs (12)–(14) of the commentary to guideline 1.1.6.

³²² See guidelines 2.3.4 (Widening of the scope of a reservation), 2.5.10 (Partial withdrawal of a reservation) and 2.5.11 (Effect of a partial withdrawal of a reservation), and commentaries thereto.

under the optional clause referred to in the first case mentioned in the guideline. Moreover, although they exclude the application of certain provisions of the treaty in respect of the State or international organization making the statement, such exclusion relates to the treaty itself and is inseparable from the entry into force of other provisions of the treaty in respect of the author of the same statement.

1.6 *Unilateral statements in respect of bilateral treaties*

Commentary

(1) The above guidelines seek to delimit as closely as possible the definition of reservations to multilateral treaties and other unilateral statements that are formulated in connection with a treaty and with which they may be compared, or even confused, including interpretative declarations. The Commission questioned whether it was possible to transpose these definitions to unilateral statements formulated in respect of bilateral treaties or at the time of their signature or of the expression of the consent of the parties to be bound. This is the subject matter of section 1.6 of the Guide to Practice.

(2) Strictly speaking, it would have been logical to include the definitions which appear in the guidelines hereafter respectively in section 1.5, insofar as guideline 1.6.1 is concerned (since the Commission considers that so-called “reservations” to bilateral treaties do not correspond to the definition of reservations), and in section 1.2, insofar as guidelines 1.6.2 and 1.6.3 are concerned (since they deal with genuine interpretative declarations). Given its particular nature, however, the Commission felt that the Guide would better serve its practical purpose if the guidelines devoted more specifically to unilateral statements formulated in respect of bilateral treaties were to be grouped in a single separate section.

(3) The Commission considers, moreover, that the guidelines on unilateral statements other than reservations and interpretative declarations, grouped in section 1.5, can be applied, where necessary, to those dealing with bilateral treaties.³²³

1.6.1 *“Reservations” to bilateral treaties*

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty, does not constitute a reservation within the meaning of the present Guide to Practice.

Commentary

(1) The 1969 and 1986 Vienna Conventions are silent on the subject of reservations to bilateral treaties: neither article 2, paragraph 1 (*d*), which defines reservations, nor

³²³ It being understood that transposition is not always possible. In particular, guideline 1.5.1, concerning statements of non-recognition, is not relevant to bilateral treaties.

articles 19–23,³²⁴ which set out their legal regime, raise or exclude expressly the possibility of such reservations. The 1978 Vienna Convention explicitly contemplates only reservations to multilateral treaties.

(2) While at the outset of its work on reservations the Commission was divided with regard to reservations only to multilateral treaties,³²⁵ in 1956, Sir Gerald Fitzmaurice stressed, in his initial report, the particular features of the regime of reservations to treaties with limited participation,³²⁶ a category in which he expressly included bilateral agreements.³²⁷ Likewise, in his first report, in 1962, Sir Humphrey Waldock did not exclude the case of reservations to bilateral treaties but treated it separately.³²⁸

(3) However, this reference to bilateral treaties disappeared from the draft text after Sir Humphrey Waldock’s proposals were considered. The introductory paragraph of the commentary to draft articles 16 and 17 (future articles 19 and 20 of the 1969 Vienna Convention), contained in the Commission’s 1962 report and included in its final report in 1966, explains this as follows:

A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two

³²⁴ At best, one can say that article 20, paragraph 1, and article 21, paragraph 2, are directed at “the other contracting States [and contracting organizations]” or “the other parties to the treaty”, both in the plural, and that article 20, paragraph 2, deals separately with treaties in whose negotiation a limited number of States or international organizations have participated, which is exactly what happens when a treaty involves only two parties. However, this argument does not in itself provide sufficient justification to say that the Conventions acknowledge the existence of reservations to bilateral treaties: the phrase “limited number of ... negotiating States” may mean “two or more States”, but it can also be interpreted as indicating only those multilateral treaties that bind a small number of States.

³²⁵ As early as 1950, the Commission stated that “the application ... in detail” of the principle that a reservation could become effective only with the consent of the parties “to the great variety of situations which may arise in the making of *multilateral** treaties was felt to require further consideration” (report of the International Law Commission covering the work of its second session, *Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*, in *Yearbook ... 1950*, vol. II, p. 381, para. 164). The study requested of the Commission by the General Assembly in resolution 478 (V) of 16 November 1950 was supposed to (and did) focus exclusively on “the question of reservations to multilateral conventions”.

³²⁶ The Commission also questioned whether the particular features of “reservations” to bilateral treaties did not characterize rather the unilateral statements made with respect to “plurilateral” (or “multiple-party bilateral”) treaties, such as, for example, the peace treaties concluded at the end of the First and Second World Wars. Those instruments have the appearance of multilateral treaties but may in fact be regarded as bilateral treaties. It is doubtful whether the distinction, although interesting from a theoretical point of view, affects the scope of guideline 1.6.1: either the treaty will be considered to have two actual parties (notwithstanding the number of those contracting), the situation covered by guideline 1.6.1, or the statement is made by one constituent of the “multiple party” and constitutes a conventional reservation within the meaning of guideline 1.1.

³²⁷ See draft article 38 (Reservations to bilateral treaties and other treaties with limited participation) which he proposed: “In the case of bilateral treaties, or plurilateral treaties made between a limited number of States for purposes specially interesting those States, no reservations may be made, unless the treaty in terms so permits, or all the other negotiating States expressly so agree” (*Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115).

³²⁸ See draft article 18, paragraph 4 (*a*): “In the case of a bilateral treaty, the consent of the other negotiating State to the reservation shall automatically establish the reservation as a term of the treaty between the two States” (*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 61).

States concerning the terms of the treaty. If they arrive at an agreement—either adopting or rejecting the reservation—the treaty will be concluded; if not, it will fall to the ground.³²⁹

Following a suggestion by the United States of America, the Commission had furthermore expressly entitled the section of the draft articles on reservations “Reservations to multilateral treaties”.³³⁰

(4) It is hardly possible, however, to draw any conclusion from this in view of the positions taken during the United Nations Conference on the Law of Treaties and the decision of that Conference to revert to the heading “Reservations” for Part II, section 2, of the 1969 Vienna Convention. It should in particular be noted that the Conference’s Drafting Committee approved a Hungarian proposal to delete the reference to multilateral treaties from the title of the section on reservations³³¹ in order not to prejudice the issue of reservations to bilateral treaties.³³²

(5) However, after that decision, the question occasioned an exchange of views between the President of the Conference, Mr. Roberto Ago, and the Chairperson of the Drafting Committee, Mr. Mustapha K. Yasseen,³³³ which

³²⁹ *Ibid.*, document A/5209, pp. 176–177, and *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 203. In his first report, Sir Humphrey Waldock simply said that: “Reservations to bilateral treaties present no problem” (*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 62).

³³⁰ See the report of the Commission to the General Assembly on the work of the first part of its seventeenth session, *Yearbook ... 1965*, vol. II, document A/6009, p. 161, and the report of the Commission to the General Assembly on the work of its eighteenth session, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 202; see also the comments of Sir Humphrey Waldock, fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 45.

³³¹ See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), document A/CONF.39/C.1/L.137; see also a similar amendment submitted by Chile (A/CONF.39/C.1/L.22).

³³² See the explanations of Mr. Yasseen, Chairperson of the Drafting Committee, *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1, United Nations publication, Sales No. E.70.V.6), 10th plenary meeting, 29 April 1969, p. 28, para. 23.

³³³ *Ibid.*, 11th plenary meeting, 30 April 1969, p. 37:

“19. The PRESIDENT said that, personally, he had been surprised to hear that the Drafting Committee had entertained the idea of reservations to bilateral treaties. As a law student, he had been taught that that idea was a contradiction in terms, for when one party to such a treaty proposed a change, that constituted a new proposal, not a reservation. He had interpreted the abbreviation of the title of Section 2 as an admission that the applicability of reservations only to multilateral treaties was self-evident. If there were any doubt on the matter, the Drafting Committee would do well to revert to the title proposed by the International Law Commission.

“20. Mr. YASSEEN, Chairman of the Drafting Committee, said that some members of the Drafting Committee had thought that the practice of certain States might convey the impression that reservations could be made to bilateral treaties. The deletion of the reference to multilateral treaties from the title of Section 2 did not, however, mean that the Drafting Committee had decided that reservations to bilateral treaties were possible. The purpose of the deletion had merely been not to prejudice the question in any way.

“21. Speaking as the representative of Iraq, he said he fully shared the President’s view that any change proposed to a bilateral treaty represented a new offer and could not be regarded as a reservation.

“22. The PRESIDENT asked whether the Drafting Committee agreed that the procedures set out in the articles in Section 2 related only to multilateral treaties.

indicates that the Conference had not, in fact, taken a firm position as to the existence and legal regime of possible reservations to bilateral treaties.³³⁴

(6) The 1986 Vienna Convention sheds no new light on the question.³³⁵ However, the 1978 Vienna Convention tends to confirm the general impression gathered from a review of the 1969 and 1986 Vienna Conventions that the legal regime of reservations provided for in those Conventions (to which article 20, paragraph 3, of the 1978 Vienna Convention refers) is applicable solely to multilateral treaties and not to bilateral treaties. Indeed, article 20, the only provision of that instrument to deal with reservations, is included in section 2 of Part III,³³⁶ which deals with “Multilateral treaties”,³³⁷ and expressly stipulates that it is applicable “when a newly independent State establishes its status as a party or as a contracting State to a *multilateral** treaty by a notification of succession”, the notification of succession being generally admitted in respect of open multilateral treaties.

(7) Here again, however, the only conclusion one can draw is that the Vienna regime is not applicable to reservations to bilateral treaties, including in cases of succession of States. This does not mean, however, that the concept of “reservations” to bilateral treaties is inconceivable or non-existent.

(8) In practice some States do not hesitate to make unilateral statements which they call “reservations” with respect to bilateral treaties, while others declare themselves hostile to them.

(9) This is a practice which has been in existence for a long time,³³⁸ widely used by the United States of

“23. Mr. YASSEEN, Chairman of the Drafting Committee, said he was not in a position to confirm that statement on behalf of the entire Drafting Committee, which had not been unanimous on the point.

“24. The PRESIDENT said that, independently of the principle involved, the procedures laid down in the articles on reservations that the Conference had considered were not applicable to bilateral treaties.”

³³⁴ Writers interpret this exchange of views differently. Compare: Ruda, *Collected Courses of the Hague Academy ...* (footnote 56 above), p. 110; Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 294; and Edwards, “Reservations to treaties” (footnote 59 above), p. 404.

³³⁵ In his fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, Mr. Reuter said: “treaties concluded by international organizations are almost always bilateral treaties, for which reservations may come into play in theory but are of no interest in practice” (*Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 36, para. 1). See also the report of the Commission to the General Assembly on the work of its twenty-ninth session, *Yearbook ... 1977*, vol. II (Part Two), commentary to draft article 19, p. 106; the report of the Commission to the General Assembly on the work of its thirty-third session, *Yearbook ... 1981*, vol. II (Part Two), pp. 137–138; and the report of the Commission on the work of its thirty-fourth session, *Yearbook ... 1982*, vol. II (Part Two), p. 34.

³³⁶ Which concerns only “Newly independent States”.

³³⁷ Section 3 deals with “Bilateral treaties”.

³³⁸ The oldest example of a “reservation” to a bilateral treaty goes back to the resolution of 24 June 1795, in which the United States Senate authorized ratification of the “Jay Treaty” (Treaty of Amity, Commerce, and Navigation between His Britannic Majesty and the United States of America, concluded in London on 19 November 1794, H. Miller (ed.), *Treaties and Other International Acts of the United States of America*,

America³³⁹ and, less frequently, by other States in their relations with the United States.³⁴⁰ The fact remains that, of all the States which replied to the Commission's questionnaire on reservations, only the United States gave an affirmative response to question 1.4;³⁴¹ all the others answered in the negative.³⁴² Some of them simply said that

(Footnote 338 continued.)

vol. 2, Washington, D.C., United States Government Printing Office, 1931, document No. 16, pp. 245 *et seq.*, in particular at p. 271), "on condition that there be added to the said treaty an article, whereby it shall be agreed to suspend the operation of so much of the 12th article as respects the trade which his said Majesty thereby consents may be carried on, between the United States and his islands in the West Indies, in the manner, and on the terms and conditions therein specified" (quoted by Bishop, "Reservations to treaties" (footnote 288 above), pp. 260–261; Bishop even cites a precedent that goes back to the Articles of Confederation: in 1778, the United States Congress demanded and obtained renegotiation of the Treaty of Commerce with France of 6 February 1778 (*ibid.*, footnote 13)). With regard to the Treaty of Commerce with France, see Miller (ed.), *Treaties and Other International Acts* ..., p. 3 *et seq.*

³³⁹ In 1929, M. Owen estimated somewhere between 66 and 87 bilateral treaties had been subject to a "reservation" by the United States after the Senate had imposed a condition on their ratification ("Reservations to multilateral treaties", *Yale Law Journal*, 1928–1929, vol. 38 (1929), p. 1091). More recently, K. C. Kennedy compiled detailed statistics covering the period from 1795 to 1990. These data show that the United States Senate made its advice and consent to ratify conditional for 115 bilateral treaties during that period, a figure that includes interpretative declarations, which account for 15 per cent on average of all bilateral treaties to which the United States has become a party in just under two centuries ("Conditional approval of treaties by the U.S. Senate", *Loyola of Los Angeles International and Comparative Journal*, vol. 19 (1996), p. 98). The same statistics show that this practice of "amendments" or "reservations" involves all categories of agreement and is particularly frequent in the area of extradition, friendship, commerce and navigation treaties ("FCN treaties"), and even peace treaties (*ibid.*, pp. 99–103 and 112–116). In its response to the questionnaire on reservations, the United States of America confirmed that this practice remains important where the country's bilateral treaties are concerned. The United States attached to its response a list of 13 bilateral treaties that were accepted with reservations between 1975 and 1985. Such was the case, for example, of the Treaties concerning the Panama Canal concluded in Washington, D.C. on 7 September 1977 (the Panama Canal Treaty, establishing new agreements on the functioning, maintenance and defence of the Panama Canal up to 31 December 1999 (United Nations, *Treaty Series*, vol. 1280, No. 21086, p. 3) and the Treaty concerning the permanent neutrality and operation of the Panama Canal (*ibid.*, vol. 1161, No. 18342, p. 177); see also *International Legal Materials*, vol. 16, No. 5 (1977), pp. 1022 and 1040, respectively); the special agreement under which Canada and the United States agreed to submit their dispute on the delimitation of maritime zones in the Gulf of Maine area to the International Court of Justice (see the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *Judgment*, I.C.J. Reports 1984, p. 246), and the Supplementary Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, concluded in Washington, D.C. on 25 June 1985 (*Treaties and Other International Acts Series*, Washington, D.C., United States Government Printing Office (12050 TIAS i)). With regard to the questionnaire, see footnote 39 above.

³⁴⁰ Either its partners make counterproposals in response to the "reservations" of the United States (see examples given by Owen, "Reservations to multilateral treaties" (footnote 339 above), pp. 1090–1091 and Bishop, "Reservations to treaties" (footnote 288 above), pp. 267–269), or they themselves take the initiative (see the examples given by Whiteman, *Digest of International Law* (see footnote 25 above), p. 161 (Japan), Owen, "Reservations to multilateral treaties" (footnote 339 above), p. 1093 (New Granada), G. H. Hackworth, *Digest of International Law*, vol. V, Washington, D.C., United States Government Printing Office, 1943, pp. 126–130 (Costa Rica, El Salvador, Portugal, Romania)).

³⁴¹ The question read: "Has the State formulated reservations to bilateral treaties?" (*Yearbook ... 1996*, vol. II (Part One), p. 98).

³⁴² Bolivia, Canada, Chile, Croatia, Denmark, Finland, France, Germany, Holy See, India, Israel, Italy, Japan, Republic of Korea, Kuwait, Mexico, Monaco, New Zealand, Panama, Peru, San Marino, Slovakia, Slovenia, Spain, Sweden and Switzerland.

they do not formulate reservations to bilateral treaties, but others expressed concerns about that practice.³⁴³

(10) Another important feature of the practice of States in this area is the fact that, in all cases where the United States or its partners have entered "reservations" (often called "amendments")³⁴⁴ to bilateral treaties, they have endeavoured in all cases to renegotiate the treaty in question and to obtain the other contracting State's acceptance of the modification which is the subject of the "reservation".³⁴⁵ If agreement is obtained, the treaty enters into force with the modification in question;³⁴⁶ if not, the ratification process is discontinued and the treaty does not enter into force.³⁴⁷

³⁴³ See the position of Germany: "The Federal Republic has not formulated reservations to bilateral treaties. It shares the commonly held view that a State seeking to attach a reservation to a bilateral treaty would in effect refuse acceptance of that treaty as drafted. This would constitute an offer for a differently formulated treaty incorporating the content of the reservation and would thus result in the reopening of negotiations." The replies from Italy and the United Kingdom were very similar. However, the United Kingdom added: "The United Kingdom does not itself seek to make reservations a condition of acceptance of a bilateral treaty. If Parliament were (exceptionally) to refuse to enact the legislation necessary to enable the United Kingdom to give effect to a bilateral treaty, the United Kingdom authorities would normally seek to renegotiate the treaty in an endeavour to overcome the difficulties."

³⁴⁴ K. C. Kennedy has identified 12 different categories of conditions set by the United States Senate for ratification of treaties (bilateral and multilateral) but notes that 4 of these account for 90 per cent of all cases: "understandings", "reservations", "amendments" and "declarations". However, the relative share of each varies over time, as the following table shows:

Type of condition	1845–1895	1896–1945	1946–1990
Amendments	36	22	3
Declarations	0	3	14
Reservations	1	17	44
Understandings	1	38	32

(Kennedy, "Conditional approval of treaties ..." (footnote 339 above), p. 100).

³⁴⁵ As the Department of State noted in its instructions to the United States Ambassador in Madrid following the refusal by Spain to accept an "amendment" to a 1904 extradition treaty which the Senate had adopted, "[t]he action of the Senate consists in advising an amendment which, if accepted by the other party, is consented to in advance. In other words, the Senate advises that the President negotiate with the foreign Government with a view to obtaining its acceptance of the advised amendment" (quoted by Hackworth, *Digest of International Law* (footnote 340 above), p. 115).

³⁴⁶ In some cases, the other contracting State makes counter-offers which are also incorporated into the treaty. For example, Napoleon accepted a modification made by the Senate to the Convention of Peace, Commerce and Navigation between the French Republic and the United States of America concluded in Paris on 30 September 1800 (W. M. Malloy (ed.), *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776–1909*, vol. I, Washington, D.C., United States Government Printing Office, 1910, p. 496), but then attached his own condition to it, which the Senate accepted (see Owen, "Reservations to multilateral treaties" (footnote 339 above), pp. 1090–1091, or Bishop, "Reservations to treaties" (footnote 288 above), pp. 267–268).

³⁴⁷ See, for example, the rejection by the United Kingdom of amendments to an 1803 convention concerning the border between Canada and the United States (London, 12 May 1803, see W. R. Manning (ed.), *Diplomatic Correspondence of the United States. Canadian Relations 1784–1860*, vol. I, Washington, D.C., Carnegie Endowment for International Peace, 1940, pp. 555–557) and an 1824 convention for suppression of the African slave trade (London, 13 March 1824, see *British and Foreign State Papers, 1824–1825*, pp. 838–844) which the United States had requested (see Bishop, "Reservations to treaties" (footnote 288 above), p. 266); see

(11) The following conclusions may be drawn from this review:

(a) with the exception of the United States of America, States seldom formulate “reservations” to bilateral treaties, although exceptions do exist (but these apparently occur only in the context of bilateral treaty relations with the United States); and

(b) this practice, which may elicit constitutional objections in some countries, does not do so at the international level, if only because the States concluding treaties with the United States of America, having on occasion rejected “reservations” proposed by that country, have never raised any objections of principle and have even, in some cases, submitted their own “counter-reservations” of a similar nature.

(12) In the light of the practice described above it would appear that, despite some obvious points in common with reservations to multilateral treaties, “reservations” to bilateral treaties are different in one key respect: their intended and their actual effects.

(13) There is no doubt that “reservations” to bilateral treaties are formulated unilaterally by States (and, *a priori*, nothing prevents an international organization from doing the same) once the negotiations have ended, and that they bear different names that may reflect real differences in domestic law, although not in international law. From these different standpoints, they meet the first three criteria set out in the Vienna definition, reproduced in guideline 1.1.

(14) The Commission has found that a “reservation” to a bilateral treaty may be made at any time after the negotiations have ended, once a signature has been put to the final agreed text but before the treaty enters into force, as such statements are aimed at modifying its text.

(15) It is precisely this feature, however, which distinguishes such “reservations” to bilateral treaties from reservations formulated in respect of multilateral treaties. There is no doubt that with a “reservation”, one of the parties to a bilateral treaty intends to modify the legal effect of the provisions of the original treaty. Yet while a reservation does not affect the provisions of the instrument in the case of a multilateral treaty, a “reservation” to a bilateral treaty purports to modify it: if the reservation is established,³⁴⁸ it is not the “legal effect” of the provisions

also the refusal of the United Kingdom to accept the United States reservations to the treaty of 1900 concerning the Panama Canal (Washington, D.C., 5 February 1900, *British and Foreign State Papers, 1900–1901*, vol. 94, pp. 474–476), which was consequently renegotiated and led to the signing of a new agreement, the Hay-Pauncefote Treaty concluded in Washington, D.C. on 18 November 1901 (*ibid.*, pp. 46–48; or *The Statutes at Large of the United States of America (December 1901 to March 1903)*, vol. 32-2, Washington, D.C., Government Printing Office, 1903, p. 1903) (see also Hackworth, *Digest of International Law* (footnote 340 above), pp. 113–114). An even more complicated case concerns ratification of the Convention of Friendship, Reciprocal Establishments, Commerce and Extradition between the United States of America and Switzerland of 25 November 1850 (Malloy (ed.), *Treaties, Conventions, International Acts ...* (see previous footnote), vol. II, p. 1763), which was the subject of a request for amendments, first by the United States Senate, then by Switzerland, and then again by the Senate, all of which were adopted and the instruments of ratification, which had been amended three times, exchanged five years after the date of signature (Bishop, “Reservations to treaties” (footnote 288 above), p. 269).

³⁴⁸ Concerning the concept of the establishment of a reservation, see section 4.1 of the Guide to Practice.

in question that will be modified or excluded “in their application” to the author; it is the provisions themselves which, by the very nature of things, will be modified. A reservation to a multilateral treaty has a subjective effect: if it is accepted, the legal effect of the provisions in question is modified *vis-à-vis* the State or the international organization that formulated it. A reservation to a bilateral treaty has an objective effect: if it is accepted by the other State, it is the treaty itself that is amended.

(16) As is the case with a reservation to a multilateral treaty,³⁴⁹ a reservation to a bilateral treaty produces effects only if it is accepted, in one way or another, expressly or implicitly: the co-contracting State or international organization must accept the “reservation”, or else the treaty will not enter into force. Thus the difference does not have to do with the need for acceptance, which is present in both cases, in order for the reservation to produce its effects, but with the consequences of acceptance:

– in the case of a multilateral treaty, an objection does not prevent the instrument from entering into force, even, at times, between the objecting State or international organization and the author of the reservation,³⁵⁰ and its provisions remain intact;

– in the case of a bilateral treaty, the absence of acceptance by the co-contracting State or international organization prevents the entry into force of the treaty; acceptance entails its modification.

(17) Thus a “reservation” to a bilateral treaty appears to be a proposal to amend the treaty in question or an offer to renegotiate it. This analysis corresponds to the prevailing views in doctrine.³⁵¹ Moreover, saying that acceptance of a “reservation” to a bilateral treaty is equivalent to amending the treaty does not make the reservation an amendment: it is simply a unilateral proposal to amend, prior to the treaty’s entry into force,³⁵² while the amendment itself is treaty-based, is the result of an agreement between the parties³⁵³ and is incorporated into the negotiated text, even if it can be contained in one or more separate instruments.

³⁴⁹ See section 4.1 of the Guide to Practice.

³⁵⁰ See article 20, paragraph 4 (b), of the 1969 and 1986 Vienna Conventions and guideline 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation).

³⁵¹ Some authors have concluded that a reservation to a bilateral treaty is purely and simply inconceivable (see C. Rousseau, *Droit international public*, vol. I, *Introduction et sources*, Paris, Pedone, 1970, p. 122, or A. Maresca, *Il diritto dei trattati—La Convenzione codificatrice di Vienna del 23 Maggio 1969*, Milan, Giuffrè, 1971, pp. 281–282). But all stress the need for the express consent of the other party and the resulting modification of the treaty’s actual text (see Miller, *Reservations to Treaties ...* (footnote 26 above), pp. 76–77; Owen, “Reservations to multilateral treaties” (footnote 339 above), pp. 1093–1094; and Bishop, “Reservations to treaties” (footnote 288 above), p. 271, footnote 14).

³⁵² The term “counter-offer” has been used. Owen (Reservations to multilateral treaties” (footnote 339 above), p. 1091) traces this idea of a “counter-offer” back to C. C. Hyde (*International law chiefly as interpreted and applied by the United States*, Boston, Little, Brown and Company, 1922, para. 519). The expression also appears in the American Law Institute’s *Restatement of the Law Third—The Foreign Relations Law of the United States*, Washington, D.C., vol. 1, 14 May 1986, p. 182, para. 113; see also the position of Mr. Ago and Mr. Yasseen, cited in footnote 333 above, and that of Reuter, footnote 335 above.

³⁵³ See article 39 of the 1969 and 1986 Vienna Conventions.

(18) As the Solicitor for the Department of State of the United States of America noted in a memorandum dated 18 April 1921:

The action of the Senate when it undertakes to make so-called “reservations” to a treaty is evidently the same in effect as when it makes so-called “amendments”, whenever such reservations and amendments in any substantial way affect the terms of the treaty. The so-called reservations which the Senate has been making from time to time are really not reservations as that term has generally been understood in international practice up to recent times.³⁵⁴

(19) This is also the view of the Commission, which believes that a unilateral statement by which a State (or an international organization) purports to obtain a modification of a treaty whose final text has been agreed by the negotiators does not constitute a reservation in the usual meaning of the term in the context of the law of treaties, as has been confirmed by the 1969, 1978 and 1986 Vienna Conventions.

(20) Although the Commission considers such a statement to constitute an offer to renegotiate the treaty, which, if accepted by the other contracting State or the other contracting organization, becomes an amendment to the treaty, it does not appear essential for this to be stated in the Guide to Practice, since, as the different categories of unilateral statement mentioned in section 1.5 above are neither reservations in the usual meaning of the term nor interpretative statements, they do not fall within the scope of the Guide to Practice.³⁵⁵

1.6.2 *Interpretative declarations in respect of bilateral treaties*

Guidelines 1.2 and 1.4 are applicable to interpretative declarations in respect of both multilateral and bilateral treaties.

Commentary

(1) The silence of the Vienna Conventions on the law of treaties extends *a fortiori* to interpretative declarations made in respect of bilateral treaties: the Conventions do not mention interpretative declarations in general³⁵⁶ and are quite cautious insofar as the rules applicable to bilateral treaties are concerned.³⁵⁷ Such declarations are nonetheless common and, unlike “reservations” to the same treaties,³⁵⁸ they correspond in all respects to the definition of interpretative declarations adopted for guideline 1.2.

(2) Almost as old as the practice of “reservations” to bilateral treaties,³⁵⁹ the practice of interpretative declarations

in respect of such treaties is less geographically limited³⁶⁰ and does not seem to give rise to objections of principle. Of the 22 States that answered question 3.3³⁶¹ of the Commission’s questionnaire on reservations, 4 said that they had formulated interpretative declarations in respect of bilateral treaties; and 1 international organization, ILO, wrote that it had done so in one situation, while noting that the statement was in reality a “corrigendum”, “made in order not to delay signature”. However incomplete, these results are nevertheless significant: while only the United States claimed to make “reservations” to bilateral treaties,³⁶² it is joined here by Panama, Slovakia and the United Kingdom and by one international organization,³⁶³ and while several States criticized the very principle of “reservations” to bilateral treaties,³⁶⁴ none of them showed any hesitation concerning the formulation of interpretative declarations in respect of such treaties.³⁶⁵

(3) The extent and consistency of the practice of interpretative declarations in respect of bilateral treaties leave little doubt as to how this institution is viewed in international law: it is clearly a “general practice accepted as law”.

(4) Whereas the word “reservation” certainly does not have the same meaning when it is applied to a unilateral statement made in respect of a bilateral treaty as it does when it concerns a multilateral instrument, the same is not true in the case of interpretative declarations: in both cases, they are unilateral statements, however phrased or named, made “by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions”.³⁶⁶ Thus, guideline 1.2, which provides this definition, may be considered to be applicable to declarations which interpret bilateral as well as multilateral treaties.

(5) On one point, however, the practice of interpretative declarations in respect of bilateral treaties seems to differ somewhat from the common practice for multilateral treaties. Indeed, it appears from what has been written that

³⁶⁰ See paragraphs (9)–(11) of the commentary to guideline 1.6.1. However, as with “reservations” to bilateral treaties, the largest number of examples can be found in the practice of the United States of America; in just the period covered by that country’s reply to the questionnaire on reservations (1975–1995), it mentions 28 bilateral treaties to which it attached interpretative declarations upon expressing its consent to be bound. With regard to the questionnaire, see footnote 39 above.

³⁶¹ “Has the State attached any interpretative declarations to the expression of its consent to be bound by bilateral treaties?” (*Yearbook ... 1996*, vol. II (Part One), p. 101).

³⁶² See paragraph (9) of the commentary to guideline 1.6.1.

³⁶³ In addition, Sweden said that “[i]t may have happened, although very rarely, that Sweden has made interpretative declarations, properly speaking, with regard to bilateral treaties. ... Declarations of a purely informative nature of course exist.”

³⁶⁴ See the commentary to guideline 1.6.1 (footnote 342 above).

³⁶⁵ The United Kingdom criticizes the United States’ “understanding” on the matter of the Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Cayman Islands relating to mutual legal assistance in criminal matters, signed at Grand Cayman on 3 July 1986 (United Nations, *Treaty Series*, vol. 1648, No. 28332, p. 178); but what the Government of the United Kingdom seems to be rejecting here is the possibility of modifying a bilateral treaty under the guise of interpretation (by means of “understandings” which are really “reservations”).

³⁶⁶ See guideline 1.2.

³⁵⁴ Quoted by Hackworth, *Digest of International Law* (footnote 340 above), p. 112; along the same lines, see the position of Miller, *Reservations to Treaties ...* (footnote 26 above).

³⁵⁵ See guideline 1.5 and commentary thereto.

³⁵⁶ See paragraph (1) of the commentary to guideline 1.2.

³⁵⁷ See paragraph (1) of the commentary to guideline 1.6.

³⁵⁸ See guideline 1.6.1 and commentary thereto.

³⁵⁹ Bishop notes a declaration attached by Spain to its instrument of ratification of the treaty ceding Florida (Bishop, “Reservations to treaties” (footnote 288 above), p. 316). With regard to the Treaty of Amity, Settlement, and Limits between the United States of America and His Catholic Majesty, concluded in Washington, D.C. on 22 February 1819, and the text of the Spanish instrument of ratification, see Miller (ed.), *Treaties and Other International Acts ...* (footnote 338 above), vol. 3, 1933, pp. 3 *et seq.*

“in the case of a bilateral treaty it is the invariable practice, prior to the making of arrangements for the exchange of ratifications and sometimes even prior to ratification of the treaty, for the government making the statement or declaration to notify the other government thereof in order that the latter may have an opportunity to accept, reject, or otherwise express its views with respect thereto”.³⁶⁷ And, once approved, the declaration becomes part of the treaty:

[W]here one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument . . . , and when the treaty is afterwards ratified by the other party with the declaration attached to it, and their ratifications duly exchanged—the declaration thus annexed is part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged.³⁶⁸

(6) It is difficult to argue with this reasoning, which leads one to ask whether interpretative declarations that are made in respect of bilateral treaties, just like “reservations” to such treaties,³⁶⁹ must necessarily be accepted by the other party. In reality, this does not seem to be the case: in (virtually) all cases, interpretative declarations made in respect of bilateral treaties have been accepted because their author requested it, but one can easily imagine that it might not make such a request. Indeed, the logic which leads one to distinguish between interpretative declarations which are conditional and those which are not³⁷⁰ would seem to be easily transposed to the case of bilateral treaties: everything depends on the author’s intention. It may be the condition *sine qua non* of the author’s consent to the treaty, in which case it is a conditional interpretative declaration, identical in nature to those made in respect of multilateral treaties and consistent with the definition proposed in guideline 1.4. But it may also be simply intended to inform the partner of the meaning and scope which the author attributes to the provisions of the treaty without, however, seeking to impose that interpretation on the partner, and in this case it is a “simple” interpretative declaration, which, like those made in respect of multilateral treaties,³⁷¹ can actually be made at any time.

(7) Accordingly, the Commission felt that it was not necessary to adopt specific guidelines on interpretative declarations in respect of bilateral treaties, since these fall under the same definition as interpretative declarations in respect of multilateral treaties, whether it be their general definition, as given in guideline 1.2, or the distinction between simple and conditional interpretative declarations which follows from guideline 1.4. It therefore seems to be sufficient to take note of this in the Guide to Practice.

(8) On the other hand, guideline 1.2.1, concerning interpretative declarations formulated jointly, is not, of course, relevant in the case of bilateral treaties.

³⁶⁷ Whiteman, *Digest of International Law* (see footnote 25 above), pp. 188–189.

³⁶⁸ Judgment of the United States Supreme Court concerning the Spanish declaration made in respect of the Treaty of Amity, Settlement, and Limits between the United States of America and His Catholic Majesty of 22 February 1819 (see footnote 359 above), *Doe v. Braden*, 16 How. 635, 656 (US 1853), cited by Bishop, “Reservations to treaties” (footnote 288 above), p. 316.

³⁶⁹ See paragraphs (16)–(20) of the commentary to guideline 1.6.1.

³⁷⁰ See guideline 1.4 and commentary thereto.

³⁷¹ See guideline 1.2 and paragraphs (21)–(30) of the commentary thereto.

(9) As regards section 1.3 of this chapter, concerning the distinction between reservations and interpretative declarations, it is difficult to see how, if the term “reservations” in respect of bilateral treaties does not correspond to the definition of reservations given in guideline 1.1, it would be applicable to the latter. At best, it may be thought that the principles set forth therein can be applied, *mutatis mutandis*, to distinguish interpretative declarations from other unilateral statements made in respect of bilateral treaties.

1.6.3 Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes an authentic interpretation of that treaty.

Commentary

(1) Although acceptance of an interpretative declaration formulated by a State in respect of a bilateral treaty is not inherent in such a declaration,³⁷² it might be asked whether acceptance modifies the legal nature of the interpretative declaration.

(2) In the Commission’s opinion, the reply to this question is affirmative: when an interpretative declaration made in respect of a bilateral treaty is accepted by the other party,³⁷³ it constitutes the authentic interpretation thereof. As the Permanent Court of International Justice noted, “the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it”.³⁷⁴ Yet in the case of a bilateral treaty this power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of a treaty, regardless of its form,³⁷⁵ exactly as “reservations” to bilateral treaties do once they have been accepted by the co-contracting State or international organization.³⁷⁶ It becomes an agreement collateral to the treaty in the sense of paragraphs 2 or 3 (a) of article 31 of the 1969 and 1986 Vienna Conventions; as such, it must be taken into consideration in interpreting the treaty.³⁷⁷ Moreover,

³⁷² See paragraphs (5)–(6) of the commentary to guideline 1.6.2.

³⁷³ And one can imagine that this would be the case even when an interpretative declaration is not conditional.

³⁷⁴ Advisory Opinion of 6 December 1923, *Jaworzina case*, 1923, P.C.I.J., Series B, No. 8, p. 37.

³⁷⁵ Exchange of letters, protocol, simple oral agreement, etc.

³⁷⁶ See guideline 1.6.1 and paragraphs (15)–(19) of the commentary thereto.

³⁷⁷ Article 31 of the 1969 Vienna Convention reads: “... 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”

this analysis is consistent with that of the United States Supreme Court in the *Doe* case.³⁷⁸

(3) While it is aware that considering this phenomenon in Part 1 of the Guide to Practice exceeds the scope of that Part, which is devoted to the definition, and not the legal regime, of reservations and interpretative declarations,³⁷⁹ the Commission has seen fit to mention it in a guideline. It does not in fact return to the highly specific question of “reservations” and interpretative declarations in respect of bilateral treaties: first, because they are not reservations, and, secondly, because interpretative declarations to bilateral treaties have no distinguishing feature with respect to interpretative declarations to multilateral treaties, except the very one covered in guideline 1.6.2. For purely practical reasons, then, it seems appropriate to make that clear at this stage.

1.7 Alternatives to reservations and interpretative declarations

Commentary

(1) Reservations are not the only procedure enabling the parties to a treaty to exclude or modify the legal effect of certain provisions of the treaty or of certain particular aspects of the treaty as a whole. Accordingly, it seems useful to link the consideration of the definition of reservations to that of other procedures, which, while not constituting reservations, are, like them, designed to enable and do indeed enable States and international organizations to modify obligations under treaties to which they are parties; what are involved are alternatives to reservations, and recourse to such procedures may probably make it possible, in specific cases, to overcome some problems linked to reservations. In the Commission’s view, these procedures, far from constituting invitations to States to limit the effects of the treaty, would instead help to make recourse to reservations less “necessary” or frequent by offering more flexible treaty techniques.

(2) Some of these alternatives differ profoundly from reservations in that they constitute, not unilateral statements, but clauses in the treaty itself and thus relate more to the process of drafting a treaty than to its application. As they produce effects almost identical to those produced by reservations, these techniques nevertheless deserve to be mentioned in the Part of the Guide to Practice devoted to the definition of reservations, if only so as to identify more clearly the key elements of the concept, distinguish them from reservations and, where applicable, draw appropriate conclusions with regard to the legal regime of reservations.

(3) The same problem arises, *mutatis mutandis*, with regard to interpretative declarations whose objective may be achieved by other means.

(4) Some of these alternative procedures are the subject of guidelines in section 1.5 of the Guide to Practice. However, these deal only with “[u]nilateral statements formulated in relation to a treaty which are not reservations nor

interpretative declarations”,³⁸⁰ excluding other techniques for modifying the provisions of a treaty or their interpretation. Given the practical nature of the Guide, the Commission considered that it might be useful to devote a short section of the instrument to the range of procedures constituting alternatives to reservations and interpretative declarations, to serve as a reminder to users and, in particular, to the negotiators of treaties of the wide range of possibilities available to them for that purpose.

1.7.1 Alternatives to reservations

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

(a) the insertion in the treaty of a clause purporting to limit its scope or application;

(b) the conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effect of certain provisions of the treaty as between themselves.

Commentary

(1) The formulation of reservations constitutes a means for States (and, to some extent, for international organizations) to partially preserve their freedom of action while accepting in principle to limit that freedom by becoming bound by a treaty. This “concern of each Government with preserving its capacity to reject or adopt [and adapt] the law (a minimal, defensive concern)”³⁸¹ is particularly present in two situations: where the treaty in question deals with especially sensitive matters or contains exceptionally onerous obligations³⁸² or where it binds States whose situations are very different and whose needs are not necessarily met by a uniform set of rules.

(2) It is this type of consideration which led the authors of the Constitution of the International Labour Organization (ILO) to state in article 19, paragraph 3, as follows:

In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.³⁸³

According to the ILO, which bases its refusal to permit reservations to the international labour conventions on this article:³⁸⁴

³⁸⁰ See guideline 1.5.

³⁸¹ G. de Lacharrière, *La politique juridique extérieure*, Paris, Economica, 1983, p. 31.

³⁸² Such is the case, for example, of the charters of international “integration” organizations (see the Treaties establishing the European Communities; see also the Rome Statute of the International Criminal Court).

³⁸³ This provision reproduces the provisions of article 405 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).

³⁸⁴ See paragraph (3) of the commentary to guideline 1.1.6.

³⁷⁸ See the commentary to guideline 1.6.2 (footnote 368 above).

³⁷⁹ See guideline 1.8.

This would suggest that the object of the framers of the Treaty of Peace, in imposing on the Conference this obligation to give preliminary consideration to the special circumstances of each country, was to prevent States from pleading, after the adoption of a convention, a special situation which had not been submitted to the Conference's judgement.³⁸⁵

As in the case of reservations, but by a different procedure, the aim is

to protect the integrity of the essential object and purpose of the treaty while simultaneously allowing the maximum number of States to become parties, though they are unable to assume full obligations.³⁸⁶

(3) The quest to reconcile these two goals is the aim both of reservations in the strict sense and of the alternative procedures that are the subject of guideline 1.7.1. Reservations are one of the means intended to bring about this reconciliation. However, they are far from "the only procedure which makes it possible to vary the content of a treaty in its application to the parties"³⁸⁷ without undermining its object and purpose. Many other procedures are used to give treaties the flexibility necessitated by the diversity of situations of the States or international organizations seeking to be bound,³⁸⁸ it being understood that the word "may" in the text of guideline 1.7.1 must not be interpreted as implying any value judgment as to the use of one or the other technique, but must be construed as being purely descriptive.

(4) The common feature of these procedures, which makes them alternatives to reservations, is that, like the latter, they purport "to exclude or to modify the legal effect of certain provisions of the treaty" or "of the treaty as a whole with respect to certain specific aspects"³⁸⁹ in their application to certain parties. There the similarities end, however, and drawing up a list of them proves difficult, "for the imagination of legal scholars and diplomats in this area has proved to be unlimited".³⁹⁰ Furthermore, on the one hand, some treaties combine several of these procedures with each other and with reservations and, on the other hand, it is not always easy to differentiate them clearly.³⁹¹

³⁸⁵ "Admissibility of reservations to general conventions", memorandum by the Director of the International Labour Office submitted to the Council on 15 June 1927, League of Nations, *Official Journal*, July 1927, p. 883. See also "Written statement of the International Labour Organization" (footnote 297 above), pp. 224 and 236.

³⁸⁶ Gormley, "The modification of multilateral conventions ..." (see footnote 115 above), p. 65. On the strength of these similarities, this author, at the cost of terminological confusion, encompasses in a single study "all devices the application of which permit a State to become a party to a multilateral convention without immediately assuming all of the maximum obligations set forth in the text", *ibid.*, p. 64.

³⁸⁷ Combacau and Sur, *Droit international public* (footnote 166 above), p. 136.

³⁸⁸ Some authors have endeavoured to reduce all these procedures to one: see, *inter alia*, G. Droz, who contrasts "reservations" and "options" (Droz, "Les réserves ..." (footnote 109 above), p. 383). On the other hand, F. Majoros believes that "the set of 'options' is merely an amorphous group of provisions which afford various options" ("Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", *Journal du droit international*, No. 1 (1974), p. 88.

³⁸⁹ See guideline 1.1.

³⁹⁰ Virally, "Des moyens utilisés dans la pratique ..." (footnote 294 above), p. 6.

³⁹¹ *Ibid.*, p. 17.

(5) There are many ways of grouping them: by techniques used (treaty or unilateral), by the object pursued (extension or restriction of obligations under the treaty) or by the reciprocal or non-reciprocal nature of their effects. They may also be distinguished according to whether the modification of the legal effects of the provisions of a treaty is provided for in the treaty itself or results from exogenous elements.

(6) In the first of these two categories, mention can be made of the following:

– restrictive clauses, "which limit the purpose of the obligation by making exceptions to and placing limits on it"³⁹² in respect of the area covered by the obligation or its period of validity;

– escape clauses, "which have as their purpose to suspend the application of general obligations in specific cases"³⁹³ and among which mention can be made of saving and derogations clauses;³⁹⁴

– opting-[or contracting-]in clauses, which have been defined as "those to which the parties accede only through

³⁹² *Ibid.*, p. 10. This notion corresponds to "clawback clauses" as they have been defined by R. Higgins: "By a 'clawback' clause is meant one that permits, in normal circumstances, breach of an obligation for a specified number of public reasons" ("Derogations under human rights treaties", *BYBIL 1976-1977*, p. 281; see also F. Ouguergouz, "L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: les réponses au droit international général", *RGDIP*, vol. 98 (1994), p. 296). Other authors propose a more restrictive definition; according to R. Gitleman, clawback clauses are provisions "that entitle a State to restrict the granted rights to the extent permitted by domestic law" ("The African Charter on Human and Peoples' Rights: A legal analysis", *Virginia Journal of International Law*, vol. 22, No. 4 (1982), p. 691, cited by R. Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles—Étude sur l'article 15 de la Convention européenne des droits de l'homme*, Brussels, Bruylant, 1987, p. 24).

³⁹³ Virally, "Des moyens utilisés dans la pratique ..." (footnote 294 above), p. 12.

³⁹⁴ Escape clauses permit a contracting State or contracting organization temporarily not to meet certain treaty requirements owing to the difficulties it is encountering in fulfilling them as a result of special circumstances, whereas waivers, which produce the same effect, must be authorized by the other parties or by an organ responsible for monitoring treaty implementation. A comparison of article XIX, paragraph 1 (a), and article XXV, paragraph 5, of the 1947 General Agreement on Tariffs and Trade (GATT) shows the difference clearly. Article XIX, paragraph 1 (a), reads: "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession." This is an escape clause (this option has been expanded on in the Agreement on Safeguards included in annex 1A of the Marrakesh Agreement Establishing the World Trade Organization of 15 April 1994). On the other hand, the general provision laid down in article XXV, paragraph 5 (entitled "Joint Action by the Contracting Parties") is a waiver: "In exceptional circumstances not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties" (see also article VIII, section 2 (a), of the Articles of Agreement of the International Monetary Fund).

a special acceptance procedure, separate from accession to the treaty as a whole”;³⁹⁵

– opting-[or contracting-]out clauses, “under which a State will be bound by rules adopted by majority vote if it does not express its intent not to be bound within a certain period of time”;³⁹⁶ or

– those which offer the parties a choice among several provisions; or again,

– reservation clauses, which enable the contracting States and contracting organizations to formulate reservations, subject to certain conditions and restrictions, as appropriate.

(7) In the second category,³⁹⁷ which includes all procedures that, although not expressly envisaged therein, enable the parties to modify the effect of the provisions of the treaty, are the following:

– reservations again, where their formulation is not provided for or regulated by the instrument to which they apply;

– suspension of the treaty,³⁹⁸ whose causes are enumerated and codified in Part V of the 1969 and 1986 Vienna Conventions, particularly the application of the principles *rebus sic stantibus*³⁹⁹ and *non adimpleti contractus*;⁴⁰⁰

– amendments to the treaty, where they do not automatically bind all the parties thereto;⁴⁰¹ or

– protocols or agreements having as their purpose (or effect) to supplement or modify a multilateral treaty only between certain parties,⁴⁰² including within the framework of “bilateralization”.⁴⁰³

(8) This list by no means claims to be exhaustive: as emphasized above,⁴⁰⁴ negotiators display seemingly limitless ingenuity which precludes any pretensions to exhaustiveness. Consequently, guideline 1.7.1 is restricted to mentioning two procedures that are not mentioned elsewhere and are sometimes characterized as “reservations”, although they do not by any means meet the definition contained in guideline 1.1.

³⁹⁵ Virally, “Des moyens utilisés dans la pratique ...” (footnote 294 above), p. 13.

³⁹⁶ Simma, “From bilateralism to community interest ...” (footnote 99 above), p. 329; see also Tomuschat, “Obligations arising for States ...” (footnote 99 above), pp. 264 *et seq.*

³⁹⁷ Among the latter modification techniques, the first two are unilateral, but derive from the general international law of treaties, while the last two derive from the joint initiative of the parties to the treaty, or some of them, following its adoption.

³⁹⁸ Termination of the treaty is a different matter; it puts an end to the treaty relations.

³⁹⁹ See article 62 of the Vienna Conventions.

⁴⁰⁰ See article 60 of the Vienna Conventions.

⁴⁰¹ See article 40, paragraph 4, and article 30, paragraph 4, of the Vienna Conventions.

⁴⁰² See article 41 of the Vienna Conventions.

⁴⁰³ See paragraphs (19)–(23) below.

⁴⁰⁴ See paragraph (4) above.

(9) Other “alternatives to reservations”, which take the form of unilateral statements made in accordance with a treaty, are the subject of guidelines appearing in section 1.5 of the Guide to Practice.

(10) Other alternative procedures are even more different. Such is the case, for example, of notifications of the suspension of a treaty. These, too, are unilateral statements, as are reservations, and, like reservations, they may purport to exclude the legal effects of certain provisions of the treaty, if separable,⁴⁰⁵ in their application to the author of the notification, but only on a temporary basis. Governed by article 65, paragraph 1, of the 1969 and 1986 Vienna Conventions,⁴⁰⁶ their purpose is to release the parties “between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension”,⁴⁰⁷ and they are clearly different from reservations, not so much by the temporary nature of the exclusion of the operation of the treaty⁴⁰⁸ as by the timing of their occurrence, which is necessarily subsequent to the entry into force of the treaty in respect of the author of the statement. Furthermore, the Vienna Conventions make such statements subject to a legal regime that differs clearly from the reservations regime.⁴⁰⁹

(11) The same applies when the suspension of the effect of the provisions of a treaty is the result of a notification made not, as in the case referred to above, under the rules of the general international law of treaties but on the basis of specific provisions in the treaty itself.⁴¹⁰ The identical approach taken when applying

⁴⁰⁵ See articles 57 (a) (Suspension of the operation of a treaty under its provisions or by consent of the parties) and 44 (Separability of treaty provisions). See also P. Reuter, “Solidarité et divisibilité des engagements conventionnels”, in Y. Dinstein (ed.), *International Law at a Time of Perplexity—Essays in Honour of Shabtai Rosenne*, Dordrecht, Nijhoff, 1989, pp. 623–634, also reproduced in P. Reuter, *Le développement de l'ordre juridique international—Écrits de droit international*, Paris, Economica, 1995, pp. 361–374.

⁴⁰⁶ “A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.”

⁴⁰⁷ Article 72, paragraph 1 (a), of the Vienna Conventions.

⁴⁰⁸ Certain reservations can be made only for a specific period; thus, Horn offers the example of ratification by the United States of the 1933 Convention on Extradition adopted by the Seventh International Conference of American States, with the reservation that certain provisions thereof should not be applicable to the United States “until subsequently ratified in accordance with the Constitution of the United States” (Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 100). And certain reservation clauses even impose such a provisional nature (see article 25, paragraph 1, of the 1967 European Convention on the adoption of children and article 14, paragraph 2, of the 1975 European Convention on the legal status of children born out of wedlock, whose wording is identical: “A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period”; or article 20 of the Convention on the recognition of divorces and legal separations of 1 June 1970, which authorizes Contracting States which do not provide for divorce to reserve the right not to recognize a divorce, but whose paragraph 2 states: “This reservation shall have effect only so long as the law of the State utilizing it does not provide for divorce”).

⁴⁰⁹ See, in particular, articles 65, 67, 68 and 72.

⁴¹⁰ As indicated above (footnote 394), such exclusionary clauses fall into two categories: waivers and escape clauses.

this method and that of reservations is noteworthy: “Both approaches appear to show little concern for the integrity of an international agreement, since they prefer a more universal application thereof. The option of formulating reservations is an element that is likely to promote more widespread acceptance of international treaties. Similarly, the fact that it is possible to release oneself or be released for a given period of time from one’s international obligations is such as to encourage a hesitant State to enter finally into a commitment that offers it a number of advantages. There, however, the similarity between the two procedures ends.”⁴¹¹ In fact, in the case of a reservation, the partners of the reserving State or international organization are informed at the outset of the limits on the commitment of that State or organization, whereas, in the case of a declaration under an escape clause, the aim is to remedy unforeseeable difficulties arising from the application of the treaty.⁴¹² There is therefore no likelihood of serious confusion between such notifications and reservations.

(12) Two other procedures that may also be considered alternatives to reservations purport (or may purport) to modify the effects of a treaty in respect of specific features of the situation of the parties: restrictive clauses and agreements whereby two or more States or international organizations purport, under a specific provision of a treaty, to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

(13) It would seem that everything but their purpose differentiates these procedures from reservations. They are purely conventional techniques which take the form not of unilateral statements, but of one or more agreements between the parties to a treaty or between some of them. Where restrictive clauses in the treaty, amendments that enter into force only for certain parties to the treaty, or “bilateralization” procedures are concerned, however, problems may arise, if only because certain legal positions have been adopted which, in a most questionable manner, characterize such procedures as “reservations”.

(14) There are countless restrictive clauses purporting to limit the purpose of obligations resulting from the treaty by introducing exceptions and limits, and they are to be found in treaties on a wide range of subjects, such as the settlement of disputes,⁴¹³ the safeguarding of human

rights,⁴¹⁴ protection of the environment,⁴¹⁵ trade⁴¹⁶ and the law of armed conflicts.⁴¹⁷ Although such provisions are similar to reservations in their object,⁴¹⁸ the two procedures “operate” differently: in the case of restrictive clauses, there is a general exclusion arising out of the treaty itself; in the case of reservations, it is merely a possibility available to the States parties, permitted under the treaty, but becoming effective only if a unilateral statement is made at the time of accession.⁴¹⁹

(15) At first glance, there would appear to be no likelihood of confusion between such restrictive clauses and reservations. However, not only is language usage deceptive and “such terms as ‘public order reservations’, ‘military imperatives reservations’, or ‘sole competence

or the honour of the two Contracting States, and do not concern the interests of third Parties.”

⁴¹⁴ See the “clawback clauses” referred to in footnote 392 above. For example (again, there are innumerable examples), article 4 of the International Covenant on Economic, Social and Cultural Rights of 1966: “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

⁴¹⁵ See article VII (Exemptions and other special provisions relating to trade) of the Convention on international trade in endangered species of wild fauna and flora of 3 March 1973; article 4 (Exceptions) of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 21 June 1993; or article 4 (Register of specific exemptions) of the Stockholm Convention on Persistent Organic Pollutants of 22 May 2001.

⁴¹⁶ See articles XII (Restrictions to safeguard the balance of payments), XIV (Exceptions to the rule of non-discrimination), XX (General exceptions) or XXI (Security exceptions) of the 1947 General Agreement on Tariffs and Trade.

⁴¹⁷ See article 5 of the Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949 (Derogations) and article 9 of the Convention relating to the Status of Refugees (Provisional measures).

⁴¹⁸ Imbert gives two examples that highlight this fundamental similarity, by comparing article 39 of the Revised General Act for the Pacific Settlement of International Disputes of 28 April 1949, with article 27 of the European Convention for the peaceful settlement of disputes of 29 April 1957 (Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 10); under article 39, paragraph 2, of the General Act, reservations that are exhaustively enumerated and “must be indicated at the time of accession ... may be such as to exclude from the procedure described in the present Act: (a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute; (b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States”. Meanwhile, article 27 of the European Convention for the peaceful settlement of disputes reads: “The provisions of this Convention shall not apply to: (a) disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute; (b) disputes concerning questions which by international law are solely within the domestic jurisdiction of States.” Article 39 of the Revised General Act for the Pacific Settlement of International Disputes is a reservation clause; article 27 of the European Convention for the peaceful settlement of disputes is a restrictive clause. There are striking similarities: in both cases, the aim is to exclude identical types of disputes from methods of settlement provided for by the treaty in question.

⁴¹⁹ In the preceding example, therefore, it is not entirely accurate to assert, as Imbert does, that “[i]n practice, article 27 of the European Convention produces the same result as a reservation in respect of the General Act” (*ibid.*, p. 10). This is true only of the reserving State’s relations with other parties to the General Act and not of such other parties’ relations among themselves, to which the treaty applies in its entirety.

⁴¹¹ A. Manin, “À propos des clauses de sauvegarde”, *Revue trimestrielle de droit européen*, No. 1 (1970), p. 3.

⁴¹² See paragraph (10) above. See also, in this connection, Åkermark, “Reservation clauses in treaties ...” (footnote 101 above), pp. 501–502.

⁴¹³ In addition to article 27 of the 1957 European Convention for the peaceful settlement of disputes, see, for example, article 1 of the Agreement between Great Britain and France, providing for the Settlement by Arbitration of certain Classes of Questions which may arise between the two Governments, London, 14 October 1903, *British and Foreign State Papers, 1902–1903*, vol. 96, p. 35, which has served as a model for a great number of subsequent treaties: “Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention [for the Pacific Settlement of International Disputes] of 29 July 1899, provided, nevertheless, that they do not affect the vital interests, the independence,

reservations' [are] frequently encountered",⁴²⁰ but there is still an unwarranted degree of confusion. For example, in an often quoted passage⁴²¹ from the dissenting opinion that he appended to the Judgment of the International Court of Justice rendered on 1 July 1952 in the *Ambatielos* case, Judge Zoričić stated the following:

A reservation is a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning.⁴²²

(16) Guideline 1.7.1 refers to restrictive clauses both as a warning against this frequent confusion and as an indication that they are a possible alternative to reservations.

(17) The reference to agreements, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves is made for the same reasons. For example, the European Union and its member States have inserted in multilateral treaties so-called "disconnection clauses" on the basis of which they purport to exclude the application of the treaty in their relations with one another, which continue to be governed by European Union law.⁴²³

⁴²⁰ Imbert, *ibid.*, p. 10. For an example of a "public order reservation", see the first paragraph of article 6 of the Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties, signed in Havana on 20 February 1928: "For reasons of public order or safety, States may expel foreigners domiciled, resident, or merely in transit through their territory." For an example of a "sole competence reservation", see article 3, paragraph 11, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988: "Nothing contained in this article [on 'offences and sanctions'] shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law."

⁴²¹ See G. Fitzmaurice, "The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points", *BYBIL 1957*, pp. 272-273; however, although he quotes this definition with apparent approval, this distinguished author departs from it considerably in his commentary.

⁴²² *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 28, at p. 76. For another example, see G. Scelle, *Précis de droits des gens: principes et systématique*, part II, Paris, Sirey, 1934, p. 472.

⁴²³ See, for example, article 26, paragraph 3, of the 2005 Council of Europe Convention on the Prevention of Terrorism: ("Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties"); or article 40, paragraph 3, of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings; article 53, paragraph 3, of the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing of Terrorism; and article 54 (B), paragraph 1, of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1988. See also Court of Justice of the European Union, Full court, opinion 1/03, 7 February 2006, *Reports of Cases before the Court of Justice and the Court of First Instance 2006-2 (A)*, Part I, pp. I-1145 *et seq.*, in particular at pp. I-1183-I-1186 (points 78-85); see also Committee of Legal Advisers on Public International Law, *Report on the consequences of the so-called "disconnection clause" in international law in general and for Council of Europe conventions containing such a clause in particular*, Council of Europe Committee of Ministers, document CM (2008)164, 27 October 2008; C. P. Economides and A. G. Koliopoulos, "La clause de déconnexion en faveur du droit communautaire: une pratique critiquable", *RGDIP*, vol. 110 (2006), pp. 273-302; or M. Ličková, "The European exceptionalism in

(18) While it would not appear to be necessary to dwell on another treaty procedure that would make for flexibility in the application of a treaty, which consists of amendments (and additional protocols) that enter into effect only as between certain parties to a treaty,⁴²⁴ it does seem necessary to consider certain specific agreements which are concluded between two or more States parties to basic treaties, which purport to produce the same effects as reservations and in connection with which reference has been made to the "bilateralization" of "reservations".

(19) The bilateralization regime has been described as permitting "contracting States, while being parties to a multilateral convention, to choose the partners with which they will proceed to implement the regime provided for".⁴²⁵ It can be traced back to article XXXV, paragraph 1, of the 1947 General Agreement on Tariffs and Trade.⁴²⁶ The general approach involved in this

international law", *European Journal of International Law*, vol. 19, No. 3 (2008), pp. 463-490.

⁴²⁴ This procedure, which is provided for in article 40, paragraphs 4-5 (and article 30, paragraph 4), and article 41 of the 1969 and 1986 Vienna Conventions, is applied as a matter of routine. Even if, in terms of its general approach and as regards some aspects of its legal regime (respect for the fundamental characteristics of the treaty, though it does not contain a reference to its "object and purpose"), it is similar to procedures that characterize reservations, it is nonetheless very different in many respects:

(a) the flexibility it achieves is not the product of a unilateral statement by a State, but of agreement between two or more parties to the initial treaty;

(b) such agreement may be reached at any stage, generally following the treaty's entry into effect for its parties, which is not so in the case of reservations that must be formulated at the time of the expression of consent to be bound, at the latest;

(c) there is no question here of "excluding or modifying the legal effect of certain provisions of the treaty in their application", but in fact of modifying the provisions in question themselves; and

(d) moreover, whereas reservations can only limit their author's treaty obligations or make provision for equivalent ways of implementing a treaty, amendments and protocols can have the effect of both extending and limiting the obligations of States and international organizations parties to a treaty. Since there is no fear of confusion in the case of reservations, no clarification is called for and it would appear unnecessary to mention expressly in guideline 1.7.1 a distinction which is already quite clear.

⁴²⁵ M. H. van Hoogstraten, "L'état présent de la Conférence de La Haye de Droit International Privé", in M. Bos (ed.), *The Present State of International Law and other Essays: written in honour of the Centenary Celebration of the International Law Association 1873-1973*, Deventer, Kluwer, 1973, p. 387.

⁴²⁶ "This Agreement, or alternatively article II of this Agreement, shall not apply as between any contracting party and any other contracting party if (a) the two contracting parties have not entered into tariff negotiations with each other, and (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application." See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 199. The practice of "lateral agreements" (see D. Carreau and P. Juillard, *Droit international économique*, Paris, Librairie générale de droit et de jurisprudence, 1998, pp. 54-56 and 127) has accentuated this bilateralization. See also article XIII of the Marrakesh Agreement Establishing the World Trade Organization; or certain conventions adopted at The Hague Conference on Private International Law: for example, article 13, paragraph 4, of the Convention concerning the recognition of the legal personality of foreign companies, associations and institutions of 1 June 1956; article 12 of the Convention abolishing the requirement of legalisation for foreign public documents of 5 October 1961; article 31 of the Convention on the recognition and enforcement of decisions relating to maintenance obligations of 2 October 1973; article 42 of the Convention concerning the international administration of the estates of deceased persons of 2 October 1973; article 44, paragraph 3, of the Convention on Protection of Children and Cooperation in respect of

procedure is not comparable to the approach on which the reservations method is based; it allows a State to exclude, by means of its silence or by means of a specific declaration, the application of a treaty as a whole in its relations with one or more other States and not to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain aspects. It is more easily compared to statements of non-recognition, where such statements purport to exclude the application of a treaty between a declaring State and the non-recognized entity.⁴²⁷

(20) However, the same is not true when bilateralization involves an agreement to derogate from a treaty concluded among certain parties in application of treaty provisions expressly authorizing this, as can be seen in the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters, adopted on 1 February 1971 within the framework of The Hague Conference on Private International Law. It was in fact during the elaboration of this Convention that the doctrine of “bilateralization of reservations” was elaborated.

(21) However, in response to a Belgian proposal, the 1971 Convention on the recognition and enforcement of foreign judgements in civil and commercial matters goes further than these traditional bilateralization methods. Not only does article 21 of this instrument make the Convention’s entry into effect with respect to relations between two States subject to the conclusion of a supplementary agreement,⁴²⁸ but it also permits the two States to modify their commitment *inter se* within the precise limits set in article 23:⁴²⁹

In the Supplementary Agreements referred to in article 21 the Contracting States may agree: ...

This is followed by a list of 23 possible ways of modifying the Convention, the purposes of which, as summarized in the explanatory report of C. N. Fragistas, are:

1. *To clarify a number of technical expressions used by the Convention whose meaning may vary from one country to another (article 23 of the Convention, items Nos. 1, 2, 6 and 12);*

Intercountry Adoption of 29 May 1993; article 58, paragraph 3, of the Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children of 19 October 1996; article 54, paragraph 3, of the Convention on the international protection of adults of 13 January 2000; or article 37 of the European Convention on State Immunity of 16 May 1972, adopted in the context of the Council of Europe: “if a State having already acceded to the Convention notifies the Secretary General of the Council of Europe of its objection to the accession of another non-member State, before the entry into force of this accession, the Convention shall not apply to the relations between these two States”.

⁴²⁷ See guideline 1.5.1 and paragraphs (5)–(9) of the commentary thereto.

⁴²⁸ “Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect.”

⁴²⁹ The initial Belgian proposal did not envisage this modification possibility, which was established subsequently as the discussions progressed (see P. Jenard, “Une technique originale: La bilatéralisation de conventions multilatérales”, *Belgian Review of International Law* (1966-2), pp. 392–393).

2. *To include within the scope of the Convention matters that do not fall within its scope (article 23 of the Convention, items Nos. 3, 4 and 22);*

3. *To apply the Convention in cases where its normal requirements have not been met (article 23 of the Convention, items Nos. 7, 8, 9, 10, 11, 12 and 13);*

4. *To exclude the application of the Convention in respect of matters normally covered by it (article 23 of the Convention, item No. 5);*

5. *To declare a number of provisions inapplicable (article 23 of the Convention, item No. 20);*

6. *To make a number of optional provisions of the Convention mandatory (article 23 of the Convention, items Nos. 8 bis and 20);*

7. *To regulate issues not settled by the Convention or adapt a number of formalities required by it to domestic legislation (article 23 of the Convention, items Nos. 14, 15, 16, 17, 18 and 19).⁴³⁰*

Undoubtedly, many of these alternatives “simply permit States to define words or to make provision for procedures”,⁴³¹ however, a number of them restrict the effect of the Convention and have effects very comparable to those of reservations, which they nevertheless are not.⁴³²

(22) The 1971 Convention on the recognition and enforcement of foreign judgements in civil and commercial matters is not the only treaty that makes use of this procedure of pairing a basic convention and a supplementary agreement, thus permitting the introduction to the convention of alternative contents, even though the convention is a typical example and probably a more refined product. Reference may also be made, *inter alia*, to:⁴³³

– article 20 of the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters of 15 November 1965, which permits contracting States to agree to dispense with a number of provisions;⁴³⁴

– article 34 of the Convention on the limitation period in the international sale of goods of 14 June 1974;⁴³⁵

– articles 26, 56 and 58 of the European Convention on social security of 14 December 1972, which, with similar wording, states:

The application [of certain provisions] as between two or more Contracting Parties shall be subject to the conclusion between those Parties of bilateral or multilateral agreements which may also contain appropriate special arrangements;

⁴³⁰ Conférence de la Haye, *Actes et documents de la session extraordinaire, Exécution des jugements, 13 au 26 avril 1966*, The Hague, Imprimerie Nationale, 1969, p. 364. See also G. A. L. Droz, “Le récent projet de Convention de La Haye sur la reconnaissance et l’exécution des jugements étrangers en matière civile et commerciale”, *Netherlands International Law Review* (1966), p. 240.

⁴³¹ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 200.

⁴³² *Contra* Imbert, *ibid.*

⁴³³ These examples have been borrowed from Imbert, *ibid.*, p. 201.

⁴³⁴ But the application of this provision does not depend on the free choice of partner; see Imbert, *ibid.*; see also Droz, “Les réserves ...” (footnote 109 above), pp. 390–391. In fact, this procedure bears a resemblance to amendments between certain parties to the basic convention alone.

⁴³⁵ The same remark applies to this provision.

or, for more recent examples:

– article 39, paragraph 2, of the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption of 29 May 1993:

Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention;⁴³⁶

or

– article 5 (Voluntary extension) of the Convention on the Transboundary Effects of Industrial Accidents of 17 March 1992:

Parties concerned should, at the initiative of any of them, enter into discussions on whether to treat an activity not covered by Annex I as a hazardous activity ... Where the Parties concerned so agree, this Convention, or any part thereof, shall apply to the activity in question as if it were a hazardous activity.

(23) These options, which permit parties concluding a supplementary agreement to exclude the application of certain provisions of the basic treaty or not to apply certain provisions thereof, either as a general rule or in particular circumstances, do indeed purport to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the two parties bound by the agreement. However, and this is a fundamental difference from true reservations, such exclusions or modifications are not the product of a unilateral statement, which constitutes an essential element of the definition of reservations,⁴³⁷ but, rather, an agreement between two of the parties to the basic treaty that does not affect the other contracting States and contracting organizations to the treaty. “The system leads to the elaboration of two instruments: a multilateral convention, on the one hand, and a supplementary agreement, on the other, which, although based on the multilateral convention, nevertheless has an independent existence.”⁴³⁸ The supplementary agreement is, so to speak, an instrument that is a “prerequisite” not for the entry into force of the treaty but for ensuring that the treaty has effects on the relations between the two parties concluding the agreement, since its effects will otherwise be diminished (and it is in this respect that its similarity to the reservations procedure is particularly obvious) or increased. However, its treaty nature precludes any equation with reservations.

(24) It is such agreements, which have the same object as reservations and which are described, frequently but misleadingly, as “bilateralized reservations”, that are the subject of the second subparagraph of guideline 1.7.1.

⁴³⁶ Once again, one cannot truly speak of bilateralization in the strict sense since this provision does not call for the choice of a partner. See also article 52 of the Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children of 19 October 1996; or article 49 of the Convention on the international protection of adults of 13 January 2000.

⁴³⁷ See guideline 1.1: “‘Reservation’ means a unilateral statement*”.

⁴³⁸ P. Jenard, *Rapport du Comité restreint sur la bilatéralisation*, Conférence de La Haye, *Actes et documents de la session extraordinaire*, 1966, p. 145. See also the explanatory report by C. N. Fragistas, *ibid.*, pp. 363–364, or G. Droz, footnote 109 above, p. 391.

1.7.2 *Alternatives to interpretative declarations*

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

(a) the insertion in the treaty of provisions purporting to interpret the treaty;

(b) the conclusion of a supplementary agreement to the same end, simultaneously or subsequently to the conclusion of the treaty.

Commentary

(1) Just as reservations are not the only means at the disposal of contracting States and organizations for modifying the application of the provisions of a treaty, interpretative declarations are not the only procedure by which States and international organizations can specify or clarify their meaning or scope. Leaving aside the third-party interpretation mechanisms provided for in the treaty,⁴³⁹ the variety of such alternative procedures in the area of interpretation is nonetheless not as great. Two procedures of this type can be mentioned by way of example.

(2) In the first place, it is very often the case that the treaty itself specifies the interpretation to be given to its own provisions. Such is the primary purpose of the clauses containing the definition of the terms used in the treaty.⁴⁴⁰ Moreover, it is very common for a treaty to provide instructions on how to interpret the obligations imposed on the parties either in the body of the treaty itself⁴⁴¹ or in a separate instrument.⁴⁴²

(3) Secondly, the parties, or some of them,⁴⁴³ may conclude an agreement for the purposes of interpreting a treaty previously concluded between them. This possibility is expressly envisaged in article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, which requires the taking into account, together with the context, of

any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

⁴³⁹ See Simon, *L'interprétation judiciaire des traités ...* (footnote 166 above), p. 936.

⁴⁴⁰ See, among countless examples, article 2 of the 1969 and 1986 Vienna Conventions, or article XXX of the Articles of Agreement of the International Monetary Fund.

⁴⁴¹ See, again among countless examples, article 13, paragraph 4, of the International Covenant on Economic, Social and Cultural Rights of 1966: “No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions”.

⁴⁴² See “Notes and supplementary provisions” in annex I of the General Agreement on Tariffs and Trade of 1947. This corresponds to the possibility envisaged in article 30, paragraph 2, of the 1969 and 1986 Vienna Conventions.

⁴⁴³ Where all the parties to the interpretative agreement are also parties to the original treaty, the interpretation is authentic (see the commentary of the International Law Commission on article 27, paragraph 3 (a), of the draft articles on the law of treaties, which became article 30, paragraph 3 (a), of the Vienna Convention of 1969: *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. 14; with regard to bilateral treaties, see guideline 1.6.3).

(4) Moreover, it may happen that the interpretation is “bilateralized”.⁴⁴⁴ This occurs when a multilateral convention relegates to bilateral agreements the task of clarifying the meaning or scope of certain provisions. Thus, article 23 of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters of 1971 provides that contracting States shall have the option of concluding supplementary agreements in order, *inter alia*:

1. To clarify the meaning of the expression “civil and commercial matters”, to determine the courts whose decisions shall be recognized and enforced under this Convention, to define the expression “social security” and to define the expression “habitual residence”;

2. To clarify the meaning of the term “law” in States with more than one legal system; ...⁴⁴⁵

(5) It therefore seemed desirable to include in the Guide to Practice a provision on alternatives to interpretative declarations, if only for the sake of symmetry with guideline 1.7.1 on alternatives to reservations. On the other hand, it does not appear necessary to devote a separate guideline to the enumeration of alternatives to conditional interpretative declarations:⁴⁴⁶ the alternative procedures listed above are treaty-based and require the agreement of the contracting States and contracting organizations. It matters little, then, whether or not the agreed interpretation constitutes the *sine qua non* of their consent to be bound.

1.8 Scope of definitions

The definitions of unilateral statements included in the present Part are without prejudice to the validity and legal effects of such statements under the rules applicable to them.

Commentary

(1) Defining is not the same as regulating. The sole function of a definition is to determine the general category in which a given statement should be classified. However, such classification does not in any way prejudice the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. *A contrario*, it is not a reservation if it does not meet the criteria set forth in these guidelines, but this does not necessarily mean that such statements are valid (or invalid) from the standpoint of other rules of international law. The same is true of interpretative declarations, which might conceivably not be valid either because they would alter the nature of the treaty or because they were not formulated at the required time,⁴⁴⁷ etc.⁴⁴⁸

(2) Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime and, above all, for the assessment

⁴⁴⁴ On the bilateralization of “reservations”, see guideline 1.7.1 and paragraphs (18)–(23) of the commentary thereto.

⁴⁴⁵ On this provision, see paragraphs (20)–(21) of the commentary to guideline 1.7.1.

⁴⁴⁶ See guideline 1.4.

⁴⁴⁷ This problem may very likely arise in connection with conditional interpretative declarations (see guideline 1.4).

⁴⁴⁸ The same may obviously be said about unilateral statements which are neither reservations nor interpretative declarations, referred to in section 1.5.

of its validity. It is only once a particular instrument has been defined as a reservation (or an interpretative declaration, either simple or conditional) that one can decide whether it is valid, evaluate its legal scope and determine its effect. However, this validity and these effects are not otherwise affected by the definition, which requires only that the relevant rules be applied.

(3) For example, the fact that a reservation was formulated “when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty” (in keeping with the wording of guideline 1.1, paragraph 1) does not mean that such a reservation is necessarily valid; its validity depends upon whether it meets the conditions stipulated in the law on reservations to treaties and, in particular, those stipulated in article 19 of the 1969 and 1986 Vienna Conventions. Similarly, the Commission’s confirmation of the well-established practice of “across-the-board” reservations in guideline 1.1, paragraph 2, is in no way meant to constitute a decision on the validity of such a reservation in a specific case, which would depend on its contents and context; the sole purpose of the draft is to show that a unilateral statement of this nature is indeed a reservation and as such subject to the legal regime governing reservations.

(4) The “rules applicable” referred to in guideline 1.8 are, first of all, the relevant rules in the 1969, 1978 and 1986 Vienna Conventions and, in general, the customary rules applicable to reservations and to interpretative declarations, which this Guide to Practice is intended to codify and develop progressively in accordance with the Commission’s mandate, and those relating to other unilateral statements which States and international organizations may formulate in respect of treaties but which are not covered in the Guide to Practice.

(5) More generally, all the guidelines contained in the Guide to Practice are interdependent and cannot be read and understood in isolation from one another.

2. Procedure

2.1 Form and notification of reservations

2.1.1 Form of reservations

A reservation must be formulated in writing.

Commentary

(1) Under article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, a reservation “must be formulated in writing and communicated to the contracting States [and contracting organizations] and other States [and international organizations] entitled to become parties to the treaty”. Guideline 2.1.1 covers the first of these requirements; the second is dealt with in guideline 2.1.5.

(2) Although it is not included in the actual definition of a reservation⁴⁴⁹ and the word “statement”, which is

⁴⁴⁹ See guideline 1.1, which combines the definitions in article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and article 2, paragraph 1 (j), of the 1978 Vienna Convention; see also *Yearbook ... 1998*, vol. II (Part Two), pp. 99–100.

included, refers to both oral and written statements, the need for a reservation to be in writing was never called into question during the *travaux préparatoires* for the Vienna Conventions.⁴⁵⁰ The Commission's final commentary on what was then the first paragraph of draft article 18 and was to become, without any change in this regard, article 23, paragraph 1, of the 1969 Vienna Convention, presents it as self-evident that a reservation must be in writing.⁴⁵¹

(3) That was the opinion expressed in 1950 by the Special Rapporteur, Mr. Brierly, who, in his first report on the law of treaties, suggested the following wording for article 10, paragraph 2:

Unless the contrary is indicated in a treaty, the text of a proposed reservation thereto must be authenticated together with the text or texts of that treaty or otherwise formally communicated in the same manner as an instrument or copy of an instrument of acceptance of that treaty.⁴⁵²

(4) This suggestion elicited no objections (except to the word "authenticated") during the discussions in 1950,⁴⁵³ but the question of the form that reservations should take was not considered again until the first report on the law of treaties by the Special Rapporteur, Mr. Fitzmaurice, in 1956; under draft article 37, paragraph 2, which he proposed and which is the direct precursor of current article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions:

Reservations must be formally framed and proposed in writing, or recorded in some form in the minutes of a meeting or conference ...⁴⁵⁴

(5) In 1962, following the first report on the law of treaties by the Special Rapporteur, Sir Humphrey Waldock,⁴⁵⁵ the Commission elaborated on this theme:

Reservations, which must be in writing, may be formulated:

- (i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connection with the adoption of the treaty;
- (ii) Upon signing the treaty at a subsequent date; or
- (iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it.⁴⁵⁶

This provision was hardly discussed by the members of the Commission.⁴⁵⁷

⁴⁵⁰ See also A. Pellet and W. Schabas: "1969 Vienna Convention. Article 23: Procedure regarding reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 598, para. 16.

⁴⁵¹ See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208.

⁴⁵² *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 239.

⁴⁵³ *Yearbook ... 1950*, vol. I, 53rd meeting, 23 June 1950, pp. 91–92.

⁴⁵⁴ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115.

⁴⁵⁵ *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 31 *et seq.*, in particular at p. 60.

⁴⁵⁶ *Ibid.*, p. 176, draft article 18, paragraph (2) (a); for the commentary on this provision, see *ibid.*, p. 180; see also paragraphs (4)–(5) of the commentary to guideline 2.2.1.

⁴⁵⁷ See the summary records of the 651st–656th meetings (25 May–4 June 1962), *Yearbook ... 1962*, vol. I, pp. 139–179. See, however, the remarks of Mr. Castrén (652nd meeting, 28 May 1962, *ibid.*, p. 148) and Sir Humphrey Waldock (656th meeting, 4 June 1962, *ibid.*, pp. 175–179); see also paragraph (8) below.

(6) In conformity with the position of two Governments,⁴⁵⁸ which had suggested "some simplification of the procedural provisions",⁴⁵⁹ Sir Humphrey Waldock made a far more restrained drafting proposal on second reading, namely:

A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.⁴⁶⁰

This draft is the direct source of article 23, paragraph 1, of the Vienna Conventions.

(7) While the wording was changed, neither the Commission⁴⁶¹ nor the 1968–1969 United Nations Conference on the Law of Treaties⁴⁶² ever called into question the need for reservations to be formulated in writing. And neither Mr. Reuter, Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations, nor the participants in the 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, added clarifications or suggested any changes in this regard. The *travaux préparatoires* thus show remarkable unanimity in this respect.

(8) This is easily explained. As it has been written:

Reservations are formal statements. Although their formulation in writing is not embraced by the terms of the definition, it would according to article 23 (1) of the Vienna Convention seem to be an absolute requirement. It is less common nowadays that the various acts of consenting to a treaty occur simultaneously, therefore it is not possible for an orally presented reservation to come to the knowledge of all contracting parties. In the era of differentiated treaty-making procedures it becomes essential for reservations to be put down in writing in order to be registered and notified by the depositary, so that all interested States would become aware of them. A reservation not notified cannot be acted upon. Other States would not be able to expressly accept or object to such reservations.⁴⁶³

(9) Nonetheless, during the discussions of the fourteenth session of the Commission in 1962, Sir Humphrey Waldock, replying to a question raised by Mr. Tabibi, did not totally exclude the idea of "oral reservations". He thought, however, that the question "belonged rather to the question of reservations at the time of the adoption of the treaty, which was dealt with in sub-paragraph 2 (a) (i)" and that, in any case, the requirement of a formal confirmation "should go a long way towards disposing of the difficulty".⁴⁶⁴

⁴⁵⁸ Denmark and Sweden (see the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 46–47).

⁴⁵⁹ *Ibid.*, p. 53, para. 13.

⁴⁶⁰ *Ibid.*, draft article 20, paragraph 1.

⁴⁶¹ See the final text of the draft articles on the law of treaties, in *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208 (draft article 18, paragraph 1).

⁴⁶² See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), the Report of the Committee of the Whole on its work at the first session of the Conference (A/CONF.39/14), pp. 138–139, paras. 190–196.

⁴⁶³ Horn, *Reservations and Interpretative Declarations ...* (see footnote 25 above), p. 44; see also L. Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?*, Dordrecht, Martinus Nijhoff, 1995, p. 50.

⁴⁶⁴ *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 223, para. 34. See also a remark made by Mr. Brierly in 1950: "Mr. Brierly

(10) Ultimately, it hardly matters how reservations are formulated at the outset, if they must be formally confirmed at the moment of the definitive expression of consent to be bound. That is undoubtedly how article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions should be interpreted in the light of the *travaux préparatoires*: a reservation need be in writing only when formulated definitively, namely:

(a) when signing a treaty where the treaty makes express provision for this⁴⁶⁵ or if signing is tantamount to definitive expression of consent to be bound (agreement in simplified form);⁴⁶⁶ and

(b) in all other cases, where the State or international organization expresses its consent to be bound.⁴⁶⁷

(11) The Commission is nevertheless of the opinion that the question of whether a reservation may initially be formulated orally can be left open. As Sir Humphrey Waldock so rightly pointed out,⁴⁶⁸ the answer has no practical impact: a contracting party can in any event formulate a reservation up to the date of its expression of consent to be bound; thus, even if its initial oral statement could not be regarded as a true reservation, the “confirmation” made in due course would serve as a formulation.

2.1.2 Statement of reasons for reservations

A reservation should, to the extent possible, indicate the reasons why it is being formulated.

Commentary

(1) Neither the Commission’s work on the law of treaties nor the 1969 and 1986 Vienna Conventions establish any requirement that a State or international organization that formulates a reservation must give its reasons for doing so or explain why it considered it necessary to exclude or modify the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects. Thus, giving reasons is not an additional condition for validity under the Vienna regime.

(2) However, some conventional instruments require States to give reasons for their reservations and to explain why they are formulating them. A particularly clear example is article 57 (former article 64) of the European Convention on Human Rights, which states as follows:

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

2. Any reservation made under this Article shall contain a brief statement of the law concerned.

agreed that a reservation must be presented formally, but it might be announced informally during negotiations” (*Yearbook ... 1950*, vol. I, 53rd meeting, p. 91, para. 19).

⁴⁶⁵ See guideline 2.2.3.

⁴⁶⁶ See guideline 2.2.2.

⁴⁶⁷ See guideline 2.2.1.

⁴⁶⁸ See paragraph (8) above.

Under this regime, which is unquestionably *lex specialis* with respect to general international law, indication of the law on which the reservation is based is a genuine condition for the validity of any reservation to the European Convention on Human Rights. In the famous *Belilos* case, the European Court of Human Rights decided that article 57 (former article 64), paragraph 2, establishes “not a purely formal requirement but a condition of substance”.⁴⁶⁹ In the Court’s view, the required reasons or explanations “provide a guarantee—in particular for the other Contracting Parties and the Convention institutions—that a reservation does not go beyond the provisions expressly excluded by the State concerned”.⁴⁷⁰ The penalty for failure to meet this requirement to give reasons (or to explain) is the invalidity of the reservation.⁴⁷¹

(3) Even though under general international law such a drastic consequence clearly cannot follow automatically from a failure to give reasons, the justification for and usefulness of giving reasons for reservations, stressed by the European Court in 1988, can be applied with respect to all treaties and all reservations. It was for this reason that the Commission deemed it useful to encourage giving reasons without expressing it as a legal obligation to do so. The non-binding formulation of the guideline, reflected in the use of the conditional, makes it clear that this formality, while desirable, is in no way a legal obligation.

(4) Giving reasons (which is thus optional) is not an additional requirement that would make it more difficult to formulate reservations; it is a useful way for both the author of the reservation and the other concerned States, international organizations or monitoring bodies to fulfil their responsibilities effectively. It gives the author of the reservation an opportunity not only to explain and clarify the reasons why the reservation was formulated—including (but not exclusively) by indicating impediments under domestic law that may make implementation of the provision on which the reservation is based difficult or impossible—but also to provide information that will be useful in assessing the validity of the reservation. In this regard, it should be borne in mind that the author of a reservation is also responsible for assessing its validity.

(5) The reasons and explanations given by the author of a reservation also facilitate the work of the bodies having competence to assess the reservation’s validity, including other concerned States or international organizations, dispute settlement bodies responsible for interpreting or implementing the treaty and treaty monitoring bodies. Giving reasons, then, is also one of the ways in which States and international organizations making a reservation can cooperate with the other contracting States and contracting organizations and the monitoring bodies so that the validity of the reservation can be assessed.⁴⁷² It is a central element of the reservations dialogue.

⁴⁶⁹ *Belilos v. Switzerland*, Judgment of 29 April 1988 (see footnote 192 above), para. 59.

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*, para. 60.

⁴⁷² The Commission stressed this obligation to cooperate with monitoring bodies in its 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties,

(6) Giving and explaining the reasons which, in the author's view, made it necessary to formulate the reservation also helps to establish a fruitful reservations dialogue among the author of the reservation, the contracting States and international organizations and the monitoring body, if any. This is beneficial not only for the States or international organizations which are called upon to comment on the reservation by accepting or objecting to it, but also for the author of the reservation, which, by giving reasons, can help allay any concerns that its partners may have regarding the validity of its reservation and steer the reservations dialogue towards greater mutual understanding.

(7) In practice, reasons are more likely to be given for objections than for reservations. There are, however, examples in State practice of cases in which States and international organizations have made a point of giving their reasons for formulating a particular reservation. Sometimes, they do so purely for reasons of convenience, in which case their explanations are of no particular use in assessing the value of the reservation except perhaps insofar as they establish that it is motivated by such considerations of convenience.⁴⁷³ But often the explanations that accompany reservations shed considerable light on the reasons for their formulation. For example, Barbados justified its reservation to article 14 of the International Covenant on Civil and Political Rights by practical problems of implementation:

The Government of Barbados states that it reserves the right not to apply in full, the guarantee of free legal assistance in accordance with paragraph 3 (d) of article 14 of the Covenant, since, while accepting the principles contained in the same paragraph, the problems of implementation are such that full application cannot be guaranteed at present.⁴⁷⁴

In another example (among the many precedents), the Congo formulated a reservation to article 11 of the Covenant, accompanying it with a long explanation:

The Government of the People's Republic of Congo declares that it does not consider itself bound by the provisions of article 11 ...

Article 11 of the International Covenant on Civil and Political Rights is quite incompatible with articles 386 *et seq.* of the Congolese Code of Civil, Commercial, Administrative and Financial Procedure, derived from Act 51/83 of 21 April 1983. Under those provisions, in matters of private law, decisions or orders emanating from conciliation proceedings may be enforced through imprisonment for debt when other means of enforcement have failed, when the amount due exceeds 20,000 CFA francs and when the debtor, between 18 and 60 years of age, makes himself insolvent in bad faith.⁴⁷⁵

(Footnote 472 continued.)

paragraph 9 of which states: "The Commission calls upon States to cooperate with monitoring bodies" (*Yearbook ... 1997*, vol. II (Part Two), p. 58). This obligation to cooperate was also stressed by the international human rights treaty bodies in 2007 at their sixth inter-committee meeting (see the report of the meeting of the working group on reservations, HRI/MC/2007/5, para. 19 (Recommendations of the working group), recommendation No. 9 (a)).

⁴⁷³ This is true of the reservation of France to the European Agreement supplementing the Convention on road signs and signals: "[w]ith regard to article 23, paragraph 3 *bis* (b), of the Agreement on Road Signs and Signals, France intends to retain the possibility of using lights placed on the side opposite to the direction of traffic, so as to be in a position to convey meanings different from those conveyed by the lights placed on the side appropriate to the direction of traffic" (*Multilateral Treaties ...* (footnote 37 above), chap. XI.B.24).

⁴⁷⁴ *Ibid.*, chap. IV.4. See also the reservation of the Gambia (*ibid.*).

⁴⁷⁵ *Ibid.*, chap. IV.4.

(8) In the light of the obvious advantages of giving reasons for reservations and the role this practice plays in the reservations dialogue, the Commission chose not to stipulate in guideline 2.1.2 that reasons should accompany the reservation and be an integral part thereof—as is generally the case for reasons for objections⁴⁷⁶—but this is no doubt desirable, even though there is nothing to prevent a State or international organization from stating the reasons for its reservation *ex post facto*.

(9) Furthermore, although it seems wise to encourage the giving of reasons, this practice must not, in the Commission's view, become a convenient smokescreen used to justify the formulation of general or vague reservations. According to guideline 3.1.5.2 (Vague or general reservations), "[a] reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess its compatibility with the object and purpose of the treaty". Giving reasons cannot obviate the need for the reservation to be formulated in terms that make it possible to assess its permissibility. Even without reasons, a reservation must be self-sufficient as a basis for assessment of its permissibility; the reasons can only facilitate this assessment.⁴⁷⁷

(10) Likewise, the fact that reasons may be given for a reservation at any time cannot be used by authors to modify or widen the scope of a reservation made previously. This is stipulated in guidelines 2.3.3 (Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations) and 2.3.4 (Widening of the scope of a reservation).

2.1.3 Representation for the purpose of formulating a reservation at the international level

1. Subject to the usual practices followed in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

⁴⁷⁶ See guideline 2.6.9 and commentary thereto. It is in any case extremely difficult to distinguish the reservation from the reasons for its formulation if they both appear in the same instrument.

⁴⁷⁷ Nevertheless, there are cases in which the clarification resulting from the reasons given for the reservation might make it possible to consider a "dubious" reservation to be valid. For example, Belize accompanied its reservation to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances with the following explanation:

"Article 8 of the Convention requires the Parties to give consideration to the possibility of transferring to one another proceedings for criminal prosecution of certain offences where such transfer is considered to be in the interests of a proper administration of justice.

"The courts of Belize have no extra-territorial jurisdiction, with the result that they will have no jurisdiction to prosecute offences committed abroad unless such offences are committed partly within and partly without the jurisdiction, by a person who is within the jurisdiction. Moreover, under the Constitution of Belize, the control of public prosecutions is vested in the Director of Public Prosecutions, who is an independent functionary and not under Government control.

"Accordingly, Belize will be able to implement article 8 of the Convention only to a limited extent insofar as its Constitution and the law allows."

(*Multilateral Treaties ...* (footnote 37 above), chap. VI.19).

Without such an explanation, Belize's reservation might have been considered "vague or general" and might thus have fallen within the scope of guideline 3.1.5.2. Accompanied by this explanation, it appears much more defensible.

(a) that person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State or the international organization for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State for the purpose of formulating a reservation at the international level:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) representatives accredited by States to an international conference, for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted in that organization or organ;

(d) heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

Commentary

(1) Guideline 2.1.3 defines the persons and organs which are authorized, by virtue of their functions, to formulate a reservation on behalf of a State or an international organization. Its text is based closely on that of article 7 of the 1986 Vienna Convention.⁴⁷⁸

(2) The 1969 and 1986 Vienna Conventions do not contain any particular explanation with regard to the persons and organs authorized to formulate a reservation at the international level. In his first report on the law of treaties in 1962, however, Sir Humphrey Waldock proposed a draft article which read:

Reservations shall be formulated in writing either:

- (i) On the face of the treaty itself, and normally in the form of an adjunct to the signature of the representative of the reserving State;
- (ii) In a Final Act of a conference, protocol, *procès-verbal* or other instrument related to the treaty and executed by a duly authorized representative of the reserving State;
- (iii) In the instrument by which the reserving State ratifies, accedes to or accepts the treaty, or in a *procès-verbal* or other instrument accompanying the instrument of ratification, accession

⁴⁷⁸ Article 7 of the 1969 Vienna Convention is drafted in much the same way, but, unlike the present Guide to Practice, it relates only to treaties between States.

or acceptance and drawn up by the competent authority of the reserving State.⁴⁷⁹

(3) As Sweden noted with regard to the corresponding article adopted by the Commission on first reading,⁴⁸⁰ such “procedural rules ... would fit better into a code of recommended practices”,⁴⁸¹ which is precisely the function of the Guide to Practice. The Commission has nevertheless concluded that it is not useful to include all of these clarifications in the present Guide: the long list of instruments in which reservations may appear does not add much, particularly since the list is not restrictive, as is indicated by the reference in two places to an instrument other than those expressly mentioned.

(4) Clarification is needed only with regard to the author of the instrument in question. The 1962 text is nevertheless not entirely satisfactory in this regard. The reservation must probably be formulated by a “representative of the reserving State” or by “the competent authority of the reserving State”.⁴⁸² The question, however, is whether there are rules of general international law to determine in a restrictive manner which authority or authorities are competent to formulate a reservation at the international level or whether this determination is left to the domestic law of each State.

(5) In the opinion of the Commission, the answer to this question may be deduced both from the general framework of the Vienna Conventions and from the practice of States and international organizations in this area.

(6) By definition, a reservation has the purpose of modifying the legal effect of the provisions of a treaty in the relations between the parties; although it appears in an instrument other than the treaty, the reservation is therefore part of the corpus of the treaty and has a direct influence on the respective obligations of the parties. It leaves intact the *instrumentum* (or *instrumenta*) constituting the treaty, but it directly affects the *negotium*. In this situation, it seems logical and inevitable that reservations should be formulated under the same conditions as the consent of the State or international organization to be bound. And this is not an area in which international law is based entirely on domestic laws.

(7) Article 7 of the 1969 and 1986 Vienna Conventions contains precise and detailed provisions on this point which undoubtedly reflect positive law on the subject. In the words of the 1986 Vienna Convention:

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

- (a) that person produces appropriate full powers; or
- (b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to

⁴⁷⁹ Draft article 17, paragraph 3 (a), *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 60. In his commentary, Sir Humphrey Waldock restricts himself to saying that this provision “does not appear to require comment” (*ibid.*, p. 66).

⁴⁸⁰ Draft article 18, paragraph 2 (a), *ibid.*, document A/5209, p. 176.

⁴⁸¹ Fourth report on the law of treaties by the Special Rapporteur, Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 47.

⁴⁸² See paragraph (2) above.

consider that person as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty ...;

(b) representatives accredited by States to an international conference, for the purpose of adopting the text of a treaty ...;

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty; if:

(a) that person produces appropriate full powers; or

(b) it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with the rules of the organization, without having to produce full powers.

(8) *Mutatis mutandis*, for the reasons indicated above, these rules may certainly be transposed to the formulation of reservations, on the understanding, of course, that a reservation formulated by a person “who cannot be considered ... as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization”.⁴⁸³

(9) Moreover, these restrictions on the representation of a State (or of an international organization) in the formulation of reservations at the international level have been broadly confirmed in practice.

(10) In an *aide-memoire* dated 1 July 1976, the United Nations Legal Counsel said:

A reservation must be formulated in writing (article 23, paragraph 1, of the [1969 Vienna] Convention), and both reservations and withdrawals of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally.⁴⁸⁴

(11) Similarly, the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* prepared by the Treaty Section of the United Nations Office of Legal Affairs confines itself to noting that “the reservation must be included in the instrument or annexed to it and must emanate from one of the three qualified authorities” and to referring to general developments concerning the “deposit of binding instruments”.⁴⁸⁵ Likewise, according to this document, “Reservations made at the time of signature must be authorized by the full powers granted

to the signatory by one of the three qualified authorities or the signatory must be one of these authorities”.⁴⁸⁶

(12) These rules seem to be strictly applied; all the instruments of ratification (or equivalents) of treaties containing reservations for which the Secretary-General is depositary are signed by one of the “three authorities” or, if they are signed by the permanent representative, the latter has attached full powers emanating from one of these authorities. Moreover, where this is not the case, the permanent representative is requested, informally but firmly, to make this correction.⁴⁸⁷

(13) The Commission nevertheless questioned whether this practice, which transposes to reservations the rules contained in article 7 of the Vienna Conventions, referred to above,⁴⁸⁸ is not excessively rigid. It may be considered, for example, whether it would be legitimate to accept that the accredited representative of a State to an international organization which is the depositary of the treaty to which the State that he represents wishes to make a reservation should be authorized to make that reservation. The issue is particularly relevant because this practice is accepted in international organizations other than the United Nations.

(14) It seems, for example, that the Secretary General of the Organization of American States (OAS) and the Secretary General of the Council of Europe accept reservations recorded in letters from permanent representatives.⁴⁸⁹

(15) One can also maintain that the rules applying to States should be transposed more fully to international organizations than they are in article 7, paragraph 2, of the 1986 Vienna Convention and, in particular, that the head of the secretariat of an international organization or its accredited representatives to a State or another organization should be regarded as having competence *ipso facto* to bind the organization.

(16) One can legitimately maintain that the recognition of such limited extensions to competence for the purpose of formulating reservations would constitute a limited

⁴⁸⁶ *Ibid.*, p. 62, para. 208; refers to chapter VI of the *Summary of Practice of the Secretary-General ...* (“Full powers and signatures”).

⁴⁸⁷ This is confirmed, by analogy, by the procedural incident between India and Pakistan that came before the International Court of Justice in the *Aerial Incident of 10 August 1999* case (see footnote 305 above). Oral pleadings revealed that, in an initial communication dated 3 October 1973, the Permanent Mission of Pakistan to the United Nations gave notification of that country’s intent to succeed British India as a party to the General Act of Arbitration of 1928. In a note dated 31 January 1974, the Secretary-General requested that such notification should be made “in the form prescribed”, in other words, that it should be transmitted by one of the three authorities mentioned above; this notification took the form of a new communication (formulated in different terms than that of the preceding year), dated 30 May 1974 and signed this time by the Pakistani Prime Minister (see the pleadings by Sir Elihu Lauterpacht on behalf of Pakistan, 5 April 2000, CR/2000/3, and by Alain Pellet on behalf of India, 6 April 2000, CR/2000/4). While this episode concerned a notification of succession and not the formulation of reservations, it testifies to the great vigilance with which the Secretary-General applies the rules set forth above (para. (11)) with regard to the general expression by States of their consent to be bound by a treaty.

⁴⁸⁸ See paragraph (7).

⁴⁸⁹ See the replies of the OAS in the report by the Secretary-General on depositary practice in relation to reservations, submitted pursuant to General Assembly resolution 1452 B (XIV), *Yearbook ... 1965*, vol. II, document A/5687, p. 78. See also Council of Europe, *European Treaty Series*, No. 24 (reservations) (available from <http://conventions.coe.int>).

⁴⁸³ See article 8 of the 1969 and 1986 Vienna Conventions.

⁴⁸⁴ United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), p. 211.

⁴⁸⁵ *Summary of Practice of the Secretary-General ...* (see footnote 75 above), p. 49, para. 161; this passage refers to *ibid.*, p. 36, paras. 121–122.

but welcome progressive development. The Commission, however, supported by a large majority of States, has consistently been careful not to change the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.⁴⁹⁰ Yet, even if the provisions of article 7 of the 1969 and 1986 Vienna Conventions do not expressly deal with competence to formulate reservations, they are nonetheless rightfully⁴⁹¹ regarded as transposable to this case.

(17) By way of a compromise between these two requirements, the Commission adopted a sufficiently flexible guideline which, while referring to the rules in article 7 of the Vienna Conventions, maintains the less rigid practice followed by international organizations other than the United Nations as depositaries.⁴⁹² The need for flexibility is reflected in the inclusion, at the beginning of guideline 2.1.3, of the expression “Subject to the usual practices followed in international organizations which are depositaries of treaties”. This expression should, incidentally, be understood as applying both to the case where the international organization itself is the depositary and to the more usual case where this function is exercised by the organization’s most senior official, the secretary general or the director general.

(18) It should also be noted that the expression “for the purposes of adopting or authenticating the text of the treaty”, as contained in guideline 2.1.3, paragraph 1 (a), covers signature, since the two (alternative or joint) functions of signature are precisely the authentication of the text of the treaty (see article 10 of the Vienna Conventions) and the expression of consent to be bound by the treaty (art. 12).

2.1.4 *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

1. The competent authority and the procedure to be followed at the internal level for formulating a reservation are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations for the purpose of invalidating the reservation.

Commentary

(1) Guideline 2.1.3 relates to the formulation of reservations at the international level, while guideline 2.1.4 deals with their formulation in the internal legal system of States and international organizations.

⁴⁹⁰ See *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (d).

⁴⁹¹ See paragraph (6) above.

⁴⁹² See paragraph (14) above. The International Telecommunication Union (ITU) is also a special case in this regard, but in a different sense and for different reasons, since reservations to texts equivalent to treaties adopted by that body “can be formulated only by delegations, namely, during conferences”⁴⁹³ (reply by ITU to the Commission’s questionnaire on reservations). With regard to the questionnaires, see footnote 39 above.

(2) It is self-evident that the international phase of formulating reservations is only the tip of the iceberg; as is true of the entire procedure whereby a State or an international organization expresses its consent to be bound, it is the outcome of an internal process that may be quite complex. Like the ratification procedure (or the acceptance, approval or accession procedure), from which it is indissociable, the formulation of reservations is a kind of “internal parenthesis” within an overwhelmingly international process.⁴⁹³

(3) As Reuter has noted, “national constitutional practices with regard to reservations and objections change from one country to the next”.⁴⁹⁴ One can see, for example, that of the 23 States which replied to the Commission’s questionnaire on reservations to treaties and whose answers to questions 1.7, 1.7.1, 1.7.2, 1.8, 1.8.1 and 1.8.2⁴⁹⁵ are utilizable, competence to formulate a reservation belongs to: the executive branch alone in 6 cases,⁴⁹⁶ the parliament alone in 5 cases,⁴⁹⁷ and it is shared between them in 12 cases.

(4) In this last hypothesis, there are various modalities for collaboration between the executive branch and the parliament. In some cases, parliament is merely kept informed of intended reservations⁴⁹⁸—although not always systematically.⁴⁹⁹ In others, it must approve all reservations before their formulation⁵⁰⁰ or, where only certain treaties are submitted to the parliament, only those which relate to those treaties.⁵⁰¹ Moreover, a judicial body may be called upon to intervene in the internal procedure for formulating reservations.⁵⁰²

(5) It is interesting to note that the procedure for formulating reservations does not necessarily follow

⁴⁹³ See Daillier, Forteau and Pellet, *Droit international public ...* (footnote 254 above), pp. 160–161, para. 85.

⁴⁹⁴ Reuter, *Introduction au droit des traités* (footnote 28 above), pp. 84–85, para. 133*.

⁴⁹⁵ Question 1.7: “At the internal level, which authority or authorities decide(s) that the State will formulate a reservation: The Head of State? The Government or a government body? The parliament?”; question 1.7.1: “If it is not always the same authority which has competence to decide that a reservation will be formulated, on what criteria is this competence based?”; question 1.7.2: “If the decision is taken by the Executive, is the parliament informed of the decision? *A priori* or *a posteriori*?” Invited to discuss the text of the intended reservation(s)?; question 1.8: “Is it possible for a national judicial body to oppose or insist on the formulation of certain reservations?”; question 1.8.1: “If so, which authority and how is it seized of the matter?”; question 1.8.2: “What reason(s) can it invoke in taking such a decision?” (*Yearbook ... 1996*, vol. II (Part One), pp. 98–99).

⁴⁹⁶ Bolivia (the Parliament can suggest reservations), Colombia (for certain treaties), Croatia (the Parliament can oppose a proposed reservation, which would imply that it is consulted), Denmark, the Holy See and Malaysia. See also the States mentioned in footnotes 498–501 below.

⁴⁹⁷ Colombia (for certain treaties), Estonia, San Marino, Slovenia and Switzerland (but the proposal is generally made by the Federal Council, unless the Federal Council has its own competence).

⁴⁹⁸ Kuwait since 1994 (consultation of an *ad hoc* commission); New Zealand “until recently” (system provisionally established).

⁴⁹⁹ France (if the rapporteurs of the Parliamentary Assemblies so request and as a mere “courtesy”), Israel, Japan (if the treaty does not contain a reservation clause) and Sweden (the “outlines” of reservations are transmitted to Parliament, never their exact text).

⁵⁰⁰ Argentina and Mexico.

⁵⁰¹ Finland, Republic of Korea, Slovakia and Spain.

⁵⁰² Colombia, Finland and Malaysia.

the one generally required for the expression of the State's consent to be bound. Thus, in France, it is only recently that the custom was established of transmitting to Parliament the text of reservations which the President of the Republic or the Government intends to attach to the ratification of treaties or the approval of agreements, even where such instruments must be submitted to Parliament under article 53 of the 1958 Constitution.⁵⁰³

(6) The diversity which characterizes the competence to formulate reservations and the procedure to be followed for that purpose among States seems to be mirrored among international organizations. Only two of them⁵⁰⁴ answered questions 3.7, 3.7.1 and 3.7.2 of the questionnaire on reservations:⁵⁰⁵ the Food and Agriculture Organization of the United Nations (FAO) stated that such competence belongs to the Conference, while the International Civil Aviation Organization (ICAO), while emphasizing the lack of real practice, held that if a reservation should be formulated on its behalf, it would be formulated by the Secretary-General as an administrative matter and, as the case may be, by the Assembly or the Council in their respective areas of competence,⁵⁰⁶ with the stipulation that it would be "appropriate" for the Assembly to be informed of the reservations formulated by the Council or by the Secretary-General.

(7) In the view of the Commission, the only conclusion that can be drawn from these observations is that international law does not impose any specific rule with regard to the internal procedure for formulating reservations.

(8) However, the freedom of States and international organizations to determine the authority competent to decide that a reservation will be formulated and the procedure to be followed in formulating it raises problems similar to those arising from the same freedom the parties to a treaty have with respect to the internal procedure for ratification: what happens if the internal rules are not followed?

(9) In the 1986 Vienna Convention, article 46 on the "Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties" provides as follows:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

⁵⁰³ See A. Pellet, *La Constitution de la République française*, 2nd ed., F. Luchaire and G. Conac (eds.), Paris, Economica, 1987, pp. 1047–1050 (commentary on article 53).

⁵⁰⁴ This is explained by the fact that international organizations are parties to treaties much more rarely than States and that, where they are parties, they generally do not formulate reservations. Concerning the European Union, only the Council has replied to the questionnaire.

⁵⁰⁵ Question 3.7: "At the internal level, which organ(s) decide(s) that the organization will formulate a reservation: The chief executive officer? The general assembly? Another organ?"; question 3.7.1: "If it is not always the same organ that has competence to decide that a reservation will be formulated, on what criteria is this competence based?"; question 3.7.2: "If the decision is taken by the chief executive officer, is the general assembly: Informed of the decision? *A priori* or *a posteriori*? Invited to discuss the text of the intended reservation(s)?" (*Yearbook ... 1996*, vol. II (Part One), p. 110).

⁵⁰⁶ See articles 49 and 50 of the Convention on International Civil Aviation of 1944, establishing the ICAO.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

(10) In the absence of practice, it is difficult to take a categorical position on the transposition of these rules to the formulation of reservations. Some elements argue in its favour: as discussed above,⁵⁰⁷ the formulation of reservations cannot be dissociated from the procedure for expressing consent to be bound; it occurs or must be confirmed at the moment of expression of consent to be bound and, in almost all cases, emanates from the same authority. These arguments are, however, not decisive. Whereas the internal rules on competence to conclude treaties are often laid down in the constitution, at least in broad outline, that is usually not the case for the formulation of reservations, which mostly derives from general constitutional principles or practice. Such rules are not necessarily in line with those concerning the expression of consent to be bound.

(11) It is therefore unlikely that a violation of internal provisions can be "manifest" in the sense of article 46 of the Vienna Conventions cited above, and one is compelled to fall back on international rules such as those set forth in guideline 2.1.3. Consequently, a State or an international organization should not be allowed to claim that a violation of the provisions of internal law or of the rules of the organization has invalidated a reservation that it has formulated if such formulation was the act of an authority competent at the international level.

(12) Since this conclusion differs from the rules applicable to "defective ratification" as set forth in article 46, it seems essential to state it expressly in a guideline. This is the object of the second paragraph of guideline 2.1.4.

(13) One may wonder whether this provision is necessary, since the author of the reservation can always withdraw it "at any time".⁵⁰⁸ However, since it is far from having been established that such withdrawal may have a retroactive effect, the question of the validity of a reservation formulated in violation of the relevant rules of internal law may arise in practice, thereby justifying the inclusion of the rule stated in the second paragraph of guideline 2.1.4.

2.1.5 Communication of reservations

1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. A reservation to a treaty in force which is the constituent instrument of an international organization must also be communicated to such organization.

⁵⁰⁷ Paragraph (2).

⁵⁰⁸ Article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions.

Commentary

(1) Once it has been formulated, the reservation must be made known to the other States or international organizations concerned. Such publicity is essential for enabling them to react, either through an acceptance or an objection, or for promoting a reservations dialogue. Article 23 of the 1969 and 1986 Vienna Conventions specifies the recipients of reservations formulated by a State or an international organization, but is silent on the procedure to be followed in effecting such notification. The object of guidelines 2.1.5–2.1.7 is to fill this gap, with guideline 2.1.5 referring more specifically to the recipients of the notification.

(2) Under article 23, paragraph 1, of the 1986 Vienna Convention, a reservation must be communicated “to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”. In addition, article 20, paragraph 3, which stipulates that a reservation to a constituent instrument requires “the acceptance of the competent organ” of the organization in order to produce effects, implies that the reservation must be communicated to the organization in question, as is stated in the second paragraph of guideline 2.1.5.

(3) The first group of recipients (contracting States and international organizations) does not pose any particular problem. These terms are defined in article 2, paragraph 1 (f), of the 1986 Vienna Convention⁵⁰⁹ as meaning, respectively:

- (i) a State, or
- (ii) an international organization,

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(4) Much more problematic, in contrast, are the definition and, even more so, the determination in each specific case of the “other States and international organizations entitled to become parties to the treaty”. As has been noted, “[n]ot all treaties are wholly clear as to which other States may become parties”.⁵¹⁰

(5) In his 1951 report on reservations to multilateral treaties, Mr. Brierly suggested the following provision:

The following classes of States shall be entitled to be consulted as to any reservations formulated after the signature of this convention (or after this convention has become open to signature or accession):

- (a) States entitled to become parties to the convention,
- (b) States having signed or ratified the convention,
- (c) States having ratified or acceded to the convention.⁵¹¹

(6) In keeping with these recommendations, the Commission suggested that, “in the absence of contrary

⁵⁰⁹ See also article 2, paragraph 1 (f), of the 1969 Vienna Convention and article 2, paragraph 1 (k), of the 1978 Vienna Convention, which define the term “contracting State” in the same way.

⁵¹⁰ *Oppenheim’s International Law* (footnote 210 above), p. 1248, footnote 4.

⁵¹¹ *Yearbook ... 1951*, vol. II, document A/CN.4/41, annex E, p. 16.

provisions in any multilateral convention ... [t]he depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention”.⁵¹²

(7) More vaguely, the Special Rapporteur, Sir Hersch Lauterpacht, in his first report on the law of treaties in 1953, proposed in three of the four alternative versions of draft article 9 on reservations a provision stating that “[t]he text of the reservations received shall be communicated by the depositary authority to all the interested States”.⁵¹³ But he did not comment on this phrase,⁵¹⁴ which is reproduced in the first report on the law of treaties by Sir Gerald Fitzmaurice in 1956,⁵¹⁵ who clarified it as follows in draft article 39: these are “all the States which have taken part in the negotiation and drawing up of the treaty or which, by giving their signature, ratification, accession or acceptance, have manifested their interest in it”.⁵¹⁶

(8) Conversely, in 1962, in his first report on the law of treaties, Sir Humphrey Waldock reverted to the 1951 formulation⁵¹⁷ and proposed that any reservation formulated “by a State signing, ratifying, acceding to, or accepting a treaty subsequently to the meeting or conference at which it was adopted shall be communicated to all other States which are, or are entitled to become, parties ...”.⁵¹⁸ This was also the formula adopted by the Commission after the Drafting Committee had considered it and made minor drafting changes.⁵¹⁹ While States had not expressed any objections in this regard in their comments on the draft articles adopted on first reading, Sir Humphrey Waldock, without explanation, proposed in his fourth report on the law of treaties in 1965 to revert to the phrase “other States concerned”,⁵²⁰ which the Commission replaced by “contracting States”⁵²¹ on the ground that the notion of “States concerned”⁵²² was “very vague”, finally adopting, in 1966, the requirement

⁵¹² *Ibid.*, document A/1858, p. 130, para. 34. This point was not extensively discussed; see, however, the statements by Hudson and Spiropoulos, the latter of whom considered that communication to States not parties to the treaty was not an obligation under positive law (*ibid.*, vol. I, 105th meeting, 18 June 1951, p. 198).

⁵¹³ *Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 92, alternatives B, C and D; oddly enough, this requirement does not appear in alternative A (acceptance of reservations by a two-thirds majority, *ibid.*, p. 91).

⁵¹⁴ *Ibid.*, p. 136.

⁵¹⁵ Draft article 37: they “must be brought to the knowledge of the other interested States” (*Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115).

⁵¹⁶ *Ibid.*

⁵¹⁷ See paragraphs (5)–(6) above.

⁵¹⁸ *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 60. Not without reason, Sir Humphrey Waldock believed that it was unnecessary to notify the other States which took part in the negotiations of a reservation formulated “when signing a treaty at a meeting or conference of the negotiating States” if it appeared at the end of the treaty itself or in the final act of the conference (*ibid.*).

⁵¹⁹ Draft article 18, paragraph 3; *ibid.*, document A/5209, p. 176. In its commentary, the Commission considered that this phrase was equivalent to “other interested States” (*ibid.*, p. 180).

⁵²⁰ *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 56.

⁵²¹ *Ibid.*, document A/6009, p. 162.

⁵²² Explanation given by Sir Humphrey Waldock at the 813th meeting of the Commission, held on 29 June 1965, *Yearbook ... 1965*, vol. I, p. 267.

of communication “to the other States entitled to become parties to the treaty”,⁵²³ a phrase which was “regarded as more appropriate to describe the recipients of the type of communications in question”.⁵²⁴

(9) At the United Nations Conference on the Law of Treaties, the delegation of Canada pointed out that that wording “might create difficulties for a depositary, as there was no criterion for deciding which were those States. It would therefore be preferable to substitute the phrase ‘negotiating States and contracting States’ as proposed in his delegation’s amendment (A/CONF.39/C.1/L.158)”.⁵²⁵ Although this common-sense proposal was submitted to the Drafting Committee,⁵²⁶ the latter preferred an amendment submitted by Spain,⁵²⁷ which appears in the final text of article 23, paragraph 1, of the 1969 Vienna Convention and which was reproduced in the 1986 text unchanged except for the addition of international organizations.⁵²⁸

(10) Not only is the phrase adopted obscure, but the *travaux préparatoires* for the 1969 Vienna Convention do little to clarify it. The same is true of paragraphs 1 (b) and 1 (e) of article 77 of the Convention, which, while not referring expressly to reservations, provide that the depositary is responsible for transmitting “to the parties and to the States entitled to become parties to the treaty” copies of the texts of the treaty and informing them of “notifications and communications relating to the treaty”,⁵²⁹ however, the *travaux préparatoires* for these provisions shed no light on this phrase,⁵³⁰ to which the Commission did not turn its attention.

⁵²³ Draft article 18, paragraph 1, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208.

⁵²⁴ Explanation given by Mr. Briggs, Chairperson of the Drafting Committee, *Yearbook ... 1966*, vol. I (Part Two), 887th meeting, 11 July 1966, p. 293.

⁵²⁵ *Official Records of the United Nations Conference on the Law of Treaties, First Session ... (A/CONF.39/11)* (see footnote 35 above), 23rd meeting of the Committee of the Whole, p. 124, para. 38. J. A. Frowein points out that the United States of America had expressed the same concern in the General Assembly’s discussion of the draft articles relating to depositaries prepared by the Commission at its fourteenth to sixteenth sessions (*Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 346 *et seq.*, in particular at pp. 352–353) (see Frowein “Some considerations regarding the function of the depositary: comments on art. 72, para. 1 (d) of the ILC’s 1966 draft articles on the law of treaties”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*, vol. 27 (1967), p. 533); see also Rosenne, “More on the depositary of international treaties”, *AJIL*, vol. 64 (1970), pp. 847–848.

⁵²⁶ See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ... (A/CONF.39/11/Add.2)* (footnote 54 above), Report of the Committee of the Whole, p. 139, para. 194.

⁵²⁷ *Ibid.*, document A/CONF.39/C.1/L.149, para. 192 (i); for the text adopted by the Committee of the Whole, see paragraph 196.

⁵²⁸ See paragraph (2) above.

⁵²⁹ Under article 77, paragraph 1 (f), the depositary is also responsible for “informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited”.

⁵³⁰ On the origin of these provisions, see, in particular, the report by Mr. Brierly on reservations to multilateral treaties, *Yearbook ... 1951*, vol. II, document A/CN.4/41, and the conclusions of the Commission, *ibid.*, document A/1858, p. 130, paragraph 34 (1); articles 17, paragraph 4 (c), and 27, paragraph 6 (c), of the draft articles proposed by Sir Humphrey Waldock in his first report on the law of

(11) This was not the case during the preparation of the 1986 Vienna Convention. Whereas the Special Rapporteur on the question of treaties concluded between States and international organizations or between two or more international organizations had, in his fourth and fifth reports,⁵³¹ merely adapted without comment the text of article 23, paragraph 1, of the 1969 Vienna Convention, several members of the Commission expressed particular concern during the discussion of the draft during the twenty-ninth session of the Commission, in 1977, regarding the problems posed by the determination of “international organizations entitled to become parties to the treaty”.⁵³² However, following a contentious debate, it was decided merely to transpose the 1969 wording.⁵³³

(12) It is certainly regrettable that the limitations proposed by Canada in 1968 and by Mr. Ushakov in 1977 regarding the recipients of communications relating to reservations were not adopted (in the second case, probably out of a debatable concern not to deviate from the 1969 wording or draw any distinction between the rights of States and those of international organizations); such limitations would have obviated practical difficulties for depositaries without significantly calling into question the “useful” publicity of reservations among truly interested States and international organizations.⁵³⁴

(13) There is obviously no problem when the treaty itself determines clearly which States or international organizations are entitled to become parties, at least in the case of “closed” treaties; treaties concluded under the auspices of a regional international organization, such as the Council of Europe,⁵³⁵ the OAS⁵³⁶ or the Organization

treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1–2, pp. 65–66 and 82–83, and article 29, paragraph 5, of the draft adopted by the Commission on first reading, *ibid.*, document A/5209, p. 185; and draft article 72 adopted definitively by the Commission at its eighteenth session, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 269.

⁵³¹ *Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 38, and *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/290 and Add.1, p. 146.

⁵³² For example, Mr. Ushakov observed that: “In the case of treaties of a universal character concluded between States and international organizations, such communications would thus have to be made to all existing States. For the same category of treaties and also treaties concluded between international organizations only, it would, however, be more difficult to determine what international organizations were ‘entitled to become parties’. If 10 international organizations were parties to a treaty, to what other international organizations would the communications have to be sent?” (*Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 101, para. 42).

⁵³³ See, in particular, the statements by Mr. Verosta, Mr. Calle y Calle, Mr. Schwebel and Mr. Reuter, *ibid.*, p. 102, paras. 45, 46, 48 and 51, and the conclusion of the debates, *ibid.*, 1451st meeting, 1 July 1977, p. 196, and *Yearbook ... 1977*, vol. II (Part Two), pp. 115–116.

⁵³⁴ It is interesting to note that, while the specialized agencies of the United Nations are not, nor are they entitled to become, “parties” to the 1947 Convention on the privileges and immunities of the specialized agencies, they do receive communications relating to the reservations formulated by some States with regard to its provisions. See, in particular, *Summary of Practice of the Secretary-General ...* (footnote 75 above), pp. 60–61, paras. 199–203.

⁵³⁵ See, for instance, article K, paragraph 1, of the European Social Charter (revised) of 3 May 1996: “This Charter shall be open for signature by the member States of the Council of Europe”; or article 32, paragraph 1, of the Criminal Law Convention on Corruption of 27 January 1999.

⁵³⁶ See, for example, article XXI of the Inter-American Convention against Corruption of 29 March 1996.

of African Unity,⁵³⁷ often fall into this category. Things are much more complicated when it comes to treaties that do not indicate clearly which States are entitled to become parties to them or “open” treaties containing the words “any State”,⁵³⁸ or when it is established that participants in the negotiations were agreed that later accessions would be possible.⁵³⁹ This is obviously very much the case when depositary functions are assumed by a State that not only has no diplomatic relations with certain other States⁵⁴⁰ but also does not recognize as States certain entities that proclaim themselves to be States.

(14) The *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* devotes an entire chapter to describing the difficulties encountered by the Secretary-General in determining the “States and international organizations which may become parties”,⁵⁴¹ difficulties which legal theorists have extensively underscored.⁵⁴² However, the States that replied on this point to the Commission’s questionnaire on reservations to treaties do not mention any particular difficulties in this area, although this can probably be explained by the fact that the problem is not specific to reservations and more generally concerns depositary functions. This is also why the Commission saw no merit in proposing the adoption of one or more guidelines on this point.

(15) By contrast, it is certainly necessary to reproduce in the Guide to Practice the rule set forth in article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions (taking the latter in its broadest formulation), no matter how problematic and arguable the provision may be.

(16) The Commission also wished to specify that, just as reservations must be formulated and confirmed in writing,⁵⁴³ so too must they be communicated in writing to the other States or international organizations concerned, this being the only means of enabling the recipients to react to them in full knowledge of the facts. This latter requirement is only implicit in the Vienna text, but it is clear from the context, since article 23, paragraph 1, is the provision which requires that reservations be formulated in writing and which uses very concise wording to link that condition to the requirement that reservations be communicated. Besides, when there is no depositary, the formulation and communication of reservations necessarily

⁵³⁷ See also, for example, article 12, paragraph 1, of the Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora of 8 September 1994.

⁵³⁸ See, for example, article XIII of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid: “The present Convention is open for signature by all States”; or article 84, paragraph 1, of the 1986 Vienna Convention: “The present Convention shall remain open for accession by any State, by Namibia (...) and by any international organization which has the capacity to conclude treaties.” See also article 305 of the 1982 United Nations Convention on the Law of the Sea, which opens the Convention for signature by not only “all States”, but also Namibia (before its independence) and self-governing States and territories.

⁵³⁹ See article 15 of the 1969 and 1986 Vienna Conventions.

⁵⁴⁰ See article 74 of the 1969 and 1986 Vienna Conventions.

⁵⁴¹ *Summary of Practice of the Secretary-General ...* (footnote 75 above), chap. V, pp. 21–30, paras. 73–100.

⁵⁴² See, *inter alia*, Frowein, “Some considerations ...” (footnote 525 above), pp. 533–539, and Rosenne, “More on the depositary of international treaties” (footnote 525 above), pp. 847–848.

⁵⁴³ See guidelines 2.1.1. and 2.2.1.

go hand in hand.⁵⁴⁴ Moreover, practice confines itself to communications in written form.⁵⁴⁵

(17) The second paragraph of guideline 2.1.5 concerns the particular case of reservations to constituent instruments of international organizations.

(18) Article 23 of the 1969 and 1986 Vienna Conventions concerning the “procedure regarding reservations” does not deal with this particular case. The general rule set forth in paragraph 1 of that article must, however, be clarified and expanded in this respect.

(19) According to article 20, paragraph 3, of the Vienna Conventions:

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

Yet that organ can take a decision only if the organization is aware of the reservation, which must therefore be communicated to it.

(20) This problem was overlooked by the first three Special Rapporteurs on the law of treaties and taken up only by Sir Humphrey Waldock in his first report in 1962. He proposed a long draft article 17 on the “Power to formulate and withdraw reservations”, paragraph 5 of which provided as follows:

However, in any case where a reservation is formulated to an instrument which is the constituent instrument of an international organization and the reservation is not one specifically authorized by such instrument, it shall be communicated to the Head of the secretariat of the organization concerned in order that the question of its admissibility may be brought before the competent organ of such organization.⁵⁴⁶

(21) Waldock indicated that this clarification was motivated by

a point to which attention is drawn in paragraph 81 of the *Summary of the Practice of the Secretary-General (ST/LEG/7)*, where it is said:

“If the agreement should be a constitution establishing an international organization, the practice followed by the Secretary-General and the discussions in the Sixth Committee show that the reservation would be submitted to the competent organ of the organization before the State concerned was counted among the parties. The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions.”⁵⁴⁷

(22) This provision disappeared from the draft after its consideration by the Drafting Committee,⁵⁴⁸ probably because the latter’s members felt that the adoption of an express stipulation that the decision on the effect of a reservation to a constituent instrument must be taken by “the competent organ of the organization in question”⁵⁴⁹ made that clarification superfluous. The question does not appear to have been raised again subsequently.

⁵⁴⁴ See guideline 2.1.6, paragraph 1 (a).

⁵⁴⁵ See the “depositary notifications” of the Secretary-General of the United Nations.

⁵⁴⁶ *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 61.

⁵⁴⁷ *Ibid.*, p. 66.

⁵⁴⁸ See draft article 18, *ibid.*, document A/5209, pp. 175–176.

⁵⁴⁹ See draft article 20, paragraph 4, *ibid.*, p. 176.

(23) It is not surprising that Sir Humphrey Waldock should have asked the question in 1962: three years earlier, the problem had arisen critically in connection with a reservation by India to the Convention on the Inter-Governmental Maritime Consultative Organization (IMCO), subsequently the International Maritime Organization (IMO). The Secretary-General of the United Nations, as depositary of the Convention, transmitted to IMCO the text of the Indian reservation, which had been formulated that very day on the opening of the first session of the IMCO Assembly. He suggested that the IMCO secretariat should refer the question to the IMCO Assembly for a decision. When that referral was contested, the Secretary-General, in a well-argued report, maintained that

this procedure conformed (1) to the terms of the IMCO Convention; (2) to the precedents in depositary practice where an organ or body was in a position to pass upon a reservation; and (3) to the views on this specific situation expressed by the General Assembly during its previous debates on reservations to multilateral conventions.⁵⁵⁰

(24) The Secretary-General stated, *inter alia*, that

[i]n previous cases where reservations had been made to multilateral conventions which were in force and which either were constitutions of organizations or which otherwise created deliberative organs, the Secretary-General has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question.⁵⁵¹

He cited as examples the communication to the World Health Assembly of the reservation formulated in 1948 by the United States of America to the Constitution of the World Health Organization⁵⁵² and the communication the following year of reservations made by the Union of South Africa and by Southern Rhodesia to the General Agreement on Tariffs and Trade (GATT) to the GATT Contracting Parties.⁵⁵³ In the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the Secretary-General gives another example of his consistent practice in this regard:

when Germany and the United Kingdom accepted the Agreement establishing the African Development Bank of 17 May 1979, as amended, they made reservations which had not been contemplated in the Agreement. The Secretary-General, as depositary, duly communicated the reservations to the Bank and accepted the deposit of the instruments only after the Bank had informed him that it had accepted the reservations.⁵⁵⁴

(25) In view of the principle set forth in article 20, paragraph 3, of the Vienna Conventions and of the practice normally followed by the Secretary-General of the United

Nations, the Commission considered it useful to set forth in a guideline the obligation to communicate reservations to the constituent instrument of an international organization to the organization in question.

(26) It nevertheless asked three questions in relation to the precise scope of this rule, the principle of which does not appear to be in doubt:

(a) Should the guideline include the clarification (which was included in the 1962 Waldock draft⁵⁵⁵) that the reservation must be communicated to the head of the secretariat of the organization concerned?

(b) Should it state that the same rule applies when the treaty is not, strictly speaking, the constituent instrument of an international organization, but creates a “deliberative organ” that may take a position on whether or not the reservation is valid, as the Secretary-General had done in his 1959 *Summary of Practice*?⁵⁵⁶ and

(c) Does the communication of a reservation to the constituent instrument of an international organization to the latter organization remove the obligation also to communicate the text of the reservation to interested States and international organizations?

(27) On the first question, the Commission considered that such a clarification is not necessary: even if, generally speaking, the communication will be addressed to the head of the secretariat, this may not always be the case because of the particular structure of a given organization. In the case of the European Union, for example, the collegial nature of the European Commission might raise some problems. Moreover, such a clarification is of little real value: what matters is that the organization in question should be duly alerted to the problem.

(28) As to whether the same rule should apply to “deliberative organs” created by a treaty which nonetheless are not international organizations in the strict sense of the term, it is very likely that in 1959 the drafters of the report of the Secretary-General of the United Nations had the GATT in mind—especially since one of the examples cited related to that organization.⁵⁵⁷ The problem no longer arises in that connection, since the GATT has been replaced by the World Trade Organization (WTO). The fact remains, however, that certain treaties, especially in the field of disarmament or environmental protection, create deliberative bodies having a secretariat which have sometimes been denied the status of an international organization.⁵⁵⁸ The Commission decided not to devote a specific guideline to it. However, it felt that this same rule applies to reservations to constituent instruments *stricto sensu* and to reservations to treaties creating oversight bodies that assist in

⁵⁵⁰ *Official Records of the General Assembly, Fourteenth Session, Annexes: Reservations to multilateral conventions: the Convention on the Inter-Governmental Maritime Consultative Organization*, document A/4235, para. 18. With regard to this incident, see also O. Schachter, “The question of treaty reservations at the 1959 General Assembly”, *AJIL*, vol. 54 (1960), pp. 372–379.

⁵⁵¹ A/4235, para. 21.

⁵⁵² *Ibid.*, para. 22. See also O. Schachter, “The development of international law through the legal opinions of the United Nations Secretariat”, *BYBIL*, vol. 25 (1948), pp. 124–126.

⁵⁵³ A/4235, para. 22.

⁵⁵⁴ *Summary of Practice of the Secretary-General ...* (see footnote 75 above), p. 59, para. 198 (footnotes omitted). See also Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 346–347.

⁵⁵⁵ See paragraph (20) above.

⁵⁵⁶ See paragraph (24) above.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ See, for example, R. R. Churchill and G. Ulfstein, “Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law”, *AJIL*, vol. 94 (2000), pp. 623–659; some authors also argue that the International Criminal Court is not, strictly speaking, an international organization.

the application of the treaty whose status as international organizations might be subject to challenge.

(29) The reply to the last question mentioned above⁵⁵⁹ is the trickiest. It is also the one that has the greatest practical significance, for a reply in the affirmative would impose a heavier burden on the depositary than a negative one. Moreover, the practice of the Secretary-General—which does not appear to be wholly consistent⁵⁶⁰—seems to tend rather in the opposite direction.⁵⁶¹ The Commission nevertheless believes that a reservation to a constituent instrument should be communicated not only to the organization concerned, but also to all other contracting States and organizations and to those entitled to become members thereof.

(30) Two arguments are advanced in support of this position. The first is that it is by no means evident that an organization's acceptance of the reservation precludes member States (or international organizations) from objecting to it.⁵⁶² Secondly, there is a good practical argument to support this affirmative reply: even if the reservation is communicated to the organization itself, it is in fact its own member States (or international organizations) that will decide. It is therefore important for them to be aware of the reservation. A two-step procedure is a waste of time.

(31) It goes without saying that the obligation to communicate the text of reservations to a constituent instrument to the international organization concerned arises only if the organization exists; in other words, if the treaty is in force.⁵⁶³ This would seem to be evident; nevertheless, it appeared that this clarification was necessary, since, without it, it would be difficult to understand the end of the second paragraph of guideline 2.1.5 (it is impossible to communicate a reservation to an international organization or to an organ that does not yet exist).

(32) The question may nevertheless arise as to whether such reservations should not also be communicated before the effective creation of the organization to the “preparatory committees” (or whatever name they may be given) that are often established to prepare for the prompt and effective entry into force of the constituent instrument.

⁵⁵⁹ Paragraph (26) (c).

⁵⁶⁰ For an earlier example in which it appears that the Secretary-General communicated the reservation of the United States of America to the Constitution of the World Health Organization both to interested States and to the organization concerned, see Schachter, “The development of international law . . .” (footnote 552 above), p. 125. See also the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (footnote 75 above), p. 51, para. 170.

⁵⁶¹ In at least one case, however, the State author of a unilateral declaration (which was tantamount to a reservation)—in this case, the United Kingdom—directly consulted the signatories to an agreement establishing an international organization, the Agreement establishing the Caribbean Development Bank of 18 October 1969, about the declaration (see *Multilateral Treaties* . . . (footnote 37 above), chap. X.6). The author of the reservation may also take the initiative to consult the international organization concerned (see the French reservation to the Agreement establishing the Asia-Pacific Institute for Broadcast Development, Kuala Lumpur, 12 August 1977 (*ibid.*, chap. XXV.3)).

⁵⁶² See guideline 2.8.12 and commentary thereto.

⁵⁶³ In practice, when the constituent instrument is not in force, the Secretary-General of the United Nations proceeds as he would in respect of any other treaty.

Even if in many cases an affirmative reply again appears necessary, it is difficult to generalize, since everything depends on the exact mandate that the conference that adopted the treaty gives to the preparatory committee.

2.1.6 Procedure for communication of reservations

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, the communication of a reservation to a treaty shall be transmitted:

(a) if there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(b) if there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

2. The communication of a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

3. The communication of a reservation to a treaty by means other than a diplomatic note or depositary notification, such as electronic mail or facsimile, must be confirmed within an appropriate period of time by such a note or notification. In such case, the reservation is considered as having been formulated at the date of the initial communication.

Commentary

(1) As in the two guidelines that follow, guideline 2.1.6 seeks to clarify aspects of the procedure to be followed in communicating the text of a treaty reservation to the addressees of the communication that are specified in guideline 2.1.5. It covers two different but closely linked aspects:

- the author of the communication; and
- the practical modalities of the communication.

(2) Article 23 of the 1969 and 1986 Vienna Conventions is silent as to the person responsible for such communication. In most cases this will be the depositary, as shown by the provisions of article 79 of the 1986 Vienna Convention,⁵⁶⁴ which generally apply to all notifications and communications concerning treaties. The provisions of that article also give some information on the modalities for the communication.

(3) On prior occasions when the topic of reservations to treaties was considered, the Commission or its special rapporteurs planned to stipulate expressly that it was the duty of the depositary to communicate the text of formulated reservations to interested States. In 1951, for example, the Commission held that “the depositary

⁵⁶⁴ Article 78 of the 1969 Vienna Convention.

of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention".⁵⁶⁵ Likewise, in his fourth report on the law of treaties in 1965, Sir Humphrey Waldock proposed that a reservation "must be notified to the depositary or, where there is no depositary, to the other interested States".⁵⁶⁶

(4) In the end, this formula was not adopted by the Commission, which, noting that the drafts previously adopted "contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter", came to the conclusion that "it would allow a considerable simplification to be effected in the texts of the various articles if a general article were to be introduced covering notifications and communications".⁵⁶⁷

(5) That was the object of draft article 73 of 1966, now article 78 of the 1969 Vienna Convention, which was reproduced without change except for the addition of a reference to international organizations in article 79 of the 1986 Vienna Convention:

Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State or any international organization under the present Convention shall:

(a) if there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1 (e).

(6) Article 79 is indissociable from this latter provision, under which:

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

...

(e) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty.

(7) It may be noted in passing that the expression "the parties and the States and international organizations entitled to become parties to the treaty", which is used in this paragraph, is not the exact equivalent of the formula used in article 23, paragraph 1, which refers to "contracting States and contracting organizations". The difference has

no practical consequences, since the contracting States and contracting international organizations are quite obviously entitled to become parties to the treaty and indeed do so simply by virtue of the treaty's entry into force, in accordance with the definition of the terms given in article 2, paragraph 1 (f), of the 1986 Vienna Convention; it does pose a problem, however, with regard to the wording of the guideline to be included in the Guide to Practice.

(8) There is no doubt that the provisions of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention should be reproduced in the Guide to Practice and adapted to the special case of reservations; otherwise, the Guide would not fulfil its pragmatic purpose of making available to users a full set of guidelines enabling them to determine what conduct to adopt whenever they are faced with a question relating to reservations. However, the Commission did wonder whether, in preparing this guideline, it should reproduce the wording of these two provisions or that of article 23, paragraph 1. It seemed logical to adopt the terminology used in the latter so as to avoid any ambiguity and conflict—even purely superficial—between the various guidelines of the Guide to Practice.

(9) Moreover, there can be no doubt that communications relating to reservations—especially those concerning the actual text of reservations formulated by a State or an international organization—are communications "relating to the treaty" within the meaning of article 78, paragraph 1 (e), referred to above.⁵⁶⁸ Furthermore, in its 1966 draft, the Commission expressly entrusted the depositary with the task of examining whether "a signature, an instrument or a reservation* is in conformity with the provisions of the treaty and of the present articles".⁵⁶⁹ This expression was replaced in Vienna with a broader one—"the signature or any instrument, notification or communication relating to the treaty"⁵⁷⁰—which cannot, however, be construed as excluding reservations from the scope of the provision.

(10) In addition, as indicated in the commentary to draft article 73 adopted by the Commission in 1966 (now article 79 of the 1986 Vienna Convention), the rule laid down in subparagraph (a) of this provision "relates essentially to notifications and communications relating to the 'life' of the treaty—acts establishing consent, reservation*, objections, notices regarding invalidity, termination, etc."⁵⁷¹

(11) In essence, there is no doubt that both article 78, paragraph 1 (e), and article 79 (a) reflect current

⁵⁶⁸ See paragraph (6) above.

⁵⁶⁹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 269, draft art. 72, para. 1 (d). On the substance of this provision, see the commentary to guideline 2.1.7 below.

⁵⁷⁰ 1969 Vienna Convention, art. 77, para. 1 (d). The new wording is derived from an amendment proposed by the Byelorussian Soviet Socialist Republic, which was adopted by the Committee of the Whole by 32 votes to 24, with 27 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ... (A/CONF.39/11/Add.2)* (footnote 54 above), p. 202, para. 654 (iv) (4), and p. 203, para. 660 (i)).

⁵⁷¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 270, paragraph (2) of the commentary.

⁵⁶⁵ *Yearbook ... 1951*, vol. II, document A/1858, p. 130, para. 34.

⁵⁶⁶ *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 53.

⁵⁶⁷ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 270, paragraph (1) of the commentary to draft article 73.

practice.⁵⁷² They warrant no special comment, except for the observation that, even in cases where there is a depositary, the State that is the author of the reservation may directly inform the other States or international organizations concerned of the text of the reservation. Thus, the United Kingdom, for example, informed the Secretary-General of the United Nations, as depositary of the Agreement establishing the Caribbean Development Bank, that it had consulted all the signatories to that agreement with regard to an aspect of the declaration (constituting a reservation) which it had attached to its instrument of ratification (and which was subsequently accepted by the Board of Governors of the Bank and then withdrawn by the United Kingdom).⁵⁷³ Likewise, France submitted to the Board of Governors of the Asia-Pacific Institute for Broadcasting Development a reservation which it had formulated to the Agreement establishing that organization, for which the Secretary-General is also depositary.⁵⁷⁴

(12) There seem to be no objections to this practice, provided that the depositary is not thereby released from his own obligations.⁵⁷⁵ It is, however, a source of confusion and uncertainty in the sense that the depositary could leave it up to States formulating reservations to perform the function expressly conferred on him by article 78, paragraph 1 (e), and the final phrase of article 79 (a) of the 1986 Vienna Convention.⁵⁷⁶ For this reason, the Commission considered that such a practice should not be encouraged and refrained from proposing a guideline enshrining it.

(13) In its 1966 commentary, the Commission dwelt on the importance of the task entrusted to the depositary in draft article 72, paragraph 1 (e) (now article 77, paragraph 1 (e), of the 1969 Vienna Convention),⁵⁷⁷ and stressed “the obvious desirability of the prompt performance of this function by a depositary”.⁵⁷⁸ This is an important issue, which is linked to subparagraphs (b) and (c) of article 78 of the 1969 Vienna Convention:⁵⁷⁹ the reservation produces effects only as from the date on which the communication relating thereto is received by the States and organizations for which it is intended, and not as from the date of its formulation. In truth, it matters little whether the communication is made directly by the author of the reservation; he will have no one but himself to blame if it is transmitted late to its recipients. On the other hand, if there is a depositary, it is essential for the latter to display promptness; otherwise,

⁵⁷² See *ibid.* with regard to draft article 73 (a) (which became article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention).

⁵⁷³ See *Multilateral Treaties ...* (footnote 37 above), chap. X.6.

⁵⁷⁴ *Ibid.*, chap. XXV.3.

⁵⁷⁵ See guideline 2.1.7 below.

⁵⁷⁶ Article 77, paragraph 1 (e), and article 78 (a), respectively, of the 1969 Vienna Convention. In the aforesaid case of the French reservation to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, it seems that the Secretary-General confined himself to taking note of the absence of objections from the organization's Governing Council (see *Multilateral Treaties ...* (footnote 37 above), chap. XXV.3). The Secretary-General's passivity in this instance is subject to criticism.

⁵⁷⁷ Article 78, paragraph 1 (e), of the 1986 Vienna Convention.

⁵⁷⁸ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 270, paragraph (5) of the commentary to draft article 72.

⁵⁷⁹ Article 79 (a) and (b) of the 1986 Vienna Convention. See the text of these provisions in paragraph (5) above.

the depositary could stall both the effect of the reservation and the opportunity for the other States and international organizations concerned to react to it.⁵⁸⁰

(14) In practice, at the current stage of modern means of communication, depositaries, at any event in the case of international organizations, perform their tasks with great speed. Whereas in the 1980s the period between the receipt of reservations and the communication thereof could vary from one to two and even three months, it is apparent from the information supplied to the Commission by the Treaty Section of the United Nations Office of Legal Affairs that:

1. The time period between receipt of a formality by the Treaty Section and its communication to the parties to a treaty is approximately 24 hours unless a translation is required or a legal issue is involved. If a translation is required, in all cases, it is requested by the Treaty Section on an urgent basis. If the legal issue is complex or involves communications with parties outside the control of the United Nations, then there may be some delay; however, this is highly unusual. It should be noted that, in all but a few cases, formalities are communicated to the relevant parties within 24 hours.

2. Depositary notifications are communicated to permanent missions and relevant organizations by both regular mail and electronic mail, within 24 hours of processing (see LA 41 TR/221 (23-1)). Additionally, effective January 2001, depositary notifications can be viewed on the United Nations Treaty Collection on the Internet at: <http://untreaty.un.org> (depositary notifications on the Internet are for information purposes only and are not considered to be formal notifications by the depositary). Depositary notifications with bulky attachments, for example those relating to chapter 11 (b) 16,⁵⁸¹ are sent by facsimile.⁵⁸²

(15) As of 1 April 2010, the communication procedure followed by the Secretary-General in his capacity as depositary has been simplified:

Depositary Notifications (CNs) will be available electronically only and the print versions will be discontinued as of *Thursday, 1 April 2010*.

The CNs will continue to be accessible on the Web site of the United Nations Treaty Collection <<http://treaties.un.org>>, under “Depositary Notifications (CNs)”. In addition, the permanent missions, as well as all other interested individuals, are urged to subscribe to receive depositary notifications electronically by e-mail through the Treaty Section's “Automated CN Subscription Service”, which is also available at <<http://treaties.un.org>>.

⁵⁸⁰ See the commentary to draft article 73, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 270–271, paragraphs (3)–(6) of the commentary; see also T. O. Elias, *The Modern Law of Treaties*, Dobbs Ferry/Leiden, Oceana/Sijthoff, 1974, pp. 216–217.

⁵⁸¹ These are communications relating to the Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions of 20 March 1958 (see *Multilateral Treaties ...* (footnote 37 above), chap. XI.B.16).

⁵⁸² The Treaty Section has also advised: “3. Please note that the depositary practice has been changed in cases where the treaty action is a modification to an existing reservation and where a reservation has been formulated by a party subsequent to establishing its consent to be bound. A party to the relevant treaty now has 12 months within which to inform the depositary that it objects to the modification or that it does not wish to consider the reservation made subsequent to ratification, acceptance, approval, etc. The time period for this 12 months is calculated by the depositary on the basis of the date of issue of the depositary notification (see LA 41 TR/221 (23-1)).” See also P. T. B. Kohona, “Some notable developments in the practice of the UN Secretary-General as depositary of multilateral treaties: reservations and declarations”, *AJIL*, vol. 99 (2005), pp. 433–450, and, by the same author, “Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations as depositary of multilateral treaties”, *Georgia Journal of International and Comparative Law*, vol. 33, No. 2 (2005), pp. 415–450.

This initiative is part of the United Nations' effort to reduce paper consumption and to conserve energy and resources.⁵⁸³

(16) For its part, the IMO secretariat has informed the Commission that the time period between the communication of a reservation to a treaty for which the organization is depositary and its transmittal to the States concerned is generally from one to two weeks. Communications, which are translated into the three official languages of the organization (English, Spanish and French), are always transmitted by regular mail.

(17) The practice of the Council of Europe has been described to the Commission by the secretariat of the Council as follows:

The usual period is two to three weeks (notifications are grouped and sent out approximately every two weeks). In some cases, delays occur owing to voluminous declarations/reservations or appendices (descriptions or extracts of domestic law and practices) that must be checked and translated into the other official language (the Council of Europe requires that all notifications be made in one of the official languages or be at least accompanied by a translation into one of these languages. The translation into the other official language is provided by the Treaty Office). Urgent notifications that have immediate effect (e.g., derogations under article 15 of the European Convention on Human Rights) are carried out within a couple of days.

Unless they prefer notifications to be sent directly to the Ministry of Foreign Affairs (currently 11 out of 43 member States), the original notifications are sent out in writing to the permanent representations in Strasbourg, which in turn forward them to their capitals. Non-member States that have no diplomatic mission (consulate) in Strasbourg are notified via a diplomatic mission in Paris or Brussels or directly. The increase in member States and notifications over the last 10 years has prompted one simplification: since 1999, each notification is no longer signed individually by the Director-General of Legal Affairs (acting for the Secretary-General of the Council of Europe), but notifications are grouped and only each cover letter is signed individually. There have not been any complaints against this procedure.

Since our new web site (<http://conventions.coe.int>) became operational in January 2000, all information relating to formalities is immediately made available on the web site. The texts of reservations or declarations are put on the web site the day they are officially notified. Publication on the web site is, however, not considered to constitute an official notification.

(18) Lastly, it is apparent from information from the OAS that:

Member States are notified of any new signatures and ratifications to inter-American treaties through the OAS Newspaper, which circulates every day. In a more formal way, we notify every three months through a *procès-verbal* sent to the permanent missions to OAS or after meetings where there are a significant number of new signatures and ratifications such as, for example, the General Assembly.

The formal notifications, which also include the bilateral agreements signed between the General Secretariat and other parties, are done in Spanish and English.

(19) It did not seem necessary to the Commission for these very helpful clarifications to be reproduced in full in the Guide to Practice. It nonetheless seemed useful to give in guideline 2.1.6 some information in the form of general recommendations intended both for the depositary (where there is one) and for the authors of reservations (where there is no depositary). This guideline combines the text of article 78, paragraph 1 (e), and article 79 of

the 1986 Vienna Convention⁵⁸⁴ and adapts it to the special problems posed by the communication of reservations.

(20) The *chapeau* of this guideline reproduces the relevant parts that are common to the *chapeaux* of articles 77 and 78 of the 1969 Vienna Convention and articles 78 and 79 of the 1986 Vienna Convention, with some simplification: the wording decided upon at Vienna to introduce article 78 of the 1986 Vienna Convention (“the contracting States and contracting organizations or, as the case may be, by the contracting organizations ...”) appears to be unnecessarily cumbersome and conveys little additional information. Moreover, as noted above,⁵⁸⁵ the text of guideline 2.1.6 reproduces, with one small difference, the wording of article 23, paragraph 1, of the 1986 Vienna Convention (“to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”), in preference to that used in article 78, paragraph 1 (e) (“the parties and the States and international organizations entitled to become parties to the treaty”). While the latter formulation is probably more elegant and has the same meaning, it departs from the terminology used in the section of the Vienna Conventions relating to reservations. However, it did not seem useful to burden the text by using the article 23 expression twice in subparagraphs (a) and (b) of paragraph 1. Incidentally, this purely drafting improvement involves no change in the Vienna text: the expression “the States and international organizations for which it is intended” in subparagraph (b) refers to the “contracting States and contracting organizations and other States and international organizations entitled to become parties” in subparagraph (a).

(21) As to the time periods for the transmittal of the reservation to the States or international organizations for which it is intended, the Commission did not think it possible to establish a rigid period of time. The expression “as soon as possible” in subparagraph (b) seems enough to draw the attention of the addressees to the need to proceed rapidly. On the other hand, such an indication is not required in subparagraph (a): it is for the author of the reservation to assume his responsibilities in this regard.⁵⁸⁶

(22) In keeping with guidelines 2.1.1 and 2.2.4, which point out that the formulation and confirmation of reservations must be done in writing, the last paragraph of guideline 2.1.6 specifies that communication to the States and international organizations for which they are intended must take a specific form. While some members of the Commission may have expressed doubts about the need for this stipulation, it seemed useful in view of the frequent practice among depositaries of using modern means of communication. For this reason, a majority of the members of the Commission considered that any communication of a reservation should be confirmed in a diplomatic note (in cases where the author is a State) or in a “depositary notification” (when it is from an international organization⁵⁸⁷). In this case, the time period begins

⁵⁸⁴ Articles 77, paragraph 1 (e), and 78 of the 1969 Vienna Convention.

⁵⁸⁵ Paragraphs (7)–(8).

⁵⁸⁶ See paragraph (13) above.

⁵⁸⁷ A depositary notification has become the usual means by which depositary international organizations or heads of secretariat make communications relating to treaties. The usual diplomatic notes could

⁵⁸³ *Journal of the United Nations*, 25 March 2010, No. 2010/57, p. 17.

at the time the electronic mail or facsimile is sent: this has the advantage of preventing any disputes as to the date of receipt of the confirmation and does not give rise to practical problems since, according to the indications given to the Commission, the written confirmation is usually done at the same time or very shortly thereafter, at least by depositary international organizations. These clarifications are given in the third paragraph of guideline 2.1.6.

(23) It seemed neither useful nor possible to be specific about the language or languages in which such communications must be transmitted, since the practices of depositaries vary.⁵⁸⁸ Similarly, the Commission took the view that it was wise to follow practice on the question of the organ to which, specifically, the communication should be addressed.⁵⁸⁹

(24) On the other hand, the second paragraph of guideline 2.1.6 reproduces the rule set out in subparagraphs (b) and (c) of article 79 of the 1986 Vienna Convention.⁵⁹⁰ It did, however, seem possible to simplify the wording without drawing a distinction between cases in which the reservation is communicated directly by the author and instances in which it is done by the depositary. In both cases, it is the receipt of the communication by the State or international organization for which it is intended that is decisive. It is, for example, from the date of receipt that the period within which an objection may be formulated is counted.⁵⁹¹ It should be noted that the date of effect of the notification may differ from one State or international organization to another, depending on the date of receipt.

(25) These clarifications regarding the procedure relating to the communication of a reservation apply *mutatis mutandis* to other unilateral acts covered by the Guide to Practice, and particularly with regard to the formalities governing and reactions to reservations (withdrawal, acceptance and objection) and interpretative declarations as well as reactions to an interpretative declaration (approval, opposition, recharacterization). The Commission nevertheless did not think it necessary to reproduce the wording of guideline 2.1.6 for each type of act. The corresponding guidelines⁵⁹² merely contain cross references to the present guidelines.

2.1.7 Functions of depositaries

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

nevertheless be used by an international organization in the case of a communication addressed to non-member States of the organization that do not have observer status.

⁵⁸⁸ Where the depositary is a State, it generally seems to transmit communications of this type in its official language(s); an international organization may use all its official languages (IMO) or one or two working languages (United Nations).

⁵⁸⁹ Ministries of Foreign Affairs, diplomatic missions to the depositary State(s), permanent missions to the depositary organization.

⁵⁹⁰ See paragraph (5) above.

⁵⁹¹ Regarding objections, see guideline 2.6.12.

⁵⁹² See guidelines 2.4.5, 2.5.6, 2.6.8, 2.8.5 and 2.9.7.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the international organization concerned.

Commentary

(1) The section of the Vienna Conventions on the law of treaties devoted to reservations makes no mention of the role of the depositary. This silence is explained by the decision, adopted belatedly during the elaboration of the 1969 Vienna Convention, to subsume the provisions relating to the communication of reservations within the general provisions applicable to depositaries.⁵⁹³ Consequently, it is thus self-evident, however, that the provisions of articles 77 and 78 of the 1986 Vienna Convention⁵⁹⁴ are fully applicable to reservations insofar as they are relevant to them. Guideline 2.1.7 makes this clear.

(2) Under article 78, paragraph 1 (e), of the 1986 Vienna Convention, the depositary is responsible for "informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty". This rule, combined with the one in article 79 (a), is reproduced in guideline 2.1.6. This guideline also implies that the depositary receives and keeps custody of reservations;⁵⁹⁵ it therefore seems unnecessary to mention this expressly.

(3) It goes without saying that the general provisions of article 77, paragraph 2, relating to the international character of the functions of depositaries and their obligation to act impartially, apply to reservations as to any other field.⁵⁹⁶ In this general form, these principles do not specifically concern the functions of depositaries in relation to reservations, and thus there does not seem to be any need to reproduce them as such in the Guide to Practice. These provisions must, however, be placed in the context of those in article 78, paragraph 2:

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the international organization concerned.

⁵⁹³ See paragraph (1) of the commentary to draft article 73, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 270.

⁵⁹⁴ Articles 76–77 of the 1969 Vienna Convention.

⁵⁹⁵ See article 78: "The functions of a depositary ... comprise ...: (c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it".

⁵⁹⁶ "The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation."

(4) These substantial limitations on the functions of depositaries were established as a result of problems that arose with regard to certain reservations; hence it appears all the more essential to recall these provisions in the Guide to Practice, adapting them to the special case of reservations.

(5) The problem is posed in different terms when the depositary is a State that is itself a party to the treaty or when it is “an international organization or the chief administrative officer of the organization”.⁵⁹⁷ In the first case, “if the other parties found themselves in disagreement with the depositary on this question—a situation which, to our knowledge, has never materialized—they would not be in a position to insist that he follow a course of conduct different from the one he believed that he should adopt”.⁵⁹⁸ In the second case, on the other hand, the political organs of the organization (composed of States that are not necessarily parties to the treaty) can give instructions to the depositary. It is in this context that problems have arisen, and their solution has consistently tended towards a strict limiting of the depositary’s power of judgment, ultimately culminating in the rules laid down in the 1969 Vienna Convention and reproduced in the 1986 Vienna Convention.

(6) As early as 1927, in the wake of the difficulties created by the reservations to which Austria intended to subject its deferred signature of the International Opium Convention of 19 February 1925, the Council of the League of Nations adopted a resolution endorsing the conclusions of a Committee of Experts⁵⁹⁹ and giving instructions to the Secretary-General of the League as to the conduct to be adopted.⁶⁰⁰

(7) But it is in the context of the United Nations that the most serious problems have arisen, as can be seen from the main stages in the evolution of the role of the Secretary-General as depositary in respect of reservations:⁶⁰¹

– Initially, the Secretary-General “seemed to determine alone ... his own rules of conduct in the matter”⁶⁰² and subjected the admissibility of reservations to the unanimous acceptance of the contracting parties or the international organization whose constituent instrument was involved;⁶⁰³

⁵⁹⁷ Article 77, paragraph 1, of the 1986 Vienna Convention.

⁵⁹⁸ J. Dehaussy, “Le dépositaire de traités”, RGDIP, vol. 56 (1952), p. 515.

⁵⁹⁹ See the report of the Committee, composed of Mr. Fromageot, Mr. McNair and Mr. Diéna, in League of Nations, *Official Journal*, 8th year, No. 7 (July 1927), pp. 880–882, in particular at p. 881.

⁶⁰⁰ Resolution of 17 June 1927, *ibid.*, pp. 800–801. See also resolution XXIX of the Eighth International Conference of American States (Lima, 1938), which established the rules to be followed by the Pan American Union with regard to reservations, Eighth International Conference of American States, *Final Act*, 1938, p. 49, transcribed in *Yearbook ... 1965*, vol. II, document A/5687, p. 80.

⁶⁰¹ See also, for example, P.-H. Imbert, “A l’occasion de l’entrée en vigueur de la Convention de Vienne sur le droit des traités—Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l’exercice de ses fonctions de dépositaire”, AFDI, vol. 26 (1980), pp. 528–529; or S. Rosenne, *Developments in the Law of Treaties 1945–1986*, Cambridge University Press, 1989, pp. 429–434.

⁶⁰² Dehaussy, “Le dépositaire de traités” (footnote 598 above), p. 514.

⁶⁰³ See the *Summary of Practice of the Secretary-General ...* (footnote 75 above), pp. 50–51, paras. 168–171.

– Following the advisory opinion of the International Court of Justice of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,⁶⁰⁴ the General Assembly adopted a first resolution in which it requested the Secretary-General in respect of future conventions:

- (i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and
- (ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.⁶⁰⁵

– These guidelines were extended to all treaties for which the Secretary-General assumes depositary functions under General Assembly resolution 1452 B (XIV) of 7 December 1959, adopted as a result of the problems related to the reservations formulated by India to the constituent instrument of the IMCO.⁶⁰⁶

(8) This is the practice followed since then by the Secretary-General of the United Nations and, apparently, by all international organizations (or the heads of the secretariats of international organizations) with regard to reservations where the treaty in question does not contain a reservations clause.⁶⁰⁷ And it was this practice that the Commission drew on in formulating the rules to be applied by the depositary in this area.

(9) It should also be noted that, once again, the formulation adopted tended towards an ever greater limitation of the depositary’s powers:

– In the draft articles on the law of treaties adopted by the Commission on first reading in 1962, paragraph 5 of article 29 on “the functions of a depositary” provided as follows:

On a reservation having been formulated, the depositary shall have the duty:

(a) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the State which formulated the reservations;

(b) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19;⁶⁰⁸

– The draft articles adopted on second reading in 1966 further provided that the functions of the depositary comprised:

Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present

⁶⁰⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of May 28th, 1951, I.C.J. Reports 1951*, p. 15.

⁶⁰⁵ Resolution 598 (VI) of 12 January 1952, para. 3 (b).

⁶⁰⁶ See paragraphs (23)–(24) of the commentary to guideline 2.1.5 above.

⁶⁰⁷ See *Summary of Practice of the Secretary-General ...* (footnote 75 above), pp. 52–56, paras. 177–188.

⁶⁰⁸ *Yearbook ... 1962*, vol. II, document A/5209, p. 185.

articles and, if need be, bringing the matter to the attention of the State in question.⁶⁰⁹

The commentary on this provision dwelt, however, on the strict limits on the depositary's examining power:

Paragraph 1 (*d*) recognizes that a depositary has a certain duty to examine whether signatures, instruments and reservations are in conformity with any applicable provisions of the treaty or of the present articles, and if necessary to bring the matter to the attention of the State in question. That is, however, the limit of the depositary's duty in this connexion. It is no part of the functions to adjudicate on the validity of an instrument or reservation. If an instrument or reservation appears to be irregular, the proper course of a depositary is to draw the attention of the reserving State to the matter and, if the latter does not concur with the depositary, to communicate the reservation to the other interested States and bring the question of the apparent irregularity to their attention ...⁶¹⁰

– During the United Nations Conference on the Law of Treaties, an amendment proposed by the Byelorussian Soviet Socialist Republic⁶¹¹ further attenuated the provision in question: even if the disappearance of any express reference to reservations certainly does not prevent the rule laid down in article 77,⁶¹² paragraph 1 (*d*), of the 1969 Vienna Convention from applying to these instruments, the fact remains that the depositary's power is limited henceforth to examining the *form* of reservations, his function being that of:

Examining whether the signature or any instrument, notification or communication relating to the treaty is *in due and proper form** and, if need be, bringing the matter to the attention of the State or international organization in question.⁶¹³

(10) In this way, the principle of the depositary as “letter box” was established. As Elias has written:

It is essential to emphasize that it is no part of the depositary's function to assume the role of interpreter or judge in any dispute regarding the nature or character of a party's reservation *vis-à-vis* the other parties to a treaty, or to pronounce a treaty as having come into force when that is challenged by one or more of the parties to the treaty in question.⁶¹⁴

(11) Opinions are divided as to the advantages or disadvantages of this diminution of the depositary's competencies with regard to reservations. Of course, as the International Court of Justice emphasized in its 1951 advisory opinion, issued in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case, that “the task of the [depositary] would be simplified and would be confined to receiving reservations and objections and notifying them”.⁶¹⁵

⁶⁰⁹ Draft article 72, paragraph 1 (*d*), *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 269.

⁶¹⁰ *Ibid.*, pp. 269–270, paragraph (4) of the commentary.

⁶¹¹ See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ... (A/CONF.39/11/Add.2)* (footnotes 54 and 570 above), p. 202, para. 657 (iv) (4) and p. 203, para. 660 (i).

⁶¹² Article 78 of the 1986 Vienna Convention.

⁶¹³ The 1986 text.

⁶¹⁴ Elias, *The Modern Law of Treaties* (footnote 580 above), p. 213.

⁶¹⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 27; and it may be considered that: “It is that passage which has established the theoretical basis for the subsequent actions by the General Assembly and the International Law Commission. For it is in that sentence that the essentially administrative features of the function [of the depositary] are emphasized and any possible political (and that means decisive) role is depressed to the greatest extent” (S. Rosenne, “The depositary of international treaties”, *AJIL*, vol. 61, No. 4 (1967), p. 931).

The effect of this, it is suggested, is to transfer the undoubted subjectivities of the United Nations system from the shoulders of the depositary to those of the individual States concerned, in their quality of parties to that treaty, and in that quality alone. This may be regarded as a positive innovation, or perhaps clarification of the modern law of treaties, especially of reservations to multilateral treaties, and is likely to reduce or at least limit the “dispute” element of unacceptable reservations.⁶¹⁶

(12) Conversely, we may also see in the practice followed by the Secretary-General of the United Nations and embodied, indeed “solidified”, in the 1969 Vienna Convention, “an unnecessarily complex system”⁶¹⁷ insofar as the depositary is no longer able to impose the least amount of coherence and unity in the interpretation and implementation of reservations.⁶¹⁸

(13) The fact remains that distrust of the depositary, as reflected in the provisions analysed above of the relevant articles of the Vienna Conventions, is too deeply entrenched, both in minds and in practice, for there to be any consideration of revising the rules adopted in 1969 and perpetuated in 1986. For this very reason the Commission decided not to include in the Guide an element of progressive development that would have, for example, allowed depositaries to draw the attention of a reservation's author to the fact that they considered the reservation to be manifestly impermissible. In the light of the criticism that this elicited, the Commission chose not to retain in the final version of the Guide to Practice the draft guideline on this subject that it had originally considered.⁶¹⁹ In the Commission's view, there is little choice but to reproduce verbatim in the Guide to Practice the relevant provisions of article 78, paragraphs 1 (*d*) and 2, of the 1986 Vienna Convention, combining them in a single guideline and applying them only to the functions of depositaries with regard to reservations.

(14) The first paragraph of the guideline is based on the text of the first part of article 78, paragraph 1 (*d*), with express and exclusive reference to the approach that the depositary is to take to reservations. The second paragraph reproduces the text of paragraph 2 of the same

⁶¹⁶ Rosenne, *Developments in the Law of Treaties ...* (footnote 601 above), pp. 435–436.

⁶¹⁷ Imbert, “À l'occasion de l'entrée en vigueur de la Convention de Vienne ...” (footnote 601 above), p. 534; the author applies the term only to the practice of the Secretary-General and seems to consider that the 1969 Vienna Convention simplifies the context of the problem.

⁶¹⁸ The depositary can, however, play a not insignificant role in the “reservations dialogue” in reconciling opposing points of view, where appropriate. See also H. Han, “The UN Secretary-General's treaty depositary function: legal implications”, *Brooklyn Journal of International Law*, vol. 14, No. 3 (1988), pp. 570–571; the author here dwells on the importance of the role that the depositary can play, but the article predates the United Nations Conference on the Law of Treaties.

⁶¹⁹ Draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations) read as follows:

“Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation.

“If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.” (*Yearbook ... 2006*, vol. II (Part Two), p. 157).

article while limiting the situation in question to that sole function (and not to the functions of the depositary in general, as article 78 does).

2.2 Confirmation of reservations

2.2.1 Formal confirmation of reservations formulated when signing a treaty

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been formulated on the date of its confirmation.

Commentary

(1) Guideline 2.2.1 reproduces the exact wording of the text of article 23, paragraph 2, of the 1986 Vienna Convention. As the Commission indicated in the commentary to guideline 1.1, it is consistent with the aim of the Guide to Practice to bring together in a single document all of the recommended rules and practices in respect of reservations.

(2) The text of article 23, paragraph 2, of the 1986 Vienna Convention is identical to the corresponding provision of the 1969 Vienna Convention, except that it refers to the procedure to be followed when an international organization is a party to a treaty. Because it is more complete, the 1986 wording was preferred to the 1969 wording.

(3) This provision originated in the proposal made by Sir Humphrey Waldock in his first report on the law of treaties for the inclusion of a provision (draft art. 17, para. 3 (b)) based on the principle that “the reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained”.⁶²⁰ The Special Rapporteur did not conceal that “[c]learly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all”⁶²¹ and mentioned, in particular, article 14 (d)⁶²² of the Harvard Draft Convention on the Law of Treaties, which posited the contrary assumption.⁶²³

(4) The principle of the obligation to confirm a reservation formulated when signing was stated in article 18, paragraph 2, of the Commission’s draft articles on the law of treaties, which were adopted without much discussion in 1962⁶²⁴ and which related generally to reservations formulated before the adoption of the text.

(5) The 1962 commentary gives a concise explanation of the *raison d’être* of the rule adopted by the Commission:

⁶²⁰ *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 66.

⁶²¹ *Ibid.*

⁶²² Waldock was citing article 15 (d) by mistake.

⁶²³ “If a State has made a reservation when signing a treaty, its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty”; the Harvard Draft is reproduced in *Yearbook ... 1950*, vol. II, pp. 243–244.

⁶²⁴ See the summary records of the 651st–656th meetings (25 May–4 June 1962), *Yearbook ... 1962*, vol. I, pp. 139–179.

A statement of reservation is sometimes made during the negotiation and duly recorded in the *procès-verbaux*. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. It seems essential, however, that the State concerned should formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear.⁶²⁵

(6) On second reading, the wording of the draft provisions on the procedure in respect of reservations was considerably simplified at the urging of some Governments, which considered that many of them “would fit better into a code of recommended practices”.⁶²⁶ The new provision, which was adopted on the basis of the proposals by the Special Rapporteur, Sir Humphrey Waldock,⁶²⁷ differs from the current text of article 23, paragraph 2, only by the inclusion of a reference to reservations formulated “on the occasion of the adoption of the text”,⁶²⁸ which was deleted at the United Nations Conference on the Law of Treaties under circumstances that have been described as “mysterious”.⁶²⁹ The commentary to this provision reproduces the 1962 text⁶³⁰ almost verbatim and adds:

Paragraph 2 concerns reservations made at a later stage [after negotiation]: on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval. Here again the Commission considered it essential that, when definitely committing itself to be bound, the State should leave no doubt as to its final standpoint in regard to the reservation. The paragraph accordingly requires the State formally to confirm the reservation if it desires to maintain it. At the same time, it provides that in these cases the reservation shall be considered as having been made on the date of its confirmation, a point which is of importance for the operation of paragraph 5 of article 17 [20 in the text of the 1969 Vienna Convention].⁶³¹

(7) The rule in article 23, paragraph 2, of the 1969 Vienna Convention was reproduced in the 1986 Vienna Convention with only the drafting changes made necessary by the inclusion of international organizations⁶³² and the introduction of the concept of “formal confirmation” (with the risks of confusion which this implies between that concept and the concept of the formal confirmation of the reservation in article 23).⁶³³ The 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International

⁶²⁵ *Ibid.*, vol. II, document A/5209, p. 180.

⁶²⁶ Comments by Sweden, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 47.

⁶²⁷ *Ibid.*, pp. 53–54.

⁶²⁸ “If formulated on the occasion of the adoption of the text or upon signing the treaty” (*Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208).

⁶²⁹ “In paragraph 2, the phrase ‘on the occasion of the adoption of the text’ mysteriously disappeared from the ILC text when it was finally approved by the Conference” (Ruda, “Reservations to treaties” (footnote 56 above), p. 195).

⁶³⁰ See paragraph (5) of the commentary to this guideline above.

⁶³¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208. Article 20 of the Vienna Convention relates to acceptance of and objection to reservations.

⁶³² See the fourth and fifth reports of the Special Rapporteur, Mr. Paul Reuter, *Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 38, and *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/290 and Add.1, p. 146.

⁶³³ See the debate of the Commission on this subject at its 1434th meeting on 6 June 1977, *Yearbook ... 1977*, vol. I, pp. 101–103. The Commission was aware of these risks, but did not believe that it should amend terminology that is now widely accepted.

Organizations adopted the Commission's text⁶³⁴ without any amendment of the French text.⁶³⁵

(8) While there can be hardly any doubt that, at the time of its adoption, article 23, paragraph 2, of the 1969 Vienna Convention related more to progressive development than to codification in the strict sense,⁶³⁶ it may be considered that the obligation formally to confirm reservations formulated when treaties in solemn form are signed has become part of positive law. Crystallized by the 1969 Vienna Convention and confirmed in 1986, the rule is followed in practice (although not systematically)⁶³⁷ and seems to satisfy an *opinio necessitatis juris*, which allows a customary value to be assigned to it.⁶³⁸

(9) In legal writings, the rule laid down in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions now appears to have met with general approval,⁶³⁹ even if

⁶³⁴ *Yearbook ... 1982*, vol. II (Part Two), p. 37.

⁶³⁵ The Chairperson of the Drafting Committee, Mr. Al-Khasawneh, stated that a correction had been made to the English text (replacing "by a treaty" with "by the treaty"), *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986, vol. I, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.129/16)* (United Nations publication, Sales No. E.94.V.5, vol. I), 5th plenary meeting, 18 March 1986, p. 14, para. 63.

⁶³⁶ See the first report of Sir Humphrey Waldock, *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 66, paragraph (11) of the commentary to draft article 17. See also Greig, "Reservations: equity as a balancing factor?" (footnote 28 above), p. 28, or Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 41.

⁶³⁷ For example, the practice of the Secretary-General of the United Nations does not draw all the necessary inferences from the 1976 note by the Legal Counsel (see footnote 638 below), since the former includes in the valuable online publication entitled *Multilateral Treaties Deposited with the Secretary-General* reservations formulated when the treaty was signed, whether or not they were confirmed subsequently, even on the assumption that the State formulated other reservations when expressing its consent to be bound; see, for example, the reservations by Turkey to the Customs Convention on containers of 2 December 1972 (*Multilateral Treaties ...* (footnote 37 above), chap. XI.A.15), or the reservations by the Islamic Republic of Iran and Peru to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 (*ibid.*, chap. VI.19); such practice probably reflects a purely mechanical approach to the role of the depositary and does not involve any value judgment about the validity or nature of the declarations in question.

⁶³⁸ See, for example, the *aide-memoire* of the United Nations Legal Counsel describing the "practice of the Secretary-General in his capacity as depositary of multilateral treaties regarding ... reservations and objections to reservations relating to treaties not containing provisions in that respect", which relied on article 23, paragraph 2, of the 1969 Vienna Convention in concluding that: "If formulated at the time of signature subject to ratification, the reservation has only a declaratory effect, having the same legal value as the signature itself. It must be confirmed at the time of ratification; otherwise, it is deemed to have been withdrawn" (United Nations, *Juridical Yearbook*, 1976, pp. 209 and 211); the Council of Europe changed its practice in this regard in 1980 (see Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), and J. Polakiewicz, *Treaty-making in the Council of Europe*, Strasbourg, Council of Europe, 1999, pp. 95–96) and, in their answers to the Commission's questionnaire on reservations to treaties, the States indicated that they usually confirmed reservations formulated when the treaty was signed at the time of ratification or accession. With regard to the questionnaire, see footnote 39 above.

⁶³⁹ See, in particular, Greig, "Reservations: equity as a balancing factor?" (footnote 28 above), p. 28; Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 285; see also the commentary by Pellet and Schabas to article 23 of the 1969 Vienna Convention: "1969 Vienna Convention. Article 23: Procedure regarding reservations",

that was not always true in the past.⁶⁴⁰ In any case, whatever arguments might be advanced against it, they would not be of such a nature as to call into question the clear-cut rule which is contained in the Vienna Conventions and which the Commission has decided to follow in principle, except in the event of an overwhelming objection.

(10) Although the principle embodied in that provision met with general approval, the Commission asked three questions about:

- the effect of State succession on the implementation of that principle;

- the incomplete list of cases in which a reservation when signing must be confirmed; and, above all,

- whether reference should be made to the "embryo reservations"⁶⁴¹ constituted by some statements made before the signing of the text of the treaty.

(11) It was, for example, asked whether the wording of article 23, paragraph 2, should not be supplemented to take account of the possibility afforded to a successor State to formulate a reservation when it makes a notification of succession in accordance with guideline I.1, which thus rounds out the definition of reservations contained in article 2, paragraph 1 (d), of the 1986 Vienna Convention. In the Commission's opinion, the answer is not very simple. At first glance, the successor State can either confirm or invalidate an existing reservation made by the predecessor State⁶⁴² or formulate a new reservation when it makes a notification of succession,⁶⁴³ in neither of these two cases, then, is the successor State led to confirm a reservation when signing. Nevertheless, under article 18, paragraphs 1 and 2, of the 1978 Vienna Convention, a newly independent State may, under certain conditions, establish, through a notification of succession, its capacity as a contracting State or party to a multilateral treaty which was not in force on the date of the State's succession and to which the predecessor State was itself a contracting State. Under article 2, paragraph 1 (f), of the 1969 Vienna Convention [and article 2, paragraph 1 (f), of the 1986 Vienna Convention], however, "Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force—and not merely a signatory. It follows, conversely, that there can be no "succession to the signing" of a treaty (subject to ratification or an equivalent procedure⁶⁴⁴)⁶⁴⁵ and that the concept of notification of succession should not be introduced into guideline 2.1.1.⁶⁴⁶

in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 596 and 614–617, paras. 7 and 81–91.

⁶⁴⁰ See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 253–254.

⁶⁴¹ See paragraph (5) of the commentary to this guideline.

⁶⁴² See article 20, paragraph 1, of the 1978 Vienna Convention.

⁶⁴³ See article 20, paragraph 2.

⁶⁴⁴ See guideline 2.2.2.

⁶⁴⁵ See also guideline 5.1.2.

⁶⁴⁶ According to C. Pilloud, "in applying by analogy the rule provided in article 23, paragraph 2, of the Vienna Convention concerning reservations expressed at the time of signature, one might say that the States which had made declarations of continuity should, if they had

(12) The Commission also questioned whether it might be possible that the number of cases to which article 23, paragraph 2, seems to limit the possibility of subordinating consent to be bound (ratification, act of formal confirmation, acceptance or approval) was too small and did not correspond to the one in article 11. However, the Commission considered that such a concern would be excessive; the differences in wording between article 11 and article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions lie in the omission from the latter of these provisions involving two situations contemplated in the former: “exchange of instruments constituting a treaty” and “any other means if so agreed”.⁶⁴⁷ The probability that a State or an international organization would subordinate the expression of its consent to be bound by a multilateral treaty subject to reservations to one of these modalities is sufficiently low that it does not seem useful to overburden the wording of guideline 2.2.1 or to include a guideline equivalent to guideline 1.1.2 in chapter 2 of the Guide to Practice.

(13) Thirdly, guideline 2.2.1 does not cover the possible case where a reservation is formulated not at the time of signature of the treaty, but before that. While there is nothing to prevent a State or an international organization from indicating formally to its partners the “reservations” it has with regard to the adopted text at the authentication stage⁶⁴⁸ or, for that matter, at any previous stage of negotiations,⁶⁴⁹ such an indication does not correspond to the definition of reservations contained in guideline 1.1.

(14) The Commission had in fact considered that possibility in draft article 18 (which became article 23 of the 1969 Vienna Convention), of which paragraph 2, as contained in the initial text of the draft articles adopted in 1966, provided that: “If formulated on the occasion of the adoption of the text ... a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.”⁶⁵⁰ Commenting on this provision, the

(Footnote 646 continued.)

intended to assume on their own account the reservations expressed by [the predecessor State], have stated this specifically in their respective declarations of continuity” (“Reservations to the Geneva Conventions of 1949”, *International Review of the Red Cross* (March 1976), p. 111). It is doubtful whether such an analogy can be made. Concerning reservations in cases of succession of States, see Part 5 of the Guide to Practice.

⁶⁴⁷ For a similar comment concerning the comparison of article 2, paragraph 1 (d), and article 11, see paragraph (12) of the commentary to guideline 1.1.

⁶⁴⁸ In addition to signing, moreover, article 10 of the 1969 and 1986 Vienna Conventions mentions initialling and signature *ad referendum* as methods of authenticating the text of a treaty. On authentication “as a distinct part of the treaty-making process”, see the commentary to article 9 of the Commission’s draft articles on the law of treaties (which became article 10 at the United Nations Conference on the Law of Treaties), *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 195.

⁶⁴⁹ See, in this connection, the reservation of Japan to article II of the 1971 Food Aid Convention, which was negotiated by that State during the negotiation of the text, announced at the time of signing and formulated at the time of the deposit of the instrument of ratification with the depositary, the Government of the United States, on 15 May 1972 (United Nations, *Treaty Series*, vol. 800, p. 197).

⁶⁵⁰ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208.

Commission stated that “[s]tatements of reservations are made in practice at various stages in the conclusion of the treaty” and explained the reasons why it considered it necessary to confirm reservations on signing when expressing consent to be bound,⁶⁵¹ adding:

Accordingly, a statement during the negotiations expressing a reservation is not, as such, recognized in article 16 [now article 19] as a method of formulating a reservation and equally receives no mention in the present article.⁶⁵²

(15) As indicated above,⁶⁵³ the reference to the adoption of the text disappeared from the text of article 23, paragraph 2, of the 1969 Vienna Convention under “mysterious” circumstances during the 1968–1969 United Nations Conference on the Law of Treaties, probably out of a concern for consistency with the wording of the *chapeau* of article 19. Such a reference might also have led to a proliferation of statements aimed at limiting the treaty’s scope before its text was adopted that would not fall within the definition of reservations.

2.2.2 Instances of non-requirement of confirmation of reservations formulated when signing a treaty

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by signature its consent to be bound by the treaty.

Commentary

(1) The solution that was adopted for guideline 2.2.1 and which is faithful to the Vienna text obviously implies that the rule thus codified applies only to treaties in solemn form, which do not enter into force solely by being signed.⁶⁵⁴ In the case of treaties not requiring any post-signature formalities in order to enter into force and which are referred to as “agreements in simplified form”,⁶⁵⁵ however, it is obvious that, if formulated when the treaty is signed, a reservation produces its effects

⁶⁵¹ See paragraph (5) of the commentary to this guideline above.

⁶⁵² *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208, paragraph (3) of the commentary to draft article 18.

⁶⁵³ See paragraph (6) of the commentary to this guideline above.

⁶⁵⁴ On the distinction between treaties in solemn form and agreements in simplified form, see, in particular: C. Chayet, “Les accords en forme simplifiée”, AFDI, vol. 3 (1957), pp. 3–13; Daillier, Forteau and Pellet, *Droit international public ...* (footnote 254 above), pp. 152–160; P. F. Smets, *La conclusion des accords en forme simplifiée*, Brussels, Bruylant, 1969, p. 284; see also the commentary to article 11 of the 1969 Vienna Convention by S. Szurek: “1969 Vienna Convention. Article 11: Means of expressing consent to be bound by a treaty”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 193–199, paras. 14–30, and the commentary to article 12 by C. Van Assche, “1969 Vienna Convention. Article 12: Consent to be bound by a treaty expressed by signature”, *ibid.*, pp. 209–242.

⁶⁵⁵ While the procedure involving agreements in simplified form is more commonly used for concluding bilateral rather than multilateral treaties, it is not at all unknown in the second case and major multilateral agreements may be cited which have entered into force solely by being signed. This is true, for example, of the 1947 General Agreement on Tariffs and Trade (at least in terms of the entry into force of the bulk of its provisions following the signing of the Protocol of Provisional Application), the Declaration on the Neutrality of Laos of 23 July 1962, the Agreement establishing a Food and Fertilizer Technology Centre for the Asian and Pacific Region of 11 June 1969, and the Agreement instituting the Order of the Caribbean Community of 26 February 1991.

immediately without any formal confirmation being necessary or even conceivable.

(2) The Commission is not aware of any clear-cut example of a reservation made at the time of signature of a multilateral agreement in simplified form. This eventuality surely cannot be ruled out, however, if only because there are “mixed treaties” that can, if the parties so choose, enter into force solely upon signature or following ratification and that are subject to reservations or contain reservation clauses.⁶⁵⁶

(3) In fact, this rule derives, *a contrario*, from the text of article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions reproduced in guideline 2.2.1. In view of the practical nature of the Guide to Practice, however, the Commission found that it would not be superfluous to clarify this expressly in guideline 2.2.2.

(4) The Commission chose not to use in this guideline the term “agreements in simplified form”, which is commonly used in French writings but does not appear in the Vienna Conventions.

(5) One might also ask whether a reservation to a treaty provisionally entering into force or provisionally implemented pending its ratification⁶⁵⁷—and hypothetically formulated at the time of signature—must be confirmed at the time of its author’s expression of consent to be bound by the treaty. The Commission took the view that that case was different from the one covered by guideline 2.2.2 and that there was no reason for a solution departing from the principle laid down in guideline 2.2.1. Accordingly, a separate guideline does not appear to be necessary.

2.2.3 Reservations formulated upon signature when a treaty expressly so provides

Where the treaty expressly provides that a State or an international organization may formulate a reservation when signing the treaty, such a reservation does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

Commentary

(1) Alongside the case described in guideline 2.2.2, there exists another hypothetical case in which the confirmation of a reservation formulated when signing appears to be superfluous, namely, where the treaty itself provides expressly for such a possibility without requiring confirmation. For example, article 8, paragraph 1, of the 1963

⁶⁵⁶ See article XIX of the Agreement relating to the International Telecommunications Satellite Organization (INTELSAT) of 20 August 1971; see also the 1971 Convention on psychotropic substances (art. 32); the Convention on a Code of Conduct for Liner Conferences of 6 April 1974; the 1992 Agreement on the conservation of small cetaceans of the Baltic and North Seas (art. 8, para. 4); the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea (art. 4, para. 3 (a)); the 1999 International Convention on Arrest of Ships (art. 12, para. 2); and the 2001 Multilateral Agreement on the liberalization of international air transportation (art. 20, para. 2).

⁶⁵⁷ See articles 24–25 of the 1969 and 1986 Vienna Conventions.

Council of Europe Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality provides:

Any Contracting Party may, when *signing this Convention** or depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the Annex to the present Convention.⁶⁵⁸

(2) In a case of this kind, it seems that practice consists of not requiring a party that formulates a reservation when signing to confirm it when expressing consent to be bound. Thus, France made a reservation when it signed this Convention and did not subsequently confirm it.⁶⁵⁹ Similarly, Hungary and Poland did not confirm their reservation to article 20 of the 1984 Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 28, paragraph 1, of which provides that such a reservation may be made when signing. Luxembourg also did not confirm the reservation it made to the Convention relating to the Status of Refugees of 28 July 1951,⁶⁶⁰ and Ecuador did not confirm its reservation to the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents of 14 December 1973.⁶⁶¹ It is true, however, that other States⁶⁶² nonetheless did confirm their reservation at the time of ratification.

(3) The rule embodied in article 23, paragraph 2, of the Vienna Conventions, which, like all their provisions, is only dispositive in nature, should be applicable only where a treaty is silent; otherwise, the provisions offering the possibility of reservations at the time of signature would serve no useful purpose. One may think that the uncertainties of practice can be explained by the fact that, if a formal confirmation is not essential in a case of this kind, it is also not ruled out: reservations made when signing an agreement expressly authorizing reservations upon signature are sufficient in and of themselves, it nevertheless being understood that nothing prevents reserving States from confirming them,⁶⁶³ even if nothing compels them to do so.

(4) Accordingly, guideline 2.2.3 endorses the “minimum” practice, which would seem logical, since the

⁶⁵⁸ See also, among many examples: article 17 of the Convention on the reduction of statelessness of 1961; article 30 of the Convention on mutual administrative assistance on tax matters of 1988; article 29 of the European Convention on Nationality of 1997; and article 24 of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons of 1989.

⁶⁵⁹ See also Council of Europe, European Committee on Legal Cooperation (CDCJ), *CDCJ Conventions and Reservations to those Conventions*, Note by the Secretariat, CDCJ (99) 36, Strasbourg, 30 March 1999, p. 11; the same applied to the reservations of Belgium to the 1988 Convention on mutual administrative assistance in tax matters (*ibid.*, p. 55).

⁶⁶⁰ *Multilateral Treaties ...* (footnote 37 above), chaps. IV.9 and V.2. The Hungarian reservation was subsequently withdrawn (*ibid.*, chap. IV.9).

⁶⁶¹ *Ibid.*, chap. XVIII.7.

⁶⁶² Belarus, Bulgaria (reservation subsequently withdrawn), Czechoslovakia (reservation subsequently withdrawn by the Czech Republic and Slovakia), Morocco, Tunisia and Ukraine (reservation subsequently withdrawn); *ibid.*, chaps. IV.9 and XVIII.7.

⁶⁶³ And such “precautionary confirmations” are quite common (see, for example, the reservations by Belarus, Brazil (which nevertheless confirmed only two of its three initial reservations), Hungary, Poland, Turkey and Ukraine to the 1971 Convention on psychotropic substances, *ibid.*, chap. VI.16).

treaty expressly provides for reservations at the time of signature. If this principle were not recognized, many unconfirmed reservations formulated when signing would have to be deemed without effect, even where the States that formulated them did so on the basis of the text of the treaty itself.

2.2.4 Form of formal confirmation of reservations

The formal confirmation of a reservation must be made in writing.

Commentary

(1) Article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions on “Procedure regarding reservations” does not expressly require reservations to be confirmed in writing. However, this provision, which is reproduced in guideline 2.2.1, does require that a reservation must be formally confirmed by the reserving State [or international organization] when expressing its consent to be bound by the treaty. The word “formally” must without any doubt be understood as meaning that this formality must be completed in writing.

(2) This interpretation is also consistent with the *travaux préparatoires* for article 23: it is precisely because the confirmation must be made in writing that the Commission and its Special Rapporteurs on the law of treaties took the view that the question of whether a reservation may initially be formulated orally could be left open.⁶⁶⁴

(3) The requirement of a written confirmation of a reservation is also a matter of common sense: a reservation could not be notified with any certainty to the other States and international organizations concerned, in accordance with the provisions of article 23, paragraph 1, if no formal text existed. This is, moreover, in keeping with a consistent practice to which there is, to the Commission’s knowledge, no exception.

(4) It should, however, be pointed out that guideline 2.2.4 does not take a position on the question of whether the formal confirmation of a reservation is always necessary. This is decided by guidelines 2.2.2 and 2.2.3, which show that there are cases that do not lend themselves to such a confirmation.

2.3 Late formulation of reservations

A State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation.

Commentary

(1) Chapter 2, section 3, of the Guide to Practice is devoted to the particularly sensitive issue of what are commonly called “late reservations”. The Commission has preferred to speak of the “late formulation of reservations”,

however, in order to indicate clearly that what is meant is not a new or separate category of reservations, but, rather, declarations which are presented as reservations but which are not in keeping with the time periods during which they may, in principle, be considered as such, since the times at which reservations may be formulated are specified in the definition of reservations itself.⁶⁶⁵

(2) Unless otherwise provided by a treaty, something which is always possible,⁶⁶⁶ the expression of consent to be bound constitutes, for the contracting States and organizations, the last (and, in view of the requirement of formal confirmation of reservations formulated during negotiations and upon signature, the only) time when a reservation may be formulated. This rule, which is unanimously recognized in legal writings⁶⁶⁷ and which arises from the very definition of reservations⁶⁶⁸ and is also implied by the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions, is widely observed in practice.⁶⁶⁹ It was regarded as forming part of positive law by the International Court of Justice in its judgment of 20 December 1988 in the *Border and Transborder Armed Actions* case:

Article LV of the Pact of Bogota enables the parties to make reservations to that instrument which “shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity”. In the absence of special procedural provisions, those reservations may, in accordance with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties, be made only at the time of signature or ratification of the pact or at the time of accession to that instrument.⁶⁷⁰

(3) It is not uncommon for a State⁶⁷¹ to try to formulate a reservation at a time other than that provided for by the Vienna definition, and this possibility, which may have

⁶⁶⁵ See article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions on the law of treaties and article 2, paragraph 1 (j), of the 1978 Vienna Convention, and guideline 1.1: “‘Reservation’ means a unilateral statement ... made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty ...”.

⁶⁶⁶ Some reservation clauses specify, for example, that “[r]eservations to one or more of the provisions of this Convention may be made at any time prior to ratification of or accession to this Convention” (Convention on third party liability in the field of nuclear energy of 29 July 1960, art. 18 (a)) or “[a]t the latest at the moment of ratification or accession, each State may make the reserves contemplated in articles 13, paragraph 3, and 15, paragraph 1 of this Convention” (Convention concerning the powers of authorities and the law applicable in respect of the protection of infants of 5 October 1961, art. 23) (these examples are quoted by Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 163–164); see also the examples given in paragraph (4) of this commentary.

⁶⁶⁷ It has been stated particularly forcefully by Gaja: “the latest moment in which a State may make a reservation is when it expresses its consent to be bound by a treaty” (“Unruly treaty reservations” (footnote 28 above), p. 310).

⁶⁶⁸ See paragraph (7) of the commentary to guideline 1.1 above.

⁶⁶⁹ Moreover, this explains why States sometimes try to get round the prohibition on formulating reservations after the entry into force of a treaty by calling unilateral statements “interpretative declarations”, which actually match the definition of reservations (see paragraph (27) of the commentary to guideline 1.2 (Definition of interpretative declarations)).

⁶⁷⁰ *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 85.

⁶⁷¹ To the Commission’s knowledge, there has been no instance of the late formulation of a reservation by an international organization to date.

⁶⁶⁴ See paragraphs (8)–(10) of the commentary to guideline 2.1.1.

some definite advantages, has not been totally ruled out by practice, particularly as the principle that a reservation may not be formulated after expression of consent to be bound “is not absolute. It applies only if the contracting States do not authorize by agreement the formulation, in one form or another, of new reservations”⁶⁷² or restrict further the times at which a reservation is possible.

(4) Although the possibility of the late formulation of a reservation “has never been contemplated, either in the context of the International Law Commission or during the United Nations Conference on the Law of Treaties”,⁶⁷³ it is relatively frequent.⁶⁷⁴ Thus, for example, article 29 of the Convention on the Unification of the Law relating to Bills of Exchange and Promissory Notes of 23 July 1912 provided:

The State which desires to avail itself of the reservations in Article 1, paragraph 2, or in Article 22, paragraph 1, must specify the reservation in its instrument of ratification or adhesion ...

The contracting State which *hereafter** desires to avail itself of the reservations⁶⁷⁵ above mentioned, must notify its intention in writing to the Government of the Netherlands ...⁶⁷⁶

Likewise, under article XXVI of the 1955 Protocol to amend the Convention for the Unification of certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929:

No reservation may be made to this Protocol except that a State may at any time declare by a notification addressed to the Government of the People’s Republic of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.

Article 38 of the Convention concerning the international administration of the estates of deceased persons of 2 October 1973 provides:

A Contracting State desiring to exercise one or more of the options envisaged in Article 4, the second paragraph of Article 6, the second and third paragraphs of Article 30 and Article 31, shall notify this to the Ministry of Foreign Affairs of the Netherlands, either at the time of the deposit of its instrument of ratification, acceptance, approval or accession *or subsequently**.⁶⁷⁷

⁶⁷² J.-F. Flauss, “Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: Requête pour la déclaration interprétative relative à l’article 6, paragraphe 1”, *Revue universelle des droits de l’homme*, vol. 5, No. 9 (1993), p. 302.

⁶⁷³ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 12, footnote 14.

⁶⁷⁴ See also the examples given by Imbert, *ibid.*, pp. 164–165.

⁶⁷⁵ In fact, what is meant here is not *reservations*, but *reservation clauses*.

⁶⁷⁶ See also article 1 of the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes of 7 June 1930, and article 1 of the Convention providing a Uniform Law for Cheques of 19 March 1931, respectively:

“[t]he reservations referred to in Articles ... may, however, be made after ratification or accession, provided that they are notified to the Secretary-General of the League of Nations”;

“Each of the High Contracting Parties may, in urgent cases, make use of the reservations contained in Articles ... even after ratification or accession”.

⁶⁷⁷ See also article 26 of the Convention on the Law Applicable to Matrimonial Property Regimes of 1978: “A Contracting State having at the date of the entry into force of the Convention for that State a complex system of national allegiance may specify *from time to time**

Under article 30, paragraph 3, of the Convention on mutual administrative assistance in tax matters of 25 January 1988:

After the entry into force of the Convention in respect of a Party, that Party may make one or more of the reservations listed in paragraph 1 which it did not make at the time of ratification, acceptance or approval. Such reservations shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the reservation by one of the Depositaries.⁶⁷⁸

Similarly, article 10, paragraph 1, of the International Convention on Arrest of Ships of 12 March 1999 provides:

Any State may, at the time of signature, ratification, acceptance, approval, or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any or all of the following ...

(5) This is not especially problematic in itself and is consistent with the idea that the Vienna rules are only of a residual nature (as the guidelines in the Guide to Practice are). However, since what is involved is a derogation from a rule now accepted as customary and enshrined in the Vienna Conventions, it would seem imperative that express provision should be made for such a derogation in the treaty. The Commission wanted to clarify this principle in the text of guideline 2.3, although this was not legally indispensable in order to emphasize the exceptional character that the late formulation of reservations should have.

(6) It is true that the European Commission of Human Rights was flexible in this respect, having appeared to rule that a State party to the European Convention on Human Rights could invoke the amendment of national legislation covered by an earlier reservation to modify at the same time the scope of that reservation without violating the time limit placed on the option of formulating reservations by article 57 (former article 64) of the Convention. The scope of this precedent⁶⁷⁹ is unclear, however, and it may be that the Commission took this position because, in reality, the amendment of the legislation did not in fact result in an additional limitation on the obligations of the State concerned.⁶⁸⁰

by declaration how a reference to its national law shall be construed for the purposes of the Convention.” This provision may refer to an interpretative declaration rather than to a reservation.

⁶⁷⁸ This Convention entered into force on 1 April 1995. See also article 5 of the 1978 Additional Protocol to the European Convention on information on foreign law, “[a]ny Contracting Party which is bound by the provisions of both chapters I and II may at any time declare by means of a notification addressed to the Secretary General of the Council of Europe that it will only be bound by one or the other of chapters I and II. Such notification shall take effect six months after the date of the receipt of such notification”.

⁶⁷⁹ See, for instance, *A.B. (an association) v. Austria*, Application no. 473/59, *International Law Reports*, vol. 28, p. 424; *X against Austria*, Application no. 1731/62, *Yearbook of the European Convention on Human Rights 1964*, vol. 7 (1966), p. 192; or *X. v. Austria*, Application no. 8180/78, European Commission of Human Rights, *Decisions and Reports*, vol. 20 (December 1980), p. 26.

⁶⁸⁰ In the *X against Austria* case, Application no. 1731/62 (see previous footnote), the Commission took the view that “the reservation made by Austria on 3rd September 1958 thus covers the law of 5 July 1962, the result of which was not to enlarge a posteriori the field removed from the control of the Commission”*(p. 202).

(7) Whatever the case, the requirement that there should be a clause expressly authorizing the formulation of a reservation after expression of consent to be bound seems all the more crucial given that it was necessary, for particularly pressing practical reasons, which the Commission has discussed in its commentary to guideline 1.1, to include a time limit in the definition of reservations itself: “the idea of including time limits on the possibility of making reservations in the definition of reservations itself has progressively gained ground, given the magnitude of the drawbacks in terms of stability of legal relations of a system that would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta sunt servanda* itself which would be called into question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question.”⁶⁸¹ Because the late formulation of reservations should be avoided as much as possible, the words “unless the treaty otherwise provides” in guideline 2.3 should be interpreted narrowly.

(8) The existence of express provisions is not, however, the only exception to the rule that a reservation must, in principle, be made not later than the time at which consent to be bound is expressed.

(9) It emerges from current practice that the other contracting States or contracting organizations may unanimously accept a late reservation, and this consent (which may be tacit) can be seen as a collateral agreement extending *ratione temporis* the option of formulating reservations—if not reservations to the treaty concerned in general, then at least the reservation or reservations in question.

(10) This possibility has been seen as translating the principle that “the parties are the ultimate guardians of a treaty and may be prepared to countenance unusual procedures to deal with particular problems”.⁶⁸² In any event, as has been pointed out, “[t]he solution must be understood as dictated by pragmatic considerations. A party remains always⁶⁸³ at liberty to accede anew to the same treaty, this time by proposing certain reservations. As the result will remain the same whichever of these two alternatives one might choose, it seemed simply more expedient to settle for the more rapid procedure”.⁶⁸⁴

(11) Initially, the Secretary-General of the United Nations, in keeping with his great caution in this area since the 1950s, had held to the position that “[i]n accordance with established international practice to which the Secretary-General conforms in his capacity as depositary, a reservation may be formulated only at the time of signature, ratification or accession”, and he had consequently taken the view that a party to the International Convention on the Elimination of All Forms of Racial Discrimination which did not make any reservations

at the time of ratification was not entitled to make any later.⁶⁸⁵ Two years later, however, he softened his position considerably in a letter to the Permanent Mission of France to the United Nations,⁶⁸⁶ which was considering the possibility of denouncing the Convention providing a Uniform Law for Cheques of 1931, with a view to reaccessing to it with new reservations. Taking as a basis “the general principle that the parties to an international agreement may, by unanimous decision, amend the provisions of an agreement or take such measures as they deem appropriate with respect to the application or interpretation of that agreement”, the Legal Counsel states:

Consequently, it would appear that your Government could address to the Secretary-General, over the signature of the Minister for Foreign Affairs, a letter communicating the proposed reservation together with an indication of the date, if any, on which it is decided that it should take effect. The proposed reservation would be communicated to the States concerned (States parties, Contracting States and signatory States) by the Secretary-General and, in the absence of any objection by States parties within 90 days from the date of that communication (the period traditionally set, according to the practice of the Secretary-General, for the purpose of tacit acceptance and corresponding, in the present case, to the period specified in the third paragraph of article I of the [1931] Convention for acceptance of the reservations referred to in articles 9, 22, 27 and 30 of annex II), the reservation would be considered to take effect on the date indicated.⁶⁸⁷

(12) That is what happened: on 7 February 1979, the French Government addressed to the Secretary-General a letter drafted in accordance with this information; the Secretary-General circulated this letter on 10 February and “[s]ince no objections by the Contracting States were received within 90 days from the date of circulation of this communication ... the reservation was deemed accepted and took effect on 11 May 1979”.⁶⁸⁸

(13) Since then, the Secretary-General of the United Nations appears to have adhered continuously to this practice in the performance of his functions as depositary.⁶⁸⁹ It was

⁶⁸⁵ Memorandum to the Director of the Division of Human Rights, 5 April 1976, United Nations, *Juridical Yearbook 1976*, p. 221.

⁶⁸⁶ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 42.

⁶⁸⁷ Letter to the Permanent Mission of a Member State to the United Nations, dated 14 September 1978, United Nations, *Juridical Yearbook 1978* (Sales No. E.80.V.1), pp. 199–200.

⁶⁸⁸ *Multilateral Treaties ...* (footnote 37 above), League of Nations Treaties, chap. 11. Curiously, the Government of the Federal Republic of Germany expressly stated, on 20 February 1980, that it “raise[d] no objections thereto” (*ibid.*).

⁶⁸⁹ In addition to the examples given by Gaja, “Unruly treaty reservations” (footnote 28 above), p. 311, see, for instance, the reservation of Belgium (which in fact amounts to a general objection to the reservations formulated by other parties) to the 1969 Vienna Convention: while this country had acceded to the Convention on 1 September 1992, “[o]n 18 February 1993, the Government of Belgium notified the Secretary-General that its instrument of accession should have specified that the said accession was made subject to the said reservation. None of the Contracting Parties to the Agreement having notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its circulation (23 March 1993), the reservation is deemed to have been accepted” (*Multilateral Treaties ...* (footnote 37 above), chap. XXIII.1). See also the reservation formulated late by Mozambique to the United Nations Convention against Corruption, which was accepted for deposit in 2009: “Within a period of one year from the date of the depositary notification transmitting the reservation (C.N.834.2008.TREATIES-32 of 5 November 2008), none of the Contracting Parties to the said Convention had notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged. Consequently, the reservation in question was accepted for deposit upon the above-stipulated one

⁶⁸¹ Paragraph (7) of the commentary to guideline 1.1.

⁶⁸² Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), pp. 28–29.

⁶⁸³ According to the Commission, it is doubtful that this is always the case.

⁶⁸⁴ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 43.

formalized in a legal opinion of the Secretariat of 19 June 1984 to the effect that “the parties to a treaty may always decide, *unanimously*, at any time, to accept a reservation in the absence of, or even contrary to, specific provisions in the treaty” and irrespective of whether the treaty contains express provisions as to when reservations may be formulated.⁶⁹⁰

(14) This practice is not limited to the treaties of which the Secretary-General is the depositary. In the above-mentioned 1978 legal opinion,⁶⁹¹ the Legal Counsel of the United Nations referred to a precedent involving a late reservation to the Customs Convention on the temporary importation of packings of 6 October 1960, which was deposited with the Secretary-General of the Customs Co-operation Council and article 20 of which “provides that any Contracting Party may, at the time of signing and ratifying the Convention, declare that it does not consider itself bound by article 2 of the Convention. Switzerland, which had ratified the Convention on 30 April 1963, made a reservation on 21 December 1965, which was submitted by the depositary to the States concerned and, in the absence of any objection, was considered accepted with retroactive effect to 31 July 1963”.⁶⁹²

(15) Several States parties to the 1978 Protocol to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), which entered into force on 2 October 1983, have broadened the scope of their earlier reservations⁶⁹³ or added new reservations after expressing their consent to be bound.⁶⁹⁴ Likewise, late reservations to certain conventions of the Council of Europe have been formulated without any opposition being raised.⁶⁹⁵

year period, that is, on 4 November 2009” (*ibid.*, chap. XVIII.14). See also Kohona, “Some notable developments ...” (footnote 582 above) and “Reservations: discussion of recent developments ...” (*ibid.*).

⁶⁹⁰ Letter to government official in a Member State, United Nations, *Juridical Yearbook 1984* (Sales No. E.91.V.1), p. 183.

⁶⁹¹ Paragraph (11) of the commentary to this guideline.

⁶⁹² Letter to the Permanent Mission of a Member State to the United Nations, 14 September 1978 (see footnote 687 above), pp. 199–200.

⁶⁹³ France (ratification 25 September 1981; amendment 11 August 1982: IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 May 2011*, p. 119).

⁶⁹⁴ Liberia (ratification 28 October 1980, new reservations 27 July 1983, subject of a *procès-verbal* dated 31 August 1983), *ibid.*; Romania (accession 8 March 1993, rectified subsequently, in the absence of any objection, to include reservations adopted by Parliament), *ibid.*; United States of America (ratification 12 August 1980, reservations communicated 27 July 1983, subject of a *procès-verbal* of rectification dated 31 August 1983), *ibid.* In the case of Liberia and the United States, the French Government stated that, in view of their nature, it had no objection to those rectifications, but such a decision could not constitute a precedent.

⁶⁹⁵ See, for example, the reservation of Greece to the European Convention on the suppression of terrorism of 27 January 1977 (ratification 4 August 1988; rectification communicated to the Secretary-General 6 September 1988. Greece invoked an error; the reservation expressly formulated in the act authorizing ratification had not been transmitted (Council of Europe, *European Treaty Series*, No. 90, available from <http://conventions.coe.int>)); the reservations of Portugal to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (deposit of the instrument of ratification 27 September 1994; entry into force of the Convention for Portugal 26 December 1994; notification of reservations and declarations 19 December 1996. In this case, too, Portugal invoked an error due to the non-transmission of the

(16) As these examples show, reservations formulated late are deemed to have been legitimately made if the other contracting States and contracting organizations consulted by the depositary do not voice any opposition. But they also show that the cases involved have almost always been fairly borderline ones: either the delay in communicating the reservation was minimal or the notification occurred after ratification but prior to entry into force of the treaty for the reserving State,⁶⁹⁶ or else the planned reservation was duly published in the official publications but “forgotten” at the time of deposit of the instrument of notification, something that can be regarded, albeit just barely, as “rectification of a material error”.

(17) A publication by the Council of Europe emphasizes the exceptional nature of the derogations permitted within that organization from the agreed rules on formulating reservations: “Accepting the belated formulation of reservations may create a dangerous precedent which could be invoked by other States in order to formulate new reservations or to widen the scope of existing ones. Such practice would jeopardize legal certainty and impair the uniform implementation of European treaties.”⁶⁹⁷ For the same reasons, some authors are reluctant to acknowledge the existence of such a derogation from the principle of the limitation *ratione temporis* of the possibility of formulating reservations.⁶⁹⁸

(18) These are also the reasons that led the Commission to consider that particular caution should be shown in sanctioning a practice which ought to remain exceptional and narrowly circumscribed. Accordingly, it decided to give a negative formulation to the rule contained in guideline 2.3: the principle is, and must remain, that the late formulation of a reservation is not valid; it may become so, in the most exceptional cases, only if none of the other contracting States or other contracting organizations “opposes the late formulation of the reservation”.⁶⁹⁹

reservations contained in the Assembly resolution and the Decree of the President of the Republic published in the Official Gazette of the Portuguese Republic (*European Treaty Series*, No. 30)); the “declaration” by the Netherlands of 14 October 1987 restricting the scope of its ratification (on 14 February 1969) of the European Convention on Extradition of 13 December 1957 (*European Treaty Series*, No. 24); or the reservation formulated by South Africa to the same instrument (*ibid.*; South Africa explained in a *note verbale*: “The Embassy of the Republic of South Africa regrets the belated communication of the reservation and declaration regarding the European Convention on Extradition, which is the result of an unfortunate administrative oversight.”). See also the example of the late formulation of reservations by Belgium and Denmark to the European Agreement on the protection of television broadcasts cited by Gaja in “Unruly treaty reservations” (footnote 28 above), p. 311.

⁶⁹⁶ In this connection, Gaja (“Unruly treaty reservations” (footnote 28 above), pp. 310–311) cites two reservations added on 26 October 1976 by the Federal Republic of Germany to its instrument of ratification (dated 2 August 1976) of the Convention of 1954 relating to the Status of Stateless Persons (see *Multilateral Treaties ...* (footnote 37 above), chap. V.3).

⁶⁹⁷ Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), p. 94.

⁶⁹⁸ See Edwards, “Reservations to treaties” (footnote 59 above), p. 383, or R. Baratta, *Gli effetti delle riserve ai trattati*, Milan, Giuffrè, 1999, p. 27, footnote 65.

⁶⁹⁹ Regarding this wording, see paragraph (24) of the commentary to this guideline.

(19) Yet it is a fact that

[a]ll the instances of practice here recalled point to the existence of a rule that allows States to make reservations even after they have expressed their consent to be bound by a treaty, provided that the other contracting States acquiesce to the making of reservations at that stage.⁷⁰⁰

In truth, it is difficult to imagine what might prevent all the contracting States and organizations from agreeing to such a derogation, whether this agreement is seen as an amendment to the treaty or as the mark of the “collectivization” of control over the permissibility of reservations.⁷⁰¹

(20) It is this requirement of unanimity, be it passive or tacit,⁷⁰² that makes the exception to the principle acceptable and limits the risk of abuse. It is an indissociable element of this derogation, observable in current practice and consistent with the role of “guardian” of the treaty that States parties may collectively assume.⁷⁰³ But this requirement is not meaningful nor does it fulfil its objectives unless a single opposition renders the formulation of the reservation impossible; failing this, the very principle established in the first sentence of article 19 of the 1969 and 1986 Vienna Conventions would be reduced to nothing: any State or organization could add a new reservation to its acceptance of a treaty at any time because there was always sure to be another contracting State or organization that would not oppose it, and the situation would revert to the one in which States or international organizations find themselves at the time they become parties, when they enjoy broad scope for formulating reservations, subject only to the limits set in articles 19 and 20.

(21) The caution demonstrated in practice and the clarifications provided on several occasions by the Secretary-General, together with doctrinal considerations and concerns relating to the maintenance of legal certainty, justify, in this particular instance, the strict application of the rule of unanimity, it being understood that, contrary to the traditional rules applicable to all reservations (except in Latin America), this unanimity concerns the acceptance of (or at least the absence of any objection to) reservations that are formulated late. It is without effect, however, on the participation of the reserving State (or international organization) in the treaty itself: in the event of an objection, it remains bound, in accordance with the initial expression of its consent, and it can opt out (with a view to reaccepting subsequently and formulating anew the rejected reservations) only in accordance with either the provisions of the treaty itself or the general rules codified in articles 54–64 of the Vienna Conventions.

⁷⁰⁰ Gaja, “Unruly treaty reservations” (footnote 28 above), p. 312.

⁷⁰¹ This “control” must, of course, be exercised in conjunction with the “organs of control”, where they exist. In the *Metropolitan Chrysostomos, Archimandrite Georgios Papachrysostomou and Titina Loizidou v. Turkey* cases (Applications nos. 15299/89, 15300/89 and 15318/89, Decision of 4 March 1991, Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 68, p. 216), control by States over the permissibility *ratione temporis* of reservations (introduced by Turkey by means of an optional statement accepting individual petitions) was superseded by the organs of the European Convention on Human Rights (see paragraphs (5)–(6) of the commentary to guideline 2.3.3).

⁷⁰² Guidelines 2.3.1 and 2.3.2 explain the terms and conditions concerning the acceptance of the late formulation of a reservation.

⁷⁰³ See paragraph (10) of the commentary to the present guideline.

(22) Nevertheless, a distinction should be drawn between, on the one hand, oppositions to the late formulation of a reservation and, on the other hand, “traditional” objections, such as those that can be made to reservations pursuant to article 20, paragraph 4 (b), of the 1969 and 1986 Vienna Conventions. This distinction appears to be necessary, for it is hard to see why co-contracting States or international organizations should only have a choice between all or nothing—that is to say, either accepting both the reservation itself and its lateness or preventing the State or organization that formulated a late reservation from doing so, even though the author of the late reservation may have reasons for doing so that are acceptable to its partners. Furthermore, in the absence of such a distinction, States and international organizations that have not yet expressed their consent to be bound by the treaty at the time the late reservation is formulated but that do so subsequently through accession or other means would be confronted with a *fait accompli*. Paradoxically, they could not object to a reservation formulated late, whereas they are permitted to do so under article 20, paragraph 5,⁷⁰⁴ relating to reservations formulated when the reserving State expresses its consent to be bound.⁷⁰⁵

(23) The unanimous consent of the other contracting States and organizations should therefore be regarded as necessary for the late formulation of reservations. On the other hand, the normal rules regarding acceptance of and objections to reservations, as codified in articles 20–23 of the Vienna Conventions, must be applicable with regard to the actual content of late reservations, to which the other parties should be able to object “as usual”.

(24) In view of this possibility, which cannot be ruled out, at least intellectually (even if it does not seem to have been used in practice to date),⁷⁰⁶ the Commission chose to use the term “oppose”, which focuses on the rejection, in principle, of a reservation on account of its late formulation, while reserving the term “objection” to designate declarations that meet the definition in guideline 2.6.1, once the lateness of the formulation has been accepted by all the contracting States and organizations.

2.3.1 Acceptance of the late formulation of a reservation

Unless the treaty otherwise provides or the well-established practice followed by the depositary differs, the late formulation of a reservation shall only be deemed to have been accepted if no contracting State or contracting organization has opposed such formulation after the expiry of the twelve-month period following the date on which notification was received.

⁷⁰⁴ “a reservation is considered to have been accepted by a State [or an international organization] if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later*”; see guideline 2.6.12.

⁷⁰⁵ It would be equally paradoxical to allow States or international organizations which become parties to the treaty after the reservation is entered to object to it under article 20, paragraph 4 (b), whereas the original parties cannot do so.

⁷⁰⁶ Some late reservations have, however, been expressly accepted. (For an example, see footnote 688 above.)

Commentary

(1) The purpose of guideline 2.3.1 is to clarify and supplement the last phrase of guideline 2.3, which rules out any possibility of the late formulation of a reservation “unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation”.

(2) According to the prevailing opinion and in keeping with practice, an express acceptance of late reservations is not necessary; just as reservations formulated within the set periods may be accepted tacitly,⁷⁰⁷ it should likewise be possible for late reservations to be accepted in that manner (whether it is their late formulation or their content that is at issue), and for the same reasons. It seems fairly clear that to require express unanimous consent would rob of any substance the possibility, even if strictly circumscribed, of the late formulation of a reservation with the unanimous consent of the other contracting States and organizations, since the express acceptance of reservations at any time is almost unheard of in practice. In fact, requiring such acceptance would be tantamount to ruling out any possibility of the late formulation of a reservation. It is hardly conceivable that all the contracting States to a universal treaty would expressly accept such a request within a reasonable period of time.

(3) Moreover, that would call into question the practice followed by the Secretary-General of the United Nations and by the Secretaries General of the Customs Co-operation Council of the World Customs Organization (WCO), the IMO and the Council of Europe,⁷⁰⁸ all of whom have considered that certain reservations formulated late had entered into force in the absence of objections from the other contracting States and organizations.

(4) It remains to be determined, however, how much time the other contracting States and organizations have to oppose the late formulation of a reservation. There are two conflicting sets of considerations in this regard. On the one hand, it must be left to the other contracting States and organizations to examine the planned reservation and respond to it; on the other, a long period of time extends the period of uncertainty about the fate of the reservation (and therefore of contractual relations).

(5) Practice in this respect is ambiguous. It seems that the Secretaries General of IMO, the Council of Europe and WCO have proceeded in an empirical manner and have not set any specific periods when they consulted the other contracting States.⁷⁰⁹ That was not the case with the Secretary-General of the United Nations.

⁷⁰⁷ See article 20, paragraph 5, of the Vienna Conventions (1986 text): “unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of the period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty”. See also guideline 2.8.1.

⁷⁰⁸ See paragraphs (11)–(15) of the commentary to guideline 2.3.

⁷⁰⁹ It would appear, however, that the Secretary General of IMO considers that, in the absence of a response within one month following notification, the reservation becomes effective (see footnote 694 above and IMO, *Status of Multilateral Conventions and Instruments ...* (footnote 693 above), p. 121, concerning the reservation of Liberia, and p. 127, concerning that of the United States of America).

(6) Initially, when the current practice of the Secretary-General began in the 1970s, the parties were given a period of 90 days in which to oppose the late formulation of a reservation, if they wished to do so. Yet the choice of this period seems to have been somewhat circumstantial: it happens to have coincided with the period provided for in the relevant provisions of the 1931 Convention providing a Uniform Law for Cheques, to which France wanted to make a new reservation.⁷¹⁰ That notwithstanding, the 90-day period was adopted whenever a State availed itself thereafter of the opportunity to formulate a new reservation, or modify an existing one, after the entry into force with respect to that State of a new treaty of which the Secretary-General was the depositary.⁷¹¹

(7) In practice, however, this 90-day period proved to be too short; owing to delays in the transmission to States of the communication by the Office of the Legal Counsel, States had very little time in which to examine these notifications and respond to them, although such communications are likely to raise “complex questions of law” for the parties to a treaty, requiring “consultations among them, in deciding what, if any, action should be taken in respect of such a communication”.⁷¹² It is significant, moreover, that, in the few situations in which parties took action, their actions were formulated well after the 90-day period that had theoretically been set for them.⁷¹³ It was for this reason that, after receiving a *note verbale* from Portugal on behalf of the European Union describing difficulties linked to the 90-day period, the Secretary-General announced, in a circular addressed to all Member States, a change in the practice in that area. From then on, if a State which had already expressed its consent to be bound by a treaty formulated a reservation to that treaty, the other parties would have a period of 12 months after the Secretary-General had circulated the reservation to inform him that they wished to object to it.⁷¹⁴

(8) In taking this decision, which is also applicable to the amendment of an existing reservation, “the Secretary-General [was] guided by Article 20, paragraph 5, of the [1969 Vienna] Convention, which indicates a period of twelve months to be appropriate for Governments to analyse and assess a reservation that has been formulated by another State and to decide upon what action, if any, should be taken in respect of it”.⁷¹⁵

(9) The drawback to this period is that, during the 12 months following notification by the Secretary-General, total uncertainty prevails as to the fate of the reservation that has been formulated, since the opposition of a single State at the last minute is sufficient for the reservation to be considered as not having been formulated in a valid manner. Nevertheless, taking into account

⁷¹⁰ See paragraphs (11)–(12) of the commentary to guideline 2.3.

⁷¹¹ *Ibid.*, paragraph (13).

⁷¹² *Note verbale* from the Legal Counsel (modification of reservations), 2000, *Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2 (ref. LA 41 TR/221 (23-1)).

⁷¹³ See the response by Germany to the French reservation to the 1931 Convention providing a Uniform Law for Cheques, issued one year following the date of the French communication (see footnote 688 in the commentary to guideline 2.3).

⁷¹⁴ See footnote 712 above.

⁷¹⁵ *Ibid.*

the provisions of article 20, paragraph 5, of the Vienna Conventions and the current practice of the Secretary-General, the Commission considered that it made more sense to bring its own position—which, in any event, has to do with progressive development and not with codification in the strict sense—into line with those intentions.

(10) Likewise, in view of the different practices followed by other international organizations acting as depositaries,⁷¹⁶ the Commission took the view that it would be wise to reserve the possibility for a depositary to maintain its usual practice, provided that it has not elicited any particular objections. In practice, this is of little concern save to international organizations that are depositaries; the Commission nevertheless considered that it was inadvisable to rule out such a possibility *a priori* when the depositary was a State.

(11) The wording of guideline 2.3.1, which tries not to call into question the practice actually followed while at the same time guiding it, is based on the provisions of article 20, paragraph 5, of the 1986 Vienna Convention,⁷¹⁷ but adapts them to the specific case of the late formulation of reservations.

(12) The Commission also debated the particular procedures to be followed for objecting to the late formulation of a reservation to the constituent instrument of an international organization. According to article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions:

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

Applying as it does to reservations formulated “in time”, this rule applies *a fortiori* when the formulation is late. This appears to be so obvious that it was not deemed useful to state it formally in a guideline.

2.3.2 *Time period for formulating an objection to a reservation that is formulated late*

An objection to a reservation that is formulated late must be made within twelve months of the acceptance, in accordance with guideline 2.3.1, of the late formulation of the reservation.

Commentary

(1) If the late formulation of the reservation has been unanimously accepted, in accordance with guidelines 2.3 and 2.3.1, the reservation must be considered and treated as such, and the rules concerning reservations are thus applicable to it. However, it seemed necessary to specify the content of those rules where the lateness of the formulation of the reservation calls for adaptations. This is the case for the period of time within which contracting States and organizations may formulate objections. What is at issue here is the objection to the reservation itself

⁷¹⁶ See paragraph (5) of the commentary to the present guideline.

⁷¹⁷ “unless the treaty otherwise provides, a reservation is considered to have been accepted by a State [or an international organization] if it [the State or the international organization] shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation”; see guideline 2.8.2.

(and not “opposition” to its late formulation): if, and only if, the late formulation is unanimously accepted by all the contracting States and organizations, then they ought to be able to formulate objections to it as they would to any other reservation, unless the treaty otherwise provides.⁷¹⁸ This is the purpose of guideline 2.3.2.

(2) The guideline establishes that the objection produces its full effects when lodged within the 12-month period following the unanimous acceptance of the late reservation. As this period is the one ordinarily provided to contracting States and organizations for the formulation of objections, it seems legitimate to provide it for objections to late reservations as well. However, the period begins not with the notification of the reservation but as of the time the late formulation of the reservation is unanimously accepted, since, under guideline 2.3.1, only in that case can it be considered to have been established.⁷¹⁹ Strict adherence to this time limit is an additional safeguard against any laxity.

(3) The Commission has not explicitly referred to the special situation of States and international organizations that, upon the expiration of the 12-month period provided for in guideline 2.3.2, have not expressed their agreement to be bound by the treaty in question. While such States and international organizations can no longer challenge the unanimous acceptance of the late formulation of the reservation, nothing prevents them from objecting to the content of the reservation when they express their agreement to be bound by the treaty. The general rule provided for in article 20, paragraph 5, of the Vienna Conventions and echoed in guideline 2.6.12 applies in this situation. The result, with regard to reservations that are formulated late, is that a State or international organization can object to them until “the date on which such State or international organization expresses its consent to be bound by the treaty”, if this consent is expressed after the end of the 12-month period specified in guideline 2.3.2.

2.3.3 *Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations*

A contracting State or a contracting organization cannot exclude or modify the legal effect of provisions of the treaty by:

- (a) **the interpretation of an earlier reservation; or**
- (b) **a unilateral statement made subsequently under a clause providing for options.**

Commentary

(1) To make the exclusion in principle of the late formulation of reservations even stricter, the Commission considered it useful to adopt guideline 2.3.3, the purpose of which is to indicate that a party to a treaty may not get round this prohibition by means that have the same purpose as reservations but do not meet the definition of

⁷¹⁸ See also paragraphs (23)–(24) of the commentary to guideline 2.3.

⁷¹⁹ For a discussion of the concept of established reservations, see section 4.1 of the Guide to Practice.

reservations. Otherwise, the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions⁷²⁰ would be deprived of any specific scope.

(2) To this end, guideline 2.3.3 aims at two means in particular: the (extensive) interpretation of reservations made earlier, on the one hand, and statements made under an option clause appearing in a treaty, on the other. The selection of these two means of “circumvention” may be explained by the fact that they have both been used in practice and that this use has given rise to jurisprudence that is accepted as authoritative. One cannot, however, rule out the possibility that States or international organizations might have recourse in the future to other means of getting round the principle set out in guideline 2.3; it goes without saying that the reasoning which justifies the express prohibitions established in guideline 2.3.3 should therefore be applied *mutatis mutandis*.

(3) The principle that a reservation may not be formulated after the expression of consent to be bound appeared to be sufficiently established to the Inter-American Court of Human Rights for the Court to consider, in its advisory opinion of 8 September 1983 concerning *Restrictions to the Death Penalty*, that, once formulated, a reservation “escapes” from its author and may not be interpreted outside the context of the treaty itself. The Court adds the following:

A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation relates, including even all such matters which the State might subsequently declare that it intended the reservation to cover.

The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting, approving or acceding to a treaty (Vienna Convention, Art. 19).⁷²¹

(4) Similarly, following the *Belilos* case,⁷²² the Swiss Government initially revised its 1974 “interpretative declaration”, which the European Court of Human Rights regarded as an invalid reservation, by adding a number of clarifications to its new “declaration”.⁷²³ The validity of this new declaration, which had been criticized in the relevant literature,⁷²⁴ was challenged before the Swiss Federal Court, which, in its decision of 17 December 1992 in the *F. v. R. et Conseil d’État*

du canton de Thurgovie case, declared the declaration invalid on the ground that it was a new reservation⁷²⁵ that was incompatible with article 57 (former article 64), paragraph 1, of the European Convention on Human Rights.⁷²⁶ *Mutatis mutandis*, the limitation on the formulation of reservations imposed by this provision of the Convention is similar to the limitation resulting from article 19 of the Vienna Conventions, and the judgment of the Swiss Federal Court should certainly be regarded as a reaffirmation of the prohibition of principle against reservations formulated after the expression of consent to be bound, but it goes further and establishes the impossibility of formulating a new reservation in the guise of an interpretation of an existing reservation.

(5) The decision of the European Commission of Human Rights in the *Chrysostomos et al.* case leads to the same conclusion, but provides an additional lesson. In that case, the Commission believed that it followed from the “clear wording” of article 57 (former article 64), paragraph 1, of the European Convention on Human Rights “that a High Contracting Party may not, when at a later state recognising the right of individual petition, substantially modify its Convention obligations for the purpose of proceedings under Article 25”.⁷²⁷ Here again, the decision of the European Commission may be interpreted as a confirmation of the rule resulting from the introductory wording of the provision in question, with the important clarification that a State may not circumvent the prohibition on reservations after ratification by adding to a declaration made under an opting-in clause (which does not in itself constitute a reservation)⁷²⁸ conditions or limitations with effects identical to those of a reservation, at least in cases where the option clause in question does not make any corresponding provision.

(6) The decisions of the Inter-American Court of Human Rights, the European Commission of Human Rights and the Swiss Federal Court reaffirm the stringency of the rule set out at the beginning of article 19 of the Vienna Conventions on the law of treaties and in guideline 2.3 and draw very direct and specific consequences therefrom, as is made explicit in guideline 2.3.3.

(7) Subparagraph (b) of this guideline refers implicitly to guideline 1.5.3 relating to unilateral statements made

⁷²⁰ The text of the *chapeau* of article 19 reads as follows: “A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: ...”. The Commission did not consider it necessary formally to reproduce in the Guide to Practice the rule enunciated in this provision, as doing so would overlap with the definition set out in guideline 1.1.

⁷²¹ *Restrictions to the Death Penalty ...* (see footnote 197 above), paras. 63–64. On the interpretation of this advisory opinion, see Gaja, “Unruly treaty reservations” (footnote 28 above), p. 310.

⁷²² European Court of Human Rights, *Belilos v. Switzerland*, Judgment of 29 April 1988 (see footnote 192 above).

⁷²³ See Council of Europe, *European Treaty Series*, No. 5, available from <http://conventions.coe.int>. See also United Nations, *Treaty Series*, vols. 1496, 1525 and 2123.

⁷²⁴ See, in particular, G. Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”, RGDIP, vol. 93 (1989), p. 314. See also the other references made by Flauss, “Le contentieux de la validité des réserves à la CEDH ...” (footnote 672 above), footnote 28, p. 300.

⁷²⁵ The European Court of Human Rights would have declared the 1974 “declaration” as a whole invalid: “the interpretative declaration concerning article 6, paragraph 1, European Convention on Human Rights, formulated by the Federal Council at the time of ratification could therefore not have a full effect in either the field of criminal law or in that of civil law. As a result, the 1988 interpretative declaration cannot be regarded as a restriction, a new formulation or a clarification of the reservation that existed previously. Rather, it represents a reservation formulated subsequently” (*F. v. R. et Conseil d’État du canton de Thurgovie*, *Journal des Tribunaux*, 1995, p. 536; German text in *Europäische Grundrechte-Zeitschrift*, vol. 20 (1993), p. 72).

⁷²⁶ “Any State may, when signing this Convention or when depositing an instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.”

⁷²⁷ Decision of 4 March 1991 in *Chrysostomos et al. v. Turkey*, Applications nos. 15299/89, 15300/89 and 15318/89, European Commission of Human Rights, *Decisions and Reports*, vol. 68, Strasbourg, 1991, pp. 240–241, para. 15. See also footnote 701 above.

⁷²⁸ See guideline 1.5.3 and commentary thereto.

under an option clause, which the Commission has clearly excluded from the scope of the Guide to Practice. However, the purpose of guideline 2.3.3 is not to regulate these procedures as such but to act as a reminder that they cannot be used to circumvent the rules relating to reservations themselves.

2.3.4 Widening of the scope of a reservation

The modification of an existing reservation for the purpose of widening its scope is subject to the rules applicable to the late formulation of a reservation. If such a modification is opposed, the initial reservation remains unchanged.

Commentary

(1) The question of the modification of reservations should be posed in connection with the questions of the withdrawal and late formulation of reservations. Insofar as a modification is intended to lessen the scope of a reservation, what is involved is a partial withdrawal of the initial reservation, which poses no problem in principle, being subject to the general rules concerning withdrawal; the provisions of guidelines 2.5.10 and 2.5.11 apply. If, however, the effect of the modification is to widen the scope of an existing reservation, it would seem logical to start from the notion that what is involved is the late formulation of a reservation and to apply to it the rules that are applicable in this regard, which are stated in guidelines 2.3, 2.3.1 and 2.3.2.

(2) This is the reasoning underlying guideline 2.3.4, which refers to the rules on the late formulation of reservations and also makes it clear that, if a State has expressed its opposition to the widening of the reservation, the initial reservation applies.

(3) Nevertheless, in the Council of Europe the prohibition against changes that widen the scope of reservations seems to be established. Within the Council framework, “[t]here have been instances where States have approached the Secretariat requesting information as to whether and how existing reservations could be modified. In its replies the Secretariat has always stressed that modifications which would result in an extension of the scope of existing reservations are not acceptable. Here the same reasoning applies as in the case of belated reservations ... Allowing such modifications would create a dangerous precedent which would jeopardize legal certainty and impair the uniform implementation of European treaties”.⁷²⁹

(4) The same author questions whether a State may denounce a treaty to which it has made reservations in order to ratify it again with widened reservations. He feels that such a procedure may constitute an abuse of rights, while admittedly basing his arguments on grounds specific to the Council of Europe conventions.⁷³⁰

⁷²⁹ Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), p. 96. This is comparable to the position taken by the European Commission of Human Rights in the case of *Chrysostomos et al. v. Turkey*, Decision of 4 March 1991 (see footnotes 701 and 727 above).

⁷³⁰ Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), p. 96. One can interpret in this sense the Swiss Federal Court decision of 17 December 1992 in the case of *F. v. R. et*

(5) The Commission nevertheless considered that a regional practice (which, moreover, is not always consistent)⁷³¹ should not be transposed to the universal level, and that, as where widening of the scope of existing reservations is concerned, it would not be logical to apply rules that differ from those applicable to the late formulation of reservations.

(6) If, after expressing its consent, together with a reservation, a State or an international organization wishes to widen the reservation, such provisions will be fully applicable, for the same reasons:

- it is essential not to encourage the late formulation of limitations on the application of the treaty;

- on the other hand, there may be legitimate reasons why a State or an international organization might wish to modify an earlier reservation and, in some cases, it may be possible for the author of the reservation to denounce the treaty in order to ratify it again with a widened reservation;

- it is always possible for the parties to a treaty to modify it at any time by unanimous agreement,⁷³² it follows that they may also, by unanimous agreement, authorize a party to modify, again at any time, the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to that party; and

- the requirement of the *unanimous* consent of the other parties to the widening of the scope of the reservation seems to constitute an adequate safeguard against abuse.

(7) At least at the universal level, moreover, the justified reluctance not to encourage States parties to a treaty to widen the scope of their reservations after expressing their consent to be bound has not prevented an alignment of practice in respect of the widening of the scope of reservations with practice relating to the late formulation of reservations,⁷³³ and this is entirely a matter of common sense.

Conseil d'État du canton de Thurgovie, Journal des Tribunaux, 1995 (see footnote 725 above), p. 523. On the same point, see Flauss, “Le contentieux de la validité des réserves à la CEDH ...” (footnote 672 above), p. 303. In this regard, it may be noted that on 26 May 1998 Trinidad and Tobago denounced the Optional Protocol to the International Covenant on Civil and Political Rights, and ratified it again the same day with a new reservation (*Multilateral Treaties ...* (footnote 37 above), chap. IV.5). After several objections and a decision by the Human Rights Committee, dated 2 November 1999 (Communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. II, annex XI, p. 258), Trinidad and Tobago again denounced the Protocol on 27 March 2000 (*Multilateral Treaties ...* (footnote 37 above), chap. IV.5). What was involved, however, was not the modification of an existing reservation, but the formulation of an entirely new reservation.

⁷³¹ See paragraph (15) of the commentary to guideline 2.3, footnote 695.

⁷³² See article 39 of the 1969 and 1986 Vienna Conventions.

⁷³³ Gaja gives the example of the “correction” by France, on 11 August 1982, of the reservation formulated in its instrument of approval of the Protocol to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), which it deposited with the IMO Secretary General on 25 September 1981 (Gaja, “Unruly treaty reservations” (footnote 28 above), pp. 311–312). This

(8) Depositaries treat widening of the scope of a reservation in the same way as the late formulation of a reservation. When they receive such a request by one of the contracting States or organizations, they consult all the other contracting States or organizations and accept the new wording of the reservation only if none of the parties opposes it by the deadline for replies.

(9) For example, when Finland acceded, on 1 April 1985, to the 1973 Protocol on road markings, additional to the European Agreement supplementing the Convention on road signs and signals of 1968, it formulated a reservation to a technical provision of the instrument.⁷³⁴ Ten years later, on 5 September 1995, Finland declared that its reservation also applied to a situation other than the one originally mentioned:⁷³⁵

In keeping with the practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged. None of the Contracting Parties to the Protocol having notified the Secretary-General of an objection within a period of 90 days from the date of its circulation (on 20 December 1995), the said modification was accepted for deposit upon the expiration of the above-stipulated 90-day period, that is, on 19 March 1996.⁷³⁶

The procedure followed by the Secretary-General is the same as the one currently followed in the case of late formulation of reservations.^{737, 738}

(10) As another example, the Government of the Republic of Maldives notified the Secretary-General on 29 January 1999 that it wished to modify the reservations it had formulated upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women in 1993. Germany, which had objected to the original reservations, also opposed their modification, arguing, among other things, that

reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty (article 19 of the Vienna Convention on the Law of Treaties). After a State has bound itself to a treaty under international law it can no longer submit new reservations or extend or add to old reservations. It is only possible to totally or partially withdraw original reservations, something unfortunately not done by the Government of the Republic of the Maldives with its modification.⁷³⁹

is a somewhat unusual case, since, at the time of the "correction", the Protocol had not yet entered into force with respect to France; in this instance, the depositary does not appear to have made acceptance of the new wording dependent on the unanimous agreement of the other parties, some of which did in fact object to the substance of the modified reservation (see IMO, *Status of Multilateral Conventions and Instruments ...* (footnote 693 above), p. 118).

⁷³⁴ In its original reservation with respect to paragraph 6 of the annex, Finland reserved "the right to use yellow colour for the continuous line between the opposite directions of traffic" (*Multilateral Treaties ...* (footnote 37 above), chap. XI.B.25).

⁷³⁵ "the reservation made by Finland also applies to the barrier line" (*ibid.*).

⁷³⁶ *Ibid.*

⁷³⁷ See the commentary to guideline 2.3, paragraphs (12) and (14).

⁷³⁸ It should be noted that, at present, the period would be 12 months, not 90 days (see guideline 2.3.1 and, in particular, paragraphs (4)–(9) of the commentary).

⁷³⁹ *Multilateral Treaties ...* (footnote 37 above), chap. IV.8. Finland also objected to the modified Maldivian reservation (*ibid.*). The German and Finnish objections were made more than 90 days after the notification of the modification, the deadline set at that time by the Secretary-General.

(11) Guideline 2.3.4 refers implicitly to guidelines 2.3, 2.3.1 and 2.3.2 on the late formulation of reservations. It did not seem necessary to say so expressly in the text because these guidelines immediately precede it in the Guide to Practice.

(12) It should, however, be noted that the transposition of the rules applicable to the late formulation of reservations, as contained in guideline 2.3.2, to the widening of the scope of an existing reservation cannot be unconditional. In both cases, the existing situation remains the same in the event of an opposition by any of the contracting States or organizations; however, this situation is different: prior to the late formulation of a reservation the treaty applied in its entirety as between the contracting States and organizations so long as no other reservations were made. In the case of the widening of the scope of a reservation, however, the reservation had already been made and produced the effects recognized by the Vienna Conventions. This is the difference of situation that is covered by the second sentence of guideline 2.3.4, which provides that, in this second case, the initial reservation remains unchanged in the event of an opposition to the widening of its scope.

(13) The Commission did not consider it necessary for a guideline to define the term "widening of the scope of a reservation" because its meaning is so obvious. Bearing in mind the definition of a reservation contained in guideline 1.1, it is clear that this term applies to any modification designed to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole in respect of certain specific aspects in their application to the reserving State or international organization, in a broader manner than the initial reservation.

2.4 Procedure for interpretative declarations

Commentary

In the absence of any provision on interpretative declarations in the Vienna Conventions and relative uncertainty of practice with regard to such declarations, they cannot be considered in isolation. One can only proceed by analogy with (or in contrast to) reservations, with the understanding that conditional interpretative declarations are subject to the same rules as reservations.⁷⁴⁰

2.4.1 Form of interpretative declarations

An interpretative declaration should preferably be formulated in writing.

Commentary

(1) There would be no justification for requiring a State or an international organization to follow a given procedure for giving, in a particular form, its interpretation of a convention to which it is a party or a signatory or to which it intends to become a party. Consequently, the formal validity of an interpretative declaration is not linked to observance of a specific form or procedure.⁷⁴¹

⁷⁴⁰ On the distinction, see guidelines 1.2 and 1.4 and commentaries thereto.

⁷⁴¹ See also Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), p. 117.

The rules governing the form and communication of reservations cannot then be purely and simply transposed to simple interpretative declarations, which may be formulated orally, and it would thus be paradoxical to insist that they be formally communicated to the other States or international organizations concerned.

(2) Nevertheless, while there is no legal obligation in that regard, it seems appropriate to ensure, to the extent possible, that interpretative declarations are publicized widely. If no such communication exercise is undertaken, the author of the declaration runs the risk that the declaration will not have the desired effect. Indeed, the influence of a declaration in practice depends to a great extent on its dissemination.

(3) Without discussing the legal implications of these declarations for the interpretation and application of the treaty in question,⁷⁴² it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their *raison d'être* and the purpose for which they are formulated by States and international organizations. The International Court of Justice has highlighted the importance of these statements in practice:

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.⁷⁴³

Rosario Sapienza has also underlined the importance and the role of interpretative declarations and of reactions to them, as they

*... forniranno utile contributo anche alla soluzione [of a dispute]. E ancor più le dichiarazioni aiuteranno l'interprete quando controversia non si dia, ma semplice problema interpretativo.*⁷⁴⁴

[... will contribute usefully to the settlement [of a dispute]. Statements will be still more useful to the interpreter when there is no dispute, but only a problem of interpretation.]

In her study *Einseitige Interpretationserklärungen zu multilateralen Verträgen* ("Unilateral interpretative declarations to multilateral treaties"), Monika Heymann has rightly stressed as follows:

*Dabei ist allerdings zu beachten, dass einer schriftlich fixierten einfachen Interpretationserklärung eine größere Bedeutung dadurch zukommen kann, dass die übrigen Vertragsparteien sie eher zur Kenntnis nehmen und ihr im Streitfall eine höhere Beweisfunktion zukommt.*⁷⁴⁵

[In this regard, it should be noted that a simple written interpretative declaration can take on greater importance because the other contracting parties take note of it and, in the event of a dispute, it has greater probative value.]

(4) Moreover, in practice, States and international organizations endeavour to give their interpretative declarations

⁷⁴² See Part 4, section 7, of the Guide to Practice.

⁷⁴³ *Advisory Opinion of 11 July 1950, International Status of South-West Africa* (see footnote 167 above), pp. 135–136. For what is clearly a narrower view of the possible influence of interpretative declarations, however, see the Court's *Judgment of 3 February 2009, Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 78, para. 42.

⁷⁴⁴ Sapienza, *Dichiarazioni interpretative unilaterali ...* (footnote 129 above), p. 275.

⁷⁴⁵ Heymann (footnote 147 above), p. 118.

the desired publicity. They transmit them to the depositary, and the Secretary-General of the United Nations in turn disseminates the text of such declarations⁷⁴⁶ and publishes them online in *Multilateral Treaties Deposited with the Secretary-General*.⁷⁴⁷ Clearly, this communication procedure, which ensures wide publicity, requires that declarations be made in writing.

(5) This requirement, however, is merely a practicality born of the need for efficacy. As the Commission has pointed out above,⁷⁴⁸ there is no legal obligation in this regard. This is why, unlike guideline 2.1.1 on the written form of reservations, guideline 2.4.1 takes the form of a simple recommendation, like the guidelines concerning, for example, the statement of reasons for reservations⁷⁴⁹ and objections to reservations.⁷⁵⁰ The use of the auxiliary "should" and the inclusion of the word "preferably" reflect the desirable but voluntary nature of use of the written form.

2.4.2 Representation for the purpose of formulating interpretative declarations

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

Commentary

(1) Guideline 2.4.2 transposes and adapts to interpretative declarations, as defined by guideline 1.2, the provisions of guideline 2.1.3 on representation for the purpose of formulating a reservation at the international level.

(2) It goes without saying that such declarations can only produce effects, whatever their nature, if they emanate from an authority competent to engage the State or the international organization at the international level. And since the declaration purports to produce effects in relation to a treaty, it would seem appropriate to limit the option of formulating it to the authorities competent to engage the State or the organization through a treaty.

2.4.3 Absence of consequences at the international level of the violation of internal rules regarding the formulation of interpretative declarations

1. The competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration are determined by the internal law of each State or the relevant rules of each international organization.

⁷⁴⁶ United Nations, *Summary of Practice of the Secretary-General ...* (footnote 75 above), para. 218.

⁷⁴⁷ To cite but one example, while article 319 of the United Nations Convention on the Law of the Sea does not explicitly require its depositary to communicate interpretative declarations made under article 311 of the Convention, the Secretary-General publishes them systematically in chapter XXI.6 of *Multilateral Treaties Deposited with the Secretary-General* (available from <http://treaties.un.org>).

⁷⁴⁸ Paragraph (1) above.

⁷⁴⁹ Guideline 2.1.2 (Statement of reasons for reservations).

⁷⁵⁰ Guideline 2.6.9 (Statement of reasons for objections).

2. A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations for the purpose of invalidating the declaration.

Commentary

(1) The formulation of interpretative declarations at the internal level calls for the same comments as in the case of reservations. In this regard, national rules and practices are extremely diverse. This becomes clear from the replies of States to the Commission's questionnaire on reservations to treaties. Of the 22 States that replied to questions 3.5 and 3.5.1:⁷⁵¹

– in 7 cases, only the executive branch is competent to formulate a declaration;⁷⁵²

– in 1 case, only the parliament has such competence;⁷⁵³ and

– in 14 cases, competence is shared between the two,⁷⁵⁴ and the modalities for collaboration between them are as diverse as they are with regard to reservations.

In general, the executive branch probably plays a more distinct role than it does in the case of reservations.

(2) It follows *a fortiori* that competence to formulate interpretative declarations and the procedure to be followed in that regard are determined purely by internal law and that a State or an international organization would not be entitled to invoke a violation of internal law as invalidating the legal effect that its declarations might produce—especially since it appears that, in general, there is greater reliance on practice than on formal written rules.

(3) It is therefore appropriate to transpose to interpretative declarations the provisions of guideline 2.1.4 on the absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations.

2.4.4 Time at which an interpretative declaration may be formulated

Without prejudice to the provisions of guidelines 1.4 and 2.4.7, an interpretative declaration may be formulated at any time.

⁷⁵¹ Question 3.5: “At the internal level, what authority or authorities take(s) the decision to make such interpretative declarations?”; question 3.5.1: “Is the parliament involved in the formulation of these declarations?” (*Yearbook ... 1996*, vol. II (Part One), p. 101). This list of States is not identical to the list of States that responded to similar questions on reservations.

⁷⁵² Chile, the Holy See, India, Israel, Italy, Japan and Malaysia.

⁷⁵³ Estonia.

⁷⁵⁴ Argentina, Bolivia, Croatia, Finland, France, Germany, Mexico, Panama, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United States of America.

Commentary

(1) It results from guideline 1.2, which defines interpretative declarations independently of any time element, that a “simple” interpretative declaration may, unlike a reservation (and a conditional interpretative declaration), be formulated at any time. It is therefore enough to refer to the Commission's commentary to that provision,⁷⁵⁵ and guideline 2.4.4 follows specifically therefrom. This possibility is, however, not absolute and involves three exceptions.

(2) The first relates to the relatively frequent case of treaties providing expressly that interpretative declarations to them can be formulated only at a specified time or times, as in the case, for example, of article 310 of the United Nations Convention on the Law of the Sea.⁷⁵⁶ It is clear that in a case of this kind the contracting States or contracting organizations may make interpretative declarations such as those referred to in the relevant provision only at the time or times restrictively indicated in the treaty.

(3) It seems superfluous to mention this exception, which is self-evident: the Guide to Practice is intended to be exclusively residual in nature, and it goes without saying that the provisions of a treaty must be applicable as a matter of priority if they are contrary to the guidelines contained in the Guide.⁷⁵⁷ It seemed advisable, however, to provide for the very specific case of the late formulation of an interpretative declaration when a treaty provision expressly limits the possibility of formulating such a declaration *ratione temporis*. This case is covered by guideline 2.4.7, to which guideline 2.4.4 refers.

(4) The existence of an express treaty provision limiting the option of formulating interpretative declarations is not the only instance in which a State or an international organization is prevented *ratione temporis* from formulating an interpretative declaration.⁷⁵⁸ The same applies in cases where the State or organization has already formulated an interpretation which its partners have taken as a basis or were entitled to take as a basis (*estoppel*). In such cases, the author of the initial declaration is prevented from modifying it.

⁷⁵⁵ See paragraphs (21)–(31) of the commentary to guideline 1.2.

⁷⁵⁶ “Article 309 [excluding reservations] does not preclude a State, when signing, ratifying or acceding to this Convention*, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and its regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of this Convention in their application to that State.” See also, for example, article 26, paragraph 2, of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal of 22 March 1989, and article 43 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995.

⁷⁵⁷ The Commission nevertheless departed from this principle in a few cases when it decided to place the emphasis on the residual nature of the guidelines it was proposing (see, for example, guideline 2.3 and paragraph (7) of the commentary thereto above; see also guidelines 2.3.1 and 2.4.8).

⁷⁵⁸ See guideline 2.4.8 and paragraph (5) of the commentary thereto.

(5) The third exception relates to conditional interpretative declarations, which, unlike simple interpretative declarations, cannot be formulated at any time, as is stated in guideline 1.4 on the definition of such instruments,⁷⁵⁹ to which guideline 2.4.4 expressly refers.⁷⁶⁰

(6) Lastly, it is obvious that only an existing instrument can be interpreted and that it is therefore unnecessary to specify that a declaration can be made only after the text of the provision of the treaty concerned has been finally adopted.

2.4.5 *Communication of interpretative declarations*

The communication of written interpretative declarations should follow the procedure established in guidelines 2.1.5, 2.1.6 and 2.1.7.

Commentary

(1) The considerations that led the Commission to adopt guideline 2.4.1, recommending that States and international organizations should preferably formulate their interpretative declarations in writing,⁷⁶¹ apply equally to the dissemination of such declarations, which need to be in written form to be publicized.

(2) Here, too, it is in the interests of both the author of the interpretative declaration and the other contracting States or contracting organizations that the declaration should be disseminated as widely as possible. If the authors of interpretative declarations wish their position to be taken into account in the application of the treaty—particularly if there is any dispute—it is undoubtedly in their interest to have their position communicated to the other States and international organizations concerned. Moreover, only a procedure of this type seems to give the other contracting States or contracting organizations an opportunity to react to an interpretative declaration.

(3) This communication procedure could draw upon the procedure applicable to other types of declaration in respect of a treaty, such as the procedure for the communication of reservations, as set out in guidelines 2.1.5 to 2.1.7, it being understood that this is only a recommendation, since, unlike reservations, interpretative declarations are not required to be made in writing.⁷⁶²

2.4.6 *Non-requirement of confirmation of interpretative declarations formulated when signing a treaty*

An interpretative declaration formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

Commentary

(1) The rule that it is not necessary to confirm interpretative declarations made when signing a treaty in

fact derives inevitably from the principle embodied in guideline 2.4.4. Since interpretative declarations may be made at any time, save in exceptional cases, it would be illogical and paradoxical to require that they should be confirmed when a State or an international organization expressed its consent to be bound by the treaty.

(2) In this connection, there is a marked contrast between the rules applicable to reservations⁷⁶³ and those relating to interpretative declarations, since the principle is the exact opposite: reservations formulated when signing a treaty must in principle be confirmed, while interpretative declarations need not.

(3) In the light of the very broad wording of guideline 2.4.6, the transposition to interpretative declarations of the principle established in guideline 2.2.2,⁷⁶⁴ according to which it is not necessary to confirm a reservation formulated when signing a treaty not subject to ratification (agreement in simplified form), would be pointless: the principle stated in guideline 2.4.6 is applicable to all categories of treaties, whether they enter into force solely as a result of their signature or are subject to ratification, approval, acceptance, formal confirmation or accession.

(4) In practice, the opposition between the rules applicable to reservations, on the one hand, and to interpretative declarations, on the other, is in fact not as clear-cut as it may seem, since nothing prevents a State or an international organization that has made a declaration when signing from confirming it when expressing its final consent to be bound.

2.4.7 *Late formulation of an interpretative declaration*

Where a treaty provides that an interpretative declaration may be formulated only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently, unless none of the other contracting States and contracting organizations objects to the late formulation of the interpretative declaration.

Commentary

(1) Guideline 2.4.7 is the counterpart, for interpretative declarations, of guideline 2.3, relating to reservations.

(2) Despite the principle enunciated in guideline 2.4.4, whereby interpretative declarations may be made at any time after the adoption of the text of the provision of the treaty concerned, interpretative declarations, like reservations, may be formulated late. This is obviously true for conditional interpretations, which, like reservations themselves, can be formulated (or confirmed) only at the time of expression of consent to be bound, as specified in guidelines 1.1 and 1.4. But this may also be the case with simple interpretative declarations, particularly when the

⁷⁵⁹ See paragraph (14) of the commentary to guideline 1.4.

⁷⁶⁰ See also guidelines 1.1 and 2.3.

⁷⁶¹ See the commentary to guideline 2.4.1.

⁷⁶² See guideline 2.4.1 and commentary thereto.

⁷⁶³ See guideline 2.2.1 and commentary thereto.

⁷⁶⁴ See the commentary to the present guideline.

treaty itself establishes the period within which they may be formulated.⁷⁶⁵ The object of guideline 2.4.7 is to cover this situation, which is expressly allowed for in guideline 2.4.4.

(3) This is not an academic question. For example, the Egyptian Government had in 1993 ratified the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal of 22 March 1989, without attaching any particular declarations to its instrument of ratification, but on 31 January 1995 it formulated declarations interpreting certain provisions of the treaty,⁷⁶⁶ which limited such a possibility solely to the time of expression by a party of its consent to be bound.⁷⁶⁷ Since certain parties to the Convention contested the admissibility of the Egyptian declarations, either because, in their view, the declarations were really reservations (prohibited by article 26, paragraph 1) or because they were formulated late,⁷⁶⁸ the Secretary-General of the United Nations, the depositary of the Basel Convention, “in keeping with the depositary practice followed in similar cases, ... proposed to receive the declarations in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of their circulation”.⁷⁶⁹ Subsequently, in view of the objections received from certain contracting States, he “[took] the view that he [was] not in a position to accept these declarations [formulated by Egypt] for deposit”,⁷⁷⁰ declined to include them in the section entitled “Declarations” and reproduced them only in the section entitled “Notes”, accompanied by the objections concerning them.

(4) It will be inferred from this example, which was not protested by any of the contracting States to the Basel Convention that, in the particular but not exceptional case in which a treaty specifies the times at which interpretative declarations may be made, the same rules should be followed as those set out in guideline 2.3. The commentary to that provision is therefore transposable, *mutatis mutandis*, to guideline 2.4.7.

(5) It is self-evident that the approaches laid down in guidelines 2.3.1 and 2.3.2 can also be transposed to acceptances of interpretative declarations formulated late and oppositions to such formulation. Nevertheless, the Commission considered that it was not useful to overburden the Guide to Practice by including specific guidelines in this respect.

2.4.8 Modification of an interpretative declaration

Unless the treaty otherwise provides, an interpretative declaration may be modified at any time.

⁷⁶⁵ See paragraphs (2)–(3) of the commentary to guideline 2.4.4.

⁷⁶⁶ See *Multilateral Treaties ...* (footnote 37 above), chap. XXVII.3.

⁷⁶⁷ Under article 26, paragraph 2, of the Convention, a State may, within certain limits, formulate such declarations, but only “when signing, ratifying, accepting, approving or formally confirming or acceding to this Convention”.

⁷⁶⁸ See the observations by the United Kingdom, Finland, Italy, the Netherlands or Sweden (*Multilateral Treaties ...* (footnote 37 above), chap. XXVII.3).

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *Ibid.*

Commentary

(1) According to the definition given in guideline 1.2, simple interpretative declarations are clarifications of the meaning or scope of the provisions of the treaty. They may be made at any time⁷⁷¹ (unless the treaty otherwise provides)⁷⁷² and are not subject to the requirement of confirmation.⁷⁷³ There is thus nothing to prevent them from being modified at any time in the absence of a treaty provision stating that the interpretation must be given at a specified time, as indicated in guideline 2.4.8, the text of which is a combination of the texts of guidelines 2.4.4 (Time at which an interpretative declaration may be formulated) and 2.4.7 (Late formulation of an interpretative declaration).

(2) It follows that a simple interpretative declaration may be modified at any time, subject to provisions to the contrary contained in the treaty itself, which may limit the possibility of making such declarations in time, or in a case which is highly unlikely but which cannot be ruled out in principle, where the treaty expressly limits the possibility of modifying interpretative declarations.

(3) There are few clear examples illustrating this guideline. Mention may be made, however, of the modification by Mexico, in 1987, of its declaration concerning article 16 of the International Convention against the taking of hostages of 17 December 1979, made upon accession in 1987.⁷⁷⁴

(4) For all that, and despite the paucity of convincing examples, guideline 2.4.8 seems to flow logically from the very definition of interpretative declarations.

(5) It is obvious that, if a treaty provides that an interpretative declaration can be made only at specified times, it follows that such a declaration cannot be modified at other times. In the case where the treaty limits the possibility of making or modifying an interpretative declaration in time, the rules applicable to the late formulation of such a declaration, as stated in guideline 2.4.7, should be applicable *mutatis mutandis* if, notwithstanding that limitation, a State or an international organization intended to modify an earlier interpretative declaration: such a modification would be possible only in the absence of an objection by any of the other contracting States or contracting organizations.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

⁷⁷¹ See guideline 2.4.4.

⁷⁷² See guideline 2.4.7.

⁷⁷³ See guideline 2.4.6.

⁷⁷⁴ *Multilateral Treaties ...* (footnote 37 above), chap. XVIII.5.

Commentary

(1) Guideline 2.5.1 reproduces the text of article 22, paragraph 1, of the 1986 Vienna Convention, which is itself based on that of article 22, paragraph 1, of the 1969 Vienna Convention, with the addition of international organizations. These provisions were hardly discussed during the *travaux préparatoires*.⁷⁷⁵

(2) The question of the withdrawal of reservations did not attract the attention of Special Rapporteurs on the law of treaties until fairly late, and even then only to a limited degree. Mr. Brierly and Sir Hersch Lauterpacht were preoccupied with the admissibility of reservations and did not devote any draft article to the question of the criterion for the withdrawal of reservations.⁷⁷⁶ It was not until 1956 that, in his first report, Sir Gerald Fitzmaurice proposed the following wording for draft article 40, paragraph 3:

A reservation, though admitted, may be withdrawn by formal notice at any time. If this occurs, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties.⁷⁷⁷

(3) The draft was not discussed by the Commission, but, in his first report on the law of treaties, Sir Humphrey Waldock returned to the concept in a draft article 17, entitled “Power to formulate and withdraw reservations”,⁷⁷⁸ which posited the principle of the “absolute right of a State to withdraw a reservation unilaterally, even when the reservation has been accepted by other States”.⁷⁷⁹

A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.⁷⁸⁰

This proposal was not discussed in plenary, but the Drafting Committee, while retaining the spirit of the provision, made extensive changes not only to the wording, but even to the substance: the new draft article 19, which dealt exclusively with “The withdrawal of reservations”, no longer mentioned the notification procedure, but included a paragraph 2 relating to the effect of the withdrawal.⁷⁸¹ This draft was adopted with the addition

⁷⁷⁵ See also Pellet, “1969 Vienna Convention. Article 22: Withdrawal of reservations and of objections to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), vol. I, p. 573, para. 17.

⁷⁷⁶ The furthest Mr. Lauterpacht went was to draw attention to some proposals made in April 1954 to the Commission on Human Rights on the subject of reservations to the “Covenant of Human Rights”, expressly providing for the possibility of withdrawing a reservation simply by notifying the Secretary-General of the United Nations (see his second report on the law of treaties, in *Yearbook ... 1954*, vol. II, document A/CN.4/87, pp. 131–132, paragraph (5) of the commentary to article 9).

⁷⁷⁷ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 116. In his commentary on this provision, Sir Gerald Fitzmaurice restricted himself to saying that it did not require any explanation (*ibid.*, p. 127, para. 101).

⁷⁷⁸ *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 60–61.

⁷⁷⁹ *Ibid.*, p. 66, paragraph (12) of the commentary to article 17.

⁷⁸⁰ *Ibid.*, p. 61, paragraph 6 of draft article 17.

⁷⁸¹ At the request of Mr. Bartoš (*ibid.*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 67).

of a provision in the first paragraph specifying when the withdrawal took legal effect.⁷⁸² According to draft article 22 on first reading:

1. A reservation may be withdrawn at any time and the consent of the State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of the reservation, the provisions of article 21 cease to apply.⁷⁸³

(4) Only three States reacted to draft article 22,⁷⁸⁴ which was consequently revised by the Special Rapporteur. He proposed that:⁷⁸⁵

– the provision should take the form of a residual rule;

– it should be specified that notification of a withdrawal should be made by the depositary, if there was one; and

– a period of grace should be allowed before the withdrawal became operative.⁷⁸⁶

(5) During the consideration of these proposals, two members of the Commission maintained that, where a reservation formulated by a State was accepted by another State, an agreement existed between those two States.⁷⁸⁷ This proposition received little support and the majority favoured the notion, expressed by Mr. Bartoš, that: “Normally, a treaty was concluded in order to be applied in full; reservations constituted an exception which was merely tolerated.”⁷⁸⁸ Following this discussion, the Drafting Committee effectively reverted, in a different formulation, to the two concepts in paragraph 1 of the 1962 text.⁷⁸⁹ The new text was the one eventually adopted,⁷⁹⁰ and it became the final version of draft article 20 (Withdrawal of reservations):

⁷⁸² *Ibid.*, paras. 69–71, and 667th meeting, 25 June 1962, p. 253, paras. 73–75.

⁷⁸³ *Ibid.*, vol. II, document A/5209, p. 181; article 21 related to “The application of reservations”.

⁷⁸⁴ See the fourth report of Sir Humphrey Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 55. Israel considered that notification should be through the channel of the depositary, while the United States of America welcomed the “provision that the withdrawal of the reservation ‘takes effect when notice of it has been received by the other States concerned’”; the comment by the United Kingdom related to the effective date of the withdrawal; see also paragraph (4) of the commentary to guideline 2.5.8. For the text of the comments by the three States, see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, annex, pp. 351 (United States), 295 (Israel, para. 14) and 344 (United Kingdom).

⁷⁸⁵ For the text of the draft article proposed by Waldock, see *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 56, or *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 43.

⁷⁸⁶ On this point, see paragraph (4) of the commentary to guideline 2.5.8.

⁷⁸⁷ See the comments by Mr. Verdross and (less clearly) Mr. Amado, *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 175, para. 49, and p. 176, para. 60.

⁷⁸⁸ *Ibid.*, p. 175, para. 50.

⁷⁸⁹ See paragraph (3) above; for the first text adopted by the Drafting Committee in 1965, see *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 272, para. 22.

⁷⁹⁰ *Yearbook ... 1965*, vol. I, 816th meeting, 2 July 1965, p. 284, paras. 56–60, and *Yearbook ... 1966*, vol. I (Part Two), 892nd meeting, 18 July 1966, p. 327, para. 106.

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States.⁷⁹¹

(6) The commentary to the provision was, apart from a few clarifications, a repetition of that of 1962.⁷⁹² The Commission expressed the view that the parties to the treaty “ought to be presumed to wish a reserving State to abandon its reservation, unless a restriction on the withdrawal of reservations has been inserted in the treaty”.⁷⁹³

(7) At the United Nations Conference on the Law of Treaties, the text of this draft article (which had by now become article 22 of the 1969 Vienna Convention) was incorporated unchanged, although several amendments of detail had been proposed.⁷⁹⁴ However, on the proposal of Hungary, two important additions were adopted:

– first, it was decided to bring the procedure relating to the withdrawal of objections to reservations into line with that relating to the withdrawal of reservations themselves;⁷⁹⁵ and,

– secondly, a paragraph 4 was added to article 23 specifying that the withdrawal of reservations (and of objections) should be made in writing.⁷⁹⁶

(8) Basing himself on the principle that “there is no reason to put international organizations in a situation different from that of States in the matter of reservations”, Paul Reuter, in his fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, restricted himself to submitting “draft articles which extend the rules embodied in articles 19 to 23 of the 1969 Convention to the agreements to which international organizations are parties”, subject only to “minor drafting changes”.⁷⁹⁷ So it proved with article 22, in which the Special Rapporteur restricted himself to adding a reference to international organizations, and

⁷⁹¹ *Yearbook ... 1966*, vol. II, p. 209, document A/6309/Rev.1; drafted along the same lines, the corresponding text was article 22 of the 1965 draft (*Yearbook ... 1965*, vol. II, document A/6009, p. 162).

⁷⁹² See paragraph (3) above.

⁷⁹³ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 209, paragraph (1) of the commentary to draft article 20.

⁷⁹⁴ See the list and text of these amendments and sub-amendments in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), Report of the Committee of the Whole on its work at the first session of the Conference (A/CONF.39/14), pp. 141–142, paras. 205–211.

⁷⁹⁵ For the text of the Hungarian amendment, see A/CONF.39/L.18, which was reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 267; for the discussion of it, see the debates at the 11th plenary meeting of the Conference (30 April 1969) in *Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (footnote 332 above), pp. 36–38, paras. 14–41.

⁷⁹⁶ Regarding this amendment, see paragraph (2) of the commentary to guideline 2.5.2.

⁷⁹⁷ *Yearbook ... 1975*, vol. II, document A/CN.4/285, pp. 36–37, paragraphs (2)–(5) of the general commentary to section 2.

article 23, paragraph 4, which he reproduced in its entirety.⁷⁹⁸ These proposals were adopted by the Commission without amendment⁷⁹⁹ and retained on second reading.⁸⁰⁰ The 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations did not bring about any fundamental change.⁸⁰¹

(9) It appears from the provisions thus adopted that the withdrawal of a reservation is a unilateral act. This puts an end to the once deeply debated theoretical question of the legal nature of withdrawal: is it a unilateral decision or a conventional act?⁸⁰² Article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions rightly opts for the first of these positions. As the Commission stated in the commentary to the draft articles adopted on first reading:⁸⁰³

It has sometimes been contended that when a reservation has been accepted by another State it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a régime between the two States which cannot be changed without the agreement of both. The Commission, however, considers that the preferable rule is that the reserving State should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted.⁸⁰⁴

(10) This is still the Commission's view. By definition, a reservation is a *unilateral*⁸⁰⁵ act, even though States or international organizations may, by agreement, reach results comparable to those produced by reservations,⁸⁰⁶ but the decision to opt for a reservation, by contrast, rightly implies a resort to unilateral action.

(11) It could perhaps be argued that, in accordance with article 20 of the Vienna Conventions, a reservation which is made by a State or an international organization and is

⁷⁹⁸ *Ibid.*, p. 38, and fifth report, *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/290 and Add.1, p. 146.

⁷⁹⁹ See the Commission's discussions in 1977: 1434th meeting, 6 June 1977, *Yearbook ... 1977*, vol. I, pp. 100–101, paras. 30–34; 1435th meeting, 7 June 1977, *ibid.*, p. 103, paras. 1–2; 1451st meeting, 1 July 1977, *ibid.*, pp. 194–195, paras. 12–16; and the report of the Commission to the General Assembly on the work of its twenty-ninth session, *ibid.*, vol. II (Part Two), pp. 114–115.

⁸⁰⁰ States and international organizations made no comment on these provisions. See the tenth report of Mr. Reuter, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, pp. 63–64; the Commission's discussions of 1981: 1652nd meeting, 15 May 1981, *ibid.*, vol. I, p. 54, paras. 27–29; 1692nd meeting, 16 July 1981, *ibid.*, pp. 264–265, paras. 38–41; the report of the Commission to the General Assembly on the work of its thirty-third session, *ibid.*, vol. II (Part Two), p. 140; and the report of the Commission to the General Assembly on the work of its thirty-fourth session, *Yearbook ... 1982*, vol. II (Part Two), p. 37.

⁸⁰¹ See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations ...* (A/CONF.129/16) (footnote 635 above), 5th plenary meeting, 18 March 1986, p. 14, paras. 62–63.

⁸⁰² On this disagreement on the theory, see particularly Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 288, or Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 223–224, and the references cited. For a muted comment on this disagreement during the *travaux préparatoires* on article 22, see paragraph (5) above.

⁸⁰³ See paragraph (3) above.

⁸⁰⁴ *Yearbook ... 1962*, vol. II, document A/5209, pp. 181–182, paragraph (1) of the commentary to article 22.

⁸⁰⁵ See article 2, paragraph 1 (d), of the Vienna Conventions and guideline 1.1.

⁸⁰⁶ See guideline 1.7.1 and commentary thereto.

not expressly provided for by the treaty is effective only for the parties that have accepted it, if only implicitly. On the one hand, however, such acceptance does not alter the nature of the reservation—it gives effect to it, but the reservation is still a distinct unilateral act—and, on the other hand and above all, such an argument involves extremely formalistic reasoning that takes no account of the benefit of limiting the number and the scope of reservations in order to preserve the integrity of the treaty. As has been rightly observed,⁸⁰⁷ the signatories to a multilateral treaty expect, in principle, that it will be accepted as a whole, and there is at least a presumption that, as a necessary evil, reservations are regretted by the other parties. It is worth pointing out, moreover, that the withdrawal of reservations, while sometimes regulated,⁸⁰⁸ is never forbidden under a treaty.⁸⁰⁹

(12) Furthermore, the unilateral withdrawal of reservations has apparently never given rise to any particular difficulty, and none of the States or international organizations that replied to the Commission's questionnaire on reservations⁸¹⁰ has noted any problem in that regard. The recognition of such a right of withdrawal is also in accordance with the letter or the spirit of treaty clauses expressly relating to the withdrawal of reservations, which are either worded in terms similar to those in article 22, paragraph 1,⁸¹¹ or aim to encourage withdrawal by urging States to withdraw them "as soon as circumstances permit".⁸¹² In the same spirit, international organizations and human rights treaty monitoring bodies constantly issue recommendations urging States to withdraw reservations that they made when ratifying or acceding to treaties.⁸¹³

(13) Such objectives also justify the fact that the withdrawal of a reservation may take place "at any time",⁸¹⁴ which could even mean before the entry into force of a

treaty by a State that withdraws a previous reservation,⁸¹⁵ although the Commission knows of no case in which this has occurred.⁸¹⁶

(14) The now customary nature of the rules contained in articles 22, paragraph 1, and 23, paragraph 4, of the 1969 and 1986 Vienna Conventions and reproduced in guideline 2.5.1 seems not to be in question⁸¹⁷ and is in line with current practice.⁸¹⁸

(15) The wording chosen does not call for any particular criticism, although some fault could be found with the first phrase ("Unless the treaty otherwise provides ..."). This precision, which appeared in the Commission's final draft, but not in that of 1962,⁸¹⁹ was added by the Special Rapporteur, Sir Humphrey Waldock, following comments by Governments⁸²⁰ and endorsed by the Drafting Committee at the seventeenth session in 1965.⁸²¹ It goes without saying that most of the provisions of the Vienna Conventions and all the rules of a procedural nature contained in them are of a residual, voluntary nature and must

⁸¹⁵ This eventuality is expressly provided for by the final clauses of the Convention concerning Customs Facilities for Touring, its Additional Protocol, relating to the importation of tourist publicity documents and material, and the Convention on the Temporary Importation of Private Road Vehicles, all of 4 June 1954; see *Yearbook ... 1965*, vol. II, document A/5687, annex II, p. 105, para. 2. There are a considerable number of cases in which a State has made a reservation on signing a treaty, but subsequently renounced it because of representations made either by other signatories or by the depositary (see the examples given by Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 345–346); but these are not strictly speaking withdrawals: see paragraphs (7)–(8) of the commentary to guideline 2.5.2.

⁸¹⁶ On the other hand, several cases of withdrawal of a reservation fairly soon after it had been made can be cited. See, for example, the reply of Estonia to question 1.6.2.1 of the Commission's questionnaire: the restrictions on its acceptance of annexes III–V of the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention) (as modified by its Protocol of 1978), to which it had acceded on 16 December 1991, were lifted on 28 July 1992, when Estonia was considered to be in a position to observe the conditions laid down in these instruments. The United Kingdom states that it withdrew, retrospectively from the date of ratification and three months after formulating it, a reservation to the 1959 Agreement Establishing the Inter-American Development Bank. With regard to the questionnaire, see footnote 39 above.

⁸¹⁷ See Migliorino, "La revoca di riserve ..." (footnote 809 above), pp. 320–321, or Szafarz, "Reservations to multilateral treaties" (footnote 27 above), p. 313; see also Pellet, "1969 Vienna Convention. Article 22: Withdrawal of reservations and of objections to reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 574–575, paras. 22–25, and Pellet and Schabas, "1969 Vienna Convention. Article 23: Procedure regarding reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 596, para. 7.

⁸¹⁸ See the *Summary of Practice of the Secretary-General ...* (footnote 75 above), p. 64, para. 216. The few States that made any comment on this subject in their replies to the questionnaire on reservations (question 1.6.2.1) said that any withdrawals of reservations had followed a change in their domestic law (Colombia, Denmark, Israel, Sweden, Switzerland, United Kingdom, United States of America) or a reassessment of their interests (Israel). On reasons for withdrawal, see Jean-François Flauss, "Note sur le retrait par la France des réserves aux traités internationaux", *AFDI*, vol. 32 (1986), pp. 860–861. With regard to the questionnaire, see footnote 39 above.

⁸¹⁹ See paragraphs (3) and (5) above.

⁸²⁰ See the fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 55–56; see also *ibid.*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 45.

⁸²¹ *Ibid.*, 814th meeting, 29 June 1965, p. 272, para. 22.

⁸⁰⁷ See paragraph (5) above.

⁸⁰⁸ See the commentary to guidelines 2.5.7 and 2.5.8.

⁸⁰⁹ See L. Migliorino, "La revoca di riserve e di obiezioni a riserve", *Rivista di diritto internazionale*, vol. 75 (1992), p. 319.

⁸¹⁰ See footnote 39 above. Particularly, in the questionnaire addressed to States, questions 1.6, 1.6.1, 1.6.2 and 1.6.2.1 relating to withdrawal of reservations.

⁸¹¹ See the examples given by Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 287, footnote 19, or by Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 437, footnote 1. See also, for example, the Convention relating to the Status of Refugees, of 28 July 1951, article 42, paragraph 2; the Convention on the Continental Shelf, of 29 April 1958, article 12, paragraph 1; the European Convention on Establishment, of 13 December 1955, article 26, paragraph 3; or the 1962 model clause of the Council of Europe, which appears in "Model final clauses", given in a note of the General Secretariat (CM (62) 148, 13 July 1962, pp. 6 and 10).

⁸¹² See, for example, the Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973, article 167, paragraph 4 (deleted by the Act revising the Convention on the Grant of European Patents of 29 November 2000) and other examples cited by Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 287, footnote 20, or by Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 437, footnote 2.

⁸¹³ See the examples cited in the commentary to guideline 2.5.3.

⁸¹⁴ One favoured occasion for the withdrawal of reservations is at the time of a succession of States, for on that date the newly independent State can express its intention of not maintaining the reservations of the predecessor State (see the 1978 Vienna Convention on succession of States in respect of treaties, article 20, paragraph 1). This situation is examined in Part 5 of the Guide to Practice on reservations in cases of succession of States.

be understood to apply “unless the treaty otherwise provides”. The same must therefore be true, *a fortiori*, of the Guide to Practice. The explanatory phrase that introduces article 22, paragraph 1, may seem superfluous, but the Commission takes the view that this is not sufficient cause for modifying the wording chosen in 1969 and retained in 1986.

2.5.2 Form of withdrawal

The withdrawal of a reservation must be formulated in writing.

Commentary

(1) The guideline reproduces the wording of article 23, paragraph 4, which is worded in the same way in both the 1969 and the 1986 Vienna Conventions.

(2) Whereas draft article 17, paragraph 6, adopted on first reading by the Commission in 1962 required that the withdrawal of a reservation should be effected “by written notification”,⁸²² the 1966 draft⁸²³ was silent regarding the form of withdrawal. Several States made proposals to restore the requirement of written withdrawal⁸²⁴ with a view to bringing the provision “into line with article 18 [23 in the final text of the 1969 Vienna Convention], where it was stated that a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing”.⁸²⁵ Although Mr. Yasseen considered that “an unnecessary additional condition [was thereby introduced] into a procedure which should be facilitated as much as possible”,⁸²⁶ the principle was unanimously adopted,⁸²⁷ and it was decided to include this provision not in article 20 itself but in article 23, which dealt with “Procedure regarding reservations” in general and was, as a result of the inclusion of this new paragraph 4, placed at the end of the section.⁸²⁸

(3) Although Mr. Yasseen had been right, at the 1969 United Nations Conference on the Law of Treaties, to emphasize that the withdrawal procedure “should be facilitated as much as possible”,⁸²⁹ the burden imposed on a State by the requirement of written withdrawal should not be exaggerated. Moreover, although the rule of parallelism of forms is not an absolute principle in

international law,⁸³⁰ it would be incongruous if a reservation, about which there can be no doubt that it must be in writing,⁸³¹ could be withdrawn simply through an oral statement. This would result in considerable uncertainty for the other contracting States and organizations, which would have received the written text of the reservation but would not necessarily have been made aware of its withdrawal.⁸³²

(4) The Commission nevertheless considered whether the withdrawal of a reservation may not be implicit, resulting from circumstances other than its formal withdrawal.

(5) Certainly, as Ruda points out, “the withdrawal of a reservation ... is not to be presumed”.⁸³³ Yet the question still arises as to whether certain acts or conduct on the part of a State or an international organization ought not to be characterized as the withdrawal of a reservation.

(6) It is, for example, certainly the case that the conclusion between the same parties of a subsequent treaty containing provisions identical to those to which one of the parties had made a reservation, whereas it did not do so in connection with the second treaty, has, in practice, the same effect as a withdrawal of the initial reservation.⁸³⁴ The fact remains, however, that this is a separate instrument, and that the commitment thereby undertaken by the State that had made a reservation to the first treaty results from the second treaty, not the first; and that if, for example, a third State that is not a party to the second treaty acceded to the first, then the reservation would produce its full effects in the relations of that State with the author of the reservation.

(7) Likewise, the non-confirmation of a reservation upon signature, when a State expresses its consent to be bound,⁸³⁵ cannot be interpreted as being a withdrawal of the reservation, which may well have been “formulated” but, for lack of formal confirmation, cannot under any circumstances be considered as having been “made”.⁸³⁶ The reserving State has simply renounced it after the time for reflection has elapsed between the date of signing and the date of ratification, act of formal confirmation, acceptance or approval.

(8) This reasoning has been disputed, largely on the grounds that the reservation exists even before it has been confirmed: it has to be taken into account when assessing the extent of the obligations incumbent on the

⁸²² *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 61; see also paragraph (5) of the commentary to guideline 2.5.1.

⁸²³ See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 177–187.

⁸²⁴ See the amendments proposed by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1), Hungary (A/CONF.39/C.1/L.178 and A/CONF.39/L.17) and the United States of America (A/CONF.39/C.1/L.171), reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), documents of the Committee of the Whole, pp. 152–153 and 287.

⁸²⁵ Statement by Mrs. Bokor-Szegó (Hungary) in *Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (footnote 332 above), p. 36, para. 13.

⁸²⁶ *Ibid.*, p. 38, para. 39.

⁸²⁷ *Ibid.*, para. 41.

⁸²⁸ *Ibid.*, 29th plenary meeting, 19 May 1969, p. 159, paras. 10–13. See Ruda, “Reservations to treaties” (footnote 56 above), p. 194.

⁸²⁹ See footnote 826 above.

⁸³⁰ See paragraph (6) of the commentary to guideline 2.5.4.

⁸³¹ See guideline 2.1.1.

⁸³² In this connection, see Ruda, “Reservations to treaties” (footnote 56 above), pp. 195–196.

⁸³³ *Ibid.*, p. 196.

⁸³⁴ In this connection, see Flauss, “Note sur le retrait par la France des réserves ...” (footnote 818 above), pp. 857–858, but see also F. Tiberghien, *La protection des réfugiés en France*, Paris, Economica, 1984, pp. 34–35 (quoted by Flauss, p. 858).

⁸³⁵ See the 1969 and 1986 Vienna Conventions, article 23, paragraph 2, and guideline 2.2.1 and commentary thereto in the report of the Commission on the work of its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 179–183.

⁸³⁶ Non-confirmation is, however, sometimes (wrongly) called “withdrawal”; see *Multilateral Treaties ...* (footnote 37 above), chap. VI.15, footnote 21, relating to the non-confirmation by the Government of Indonesia of reservations formulated when it signed the Single Convention on Narcotic Drugs, 1961 (see United Nations, *Treaty Series*, vol. 520, p. 368).

signatory State (or international organization) under article 18 of the Vienna Conventions; and, under article 23, paragraph 3, “an express acceptance or an objection does not need to be renewed if made before confirmation of the reservation”.⁸³⁷ Nevertheless, as the same writer says: “Where a reservation is not renewed [confirmed], whether expressly or not, no change occurs, either for the reserving State itself or in its relations with the other parties, since until that time the State was not bound by the treaty. Conversely, if the reservation is withdrawn after the deposit of the instrument of ratification or accession, the obligations of the reserving State are increased by virtue of the reservation, and it may be bound for the first time by the treaty with parties which had objected to its reservation. A withdrawal thus affects the application of the treaty, whereas non-confirmation has no effect at all, from this point of view.”⁸³⁸ The effects of non-confirmation and of withdrawal are thus too dissimilar for it to be possible to class the two institutions together.

(9) It likewise seems impossible to consider that an expired reservation has been withdrawn. It sometimes happens that a clause in a treaty places a limit on the period of validity of reservations.⁸³⁹ But the resulting expiration of the reservation is the consequence of the lapse of a fixed period of time, whereas withdrawal is a unilateral juridical act expressing the will of its author.

(10) The same applies when, as sometimes occurs, the reservation itself sets a time limit to its validity. Thus, in its reply to the questionnaire on reservations,⁸⁴⁰ Estonia stated that it had limited its reservation to the European Convention on Human Rights to one year, since “one year is considered to be a sufficient period to amend the laws in question”.⁸⁴¹ In this case, the reservation ceases to be in

force not because it has been withdrawn, but because of the time limit set by the text of the reservation itself.

(11) What have been termed “forgotten reservations”⁸⁴² should also be mentioned. Specifically, a reservation is “forgotten” when it is connected with a provision of domestic law that has subsequently been amended by a new text that renders the reservation obsolete. This situation, which is not uncommon,⁸⁴³ although a full assessment is difficult, and which is probably usually the result of negligence by the relevant authorities or insufficient consultation between the relevant services, has its drawbacks. Indeed, it can lead to legal uncertainty, particularly in States with a tradition of legal monism.⁸⁴⁴ Moreover, since domestic laws are “merely facts” from the standpoint of international law,⁸⁴⁵ whether the legal system of the State in question is monist or dualist, an unwithdrawn reservation, having been made at the international level, will continue, in principle, to be fully effective, and the reserving State will continue to avail itself of the reservation with regard to the other parties, although such an attitude could be questionable in terms of the principle of good faith.

(12) These examples, taken together, show that the withdrawal of a reservation may never be implicit: a withdrawal occurs only if the author of the reservation declares formally and in writing, in accordance with the rule embodied in article 23, paragraph 4, of the Vienna Conventions and reproduced in guideline 2.5.2, that it intends to revoke it.

2.5.3 Periodic review of the usefulness of reservations

1. States or international organizations which have formulated one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

2. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, consider the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

⁸³⁷ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 286.

⁸³⁸ *Ibid.*, footnote omitted.

⁸³⁹ See, for example, article 12 of the Convention on the unification of certain points of substantive law on patents for invention of 1963, which provides for the possibility of non-renewable reservations to some of its provisions for maximum periods of 5 or 10 years, while an annex to the Convention on Civil Liability for Damage caused by Motor Vehicles of 1973 allows Belgium to make a reservation for a three-year period starting at the entry into force of the Convention. See also the examples given by Åkermark (footnote 101 above), pp. 499–500, or Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 287–288, footnote 21; see also article 124 of the Rome Statute of the International Criminal Court of 17 July 1998, which sets a seven-year time limit on the possibility of non-acceptance of the Court’s competence in respect of war crimes. Other Council of Europe conventions such as the European Convention on the adoption of children of 24 April 1967, and the European Convention on the legal status of children born out of wedlock of 15 October 1975 likewise authorize only temporary, but renewable reservations; as a result of difficulties with the implementation of these provisions (see Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), pp. 101–102), the new reservation clauses in Council of Europe conventions state that failure to renew a reservation would cause it to lapse (see the Criminal Law Convention on Corruption of 1999, article 38, paragraph 2).

⁸⁴⁰ Replies to questions 1.6 and 1.6.1. (see footnote 39 above).

⁸⁴¹ See also the example given by Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), pp. 102–104. It can also happen that a State, when formulating a reservation, indicates that it will withdraw it as soon as possible (see the reservation by Malta to articles 13, 15 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women, *Multilateral Treaties ...* (footnote 37 above), chap. IV.8; see also the reservations by Barbados to the International Covenant on Civil and Political Rights, *ibid.*, chap. IV.4).

⁸⁴² See Flauss, “Note sur le retrait par la France des réserves ...” (footnote 818 above), p. 861, or Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 223.

⁸⁴³ See Flauss, “Note sur le retrait par la France des réserves ...” (footnote 818 above), p. 861; see pp. 861–862, the examples concerning France given by this author.

⁸⁴⁴ In these States, judges are expected to apply duly ratified treaties (although not reservations) and these generally take precedence over domestic laws, even if the latter were adopted later (see article 55 of the French Constitution of 1958 and the many constitutional provisions, which either use the same wording or are inspired by it in French-speaking African countries). The paradoxical situation can thus arise that, in a State that has aligned its internal legislation with a treaty, it is nonetheless the treaty as ratified (and thus stripped of the provision or provisions to which reservations were made) that prevails, unless the reservation is formally withdrawn. The problem is less acute in States with a dualist system: international treaties are not applied as such, although, in all cases, national judges will apply the most recent domestic law.

⁸⁴⁵ See judgment of 25 May 1926 in *Certain German interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19.

Commentary

(1) Treaty monitoring bodies, particularly but not exclusively in the field of human rights, are calling with increasing frequency on States to reconsider their reservations and, if possible, to withdraw them. These appeals are often relayed by the general policymaking bodies of international organizations such as the General Assembly of the United Nations and the Committee of Ministers of the Council of Europe.⁸⁴⁶ Guideline 2.5.3 reflects these concerns.

(2) The Commission is aware that such a provision would have no place in a draft convention, since it could not be of much normative value. The Guide to Practice, however, does not aim to be a convention; it is, rather, a “code of recommended practices”.⁸⁴⁷ It would therefore not be out of place to draw its users’ attention to the drawbacks of these “forgotten”, obsolete or superfluous reservations⁸⁴⁸ and the benefits of reconsidering them periodically with a view to withdrawing them totally or partially.

(3) It goes without saying that it is no more than a recommendation, as emphasized by the use of the conditional tense in both paragraphs of guideline 2.5.3 and of the word “consider” in the first paragraph and the words “where relevant” in the second, and that the parties to a treaty that have accompanied their consent to be bound by reservations remain absolutely free to withdraw their reservations or not. This is why the Commission has not thought it necessary to determine precisely the frequency with which reservations should be reconsidered.

(4) Similarly, in the second paragraph, the elements to be taken into consideration are cited merely by way of example, as shown by the use of the words “in particular”. The reference to the integrity of multilateral treaties is an allusion to the drawbacks of reservations, which may undermine the unity of the treaty regime. The reference to careful consideration of internal law and developments in it since the reservations were formulated may be explained

⁸⁴⁶ See, among others, the following General Assembly resolutions: 65/200 of 21 December 2010 on the International Convention on the Elimination of All Forms of Racial Discrimination (para. 27); 65/197 of 21 December 2010 on the rights of the child (para. 3); 64/152 of 18 December 2009 on the International Covenants on Human Rights (para. 8); and 64/138 of 18 December 2009 on the Convention on the Elimination of All Forms of Discrimination against Women (para. 6). See also the Declaration of the Council of Europe Committee of Ministers adopted on 10 December 1998 on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights, and Parliamentary Assembly of the Council of Europe Recommendation 1671 (2004), adopted on 7 September 2004, on ratification of protocols and withdrawal of reservations and derogations made in respect of the European Convention on Human Rights, and resolution 1391 (2004), adopted the same day, on ratification of protocols and withdrawal of reservations and derogations made in respect of the European Convention on Human Rights, or, more generally (in that it is not limited to human rights treaties), Parliamentary Assembly of the Council of Europe Recommendation 1223 (1993), paragraph 7, dated 1 October 1993.

⁸⁴⁷ This expression was used by Sweden in its comments on the Commission’s 1962 draft on the law of treaties; see the fourth report of Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 47.

⁸⁴⁸ In this connection, see paragraphs (9)–(11) of the commentary to guideline 2.5.2.

by the fact that the divergence from the treaty provisions of the provisions in force in the State party is often used to justify the formulation of a reservation. Domestic provisions are not immutable, however (and participation in a treaty should in fact be an incentive to modify them), so that it may happen—and often does⁸⁴⁹—that a reservation becomes obsolete because internal law has been brought into line with treaty requirements.

(5) The Commission considered the appropriateness of the words “internal law” as it applied to international organizations. It noted that article 46 of the 1986 Vienna Convention contains “Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties”.⁸⁵⁰ The Commission nevertheless did not consider it necessary to include this expression in its entirety in guideline 2.5.3 so as not to burden the text unduly. Moreover, the phrase “internal law of an international organization” is commonly used as a way of referring to the “proper law”⁸⁵¹ of international organizations.⁸⁵²

2.5.4 Representation for the purpose of withdrawing a reservation at the international level

1. Subject to the usual practices followed in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of withdrawing a reservation made on behalf of a State or an international organization if:

(a) that person produces appropriate full powers for the purpose of that withdrawal; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State or the international organization for such purpose without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of withdrawing a reservation at the international level on behalf of that State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted in that organization or organ;

⁸⁴⁹ *Ibid.*, para. (11).

⁸⁵⁰ See the commentary to the corresponding draft article, adopted by the Commission in *Yearbook ... 1982*, vol. II (Part Two), p. 53, para. 2.

⁸⁵¹ See Jenks, *The Proper Law of International Organizations* (footnote 292 above), p. 282.

⁸⁵² See L. Focsaneanu, “Le droit interne de l’Organisation des Nations Unies”, *AFDI*, vol. 3 (1957), pp. 315–349; Cahier, “Le droit interne des organisations internationales” (footnote 292 above), pp. 563–602; Balladore-Pallieri, “Le droit interne des organisations internationales” (footnote 292 above), pp. 1–38; and Daillier, Forteau and Pellet, *Droit international public ...* (footnote 254 above), pp. 640–642.

(c) heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

Commentary

(1) The two Vienna Conventions of 1969 and 1986, while reticent on the procedure for the formulation of reservations,⁸⁵³ are entirely silent as to the procedure for their withdrawal. The aim of guideline 2.5.4 is to repair that omission.⁸⁵⁴

(2) The question has not, however, been completely overlooked by several of the Commission's Special Rapporteurs on the question of the law of treaties. Thus, in 1956, Sir Gerald Fitzmaurice proposed a provision under which the withdrawal of a reservation would be the subject of "formal notice",⁸⁵⁵ but he did not specify who should notify whom or how notice should be given. Later, in 1962, Sir Humphrey Waldock, in his first report, went into more detail in draft article 17, paragraph 6, the adoption of which he recommended as follows:

Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.⁸⁵⁶

(3) Although the proposal was not discussed in plenary, the Drafting Committee simply deleted it,⁸⁵⁷ and it was not restored by the Commission. During the brief discussion of the Drafting Committee's draft, however, Sir Humphrey Waldock pointed out that "Notification of the withdrawal of a reservation would normally be made through a depositary".⁸⁵⁸ This approach was approved by Israel, the only State to provide comments on the draft adopted on first reading on that matter,⁸⁵⁹ and the Special Rapporteur proposed an amendment to the draft whereby the withdrawal "becomes operative when *notice of it has been received by the other States concerned from the depositary*".⁸⁶⁰

(4) During the discussion in the Commission, Sir Humphrey Waldock explained that the omission of a reference to the depositary on first reading had been due solely to "inadvertence",⁸⁶¹ and his suggestion for remedying it was not disputed in principle. Mr. Rosenne,

however, believed that it was "not as clear as it appeared"⁸⁶² and suggested the adoption of a single text grouping together all notifications made by the depositary.⁸⁶³ Although the Drafting Committee did not immediately adopt this idea, this probably explains why its draft again omitted any reference to the depositary,⁸⁶⁴ which is also not mentioned in the Commission's final draft⁸⁶⁵ or in the text of the 1986 Vienna Convention itself.⁸⁶⁶

(5) To rectify the omissions in the Vienna Conventions regarding the procedure for the withdrawal of reservations, the Commission could have contemplated transposing the rules relating to the formulation of reservations. This is not, however, self-evident.

(6) On the one hand, it is by no means clear that the rule of parallelism of forms has been accepted in international law. In its commentary in 1966 on draft article 51 on the law of treaties relating to the termination of or withdrawal from a treaty by consent of the parties, the Commission concluded that "this theory reflects the constitutional practice of particular States and not a rule of international law. In its opinion, international law does not accept the theory of the '*acte contraire*'".⁸⁶⁷ As Reuter pointed out, however, the Commission "is really taking exception only to the formalist conception of international agreements: it feels that what one conceptual act has established, another can undo, even if the second takes a different form from the first. In fact, the Commission is really accepting a non-formalist conception of the theory of the *acte contraire*".⁸⁶⁸ This nuanced position surely can and should be applied to the issue of reservations: it is not essential that the procedure followed in withdrawing a reservation should be identical with that used for formulating it (particularly since a withdrawal is generally welcome). The withdrawal should, however, leave all the contracting States or contracting organizations in no doubt as to the will of the State or the international organization which takes that step to renounce its reservation. It therefore seems reasonable to proceed on the basis of the idea that the procedure for withdrawing reservations should be modelled on the procedure for formulating them, although that may involve some adjustment and fine-tuning where appropriate.

(7) On the other hand, it must be said that the Vienna Conventions contain few rules specifically relating to the

⁸⁵³ See paragraph (7) below.

⁸⁵⁴ See Pellet and Schabas, "1969 Vienna Convention. Article 23: Procedure regarding reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 597–598.

⁸⁵⁵ See paragraph (2) of the commentary to guideline 2.5.1.

⁸⁵⁶ *Yearbook ... 1962*, vol. II, p. 61; see also paragraph (3) of the commentary to guideline 2.5.1. The Special Rapporteur on the law of treaties did not accompany this part of his draft with any commentary (*Yearbook ... 1962*, vol. II, p. 66).

⁸⁵⁷ *Ibid.*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 67.

⁸⁵⁸ *Ibid.*, para. 71.

⁸⁵⁹ *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 55.

⁸⁶⁰ *Ibid.*, p. 56. See the commentary to guideline 2.5.1 (footnote 784 above).

⁸⁶¹ *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 45.

⁸⁶² *Ibid.*, p. 176, para. 65.

⁸⁶³ *Ibid.*, 803rd meeting, 16 June 1965, pp. 197–199, paras. 30–56; the text of the proposal is contained in *Yearbook ... 1965*, vol. II, document A/CN.4/L.108, p. 73.

⁸⁶⁴ *Ibid.*, 814th meeting, 29 June 1965, p. 272, para. 22; the comments by Mr. Rosenne and Sir Humphrey Waldock are contained in paragraphs 26–28.

⁸⁶⁵ Art. 20, para. 2; see the text of this provision in paragraph (5) of the commentary to guideline 2.5.1.

⁸⁶⁶ See articles 22–23 of the 1969 and 1986 Vienna Conventions.

⁸⁶⁷ See paragraph (3) of the commentary to draft article 51, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 249; see also the commentary to article 35, *ibid.*, pp. 232–233.

⁸⁶⁸ Reuter, *Introduction au droit des traités* (footnote 28 above), p. 141, para. 211 (original italics). See also Sinclair, *The Vienna Convention on the Law of Treaties* (footnote 129 above), p. 183. For a flexible position on the denunciation of a treaty, see the International Court of Justice, *Judgment of 21 June 2000, Aerial Incident of 10 August 1999* (see footnote 305 above) p. 25, para. 28.

procedure for formulating reservations, apart from article 23, paragraph 1, which merely states that they must be “communicated to the contracting States [and contracting organizations] and other States [and international organizations] entitled to become parties to the treaty”.⁸⁶⁹

(8) Since there is no treaty provision directly concerning the procedure for withdrawing reservations, and in view of the inadequacy even of those relating to the formulation of reservations, the Commission considered guidelines 2.1.5 to 2.1.7 relating to the communication of reservations in the light of current practice and the (rare) discussions of theory and discussed the possibility and the appropriateness of transposing them to the withdrawal of reservations.

(9) With regard to the formulation of reservations, guideline 2.1.3 is taken directly from article 7 of the Vienna Conventions entitled “Full powers”. There seems no reason why these rules should not also apply to the withdrawal of reservations. The grounds on which they are justified in relation to the formulation of reservations⁸⁷⁰ apply also to withdrawal: the reservation has altered the respective obligations of the reserving State and the other contracting States or contracting organizations and should therefore be issued by the same individuals or bodies with competence to bind the State or international organization at the international level. This must therefore apply *a fortiori* to its withdrawal, which puts the seal on the reserving State’s commitment.

(10) The United Nations Secretariat firmly adopted that position in a letter dated 11 July 1974 to the Legal Adviser of the Permanent Mission of a Member State who had inquired about the “form in which the notifications of withdrawal” of some reservations made in respect of the Convention on the Political Rights of Women of 31 March 1953, and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962 should be made.⁸⁷¹ After noting that the 1969 Vienna Convention makes no reference to the subject and recalling the definition of “full powers” given in article 2, paragraph 1 (c),⁸⁷² the author of the letter adds:

Clearly the withdrawal of a reservation constitutes an important treaty action and one of those for which the production of full powers should certainly be contemplated. It would appear only logical to apply to a notification of withdrawal of reservations the same standard as to the formulation of reservations since the withdrawal would entail as much change in the application of the treaty concerned as the original reservations.

And the author went on to conclude:

Our views, therefore, are that the withdrawal of reservations should *in principle* be notified to the Secretary-General either by the Head of

⁸⁶⁹ Guideline 2.1.5, paragraph 1, reproduces this provision, while paragraph 2 details the procedure to be followed when the reservation relates to the constituent instrument of an international organization.

⁸⁷⁰ See paragraphs (8)–(12) of the commentary to guideline 2.1.3.

⁸⁷¹ United Nations, *Juridical Yearbook 1974* (Sales No. E.76.V.1), pp. 190–191.

⁸⁷² “[The Vienna Convention which] defines ‘full powers’ as ‘a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty ... or for accomplishing any other act with respect to a treaty’” (*ibid.*, p. 191).

State or Government or the Minister for Foreign Affairs, or by an official authorized by one of those authorities. While such a high level of procedure may prove somewhat burdensome, the fundamental safeguard which it provides to all concerned in regard to the validity of the notification more than make[s] up for the resulting inconvenience.⁸⁷³

(11) Firm though this conclusion is, the words “in principle”, which appear in italics in the text of the Secretariat’s legal advice, testify to a certain unease. This is explained by the fact that, as the writer of the letter acknowledges:

[O]n several occasions, there has been a tendency in the Secretary-General’s depositary practice, with a view to a broader application of treaties, to receive in deposit withdrawals of reservations made in the form of notes verbales or letters from the Permanent Representative to the United Nations. It was considered that the Permanent Representative duly accredited with the United Nations and acting upon instructions from his Government, by virtue of his functions and without having to produce full powers, had been authorized to do so.⁸⁷⁴

(12) This raises a question that the Commission has already considered in relation to the formulation of reservations:⁸⁷⁵ would it not be legitimate to assume that the representative of a State to an international organization that is the depositary of a treaty (or the ambassador of a State accredited to a depositary State) has been recognized as being competent to give notice of reservations? And the question arises with all the more force in relation to the withdrawal of reservations, since there may be a hope of facilitating such a step, which would have the effect of making the treaty more fully applicable and thus be instrumental in preserving, or re-establishing, its integrity.

(13) After thorough consideration, however, the Commission did not adopt this progressive development, since it was anxious to depart as little as possible from the provisions of article 7 of the Vienna Conventions. On the one hand, it would be strange to depart, without a compelling reason, from the principle of the *acte contraire*,⁸⁷⁶ so long as it is understood that a “non-formalist conception”⁸⁷⁷ of it is advisable. This means, in the present case, that any of the authorities competent to formulate a reservation on behalf of a State may also withdraw it and that the withdrawal need not necessarily be issued by the same body as the one which formulated the reservation. On the other hand, while it is true that there may well be a desire to facilitate the withdrawal of reservations, it is also the case that withdrawal resembles more closely than the formulation of reservations the expression of consent to be bound by a treaty. This constitutes a further argument for not departing from the rules contained in article 7 of the Vienna Conventions.

⁸⁷³ *Ibid.* A memorandum by the Secretariat dated 1 July 1976 confirms this conclusion: “A reservation must be formulated in writing (article 23, paragraph 1, of the [1969 Vienna] Convention), and both reservations and withdrawals* of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally (article 7 of the Convention)” (United Nations, *Juridical Yearbook 1976*, p. 211).

⁸⁷⁴ United Nations, *Juridical Yearbook 1974*, pp. 190–191. This is confirmed by the memorandum of 1 July 1976: “On this point, the Secretary-General’s practice in some cases has been to accept the withdrawal of reservations simply by notification from the representative of the State concerned to the United Nations”, United Nations, *Juridical Yearbook 1976*, p. 211, footnote 121.

⁸⁷⁵ See paragraphs (13)–(17) of the commentary to guideline 2.1.3.

⁸⁷⁶ See paragraph (6) above.

⁸⁷⁷ See Reuter’s phrase, *ibid.*

(14) Moreover, it seems that the Secretary-General of the United Nations has since adopted a harder line and no longer accepts notification of withdrawal of reservations from permanent representatives accredited to the Organization.⁸⁷⁸ Moreover, in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the Treaty Section of the Office of Legal Affairs states that: “Withdrawal must be made in writing and under the signature of one of the three recognized authorities, since such withdrawal shall normally result, in substance, in a modification of the scope of the application of the treaty.”⁸⁷⁹ There is no mention of any possible exceptions.

(15) The Secretary-General of the United Nations is not, however, the only depositary of multilateral treaties, and the practice followed by other depositaries in this regard could usefully be considered. Unfortunately, the replies from States to the questionnaire on reservations give no information of any practical benefit in that direction. On the other hand, publications of the Council of Europe indicate that it accepts the formulation⁸⁸⁰ and withdrawal⁸⁸¹ of reservations by letters from permanent representatives to the Council.

(16) It would be regrettable if such practices, which are perfectly acceptable and do not seem to give rise to any particular difficulties, were to be called into question by the inclusion of overly rigid rules in the Guide to Practice. That pitfall is avoided in the text adopted for guideline 2.5.4, which transposes to the withdrawal of reservations the wording of guideline 2.1.3 while taking care to maintain the “usual practices followed in international organizations which are depositaries of treaties”.

(17) Even apart from the replacement of the word “formulate” by the word “withdraw”, however, the transposition is not entirely word for word:

– since the withdrawal procedure is, by definition, distinct both from that used in adopting or authenticating the text of a treaty and from the expression of consent to be bound and may take place many years later, it is necessary that the person applying the procedure should produce specific full powers (para. 1 (a));

– for the same reason, paragraph 2 (b) of guideline 2.1.3 cannot apply to the withdrawal of reservations: when a State or an international organization comes to withdraw a reservation, the international conference which adopted the text is obviously no longer in session.

⁸⁷⁸ Flauss mentions, however, a case in which a reservation by France (to article 7 of the Convention on the Elimination of All Forms of Discrimination against Women) was withdrawn on 22 March 1984 by the Permanent Mission of France to the United Nations (Flauss, “Note sur le retrait par la France des réserves ...” (footnote 818 above), p. 860).

⁸⁷⁹ *Summary of Practice of the Secretary-General ...* (see footnote 75 above), p. 64, para. 216.

⁸⁸⁰ See paragraph (14) of the commentary to guideline 2.1.3.

⁸⁸¹ See Council of Europe, European Committee on Legal Cooperation (CDCJ), *CDCJ Conventions and Reservations to those Conventions* (footnote 659 above).

2.5.5 *Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

1. The competent authority and the procedure to be followed at the internal level for withdrawing a reservation are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations for the purpose of invalidating the withdrawal.

Commentary

(1) Guideline 2.5.5 is, in relation to the withdrawal of reservations, the equivalent of guideline 2.1.4 relating to the “Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations”.

(2) The competent authority to formulate the withdrawal of a reservation at the international level is not necessarily the same as the one having competence to decide the issue at the internal level. Here, too, *mutatis mutandis*,⁸⁸² the problem is the same as that relating to the formulation of reservations.⁸⁸³

(3) The replies by States and international organizations to the questionnaire on reservations do not give any usable information regarding competence to decide on the withdrawal of a reservation at the internal level. The literature, however, provides certain indications in that respect.⁸⁸⁴ A more exhaustive study would very probably reveal the same diversity in relation to internal competence to withdraw reservations as has been noted with regard to their formulation.⁸⁸⁵ There seems to be no reason, therefore, why the wording of guideline 2.1.4 should not be transposed to the withdrawal of reservations.

(4) It would in particular seem essential to indicate in the Guide to Practice whether and to what extent a State can claim that the withdrawal of a reservation is not valid because it violates the rules of its internal law; this situation could very well arise in practice, even though a specific example does not appear to exist.

(5) As the Commission indicated in relation to the formulation of reservations,⁸⁸⁶ there might be a case for

⁸⁸² A reservation “removed” from the treaty; its withdrawal serves as the culmination of its acceptance.

⁸⁸³ See the commentary to guideline 2.1.4.

⁸⁸⁴ See, for example, G. Gaja, “Modalità singolari per la revoca di una riserva”, *Rivista di diritto internazionale*, vol. 72 (1989), pp. 905–907, or Migliorino, “La revoca di riserve ...” (footnote 809 above), pp. 332–333, in relation to the withdrawal of a reservation by Italy to the 1951 Convention relating to the Status of Refugees or, for France, Flauss, “Note sur le retrait par la France des réserves ...” (footnote 818 above), p. 863.

⁸⁸⁵ See paragraphs (3)–(6) of the commentary to guideline 2.1.4.

⁸⁸⁶ *Ibid.*, paragraph (10).

applying to reservations the “defective ratification” rule of article 46 of the Vienna Conventions, and still more to the withdrawal of reservations, given that the process of ratification or accession is thereby completed. Whether the formulation of reservations or, to an even greater extent, their withdrawal is involved, the relevant rules are seldom spelt out in formal texts of a constitutional or even a legislative nature.⁸⁸⁷

(6) The Commission wondered whether it would not be more elegant simply to refer the reader to guideline 2.1.4, of which guideline 2.5.5 is a word-for-word transposition, with the simple replacement of the words “formulation” and “formulate” by the words “withdrawal” and “withdraw”. Contrary to the position it took with regard to guideline 2.5.6, the Commission decided that it would be preferable in the present case to opt for the reproduction of guideline 2.1.4: guideline 2.5.5 is inextricably linked with guideline 2.5.4, for which a simple reference is impossible.⁸⁸⁸ It seems preferable to proceed in the same manner in both cases.

2.5.6 Communication of withdrawal of a reservation

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.

Commentary

(1) As the Commission has noted elsewhere,⁸⁸⁹ the Vienna Conventions are completely silent as to the procedure for the communication of withdrawal of reservations. Article 22, paragraph 3 (a), undoubtedly implies that the contracting States and international organizations should be notified of a withdrawal, but it does not specify either who should make this notification or the procedure to be followed. Guideline 2.5.6 serves to fill that gap.

(2) To that end, the Commission used the same method as for the formulation of a withdrawal *stricto sensu*⁸⁹⁰ and considered whether it might not be possible and appropriate to transpose guidelines 2.1.5–2.1.7, which it had adopted on the communication of reservations themselves.

(3) The first remark that must be made is that, although the Vienna Conventions do not specify the procedure to be followed for withdrawing a reservation, the *travaux préparatoires* of the 1969 Vienna Convention show that those who drafted the law of treaties were in no doubt about the fact that:

– notification of withdrawal must be made by the depositary, if there is one; and

– the recipients of the notification must be “every State which is or is entitled to become a party to the treaty” and “interested States”.⁸⁹¹

(4) It is only because, at least partly at the instigation of Rosenne, it was decided to group together all the rules relating to depositaries and notification, which constitute articles 76–78 of the 1969 Vienna Convention,⁸⁹² that these proposals were abandoned.⁸⁹³ They are, however, entirely consistent with guidelines 2.1.5 and 2.1.6.

(5) This approach is endorsed by the literature,⁸⁹⁴ meagre though it is, and is also in line with current practice. Thus:

– both the Secretary-General of the United Nations⁸⁹⁵ and the Secretary General of the Council of Europe⁸⁹⁶ observe the same procedure on withdrawal as on the communication of reservations: they are the recipients of withdrawals of reservations made by States or international organizations to treaties of which they are depositaries, and they communicate them to all the contracting States or contracting organizations and the States and international organizations entitled to become parties;

– moreover, where treaty provisions expressly relate to the procedure to be followed in respect of withdrawal of reservations, they generally follow the model used for the formulation of reservations, in line with the rules given in guidelines 2.1.5 and 2.1.6, in that they specify that the depositary must be notified of a withdrawal⁸⁹⁷ and even

⁸⁹¹ *Ibid.*, paragraphs (2)–(3).

⁸⁹² And articles 77–79 of the 1986 Vienna Convention.

⁸⁹³ See paragraph (4) of the commentary to guideline 2.5.4.

⁸⁹⁴ See Migliorino, “La revoca di riserve ...” (footnote 809 above), at p. 323, or Maresca, *Il diritto dei trattati ...* (footnote 351 above), p. 302, or Pellet and Schabas, “1969 Vienna Convention. Article 23: Procedure regarding reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 623–625, paras. 110–116.

⁸⁹⁵ See *Multilateral Treaties ...* (footnote 37 above), *passim* (see, among many other examples, the withdrawal of reservations to the Vienna Convention on Diplomatic Relations of 18 April 1961 by China (chap. III.3), Egypt (*ibid.*) or Mongolia (*ibid.*); to the International Covenant on Civil and Political Rights of 16 December 1966 by Australia, Belarus, Belgium, Finland, France, Iceland, Ireland, Italy, Liechtenstein, Mexico, the Netherlands, Norway, the Republic of Korea, Switzerland and the United Kingdom (*ibid.*, chap. IV.4); or to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 by Colombia, Jamaica and the Philippines (*ibid.*, chap. VI.19)).

⁸⁹⁶ See Council of Europe, European Committee on Legal Cooperation (CDCJ), *CDCJ Conventions and Reservations to those Conventions* (footnote 659 above) (withdrawal of reservations by Germany and Italy to the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality of 1963, pp. 11–12); see also the brochure issued by the Directorate of Legal Advice and Public International Law, 2009, p. 2. For an example, see the notification by Poland of the withdrawal of its reservations to the Criminal Law Convention on Corruption, addressed to all member States and to Belarus (Council of Europe, document JJ6871C Tr./173-102 of 19 June 2009).

⁸⁹⁷ See, for example, article 48, paragraph 2, of the Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May 1956; article 40, paragraph 2, of the Convention on the limitation period in the international sale of goods, as amended by the Protocol of 11 April 1980; article 15, paragraph 2, of the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union of 26 May 1997; or article 43, paragraph 1, of the Convention on cybercrime of 23 November 2001.

⁸⁸⁷ These uncertainties also explain the hesitation of the few authors who have tackled the question (see footnote 884 above). If a country’s own specialists in these matters are in disagreement among themselves or criticize the practices of their own Government, other States or international organizations cannot be expected to delve into the mysteries and subtleties of internal law.

⁸⁸⁸ See paragraph (17) of the commentary to guideline 2.5.4.

⁸⁸⁹ *Ibid.*, paragraph (1).

⁸⁹⁰ *Ibid.*, paragraph (8).

that he should communicate it to the contracting States or organizations⁸⁹⁸ or, more broadly, to “every State entitled to become party” or to “every State”, without specifying further.⁸⁹⁹

(6) As for the depositary, there is no reason to give him a role different from the extremely limited one assigned to it for the formulation of reservations in guidelines 2.1.6 and 2.1.7, which are a combination of article 77, paragraph 1, and article 78, paragraphs 1 (*d*) and 2, of the 1986 Vienna Convention⁹⁰⁰ and are consistent with the principles on which the relevant Vienna rules are based:⁹⁰¹

– under article 78, paragraph 1 (*e*), the depositary is given the function of “informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty”; notifications relating to reservations and their withdrawal are covered by this provision, which appears in modified form in guideline 2.1.6, paragraph (1) (*b*);

– paragraph 1 of guideline 2.1.7 is based on the provision contained in article 78, paragraph 1 (*d*), under which the depositary should examine whether “notification or communication relating to the treaty is in due and proper form and, if need be, [bring] the matter to the attention of the State or international organization in question”; this, too, applies equally well to the formulation of reservations and to their withdrawal (which could cause a problem with regard to, for example, the person making the communication);⁹⁰²

– paragraph 2 of the same guideline carries through the logic of the “letter-box depositary” theory endorsed by the Vienna Conventions in cases where a difference arises. It reproduces word for word the text of article 78, paragraph 2, of the 1986 Vienna Convention and, again, there seems no need to make a distinction between formulation and withdrawal.

(7) Since the rules contained in guidelines 2.1.5–2.1.7 are in every respect transposable to the withdrawal of reservations, should they be merely referred to or reproduced in their entirety? In relation to the formulation of reservations, the Commission preferred to reproduce and adapt

⁸⁹⁸ See, for example, articles 15, paragraph 2, and 17 (*b*) of the European Agreement on Road Markings of 13 December 1957, or articles 18 and 34, paragraph 1 (*c*), of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961.

⁸⁹⁹ See, for example, articles 25, paragraph 1, and 33 of the Convention on psychotropic substances of 21 February 1971; articles 26, paragraph 3, and 27 of the Customs Convention on Containers of 2 December 1972; articles 21 and 25 of the International Convention on the harmonization of frontier controls of goods of 21 October 1982; article 63 of the Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children of 19 October 1996 (notification to be made “to Member States of the Hague Conference on Private International Law”); or article 22 of or the Council of Europe Convention on the avoidance of statelessness in relation to State succession of 19 May 2006.

⁹⁰⁰ These correspond to articles 77–78 of the 1969 Vienna Convention.

⁹⁰¹ See the commentary to guidelines 2.1.6 and 2.1.7.

⁹⁰² See paragraphs (10)–(11) of the commentary to guideline 2.5.4.

guidelines 2.1.3 and 2.1.4 in guidelines 2.5.4 and 2.5.5. That position was, however, primarily dictated by the consideration that simply transposing the rules governing competence to formulate a reservation to competence to withdraw it was impossible.⁹⁰³ The same does not apply to the communication of withdrawal of reservations or the role of the depositary in that regard: the text of guidelines 2.1.5, 2.1.6 and 2.1.7 fits perfectly, with the simple replacement of the word “formulation” by the word “withdrawal”. The use of a cross reference thus has fewer disadvantages.

2.5.7 *Effects of withdrawal of a reservation*

1. The withdrawal of a reservation entails the full application of the provisions to which the reservation relates in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

2. The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

Commentary

(1) In the abstract, it is not very logical to insert guidelines relating to the effect of the withdrawal of a reservation in a section of the Guide to Practice dealing with the procedure for reservations, particularly since it is scarcely possible to dissociate the effect of the withdrawal from that of the reservation itself: the one cancels out the other. After some hesitation, however, the Commission decided to do so, for two reasons:

– in the first place, article 22 of the Vienna Conventions links the rules governing the form and procedure⁹⁰⁴ of a withdrawal closely with the question of its effect; and

– in the second place, the effect of a withdrawal may be viewed as being autonomous, thus precluding the need to go into the infinitely more complex effect of the reservation itself.

(2) Article 22, paragraph 3 (*a*), of the Vienna Conventions is concerned with the effect of the withdrawal of a reservation only in relation to the particular question of the time at which the withdrawal “becomes operative”. During the *travaux préparatoires* of the 1969 Vienna Convention, however, the Commission occasionally considered the more substantial question of how it would be operative.

(3) In his first report on the law of treaties, Sir Gerald Fitzmaurice proposed a provision that, where a reservation

⁹⁰³ See paragraph (17) of the commentary to guideline 2.5.4 and paragraph (6) of the commentary to guideline 2.5.5.

⁹⁰⁴ Admittedly, only to the extent that paragraph 3 (*a*) refers to the “notice” of a withdrawal.

is withdrawn, “the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties”.⁹⁰⁵ Draft article 22, paragraph 2, adopted by the Commission on first reading in 1962, provided that “upon withdrawal of a reservation, the provisions of article 21 [relating to the application of reservations] cease to apply”.⁹⁰⁶ This sentence disappeared from the Commission’s final draft.⁹⁰⁷ In plenary, Sir Humphrey Waldock suggested that the Drafting Committee might discuss a further question, namely, “the possibility that the effect of the withdrawal of a reservation might be that the treaty entered into force in the relations between two States between which it had not previously been in force”,⁹⁰⁸ while, during the United Nations Conference on the Law of Treaties, several amendments were made with a view to re-establishing a provision to that effect in the text of the 1969 Vienna Convention.⁹⁰⁹

(4) The Drafting Committee of the Conference rejected the proposed amendments, on the grounds that they were superfluous and that the effect of the withdrawal of a reservation was self-evident.⁹¹⁰ This is only partially true.

(5) There can be no doubt that “the effect of withdrawal of a reservation is obviously to restore the original text of the treaty”.⁹¹¹ A distinction should, however, be drawn between three possible situations.

(6) In the relations between the reserving and the accepting State (or international organization) (article 20, paragraph 4, of the Vienna Conventions), the reservation ceases to be operational (article 21, paragraph 1):

*Intervenendo in una situazione di questo tipo, la revoca della riserva avrà l'effetto di ristabilire il contenuto originario del trattato nei rapporti tra lo Stato riservante e lo Stato che ha accettato la riserva. La revoca della riserva crea quella situazione giuridica che sarebbe esistita se la riserva non fosse stata appostata.*⁹¹² (“In

⁹⁰⁵ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 116, art. 40, para. 3; see paragraph (2) of the commentary to guideline 2.5.1 and footnote 777 above.

⁹⁰⁶ *Yearbook ... 1962*, vol. II, document A/5209, p. 181; see paragraph (3) of the commentary to guideline 2.5.1 and footnote 783 above.

⁹⁰⁷ It was discarded on second reading following consideration by the Drafting Committee of the new draft article proposed by Sir Humphrey Waldock, who retained it in part (see the commentary to guideline 2.5.8, paragraph (4)), without offering any comment (see *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 272, para. 22).

⁹⁰⁸ *Ibid.*, 800th meeting, 11 June 1965, p. 178, para. 86; in that context, see the statement made by Mr. Rosenne, *ibid.*, para. 87.

⁹⁰⁹ Amendment by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1); see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (see footnote 54 above), Reports of the Committee of the Whole, p. 141, para. 207, documents with a sub-amendment by the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.167), *ibid.*, p. 141.

⁹¹⁰ *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (see footnote 35 above), 70th meeting of the Committee of the Whole (14 May 1968), statement by Mr. Yasseen, Chairperson of the Drafting Committee, p. 417, para. 37.

⁹¹¹ Bowett, “Reservations to non-restricted ...” (footnote 150 above), p. 87. See also Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 313.

⁹¹² Migliorino, “La revoca di riserve ...” (footnote 809 above), p. 325; in this connection, see also Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 314.

a situation of this kind, the withdrawal of a reservation will have the effect of re-establishing the original content of the treaty in the relations between the reserving and the accepting State. The withdrawal of the reservation produces the situation that would have existed if the reservation had not been made.”)

Migliorino gives the example of the withdrawal by Hungary, in 1989, of its reservation to the Single Convention on Narcotic Drugs, 1961, article 48, paragraph 2, of which provides for the competence of the International Court of Justice;⁹¹³ there had been no objection to this reservation and, as a result of the withdrawal, the Court’s competence to interpret and apply the Convention was established from the effective date of the withdrawal.⁹¹⁴

(7) The same applies to the relations between the State (or international organization) that withdraws a reservation and a State (or international organization) that has objected to but not opposed the entry into force of the treaty between itself and the reserving State. In this situation, under article 21, paragraph 3, of the Vienna Conventions, the provisions to which the reservation related did not apply in the relations between the two parties:

Intervenendo in una situazione di questo tipo la revoca della riserva produce l'effetto di estendere, nei rapporti tra lo Stato riservante e lo Stato obiettante, l'applicazione del trattato anche alle disposizioni coperte dalla riserva. (“In a situation of this kind, the withdrawal of a reservation has the effect of extending, in the relations between the reserving and the objecting State, the application of the treaty to the provisions covered by the reservation.”)⁹¹⁵

(8) The most radical effect of the withdrawal of a reservation occurs where the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or organization. In this situation, the treaty enters into force⁹¹⁶ on the date on which the withdrawal takes effect. “For a State ... which had previously expressed a maximum-effect objection, the withdrawal of the reservation will mean the establishment of full treaty relations with the reserving State.”⁹¹⁷

(9) In other words, the withdrawal of a reservation entails the application of those provisions of the treaty to which the reservation applied in their entirety (but not necessarily of the treaty as a whole if any other reservations exist) in the relations between the State or international organization that withdraws the reservation and all the other contracting States or contracting organizations,

⁹¹³ *Multilateral Treaties ...* (footnote 37 above), chap. VI.15.

⁹¹⁴ Migliorino, “La revoca di riserve ...” (footnote 809 above), pp. 325–326.

⁹¹⁵ *Ibid.*, pp. 326–327; the author gives the example of the withdrawal by Portugal, in 1972, of its reservation to article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations of 1961, which gave rise to several objections by States which did not, nevertheless, oppose the entry into force of the Convention between them and Portugal (see *Multilateral Treaties ...* (footnote 37 above), chap. III.3, footnote 23).

⁹¹⁶ See article 24 of the Vienna Conventions, especially paragraph 3.

⁹¹⁷ Szafarz, “Reservations to multilateral treaties” (footnote 27 above), pp. 313 and 314; in that connection, see Ruda, “Reservations to treaties” (footnote 56 above), p. 202; Bowett, “Reservations to non-restricted ...” (footnote 150 above), p. 87; and Migliorino, “La revoca di riserve ...” (footnote 809 above), pp. 328–329. The latter gives the example of the withdrawal by Hungary, in 1989, of its reservation to article 66 of the 1969 Vienna Convention (see *Multilateral Treaties ...* (footnote 37 above), chap. XXIII.1); this example is not really convincing, since the objecting States had not formally rejected the application of the Convention in the relations between themselves and Hungary.

whether they had accepted or objected to the reservation, although, in the second case, if the objecting State or international organization had opposed the entry into force of the treaty between itself and the author of the reservation by reason of the reservation in question, the treaty enters into force from the effective date of the withdrawal.

(10) In the latter case, treaty relations between the author of the reservation and the author of the objection are established even where other reservations remain, since the opposition of the State or international organization to the entry into force of the treaty was due to the objection to the withdrawn reservation. The other reservations become operational, in accordance with the provisions of article 21 of the Vienna Conventions, as from the entry into force of the treaty in the relations between the two parties.

(11) It should also be noted that the wording of paragraph 1 of the guideline follows that of the Vienna Conventions, in particular article 2, paragraph 1 (*d*), and article 23, which assume that a reservation refers to treaty provisions (in the plural). It goes without saying that the reservation can be made to only one provision or, in the case of an “across-the-board” reservation, to “the treaty as a whole with respect to certain specific aspects”.⁹¹⁸ Paragraph 1 of guideline 2.5.7 covers both of these cases.

2.5.8 *Effective date of withdrawal of a reservation*

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Commentary

(1) Guideline 2.5.8 reproduces the text of the *chapeau* and subparagraph (*a*) of article 22, paragraph 3, of the 1986 Vienna Convention.

(2) This provision, which reproduces the 1969 text with the sole addition of the reference to international organizations, was not specifically discussed during the *travaux préparatoires* of the 1986 Vienna Convention⁹¹⁹ or at the United Nations Conference on the Law of Treaties of

1968–1969, which did no more than clarify⁹²⁰ the text adopted on second reading by the Commission.⁹²¹ Its adoption had, however, given rise to some discussion in the Commission in 1962 and 1965.

(3) Whereas Sir Gerald Fitzmaurice had planned in his first report, in 1956, to spell out the effects of the withdrawal of a reservation,⁹²² Sir Humphrey Waldock expressed no such intention in his first report, in 1962.⁹²³ It was, however, during the Commission’s discussions in that year that, for the first time, a provision was included, at the request of Mr. Bartoš, in draft article 22 on the withdrawal of reservations, that such withdrawal “takes effect when notice of it has been received by the other States concerned”.⁹²⁴

(4) Following the adoption of this provision on first reading, three States reacted:⁹²⁵ the United States of America, which welcomed it; and Israel and the United Kingdom of Great Britain and Northern Ireland, which were concerned about the difficulties that might be encountered by other States parties as a result of the suddenness of the effect of a withdrawal. Their arguments led the Special Rapporteur to propose, in his report, the addition to draft article 22 of a subparagraph (*c*) involving a complicated formulation whereby the withdrawal became operative as soon as the other States had received notice of it, but they were given three months’ grace to make any necessary changes.⁹²⁶ In this way, Sir Humphrey Waldock intended to give the other parties the opportunity to take the “requisite legislative or administrative action ..., where necessary”, so that their internal law could be brought into line with the situation arising out of the withdrawal of the reservation.⁹²⁷

(5) As well as criticizing the overcomplicated formulation of the solution proposed by the Special Rapporteur, the members of the Commission were divided on the principle of the provision. Mr. Ruda, supported by Mr. Briggs, said that there was no reason to allow a period of grace in the case of withdrawal of reservations when no such provision existed in the case of the entry

⁹²⁰ See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 142, para. 211 (text of the Drafting Committee).

⁹²¹ The plural (“when notice of it has been received by the other contracting States”); see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 209) was changed to the singular, which had the advantage of underlining that the time of becoming operative was specific to each of the parties (see the exposition by Mr. Yasseen, Chairperson of the Conference Drafting Committee, in *Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (footnote 332 above), 11th plenary meeting, p. 36, para. 11). On the final adoption of draft article 22 by the Commission, see *Yearbook ... 1965*, vol. I, 816th meeting, p. 285, and *Yearbook ... 1966*, vol. I (Part Two), 892nd meeting, p. 327.

⁹²² See paragraph (2) of the commentary to guideline 2.5.1.

⁹²³ See paragraph (3) of the commentary to guideline 2.5.1.

⁹²⁴ See paragraph (5) of the commentary to guideline 2.5.1.

⁹²⁵ See the fourth report by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 55–56.

⁹²⁶ “(c) on the date when the withdrawal becomes operative[,] article 21 ceases to apply, provided that, during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice” (*ibid.*).

⁹²⁷ *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 175, para. 47.

⁹¹⁸ See paragraph 2 of guideline 1.1.

⁹¹⁹ See Mr. Reuter, fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations (*Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 38), and fifth report (*Yearbook ... 1976*, vol. II (Part One), document A/CN.4/290 and Add.1, p. 146); for the (lack of) discussion by the Commission at its twenty-ninth session, see *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, pp. 100–101, paras. 30–34 and 1435th meeting, 7 June 1977, p. 103, paras. 1–2; also 1451st meeting, 1 July 1977, pp. 194–196, paras. 12–16, and the Commission’s report to the General Assembly on the work of its twenty-ninth session, *ibid.*, vol. II (Part Two), pp. 114–115; and, for the second reading, see the tenth report of Mr. Reuter, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, p. 63, para. 84; for the (lack of) discussion by the Commission at its thirty-third session, see *ibid.*, vol. I, 1652nd meeting, 15 May 1981, p. 54, paras. 27–28 and 1692nd meeting, 16 July 1981, p. 264, para. 38. The final text is contained in *ibid.*, vol. II (Part Two), p. 140, and *Yearbook ... 1982*, vol. II (Part Two), pp. 36–37.

into force of a treaty as a result of the consent given by a State to be bound.⁹²⁸ Other members, however, including Mr. Tunkin and Sir Humphrey Waldock himself, pointed out, with some reason, that the two situations were different: where ratification was concerned, “a State could obtain all the time it required by the simple process of delaying ratification until it had made the necessary adjustments to its municipal law”; in the case of the withdrawal of a reservation, by contrast, “the change in the situation did not depend on the will of the other State concerned, but on the will of the reserving State which decided” to withdraw it.⁹²⁹

(6) The Commission considered, however, that “such a clause would unduly complicate the situation and that, in practice, any difficulty that might arise would be obviated during the consultations in which the States concerned would undoubtedly engage”.⁹³⁰ The Commission nevertheless showed some hesitation in once again stipulating that the date on which the withdrawal became operative was that on which the other contracting States or organizations had been notified, because in its final commentary, after explaining that it had concluded that to formulate as a general rule the granting of a short period of time within which States could “adapt their internal law to the new situation [resulting from the withdrawal of the reservation] would be going too far”, the Commission “felt that the matter should be left to be regulated by a specific provision in the treaty. It also considered that, even in the absence of such a provision, if a State required a short interval of time in which to bring its internal law into conformity with the situation resulting from the withdrawal of the reservation, good faith would debar the reserving State from complaining of the difficulty which its own reservation had occasioned”.⁹³¹

(7) This raises another problem: by proceeding in this manner, the Commission surreptitiously reintroduced in the commentary the exception that Sir Humphrey Waldock had tried to incorporate in the actual text of what was to become article 22 of the 1969 Vienna Convention. Not only was such a manner of proceeding questionable, but the reference to the principle of good faith did not provide any clear guidance.⁹³²

(8) In the Commission’s view, the question is nevertheless whether the Guide to Practice should include the clarification contained in the commentary of 1965: it makes sense to be more specific in this Guide of

recommended practices than in general conventions on the law of treaties. In this case, however, there are some serious objections to such inclusion: the “rule” set out in the commentary manifestly contradicts the one that appears in the 1969 Vienna Convention, and its inclusion in the Guide would therefore depart from that rule. That would be acceptable only if it was felt to meet a clear need, but this is not the case here. In 1965, Sir Humphrey Waldock had “heard of no actual difficulty arising in the application of a treaty from a State’s withdrawal of its reservation”;⁹³³ this would still seem to be the case today. Consequently, it does not appear necessary or advisable to contradict or relax the rule stated in article 22, paragraph 3, of the Vienna Conventions.

(9) It is nonetheless true that, in certain cases, the effect of the withdrawal of a reservation immediately after notification is given might create problems. The 1965 commentary itself, however, gives the correct answer to the problem: in such a case, “the matter should ... be regulated by a specific provision of the treaty”.⁹³⁴ In other words, whenever a treaty relates to an issue, such as personal status or certain aspects of private international law, with regard to which it might be thought that the unexpected withdrawal of a reservation could cause the other parties difficulty because they had not adjusted their internal legislation, a clause should be included in the treaty specifying the period of time required to deal with the situation created by the withdrawal.

(10) This is, moreover, what happens in practice. A considerable number of treaties set a time limit longer than the one ordinarily given, which is reflected in article 22, paragraph 3 (a), of the Vienna Conventions, for the withdrawal of a reservation to take effect. This time limit generally ranges from one to three months, starting, in most cases, from the notification of the withdrawal to the depositary rather than to the other contracting States.⁹³⁵ Conversely, the treaty may set a shorter period than that contained in the Vienna Conventions. Thus, under the European Convention on transfrontier television of 5 May 1989, article 32, paragraph 3:

Any Contracting State which has made a reservation under paragraph 1 may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General*

⁹²⁸ *Ibid.*, p. 176, para. 59 (Mr. Ruda), and p. 177, para. 76 (Mr. Briggs).

⁹²⁹ *Ibid.*, p. 176, paras. 68–69 (Mr. Tunkin); see also p. 175, para. 54 (Mr. Tsuruoka), and p. 177, paras. 78–80 (Sir Humphrey Waldock).

⁹³⁰ Explanations given by Sir Humphrey Waldock, *ibid.*, 814th meeting, 29 June 1965, p. 273, para. 24.

⁹³¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 209, paragraph (2) of the commentary to draft article 20.

⁹³² As the International Court of Justice has observed: “One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith”, *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p. 253, at p. 268, para. 46; p. 473, para. 49; “it is not in itself a source of obligation where none would otherwise exist”, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1988*, p. 69 (see footnote 670 above), at p. 105, para. 94.

⁹³³ *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 273, para. 24.

⁹³⁴ See paragraph (6) above.

⁹³⁵ See the examples given by Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 390, or Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 438. See also, for example, article 24, paragraph 3, of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, adopted on 1 August 1989 by the Hague Conference on Private International Law (three months after notification of the withdrawal); article 12, paragraph 4, of the Convention concerning International Carriage by Rail of 9 May 1980 (one month after the depositary Government notifies the States of the withdrawal); article 97, paragraph 4, of the United Nations Convention on contracts for the international sale of goods of 11 April 1980 (six months); article XIV, paragraph 2, of the Convention on the conservation of migratory species of wild animals of 23 June 1979 (90 days from the transmission of the withdrawal to the parties by the depositary); and article 40, paragraph 3, of the International Convention on travel contracts (CCV) of 23 April 1970 (three months after notification of withdrawal to the Belgian Government).

and not on the date of receipt by the other contracting parties of the notification by the depositary.⁹³⁶ Furthermore, sometimes a treaty stipulates that it is for the State which withdraws its reservation to specify the effective date of the withdrawal.⁹³⁷

(11) The purpose of these express clauses is to overcome the disadvantages of the principle established in article 22, paragraph 3 (a), of the Vienna Conventions, which is not above criticism. Apart from the problems considered above⁹³⁸ arising, in some cases, from the fact that a withdrawal takes effect on receipt of its notification by the other parties, it has been pointed out that the paragraph does not “really resolve the question of the time factor”,⁹³⁹ for although, thanks to the specific provision introduced at the 1969 United Nations Conference on the Law of Treaties,⁹⁴⁰ the partners of a State or international organization that withdraws a reservation know the exact date on which the withdrawal has taken effect in their respect, the withdrawing State or international organization itself remains in uncertainty, for the notification may be received at completely different times by the other parties. This has the unfortunate effect of leaving the author of the withdrawal uncertain as to the date on which its new obligations will become operational.⁹⁴¹ Short of amending the text of article 22, paragraph 3 (a), itself, however, there is no way of overcoming this difficulty, which seems too insignificant in practice⁹⁴² to justify “revising” the Vienna text.

(12) It should, however, be noted in this connection that the rule laid down in this provision departs from ordinary law: normally, an action under a treaty takes effect from the date of its notification to the depositary. That is what articles 16, subparagraph (b), 24, paragraph 3, and 78, subparagraph (b),⁹⁴³ of the 1969 Vienna Convention provide. And that is how the International Court of Justice ruled with regard to optional declarations of acceptance of its compulsory jurisdiction, following a line of reasoning that may, by analogy, be applied to the law of treaties.⁹⁴⁴

⁹³⁶ Council of Europe conventions containing clauses on the withdrawal of reservations generally follow this formula: see article 8, paragraph 2, of the Convention on the reduction of cases of multiple nationality and on military obligations in cases of multiple nationality of 1963; article 13, paragraph 2, of the European Agreement on the transmission of applications for legal aid of 1977; or article 29, paragraph 3, of the European Convention on Nationality of 1997.

⁹³⁷ See article 12, paragraph 2, of the International Convention on the simplification and harmonization of Customs procedures of 18 May 1973 (Revised): “Any Contracting Party which has entered reservations may withdraw them, in whole or in part, at any time by notification to the depositary specifying the date on which such withdrawal takes effect.”

⁹³⁸ Paragraphs (4)–(9).

⁹³⁹ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 290.

⁹⁴⁰ See footnote 921 above.

⁹⁴¹ In this connection, see the comments by Mr. Briggs, *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 177, para. 75, and 814th meeting, 29 June 1965, p. 273, para. 25.

⁹⁴² See paragraph (8) above.

⁹⁴³ Article 79 (b) of the 1986 Vienna Convention.

⁹⁴⁴ “[B]y the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. ... For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned”, *Case concerning Right of Passage over Indian Territory, Preliminary Objections, Judgment*

The exception established by the provisions of article 22, paragraph 3 (a), of the Vienna Conventions is explained by the concern to avoid a situation in which the other contracting States or contracting organizations to a treaty to which a State withdraws its reservation find themselves held responsible for not having observed the treaty provisions with regard to that State, even though they were unaware of the withdrawal.⁹⁴⁵ This concern is to be commended.

(13) The Commission has sometimes criticized the inclusion of the phrase “unless the treaty otherwise provides”⁹⁴⁶ in some provisions of the Vienna Conventions. In some circumstances, however, it is valuable in that it draws attention to the advisability of possibly incorporating specific reservation clauses in the actual treaty in order to obviate the disadvantages associated with the application of the general rule or the ambiguity resulting from silence.⁹⁴⁷ This is the case with regard to the time at which the withdrawal of a reservation becomes operative, which it is certainly preferable to specify whenever the application of the principle set forth in article 22, paragraph 3 (a), of the Vienna Conventions and also contained in guideline 2.5.8 might give rise to difficulties, either because the relative suddenness with which the withdrawal takes effect might put the other parties in an awkward position or, conversely, because there is a desire to neutralize the length of time elapsing before notification of withdrawal is received by them.

2.5.9 Cases in which the author of a reservation may set the effective date of withdrawal of the reservation

The withdrawal of a reservation becomes operative on the date set by the State or international organization which withdraws the reservation, where:

(a) that date is later than the date on which the other contracting States or contracting organizations received notification of it; or

(b) the withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or contracting organizations.

Commentary

(1) Guideline 2.5.9 specifies the cases in which article 22, paragraph 3 (a), of the Vienna Conventions does not apply, not because there is an exemption to it but because it is not designed for that purpose. Regardless of the situations in which an express clause of the treaty rules out the application of the principle embodied in this

of November 26th, 1957, I.C.J. Reports 1957, p. 125, at p. 146; see also *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1988*, p. 275, at pp. 291 and 293, paras. 25 and 30.

⁹⁴⁵ See the Commission’s commentary to draft article 22, adopted on first reading, *Yearbook ... 1962*, vol. II, document A/5209, pp. 181–182, and to draft article 20, adopted on second reading, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 209.

⁹⁴⁶ See, for example, paragraph (15) of the commentary to guideline 2.5.1.

⁹⁴⁷ See, for example, guidelines 2.3 and 2.3.1.

provision, this applies in the two above-mentioned cases, where the author of the reservation can unilaterally set the effective date of its withdrawal.

(2) Subparagraph (a) of guideline 2.5.9 considers the case in which the author of a reservation sets that date at a time later than that resulting from the application of article 22, paragraph 3 (a). This does not pose any particular problems: the period provided for in this provision is intended to enable the other parties not to be caught unawares and to be fully informed of the scope of their commitments in relation to the State (or international organization) renouncing its reservation. From such time as that information is effective and available, therefore, there is no reason why the author of the reservation should not set the effective date of the reservation's withdrawal as it wishes, since, in any case, it could have deferred the date by notifying the depositary of the withdrawal at a later time.

(3) Subparagraph (a) of guideline 2.5.9 deliberately uses the plural ("the other contracting States or contracting organizations") where article 22, paragraph 3 (a), uses the singular ("that State or that organization"). For the withdrawal to take effect on the date specified by the withdrawing State, it is essential that all the other contracting States and contracting organizations should have received notification, otherwise neither the spirit nor the *raison d'être* of article 22, paragraph 3 (a), would have been respected.

(4) Subparagraph (b) concerns cases in which the date set by the author of the reservation is prior to the receipt of notification by the other contracting States or contracting organizations. In this situation, only the withdrawing State or international organization (and, where relevant, the depositary) knows that the reservation has been withdrawn. This is particularly the case where the withdrawal is assumed to be retroactive, as sometimes occurs.⁹⁴⁸

(5) In the absence of a specific treaty provision, an intention expressed unilaterally by the reserving State cannot, in theory, prevail over the clear provisions of article 22, paragraph 3 (a), if the other contracting States or international organizations object. The Commission believes, however, that it is not worth making an exception of the category of treaties establishing "integral obligations", especially in the field of human rights; in such a situation, there can be no objection—quite the contrary—to the fact that the withdrawal takes immediate, even retroactive, effect if the State making the original reservation so wishes, since the legislation of other States is, by definition, not affected.⁹⁴⁹ In practice, this is the kind of situation in which retroactive withdrawals have occurred.⁹⁵⁰

(6) One may ask whether it is preferable to view the question from the angle of the withdrawing State or from

that of the other parties, in which case subparagraph (b) ought to have been worded "the withdrawal does not add to the obligations of the other contracting States or international organizations". In fact, these are two sides of the same coin; nevertheless, the first solution is more consistent with the active role of the State that decides to withdraw its reservation.

2.5.10 *Partial withdrawal of a reservation*

1. The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, in the relations between the withdrawing State or international organization and the other parties to the treaty.

2. The partial withdrawal of a reservation is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions.

Commentary

(1) The prevailing view among legal scholars holds that, "[s]ince a reservation can be withdrawn, it is possible also to modify or even replace a reservation, provided the result is to restrict its effect"⁹⁵¹ While this principle is formulated in cautious terms, it is hardly debatable and can be stated more categorically: nothing prevents the modification of a reservation if the modification reduces the scope of the reservation and amounts to a partial withdrawal. This is the point of departure of guideline 2.5.10.

(2) Clearly, this does not raise the slightest problem when such a modification is expressly provided for by the treaty. While this is relatively rare, there are reservation clauses to this effect. For example, article 23, paragraph 2, of the Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) of 6 February 1976 provides as follows:

The declaration provided for in paragraph 1 of this article may be made, withdrawn or modified at any later date; in such case, the declaration, withdrawal or modification shall take effect as from the ninetieth day after receipt of the notice by the Secretary-General of the United Nations.

(3) In addition, reservation clauses expressly contemplating the total or partial withdrawal of reservations are to be found more frequently. For example, article 8, paragraph 3, of the Convention on the nationality of married women of 20 February 1957 provides as follows:

Any State making a reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received.⁹⁵²

⁹⁴⁸ See the example given by Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 291 (withdrawal of reservations by Denmark, Norway and Sweden to the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons: see *Multilateral Treaties ...* (footnote 37 above), chap. V.2–3).

⁹⁴⁹ In this connection, see Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 290–291.

⁹⁵⁰ See footnote 948 above.

⁹⁵¹ Aust, *Modern Treaty Law and Practice* (footnote 155 above), p. 156. See also Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 293, or Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), p. 96.

⁹⁵² See also, for example, article 50, paragraph 4, of the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Convention of 1975: "A State which has made reservations may at any time by notification in writing withdraw all or part of its reservations."

The same applies to article 17, paragraph 2, of the Convention on the Protection of the Environment Through Criminal Law of 4 November 1998, which reads as follows:

Any State which has made a reservation ... may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.⁹⁵³

In addition, under article 15, paragraph 2, of the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union of 26 May 1997:

Any Member State which has entered a reservation may withdraw it at any time in whole or in part by notifying the depositary. Withdrawal shall take effect on the date on which the depositary receives the notification.

(4) The fact that partial or total withdrawal are mentioned simultaneously in numerous treaty clauses highlights the close relationship between them. This relationship, confirmed in practice, is, however, sometimes contested in the literature.

(5) During the preparation of the draft articles on the law of treaties by the International Law Commission, Sir Humphrey Waldock suggested the adoption of a draft article placing the total and partial withdrawal of reservations on an equal footing.⁹⁵⁴ Following the consideration of this draft by the Drafting Committee, it returned to the plenary stripped of any reference to the possibility of withdrawing a reservation “in part”,⁹⁵⁵ although no reason for this modification can be inferred from the summaries of the discussions. The most plausible explanation is that this seemed to be self-evident—“he who can do more can do less”—and the word “withdrawal” should very likely be interpreted, given the somewhat surprising silence of the commentary, as meaning “total or partial withdrawal”.

(6) The fact remains that this is not entirely self-evident and that practice and the literature⁹⁵⁶ appear to be somewhat undecided. In practice, one can cite a number of reservations to conventions concluded within the framework of the Council of Europe which were modified without arousing opposition.⁹⁵⁷ For its part, the European

⁹⁵³ See also, for example, article 13, paragraph 2, of the European Convention on the suppression of terrorism of 27 January 1977: “Any State may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.” For other examples of conventions concluded under the auspices of the Council of Europe and containing a comparable clause, see the commentary to guideline 2.5.2, footnote 839 above.

⁹⁵⁴ See draft article 17, paragraph 6, in the first report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 61.

⁹⁵⁵ *Ibid.*, pp. 181–182 (art. 22); on the changes made by the Drafting Committee to the draft prepared by the Special Rapporteur, see paragraph (3) of the commentary to guideline 2.5.1.

⁹⁵⁶ See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 293.

⁹⁵⁷ Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), p. 95; admittedly, it seems to be more a matter of “statements concerning modalities of implementation of a treaty at the internal level” within the meaning of guideline 1.5.2 than of reservations as such.

Commission of Human Rights “showed a certain flexibility” as to the time requirement set out in article 64 of the European Convention on Human Rights:⁹⁵⁸

As internal law is subject to modification from time to time, the Commission considered that a modification of the law protected by the reservation, even if it entails a modification of the reservation, does not undermine the time requirement of article 64. According to the Commission, despite the explicit terms of article 64, “... to the extent that a law *then in force* in its territory is not in conformity ... the reservation signed by Austria on 3 September 1958 [(1958–1959) (2 *Annuaire* 88–91)] covers ... the law of 5 July 1962, which did not have the result of enlarging, *a posteriori*, the area removed from the control of the Commission.”⁹⁵⁹

(7) This latter clarification is essential and undoubtedly provides the key to this jurisprudence: it is *because* the new law *does not enlarge* the scope of the reservation that the Commission considered that it was covered by the law.⁹⁶⁰ Technically, what is at issue is not a modification of the reservation itself but the effect of the modification of the internal law; nevertheless, it seems legitimate to make the same argument. Moreover, in some cases, States formally modified their reservations to the European Convention on Human Rights (in the sense of diminishing their scope) without protest from the other parties.⁹⁶¹

(8) The case law of the European Court of Human Rights can be interpreted in the same way in that, while the Strasbourg Court refuses to extend to new, more restrictive laws benefit of a reservation made upon ratification, it proceeds differently if, following ratification, the law “goes no further than a law in force at the time when the reservation was made”.⁹⁶² The outcome of the *Belilos* case is, however, likely to raise doubts in this regard.

(9) Following the position taken by the European Court of Human Rights concerning the follow-up to its finding that the Swiss “declaration” made in 1974, relating to article 6, paragraph 1, of the European Convention on

⁹⁵⁸ Article 57 since the entry into force of Protocol No. 11 to the Convention, restructuring the control machinery established thereby: “(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article. (2) Any reservation made under this article shall contain a brief statement of the law concerned.”

⁹⁵⁹ Schabas, “Article 64” (footnote 137 above), p. 932. See the reports of the European Commission of Human Rights in the cases of *A.B. (an association) v. Austria* (Application no. 473/59) (footnote 679 above), p. 424, or *X. v. Austria* (Application no. 8180/78) (footnote 679 above), pp. 23–25.

⁹⁶⁰ See the partly dissenting opinion of Judge Valticos in the *Chorherr v. Austria* case: “Where the law in question is amended, the discrepancy to which the reservation relates could no doubt, if a strict view is not taken, be retained in the new text, but it could not of course be widened” (European Court of Human Rights, *Chorherr v. Austria*, Application no. 13308/87, Judgment of 25 August 1993, Series A no. 266-B, p. 40).

⁹⁶¹ See the successive partial withdrawals by Finland of its reservation to article 6 in 1996, 1998, 1999 and 2001 (available from <http://conventions.coe.int/>).

⁹⁶² European Court of Human Rights, case of *Campbell and Cosans*, Applications nos. 7511/76 and 7743/76, Judgment of 25 February 1982, Series A no. 48, p. 17, para. 37.

Human Rights, was invalid,⁹⁶³ Switzerland not without hesitation,⁹⁶⁴ first modified its “declaration”—equated by the Court with a reservation, at least insofar as the applicable rules are concerned—so as to render it compatible with the judgment of 29 April 1988.⁹⁶⁵ The “interpretative declaration” thus modified was notified by Switzerland to the Secretary General of the Council of Europe, the depositary of the Convention, and to the Committee of Ministers “acting as a monitoring body for the enforcement of judgements of the Court”.⁹⁶⁶ These notifications do not seem to have given rise to any disputes or posed any problems for the Convention bodies or other States parties.⁹⁶⁷ However, the situation in the Swiss courts was different. In a decision dated 17 December 1992, *F. v. R. et Conseil d’État du canton de Thurgovie*, the Swiss Federal Court decided, with regard to the grounds for the *Belilos* decision, that it was the entire “interpretative declaration” of 1974 that was invalid and that there was thus no validly formulated reservation to be amended 12 years later; if anything, it would have been a new reservation, which was incompatible with the *ratione temporis* condition for the formulation of reservations established in article 64 of the European Convention on Human Rights⁹⁶⁸ and in article 19 of the 1969 Vienna Convention.⁹⁶⁹ On 29 August 2000, Switzerland officially withdrew its “interpretative declaration” concerning article 6 of the European Convention on Human Rights.

(10) Despite appearances, however, it cannot be inferred from this important decision that the fact that a treaty body with a regulatory function (human rights or other) invalidates a reservation prohibits any change in the challenged reservation:

⁹⁶³ The Court held that “the declaration in question does not satisfy two of the requirements of Article 64 (art. 64) of the Convention [see footnote 958 above], with the result that it must be held to be invalid” (*Belilos* case, Application no. 10328/83, Judgment of 29 April 1988, Series A no. 132, p. 28, para. 60 (see footnote 192 above)) and that, since “it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration”, the Convention should be applied to Switzerland irrespective of the declaration (*ibid.*).

⁹⁶⁴ See Cameron and Horn, “Reservations to the European Convention ...” (footnote 205 above), pp. 69–129.

⁹⁶⁵ Believing that the Court’s rebuke dealt only with the “penal aspect”, Switzerland had limited its “declaration” to civil proceedings.

⁹⁶⁶ Flauss, “Le contentieux de la validité des réserves à la CEDH ...” (footnote 672 above), p. 301; see also W. A. Schabas, “Reservations to human rights treaties: time for innovation and reform”, *Canadian Yearbook of International Law* 1994, p. 39. For references to these notifications, see United Nations, *Treaty Series*, vol. 1496, No. 2889, pp. 234–235, United Nations, *Treaty Series*, vol. 1525, No. 2889, p. 213 and the Appendix to Resolution DH (89) 24 of the Committee of Ministers of 19 September 1989, *Yearbook of the European Convention on Human Rights* 1989, vol. 32 (1989), p. 246.

⁹⁶⁷ Some authors have, however, contested their validity; see Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme ...” (footnote 724 above), p. 314. See also the works cited in the judgment handed down on 17 December 1992 by the Swiss Federal Court in the case *F. v. R. et Conseil d’État du canton de Thurgovie* (footnote 725 above) (para. 6 (b)), and by Flauss, “Le contentieux de la validité des réserves à la CEDH ...” (footnote 672 above), p. 300.

⁹⁶⁸ See footnote 958 above.

⁹⁶⁹ Extensive portions of the Swiss Federal Court’s decision are cited in French translation in the *Journal des Tribunaux* (see footnote 725 above), vol. I: Droit fédéral, 1995, pp. 523–537 [the German text is contained in *Europäische Grundrechte-Zeitschrift*, vol. 20 (1993)]. The relevant passages are to be found in paragraph 7 of the decision (pp. 533–537).

– the Swiss Federal Court’s position is based on the idea that, in this case, the 1974 “declaration” was invalid in its entirety (even if it had not been explicitly invalidated by the European Court of Human Rights); and, above all:

– in that same decision, the Court stated:

While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed. While neither article 64 of the European Convention on Human Rights nor the 1969 Vienna Convention on the Law of Treaties (RS 0.111) explicitly settles this issue, it would appear that, as a rule, the reformulation of an existing reservation should be possible if its purpose is to attenuate an existing reservation. This procedure does not limit the relevant State’s commitment vis-à-vis other States; rather, it increases it in accordance with the Convention.⁹⁷⁰

(11) This is an excellent presentation of both the applicable law and its basic underlying premise: there is no valid reason for preventing a State from *limiting* the scope of a previous reservation by withdrawing it, if only in part; the treaty’s integrity is better ensured thereby, and it is not impossible that, as a consequence, some of the other parties may withdraw objections that they had made to the initial reservation.⁹⁷¹ Furthermore, as has been pointed out, without this option, the equality between parties would be disrupted (at least in cases where a treaty monitoring body exists): “States which have long been parties to the Convention might consider themselves to be subject to unequal treatment by comparison with States which ratified the Convention [more recently] and, *a fortiori*, with future contracting parties”⁹⁷² that would have the advantage of knowing the treaty body’s position with regard to the validity of reservations comparable to the one that they might be planning to formulate and of being able to modify it accordingly.

(12) Moreover, it was such considerations⁹⁷³ that led the Commission to state in its preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, that when a State takes action to address the impermissibility of a reservation, such action “may consist, for example, in the State’s ... modifying its reservation so as to eliminate the inadmissibility”;⁹⁷⁴ obviously, this is possible only if it has the option of modifying the reservation by partially withdrawing it.

(13) In practice, partial withdrawals are far from non-existent. In 1988, Horn noted that, of 1,522 reservations or interpretative declarations made in respect of treaties of which the Secretary-General of the United Nations is the depositary, “47 have been withdrawn completely or

⁹⁷⁰ *F. v. R. et Conseil d’État du canton de Thurgovie*, *Journal des Tribunaux*, 1995 (see footnote 725 above), p. 535.

⁹⁷¹ See Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 223.

⁹⁷² See Flauss, “Le contentieux de la validité des réserves à la CEDH ...” (footnote 672 above), p. 299.

⁹⁷³ *Yearbook ... 1997*, vol. II (Part Two), p. 49, para. 86, and p. 55, paras. 141–144.

⁹⁷⁴ See point 10 of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties adopted by the Commission, *Yearbook ... 1997*, vol. II (Part Two), p. 56, at p. 57, para. 157. See also guideline 4.5.3.

partly”.⁹⁷⁵ He also added that “[i]n the majority of cases, i.e., 30 statements, the withdrawals have been partial. Of these, 6 have experienced successive withdrawals leading in only two cases to a complete withdrawal”.⁹⁷⁶ This trend, while not precipitous, has since shown no signs of slowing down. To cite merely a few recent examples:

– on 25 February 2011, the Government of the Commonwealth of the Bahamas notified the Secretary-General of its decision to withdraw its reservation to article 16, paragraph 1 (*h*), of the Convention on the Elimination of All Forms of Discrimination against Women;⁹⁷⁷

– on 13 December 2010, Thailand partially withdrew its reservation to article 7 of the Convention on the rights of the child;⁹⁷⁸

– on 5 July 1995, following several objections, the Libyan Arab Jamahiriya modified the general reservation that it had made upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, “making it more specific”.⁹⁷⁹

– on 11 November 1988, Sweden partially withdrew its reservation to article 9, paragraph 2, of the Convention on the Recovery Abroad of Maintenance of 20 June 1956;⁹⁸⁰

– on two occasions, in 1986 and 1995, Sweden also withdrew, in whole or in part, some of its reservations to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961.⁹⁸¹

In all these cases, which provide only a few examples, the Secretary-General, as depositary of the conventions in question, took note of the modification without any comment whatsoever.

(14) The Secretary-General’s practice is not absolutely consistent, however, and, in some cases, even those involving modifications which apparently reduce the scope

⁹⁷⁵ Horn, *Reservations and Interpretative Declarations* ... (footnote 25 above), p. 226. Of these 47 withdrawals, 11 occurred during a succession of States. There is no question that a successor State may withdraw reservations made by its predecessor, in whole or in part (see article 20 of the 1978 Vienna Convention); however, as the Commission has decided (see *Yearbook* ... 1995, vol. II (Part Two), p. 107, para. 477 and *Yearbook* ... 1997, vol. II (Part Two), p. 68, para. 221) all problems concerning reservations related to the succession of States are the subject of Part 5 of the Guide to Practice.

⁹⁷⁶ Horn, *Reservations and Interpretative Declarations* ... (footnote 25 above), p. 226. These figures are an interesting indication but should be viewed with caution.

⁹⁷⁷ *Multilateral Treaties* ... (footnote 37 above), chap. IV.8.

⁹⁷⁸ *Ibid.*, chap. IV.11.

⁹⁷⁹ *Ibid.*, chap. IV.8.

⁹⁸⁰ *Ibid.*, chap. XX.1; see also the 1996 “reformulation” of Sweden of one of its reservations to the 1951 Convention relating to the Status of Refugees and its simultaneous withdrawal of several other reservations (*ibid.*, chap.V.2) and the partial, then total (in 1963 and 1980, respectively) withdrawal of a Swiss reservation to that Convention (*ibid.*).

⁹⁸¹ *Ibid.*, chap. XIV.3; see also the modification of Finland of 10 February 1994 reducing the scope of a reservation to the same Convention (*ibid.*).

of the reservations in question, he proceeds as in the case of late formulation of reservations⁹⁸² and confines himself, “in light of the ... practice followed in similar cases”, to receiving “the declarations in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged”.⁹⁸³ This practice is defended in the following words in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*: “when States have wished to substitute new reservations for initial reservations made at the time of deposit ... this has amounted to a withdrawal of the initial reservations—which raised no difficulty—and the making of (new) reservations”.⁹⁸⁴ This position seems to be confirmed by a *note verbale* dated 4 April 2000 from the United Nations Legal Counsel, which describes “the practice followed by the Secretary-General as depositary in respect of communications from States which seek to modify their existing reservations to multilateral treaties deposited with the Secretary-General or which may be understood to seek to do so” and extends the length of time during which parties may object from 90 days to 12 months.⁹⁸⁵

(15) Not only is this position contrary to what appears to be the accepted practice when the proposed modification limits the scope of the modified reservation; it is more qualified than initially appears. The *note verbale* of 4 April 2000 must be read together with the Legal Counsel’s reply of the same date to a *note verbale* from Portugal on behalf of the European Union reporting problems associated with the 90-day time period. In that *note* a distinction is made between “a modification of an existing reservation” and “a partial withdrawal thereof”. In the case of the second type of communication, “the Legal Counsel shares the concerns expressed by the Permanent Representative that it is highly desirable that, as far as possible, communications which are no more than partial withdrawals of reservations should not be subjected to the procedure that is appropriate for modifications of reservations”.

(16) The question is thus merely one of wording: the Secretary-General refers to withdrawals which enlarge the scope of reservations as “modifications” and to those which reduce that scope as “partial withdrawals”; the latter are not (or should not be, although this is not always translated into practice) subject to the cumbersome procedure required for the late formulation of reservations.⁹⁸⁶ To require a one-year time period before the *limitation* of a reservation can produce effects and subjecting it to the

⁹⁸² See paragraphs (11)–(13) of the commentary to guideline 2.3.

⁹⁸³ *Summary of Practice of the Secretary-General* ... (see footnote 75 above), p. 142. See, for example, the procedure followed in the case of the undeniably limiting modification of Azerbaijan of 28 September 2000 (in response to the comments of States which had objected to its initial reservation) of its reservation to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (*Multilateral Treaties* ... (footnote 37 above), chap. IV.12).

⁹⁸⁴ *Summary of Practice of the Secretary-General* ... (see footnote 75 above), p. 62, para. 206.

⁹⁸⁵ *Note verbale* from the Legal Counsel (modification of reservations), 2000 (see footnote 712 above). For further information on this time period, see paragraphs (8)–(9) of the commentary to guideline 2.3.1.

⁹⁸⁶ See guidelines 2.3 to 2.3.2.

risk of a “veto” by a single other party would obviously be counterproductive and in violation of the principle that, to the extent possible, the treaty’s integrity should be preserved.

(17) Despite some elements of uncertainty, the result of the foregoing considerations is that the modification of a reservation whose effect is to reduce its scope must be subject to the same legal regime as a total withdrawal. In order to avoid any ambiguity, especially in view of the terminology used by the Secretary-General of the United Nations,⁹⁸⁷ it is better to refer here to a “partial withdrawal”.

(18) The second paragraph of guideline 2.5.10 takes account of the alignment of the rules on partial withdrawal of reservations with those that apply in the case of a total withdrawal. Thus, it implicitly refers to guidelines 2.5.1, 2.5.2, 2.5.5, 2.5.6 and 2.5.8, which fully apply to partial withdrawals. The same is not true, however, for guideline 2.5.7, on the effect of a total withdrawal.⁹⁸⁸

(19) To avoid any confusion, the Commission also deemed it useful to set out in the first paragraph the definition of what constitutes a partial withdrawal. The definition draws on the actual definition of reservations found in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions and in guideline 1.1.

(20) It is not, however, aligned with that guideline: whereas a reservation is defined “subjectively” by the objective pursued by the author (as reflected by the expression “purports to ...” in those provisions), partial withdrawal is defined “objectively” by the effects that it produces. The explanation for the difference lies in the fact that, while a reservation produces an effect only if it is accepted (expressly or implicitly),⁹⁸⁹ withdrawal, whether total or partial, produces its effects and “the consent of a State or of an international organization which has accepted the reservation is not required”,⁹⁹⁰ nor indeed is any additional formality. This effect is mentioned in the first paragraph of guideline 2.5.10 (partial withdrawal “limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole”) and explained in guideline 2.5.11.

2.5.11 *Effect of a partial withdrawal of a reservation*

1. The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent provided by the new formulation of the reservation. An objection formulated to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

2. No new objection may be formulated to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

⁹⁸⁷ See paragraphs (14)–(16) above.

⁹⁸⁸ See guideline 2.5.11 and paragraph (1) of the commentary thereto.

⁹⁸⁹ See article 20 of the Vienna Conventions and guideline 4.1.

⁹⁹⁰ See guideline 2.5.1.

Commentary

(1) While the form and procedure of a partial withdrawal must definitely be aligned with those of a pure and simple withdrawal,⁹⁹¹ the problem also arises as to whether the provisions of guideline 2.5.7 (Effects of withdrawal of a reservation) can be transposed to partial withdrawals. In fact, there can be no hesitation: a partial withdrawal of a partial reservation cannot be compared to that of a total withdrawal, nor can it be held that the *partial* withdrawal of a reservation entails the full application of the provisions to which the reservation relates in the relations between the State or international organization which *partially* withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.⁹⁹² Of course, the treaty may be implemented to a greater extent in the relations between the reserving State or international organization and the other contracting States or contracting organizations, but not “fully” since, hypothetically, the reservation (in a more limited form, admittedly) remains.

(2) Yet, while partial withdrawal of a reservation does not constitute a new reservation,⁹⁹³ it nonetheless leads to a modification of the previous text. Thus, as the first sentence of guideline 2.5.11 specifies, the legal effect of the reservation is modified “to the extent provided by the new formulation of the reservation”. This wording is based on the terminology used in article 21 of the 1969 and 1986 Vienna Conventions⁹⁹⁴ without entering into a substantive discussion of the effects of reservations and objections thereto.

(3) Another specific problem arises in the case of partial withdrawal. In the case of total withdrawal, the effect is to deprive of consequences the objections that had been made to the reservation as initially formulated,⁹⁹⁵ even if those objections had been accompanied by opposition to the entry into force of the treaty with the author of the reservation.⁹⁹⁶ There is no reason for this to be true in the case of a partial withdrawal. Admittedly, States or international organizations that had made objections would be well advised to reconsider them and withdraw them if the motive or motives that gave rise to them were eliminated by the modification of the reservation, and they may certainly proceed to withdraw them,⁹⁹⁷ but they cannot be required to do so, and they may perfectly well maintain their objections if they deem it appropriate, on the understanding that the objection has been expressly justified by the part of the reservation that has been withdrawn. In the latter case, the objection disappears, which is what is meant by the phrase “insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn”. Two questions nonetheless arise in this connection.

⁹⁹¹ See paragraph (18) of the commentary to guideline 2.5.10.

⁹⁹² See guideline 2.5.7.

⁹⁹³ See paragraph (15) of the commentary to guideline 2.5.10.

⁹⁹⁴ See article 21, paragraph 1: “A reservation established with regard to any party in accordance with articles 19, 20 and 23: (*a*) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation.”

⁹⁹⁵ See paragraph 1 of guideline 2.5.7 (“whether they had accepted the reservation or objected to it”).

⁹⁹⁶ See paragraph 2 of guideline 2.5.7.

⁹⁹⁷ See paragraph (11) of the commentary to guideline 2.5.10, and footnote 971 above; see also guideline 2.7.1.

(4) The first is to know whether the authors of an objection not of this nature must formally confirm it or whether it must be understood to apply to the reservation in its new formulation. In the light of practice, there is scarcely any doubt that this assumption of continuity is essential, and the Secretary-General of the United Nations, as depositary, seems to consider that the continuity of the objection goes without saying.⁹⁹⁸ This seems fairly reasonable, for the partial withdrawal does not eliminate the initial reservation and does not constitute a new reservation; *a priori*, the objections that were made to it rightly continue to apply so long as their authors do not withdraw them. The second sentence of guideline 2.5.11, paragraph 1, draws the necessary consequences.

(5) The second question that arises is whether partial withdrawal of the reservation can, conversely, constitute a new opportunity to object to the reservation resulting from the partial withdrawal. Since it is not a new reservation but an attenuated form of the existing reservation, reformulated so as to bring the reserving State's commitments more fully into line with those provided for in the treaty, it might, *prima facie*, seem somewhat doubtful that the other contracting States and contracting organizations could object to the new formulation.⁹⁹⁹ If they have adapted to the initial reservation, it is difficult to see how they can go against the new one, which, in theory, has attenuated effects. In principle, therefore, a State cannot object to a partial withdrawal any more than it can object to a withdrawal pure and simple.

(6) There is nevertheless an exception to this principle. While there seems to be no example, a partial withdrawal might have a discriminatory effect. Such would be the case if, for instance, a State or an international organization renounced a previous reservation except *vis-à-vis* certain parties or categories of parties or certain categories of beneficiaries to the exclusion of others. In those cases, it would seem necessary for those parties to be able to object to the reservation even though they had not objected to the initial reservation when it applied to all of the contracting States and contracting organizations together. The second paragraph of guideline 2.5.11 sets out both the principle that it is impossible to object to a reservation in the event of a partial withdrawal and the exception when the withdrawal is discriminatory.

2.5.12 *Withdrawal of interpretative declarations*

An interpretative declaration may be withdrawn at any time by an authority considered as representing the State or international organization for that purpose, following the same procedure applicable to its formulation.

⁹⁹⁸ The objections of Denmark, Finland, Mexico, the Netherlands, Norway or Sweden to the reservation formulated by the Libyan Arab Jamahiriya to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (see the commentary to guideline 2.5.10, footnote 979 above) were not modified following the reformulation of the reservation and are still listed in *Multilateral Treaties ...* (footnote 37 above), chap. IV.8.

⁹⁹⁹ Whereas they can certainly remove their initial objections, which, like reservations themselves, can be withdrawn at any time (see article 22, paragraph 2, of the 1969 and 1986 Vienna Conventions); see also paragraph (11) of the commentary to guideline 2.5.10.

Commentary

(1) It follows from guideline 2.4.4 that, except where a treaty provides otherwise,¹⁰⁰⁰ a "simple" interpretative declaration "may be formulated at any time". It may, of course, be inferred therefrom that such a declaration may also be withdrawn at any time without any special procedure. It would, moreover, be paradoxical if the possibility of the withdrawal of an interpretative declaration was more limited than that of the withdrawal of a reservation, which can be done "at any time".¹⁰⁰¹

(2) While States seldom withdraw their interpretative declarations, this does happen occasionally. On 1 March 1990, for instance, the Government of Italy notified the Secretary-General that "it had decided to withdraw the declaration by which the provisions of articles 17 and 18 [of the Convention relating to the Status of Refugees of 28 July 1951] were recognized by it as recommendations only".¹⁰⁰² Likewise, "[o]n 20 April 2001, the Government of Finland informed the Secretary-General [of the United Nations] that it had decided to withdraw its declaration in respect of article 7 (2) made upon ratification" of the 1969 Vienna Convention (ratified by that country in 1977).¹⁰⁰³

(3) This practice is compatible with the very informal nature of interpretative declarations.

(4) The withdrawal of an interpretative declaration must nevertheless be based on the few procedures provided for in guidelines 2.4.2 and 2.4.5 with regard to the authorities which are competent to formulate such a declaration (and which are the same as those which may represent a State or an international organization for the adoption or authentication of the text of the treaty or for expressing their consent to be bound). The wording used in guideline 2.5.12 implicitly refers to those provisions.

2.6 *Formulation of objections*

2.6.1 *Definition of objections to reservations*

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation formulated by another State or international organization,

¹⁰⁰⁰ See guideline 2.4.7.

¹⁰⁰¹ See article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions and guideline 2.5.1.

¹⁰⁰² *Multilateral Treaties ...* (footnote 37 above), chap. V.2. It should be noted that doubts persist as to the nature of this declaration. There are also withdrawals of "statements of non-recognition" (see, for example, the withdrawal of the Egyptian declarations in respect of Israel concerning the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, or the Single Convention on Narcotic Drugs, 1961, following the implementation, in 1980, of the Framework for peace in the Middle East agreed at Camp David, signed in Washington, D.C., on 17 September 1978 (United Nations, *Treaty Series*, vol. 1138, No. 17853, p. 39), *Multilateral Treaties ...* (footnote 37 above), chap. IV.2 or chap. VI.15), but such statements are "outside the scope of the ... Guide to Practice" (see guideline 1.5.1).

¹⁰⁰³ *Multilateral Treaties ...* (footnote 37 above), chap. XXIII.1. The declaration concerned the respective powers of the President of the Republic, the Head of Government and the Minister for Foreign Affairs to conclude treaties. See also the withdrawal by New Zealand of a declaration made upon ratification of the Agreement establishing the Asian Development Bank (*ibid.*, chap. X.4).

whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation.

Commentary

(1) The aim of guideline 2.6.1 is to provide a generic definition applicable to all the categories of objections to reservations provided for in the 1969 and 1986 Vienna Conventions. For this purpose, the Commission has taken as a model the definition of reservations provided in article 2, paragraph 1 (*d*), of the Vienna Conventions and reproduced in guideline 1.1 of the Guide to Practice, adapting it to objections.

(2) The definition of reservations contains five elements:

- the first concerns the nature of the act (“a unilateral statement”);

- the second concerns its designation (“however phrased or named”);

- the third concerns its author (“made by a State or an international organization”);

- the fourth concerns when it should be made (when expressing consent to be bound¹⁰⁰⁴); and

- the fifth concerns its content or object, defined in relation to the objective pursued by the author of the reservation (“whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or organization”¹⁰⁰⁵).

(3) However, the definition of objections need not include all these elements, some of which are specific to reservations and some of which deserve to be further clarified for the purposes of the definition of objections.

(4) It appeared to the Commission in particular that it would be better not to mention the time at which an objection can be formulated; the matter is not clearly resolved in the Vienna Conventions, and it is preferable to consider it separately and endeavour to respond to it in a separate guideline.¹⁰⁰⁶

(5) Conversely, two of the elements in the definition of reservations must without any doubt appear in the definition of objections, which, like reservations, are unilateral statements whose wording or designation is unimportant if their object makes it possible to characterize them as objections.

(6) With regard to the first element, the provisions of the Vienna Conventions leave not the slightest doubt: an objection emanates from a State or an international organization and can be withdrawn at any time.¹⁰⁰⁷ However,

this does not resolve the question of which categories of States or international organizations can formulate an objection.

(7) At this point, it is not necessary to include in the definition the detail found in article 20, paragraph 4 (*b*), of the 1986 Vienna Convention, which refers to a “*contracting* State*” and a “*contracting* organization*”.¹⁰⁰⁸ There are two reasons for this:

- on the one hand, article 20, paragraph 4 (*b*), settles the question of whether an objection has *effects* on the entry into force of the treaty between the author of the reservation and the author of the objection; however, it leaves open the question of whether it is possible for a State or an international organization that is not a contracting State or organization in the meaning of article 2, paragraph 1 (*f*), of the Convention to make an objection; the possibility that such a State or organization might formulate an objection cannot be ruled out, it being understood that the objection would not produce the effect provided for in article 20, paragraph 4 (*b*), until the author became a contracting State or contracting organization. Moreover, article 21, paragraph 3, does not reproduce this detail but refers only to “a State or an international organization objecting to a reservation” without further elaboration; this aspect deserves to be studied separately;

- on the other hand, the definition of reservations itself gives no information as to the status of a State or an international organization that is empowered to formulate a reservation; it does not therefore seem helpful to make the definition of objections more cumbersome by proceeding differently.

(8) With regard to the second element, it is sufficient to recall that the law on reservations to treaties, as embodied in the 1969 Vienna Convention, is permeated by the notion that the intentions of States take precedence over the terminology that they use to express them. According to the definition given in the Convention, the “term”¹⁰⁰⁹ “treaty”, which “means an international agreement ... whatever its particular designation”.¹⁰¹⁰ Likewise, a reservation is defined therein as “a unilateral statement, however phrased or named”,¹⁰¹¹ and the Commission used the same term to define interpretative declarations.¹⁰¹² The same must apply to objections: here again, it is “the

(footnote 698 above), p. 341, or Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 313. It does not follow, however, that, like a reservation, an objection cannot be formulated jointly by several States or international organizations. See guideline 2.6.4 below.

¹⁰⁰⁸ Article 20, paragraph 4 (*b*), of the 1969 Vienna Convention speaks only of the “contracting State”.

¹⁰⁰⁹ The appropriateness in French of describing a single word as an “*expression*” may be questionable, but as this terminological inflection is enshrined in custom it does not seem advisable to question it.

¹⁰¹⁰ Article 2, paragraph 1 (*a*), of the 1969 Vienna Convention. See also, for example, the *Judgment of 1 July 1994* of the International Court of Justice in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112, at p. 120, para. 23: “international agreements may take a number of forms and be given a diversity of names”.

¹⁰¹¹ Article 2, paragraph 1 (*d*), of the 1969 Vienna Convention.

¹⁰¹² See guideline 1.2 and commentary thereto (in particular, paragraphs (14) and (15)) and the examples of “renaming” (*ibid.*, and in the commentary to guideline 1.3.2, “Phrasing and name”).

¹⁰⁰⁴ See guideline 1.1.

¹⁰⁰⁵ *Ibid.*

¹⁰⁰⁶ See guideline 2.6.12 and commentary thereto.

¹⁰⁰⁷ See article 20, paragraph 4 (*b*), article 21, paragraph 3, and article 22, paragraphs 2 and 3 (*b*), of the 1969 and 1986 Vienna Conventions. On this subject, see: Baratta, *Gli effetti delle riserve ...*

intention that counts". The question remains, however, as to what this intention is: this problem is at the heart of the definition proposed in guideline 2.6.1.

(9) At first sight, the word "objection" has nothing mysterious about it. According to the *Dictionnaire de droit international public*, it means the "opposition expressed by a subject of law to an act or a claim by another subject of law in order to prevent its entry into force or its opposability to the first subject".¹⁰¹³ The same work defines "objection to a reservation" as follows: "Expression of rejection by a State of a reservation to a treaty formulated by another State, where the aim of the reservation is to oppose the applicability between the two States of the provision or provisions covered by the reservation, or, if such is the intention stated by the author of the objection, to prevent the entry into force of the treaty as between those two States."¹⁰¹⁴

(10) This latter clarification has its basis in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, which envisages that the author of the objection may indicate whether it opposes the entry into force of the treaty between it and the author of the reservation. In such a case, the intention of the author of the unilateral statement to object to the reservation is not in doubt.

(11) This might not be true of all categories of reactions to a reservation, which might show misgivings on the part of their authors without amounting to an objection as such.

(12) As the arbitral tribunal that settled the dispute between France and the United Kingdom concerning the delimitation of the continental shelf stated in its decision of 30 June 1977:

Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned.¹⁰¹⁵

In this case, the tribunal did not expressly take a position on the nature of the "reaction" of the United Kingdom, but it "acted as if it were an objection",¹⁰¹⁶ namely, by applying the rule set out in article 21, paragraph 3, of the 1969 Vienna Convention, which, however, was not in force between the parties.

(13) The arbitral award has been criticized in this regard,¹⁰¹⁷ but it appears indisputable that the wording of the British statement in question clearly reflects the

¹⁰¹³ J. Salmon (ed.), *Dictionnaire de droit international public*, Brussels, Bruylant, 2001, p. 763.

¹⁰¹⁴ *Ibid.*, p. 764. It need hardly be stated that this definition also applies to an objection formulated by an international organization.

¹⁰¹⁵ Decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), in particular, pp. 32–33, para. 39.

¹⁰¹⁶ P.-H. Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande Bretagne et d'Irlande du Nord", *AFDI*, vol. 24 (1978), p. 45.

¹⁰¹⁷ *Ibid.*

intention of the United Kingdom to object to the French reservation. The statement reads as follows:

The Government of the United Kingdom are unable to accept reservation (b).¹⁰¹⁸

The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning.

(14) As the Anglo-French arbitral tribunal noted, it can happen that a reaction to a reservation, even if critical of it, does not constitute an objection in the sense of articles 20–23 of the Vienna Conventions. The reaction may simply consist of observations, in which a State or an international organization announces its (restrictive) interpretation of the reservation or the conditions under which it considers it to be permissible. For example,

[i]n 1979, the United Kingdom, Germany and France reacted to the reservation made by Portugal to the protection of property rights contained in article 1 of the Protocol to the European Convention on Human Rights. By making this reservation, Portugal intended to exclude the sweeping expropriation and nationalization measures, which had been adopted in the wake of the Carnations Revolution, from any challenge before the European Commission and Court of Human Rights. The reacting States did not formally object to the reservation made by Portugal, but rather made declarations to the effect that it could not affect the general principles of international law which required the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property. Following constitutional and legislative amendments, Portugal withdrew this reservation in 1987.¹⁰¹⁹

(15) The following examples can be interpreted in the same way:

– the communications whereby a number of States indicated that they did not regard "the statements"¹⁰²⁰ concerning paragraph (1) of Article 11 [of the 1961 Vienna Convention on Diplomatic Relations] made by the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and the Mongolian People's Republic as modifying any rights or obligations under that paragraph";¹⁰²¹ the communications could be seen as interpretations of the statements in question (or of the provision to which they relate) rather than as true objections, particularly in contrast with other statements formally presented as objections;¹⁰²²

¹⁰¹⁸ *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), p. 33, para. 40.

¹⁰¹⁹ Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), p. 106; footnotes omitted.

¹⁰²⁰ These statements, in which the parties concerned explained that they consider "that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State", they expressly termed "reservations" (*Multilateral Treaties ...* (footnote 37 above), chap. III.3).

¹⁰²¹ *Ibid.*, Australia, Canada, Denmark, France, Malta, New Zealand, Thailand and the United Kingdom.

¹⁰²² *Ibid.*, statements by Greece, Luxembourg and the Netherlands, or the United Republic of Tanzania and the more ambiguous statement by Belgium. See also, for example, the last paragraph of the communication of the United Kingdom concerning the reservations and declarations accompanying the instrument of ratification deposited by the Union of Soviet Socialist Republics to the 1969 Vienna Convention (*ibid.*, chap. XXIII.1) or the reaction of Norway to the corrective "declaration" of France dated 11 August 1982 regarding the 1978 Protocol to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention) (a declaration that clearly appears

– the communication of the United States of America regarding the first reservation of Colombia to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, in which the United States Government says that it understands the reservation “to exempt Colombia from the obligations imposed by article 3, paragraphs 6 and 9, and article 6 of the Convention only insofar as compliance with such obligations would prevent Colombia from abiding by article 35 of its Political Constitution (regarding the extradition of Colombian nationals by birth), to the extent that the reservation is intended* to apply other than to the extradition of Colombian nationals by birth, the Government of the United States *objects to the reservation**¹⁰²³;¹⁰²³ this is an example of a “conditional acceptance” rather than an objection strictly speaking; or

– the communications of the United Kingdom, Norway and Greece concerning the declaration of Cambodia with regard to the Convention on the International Maritime Organization.¹⁰²⁴

(16) Such “quasi-objections” have tended to proliferate in recent years with the growth of the practice of the “reservations dialogue”. What the dialogue entails is that States inform the reserving State in more or less formal terms of the reasons why they think the reservation should be withdrawn, clarified or modified. Such communications may be true objections, but they may—and often do—initiate a dialogue that might indeed lead to an objection, although it might also result in the modification or withdrawal of the reservation. The reaction of Finland to the reservations formulated by Malaysia on its accession to the Convention on the rights of the child of 1989 clearly falls into the first category and undoubtedly constitutes an objection:

In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation**. The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.¹⁰²⁵

to be a reservation and to which Sweden and Italy had objected as such) stating that it considered it to be a declaration and not a reservation, IMO, *Status of Multilateral Conventions and Instruments ...* (footnote 693 above), p. 118, footnote 1.

¹⁰²³ *Multilateral Treaties ...* (footnote 37 above), chap. VI.19. Colombia subsequently withdrew the reservation (*ibid.*).

¹⁰²⁴ *Ibid.*, chap. XII.1.

¹⁰²⁵ *Ibid.*, chap. IV.11. The full text of this objection reads as follows:

“The reservation made by Malaysia covers several central provisions of the [said Convention]. The broad nature of the said reservation leaves open to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention. In the view of the Government of Finland reservations of such comprehensive nature may contribute to undermining the basis of international human rights treaties.

“The Government of Finland also recalls that the said reservation is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations. It is in the common interest of the States that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfil the object and purpose of the treaty. Moreover, the internal legislation as well as the national policies are also subject to changes which might further expand the unknown effects of the reservation.

(17) Whether or not the reaction of Austria to the same reservations, a reaction also thoroughly reasoned and directed towards the same purpose, can be considered to be an objection is more debatable; the statement of Austria of 18 June 1996 contains no language expressive of a definitive rejection of the reservation of Malaysia but suggests instead a waiting stance:

Under article 19 of the Vienna Convention on the Law of Treaties, which is reflected in article 51 of the [Convention on the rights of the child], a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with the object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.

The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations a *final assessment as to its admissibility under international law cannot be made without further clarification**.

*Until** the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].

Austria, however, objects to the admissibility of the reservations in question *if** the application of this reservation negatively affects the compliance of Malaysia ... with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

Austria could not consider the reservation made by Malaysia ... as admissible under the regime of article 51 of the [Convention on the rights of the child] and article 19 of the Vienna Convention on the Law of Treaties *unless** Malaysia ..., by *providing additional information or through subsequent practice** to ensure[s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention].¹⁰²⁶

Here again, rather than a straightforward objection, the statement can be considered a conditional acceptance (or conditional objection) with a clear intent (to induce the reserving State to withdraw or modify its reservation) but the legal status and effects of which are uncertain, if only because the conditions for accepting or rejecting the reservation are not susceptible to an objective analysis and no particular time limit is set.

(18) Such statements pose problems comparable to those raised by communications in which a State or an international organization “reserves its position” regarding the permissibility of a reservation. For example, there is some doubt as to the scope of the statement by the Netherlands to the effect that the Government of the Netherlands “reserve all rights regarding the

“In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation**. The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.

“The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention].”

For even clearer objections to the reservations of Malaysia, see the statements of Germany, Ireland, the Netherlands, Norway, Portugal and Sweden and the communications of Belgium and Denmark (*ibid.*). Malaysia subsequently withdrew part of its reservations (*ibid.*).

¹⁰²⁶ *Ibid.* See also the reaction of Sweden to the reservation of Canada to the Convention on environmental impact assessment in a transboundary context of 25 February 1991, *ibid.*, chap. XXVII.4.

reservations made by the Government of Venezuela on ratifying [the Convention on the Territorial Sea and the Contiguous Zone of 1958] in respect of article 12 and article 24, paragraphs 2 and 3”.¹⁰²⁷ The same could be said of the statement by the United Kingdom to the effect that it was “not however able to take a position on [the] purported reservations [of the Republic of Korea to the International Covenant on Civil and Political Rights] in the absence of a sufficient indication of their intended effect, in accordance with the terms of the Vienna Convention on the Law of Treaties and the practice of the Parties to the Covenant. Pending receipt of such indication, the Government of the United Kingdom reserve their rights under the Covenant in their entirety”.¹⁰²⁸ Similarly, the nature of the reactions of several States¹⁰²⁹ to the limitations that Turkey had set on its acceptance of the right of individual petition under former article 25 of the European Convention on Human Rights is not easy to determine. These States, using a number of different formulas, communicated to the Secretary General of the Council of Europe that they “reserved their position” pending a decision by the competent organs of the Convention, explaining that “the absence of a formal and official reaction on the merits of the problem should not ... be interpreted as a tacit recognition ... of the Turkish Government’s reservations”.¹⁰³⁰ It is hard to see these as objections; rather, they are notifications of provisional “non-acceptance” associated with a waiting stance. In contrast, an objection involves taking a formal position seeking to prevent the reservation from having the effects intended by its author.

(19) It does not follow that reactions of the type mentioned above¹⁰³¹ which other contracting States or organizations to the treaty may have with respect to the reservations formulated by a State or an international organization are prohibited, or even that they produce no legal effects. However, such reactions are not objections within the meaning of the Vienna Conventions, and their effects relate to the interpretation of the treaty or the unilateral acts constituted by the reservations, or else they form part of the “reservations dialogue” that the treaty’s other contracting States or organizations try to initiate with the author of the reservation. These uncertainties clearly illustrate the value of using precise and unambiguous terminology in the description of a

¹⁰²⁷ *Ibid.*, chap. XXI.1. See also the examples given by Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 318 and 336 (the reaction of Canada to the reservations and declarations of France to the Convention on the Continental Shelf).

¹⁰²⁸ *Multilateral Treaties ...* (footnote 37 above), chap. IV.4. See also the communication of the Netherlands concerning the Australian reservations to article 10 of the Covenant (*ibid.*); on the other hand, the reaction of the Netherlands to the Australian reservations to articles 2 and 50 of the Covenant has more the appearance of an interpretation of the reservations in question (*ibid.*).

¹⁰²⁹ Belgium, Denmark, Luxembourg, Norway and Sweden. Such limitations do not constitute reservations within the meaning of the Guide to Practice (see guideline 1.5.3, paragraph 2), but the example given by Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), p. 107, is no less striking by analogy.

¹⁰³⁰ Statement of Luxembourg. The text of these different statements is reproduced in the Judgment of 23 March 1995 of the European Court of Human Rights in *Loizidou v. Turkey* (Preliminary Objections) (see footnote 304 above), Series A no. 310, pp. 12–13, paras. 18–24.

¹⁰³¹ See paragraphs (13)–(17) of the commentary to the present guideline.

reaction to a reservation, in its phrasing and in the definition of the scope which the author of an objection intends to give to it.¹⁰³²

(20) As to the first point—the description of the reaction—the most prudent solution is certainly to use the noun “objection” or the verb “object”. Such other terms as “opposition/oppose”,¹⁰³³ “rejection/reject”,¹⁰³⁴ and “refusal/refuse” must also, however, be regarded as signifying objection. Unless a special context demands otherwise, the same is true of expressions like “the Government of ... does not accept the reservation ...”¹⁰³⁵ or “the reservation formulated by ... is impermissible/unacceptable/inadmissible”.¹⁰³⁶ Such is also the case when a State or an international organization, without drawing any express inference, states that a reservation is “prohibited by the treaty”,¹⁰³⁷ “entirely void”¹⁰³⁸ or simply “incompatible with the object and purpose”¹⁰³⁹ of the treaty, which is extremely frequent. Even if the author of a statement made in such a way does not openly purport to preclude the reservation from producing its intended effects, it is still expressing opposition to the reservation or, in any case, its firm intention not to accept it. Such statements also constitute objections within the meaning of the Vienna Conventions, and this is taken into account with the expression “otherwise opposes the reservation” in guideline 2.6.1.

(21) The fact remains that in some cases States intend their objections to produce effects other than those

¹⁰³² See, in this respect, the “Model response clauses to reservations” appended to Recommendation No. R (99) 13 adopted on 18 May 1999 by the Committee of Ministers of the Council of Europe. It should be noted that all the alternative wordings proposed in that document expressly utilize the word “objection”. On the disadvantages of vague and imprecise objections, see Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 184–185; see also pp. 191–197 and 221–222.

¹⁰³³ See also the objection of Finland to the reservation by Malaysia to the Convention on the rights of the child (paragraph (16) above, footnote 1025).

¹⁰³⁴ See, for example, the objection of Guatemala to the reservations of Cuba to the Vienna Convention on Diplomatic Relations of 1961 (*Multilateral Treaties ...* (footnote 37 above), chap. III.3).

¹⁰³⁵ See, for example, the objections of the Australian Government to various reservations to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (*ibid.*, chap. IV.1) and of the Government of the Netherlands to numerous reservations to the Convention on the High Seas of 1958 (*ibid.*, chap. XXI.2). See also the British objection to French reservation (b) to article 6 of the Convention on the Continental Shelf (paragraph (13) above, footnote 1018).

¹⁰³⁶ See, for example, the reaction of Japan to reservations made to the Convention on the High Seas of 1958 (*Multilateral Treaties ...* (footnote 37 above), chap. XXI.2) or that of Germany to the Guatemalan reservation to the Convention relating to the Status of Refugees of 1951 (*ibid.*, chap. V.2).

¹⁰³⁷ See, for example, all the communications relating to the declarations made under article 310 of the United Nations Convention on the Law of the Sea of 1982 (*ibid.*, chap. XXI.6).

¹⁰³⁸ See, for example, the reactions of the European Community to the declarations of Bulgaria and the German Democratic Republic regarding the Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) of 1975 (*ibid.*, chap. XI.A.16).

¹⁰³⁹ See, for example, the statement by Portugal concerning the reservations of the Maldives to the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (*ibid.*, chap. IV.8) and that by Belgium concerning the reservations of Singapore to the Convention on the rights of the child of 1989 (*ibid.*, chap. IV.11).

expressly provided for in article 21, paragraph 3, of the Vienna Conventions. The question that then arises is whether, strictly speaking, these can be called objections.

(22) This provision contemplates only two possibilities:

(a) either “the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation”; this is the “minimum” effect of an objection;

(b) or, if the State or international organization formulating an objection to a reservation clearly states that such is its intention, in accordance with the provisions of article 20, paragraph 4 (b), the treaty does not enter into force between itself and the reserving State or organization; this is generally known as the “maximum” effect of an objection.¹⁰⁴⁰

(23) However, there is in practice an intermediate stage between the “minimum” and “maximum” effects of the objection, contemplated in this provision, since there are situations in which a State wishes to enter into treaty relations with the author of the reservation while at the same time considering that the effect of the objection should go beyond what is provided for in article 21, paragraph 3.¹⁰⁴¹

(24) Similarly, the objecting State may intend to produce what has been described as a “super-maximum” effect,¹⁰⁴² consisting in the determination not only that the reservation objected to is not valid but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States. This is the case, for example, with the objection of Sweden of 27 November 2002 to the reservation that Qatar made when acceding to the Optional Protocol to the Convention on the rights of the child on the sale of children, child prostitution and child pornography of 25 May 2000:

This objection shall not preclude the entry into force of the Convention between Qatar and Sweden. The Convention enters into force in its entirety between the two States, without Qatar benefiting from its reservation.¹⁰⁴³

¹⁰⁴⁰ Riquelme Cortado, *Las reservas a los tratados...* (footnote 150 above), pp. 279–280; Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 170–172.

¹⁰⁴¹ See guidelines 3.4.2 and 4.3.7 and commentaries thereto. In this regard, see, for example, the objection of Canada to the reservation of Syria to the 1969 Vienna Convention: “Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable” (*Multilateral Treaties ...* (footnote 37 above), chap. XXIII.1). For other examples and for a discussion of the permissibility of this practice, see below. See also Edwards, “Reservations to treaties” (footnote 59 above), p. 400.

¹⁰⁴² See B. Simma, “Reservations to human rights treaties—some recent developments”, in G. Hafner (ed.), *Liber Amicorum, Professor Ignaz Seidl-Hohenveldern in honour of his 80th birthday*, The Hague, Kluwer, 1998, p. 659, and Riquelme Cortado, *Las reservas a los tratados...* (footnote 150 above), pp. 300–305. On this issue, see guideline 4.5.3 and commentary thereto.

¹⁰⁴³ *Multilateral Treaties ...* (footnote 37 above), chap. IV.11.C; see also the objection of Norway of 30 December 2002 (*ibid.*).

(25) Although the effect of such objections may have been questioned,¹⁰⁴⁴ the fact is that the authors *intend* their objection to produce such intermediate or “super-maximum” effects. Just as the definition of reservations does not prejudice their permissibility, so, in stating in guideline 2.6.1 that, by objecting, the “State or organization purports to preclude the reservation from having its intended effects”, the Commission has endeavoured to take a completely neutral position with regard to the validity of the effects that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections.

(26) The expression “or otherwise opposes the reservation”, meanwhile, purports to recall that, in some cases, the author of the objection is aware that it will produce no concrete effect. This is especially true of objections made to reservations that are considered by the author as being contrary to the object and purpose of the treaty.¹⁰⁴⁵ However, even when an objection to a reservation is permissible, the legal effect of the objection might not have any concrete effect on the treaty relationship “to the extent of the reservation”.¹⁰⁴⁶ Nevertheless, it is quite literally an objection that ultimately produces effects different from those produced by an acceptance, particularly with regard to the entry into force of the treaty for the author of the reservation.¹⁰⁴⁷

(27) This being so, notwithstanding the contrary opinion of some writers,¹⁰⁴⁸ no rule of international law requires a State or an international organization to state its reasons for objecting to a reservation. Except where a specific reservation is expressly authorized by a treaty,¹⁰⁴⁹ the other States and organizations are always free to reject it for any reason whatsoever and even not to enter into treaty relations with its author. A statement drafted as follows:

¹⁰⁴⁴ See guideline 4.5.3 and commentary thereto.

¹⁰⁴⁵ See guideline 4.5.2 (Reactions to a reservation considered invalid) and especially paragraph (7) of the commentary thereto; see also A. Pellet and D. Müller, “Reservations to treaties: an objection to a reservation is definitely not an acceptance”, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, 2011, pp. 54–59.

¹⁰⁴⁶ See guideline 4.3.6, paragraph 1; see also Pellet and Müller, “Reservations to treaties ...” (see previous footnote), p. 50.

¹⁰⁴⁷ Pellet and Müller, “Reservations to treaties ...” (footnote 1045 above), pp. 42–46 and p. 53.

¹⁰⁴⁸ Lijnzaad, *Reservations to UN Human Rights Treaties ...* (footnote 463 above), p. 45, cites in this respect R. Kühner, *Vorbehalte zu multilateralen völkerrechtlichen Verträgen*, Berlin, Springer-Verlag, 1986, p. 183 and Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 309; where the last-mentioned author is concerned, this does not, however, appear to be her true position. Practice indicates that States do not feel bound to give reasons for their objections; see, among others, Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 131 and pp. 209–219.

¹⁰⁴⁹ See, in this respect, the arbitral award of 30 June 1977 in the Anglo-French *Case concerning the delimitation of the Continental Shelf*: “Only if the article had authorised the making of specific reservations could parties to the Convention [on the Continental Shelf] be understood as having accepted a particular reservation in advance” (*Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (footnote 24 above) p. 32, para. 39). Imbert even thinks that an expressly authorized reservation can be objected to (Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 151–152). See also guideline 2.8.13 below.

The Government ... intends to formulate an objection to the reservation made by ...¹⁰⁵⁰

is as valid and legally sound as a statement setting forth a lengthy argument.¹⁰⁵¹ There is, however, a recent but unmistakable trend towards specifying and explaining the reasons that justify the objection in the eyes of the author, and guideline 2.6.9 seeks to encourage States and international organizations to do just this.

(28) The Commission also wishes to point out that it is aware that the word “made”, which appears in the definition (“a unilateral statement ... *made* by a State or an international organization”) is open to discussion: taken literally, it might be understood as meaning that the objection produces effects *per se* without any other condition having to be met. The word “made” was chosen for reasons of symmetry, because it appears in the definition of reservations. On the other hand, it is preferable to indicate that the objection is made “in response to a reservation to a treaty *formulated* by another State or international organization”, as a reservation only produces effects if it is “established with regard to another party in accordance with articles 19, 20 and 23”.¹⁰⁵²

(29) The expression “*in response to a reservation to a treaty formulated* by another State or international organization” would seem to suggest that an objection may be made by a State or an international organization only after a reservation has been *formulated*. *A priori*, this would seem quite logical, but in the Commission’s view this conclusion is hasty.

(30) State practice in fact demonstrates that States also raise objections for “pre-emptive” purposes. Chile, for example, formulated the following objection to the 1969 Vienna Convention:

The Republic of Chile formulates an objection to the reservations which have been made or may be made in the future relating to article 62, paragraph 2, of the Convention.¹⁰⁵³

In the same vein, Japan raised the following objection:

The Government of Japan objects to any reservation intended to exclude the application, wholly or in part, of the provisions of article 66 and the Annex concerning the obligatory procedures for settlement of disputes and does not consider Japan to be in treaty relations with any State which has formulated or will formulate such reservation, in respect of those provisions of Part V of the Convention regarding which the application of the obligatory procedures mentioned above are to be excluded as a result of the said reservation.¹⁰⁵⁴

¹⁰⁵⁰ Among the many examples, see the statements by Australia concerning the reservations of Mexico to the Convention on the Territorial Sea and the Contiguous Zone of 1958 (*Multilateral Treaties ...* (footnote 37 above), chap. XXI.1) and the Convention on the High Seas of 1958 (*ibid.*, chap. XXI.2). See also those by Belgium, Finland, Italy, Norway and the United Kingdom concerning the reservation formulated by Yemen to the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (*ibid.*, chap. IV.2), or statements by Austria concerning the reservation formulated by El Salvador to the Convention on the Rights of Persons with Disabilities of 2006 (*ibid.*, chap. IV.15).

¹⁰⁵¹ See the objection of Finland to the reservation of Malaysia to the Convention on the rights of the child (footnote 1025 above).

¹⁰⁵² Art. 21, para. 1; see also section 4.1 of the Guide to Practice.

¹⁰⁵³ *Multilateral Treaties ...* (footnote 37 above), chap. XXIII.1.

¹⁰⁵⁴ *Ibid.*

However, in the second part of this objection the Japanese Government noted that the effects of this objection should apply *vis-à-vis* the Syrian Arab Republic and Tunisia. It subsequently reiterated its declaration to make it clear that the same effects should be produced *vis-à-vis* the German Democratic Republic and the Union of Soviet Socialist Republics, which had formulated reservations similar to those of the Syrian Arab Republic and Tunisia.¹⁰⁵⁵ Other States have raised new objections in reaction to every reservation to the same provisions newly formulated by another State party.¹⁰⁵⁶

(31) The Japanese objection to the reservations formulated by the Government of Bahrain and the Government of Qatar to the Vienna Convention on Diplomatic Relations of 1961 also states that not only are the two reservations in question regarded as impermissible, but that this [the Japanese] “position is applicable to any reservations to the same effect to be made in the future by other countries”.¹⁰⁵⁷

(32) The objection of Greece regarding reservations to the Convention on the Prevention and Punishment of the Crime of Genocide also belongs in this category of advance objections. It states:

We further declare that we have not accepted and do not accept any reservation which has already been made or which may hereafter be made by the countries signatory to this instrument or by countries which have acceded or may hereafter accede thereto.¹⁰⁵⁸

A general objection was also raised by the Netherlands concerning the reservations to article IX of the same Convention. Although this objection lists the States that had already formulated such a reservation, it concludes: “The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will *make** such reservation a party to the Convention.” This objection was, however, reiterated in 1996 with respect to the reservations made by Malaysia and Singapore and, on the same occasion, withdrawn in relation to Hungary, Bulgaria and Mongolia, which had withdrawn their reservations.¹⁰⁵⁹

(33) Thus State practice is far from uniform in this regard. The Commission believes that there is nothing to prevent a State or international organization from formulating pre-emptive or precautionary objections before a reservation has been formulated or, in the case of reservations already formulated, from declaring in advance its opposition to any similar or identical reservation.

(34) Such advance objections do not, of course, produce the effects contemplated in article 20, paragraph 4, and article 21, paragraph 3, of the Vienna Conventions until a corresponding reservation is formulated by another contracting State or contracting organization. This situation

¹⁰⁵⁵ *Ibid.*

¹⁰⁵⁶ See, for example, the declarations and objections of Germany, the Netherlands, New Zealand, the United Kingdom and the United States to the comparable reservations of several States to the 1969 Vienna Convention (*ibid.*).

¹⁰⁵⁷ *Ibid.*, chap. III.3.

¹⁰⁵⁸ *Ibid.*, chap. IV.1. Despite this general objection, Greece raised two further objections with regard to the reservation of the United States (*ibid.*).

¹⁰⁵⁹ *Ibid.*

is rather similar to that of a reservation formulated by a State or international organization that is a signatory but not yet a party, against which another contracting State or organization has raised an objection; objections of this kind do not produce their effects until the reserving State expresses its consent to be bound by the treaty.¹⁰⁶⁰ An advance objection nevertheless constitutes notice that its author will not accept certain reservations. As the International Court of Justice has noted, such notice safeguards the rights of the objecting State and warns other States intending to formulate a corresponding reservation that such a reservation will be met with an objection.¹⁰⁶¹

2.6.2 Right to formulate objections

A State or an international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation.

Commentary

(1) It is now well established that a State or an international organization may make an objection to a reservation formulated by another State or another international organization, irrespective of the question of the permissibility of the reservation.¹⁰⁶² Although this right is quite extensive, it is not unlimited.

(2) The *travaux préparatoires* of the 1969 Vienna Convention leave no doubt as to the discretionary nature of the formulation of objections but are not very enlightening on the question of who may formulate them.¹⁰⁶³

(3) In its 1951 advisory opinion, the International Court of Justice made an analogy between the permissibility of objections and that of reservations. It considered that

[t]he object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.¹⁰⁶⁴

(4) Draft article 20, paragraph 2 (b), adopted by the Commission on first reading in 1962 after heated debate,¹⁰⁶⁵ endorsed that position and established a link between the objection and the incompatibility of the reservation with the object and purpose of the treaty, which

¹⁰⁶⁰ See guideline 2.6.11.

¹⁰⁶¹ See the citations from the Court's advisory opinion of 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), in paragraph (5) of the commentary to guideline 2.6.11.

¹⁰⁶² See also guideline 4.5.2 and commentary thereto.

¹⁰⁶³ See guideline 2.6.3 and commentary thereto.

¹⁰⁶⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), p. 24.

¹⁰⁶⁵ The criterion of compatibility with the object and purpose of the treaty played a large part in the early debates on reservations (see *Yearbook ... 1962*, vol. I, 651st–656th meetings). One of the leading advocates of the link between this criterion and reactions to a reservation was S. Rosenne, who based his arguments on the advisory opinion of the International Court of Justice (*Yearbook ... 1962*, vol. I, 651st meeting, para. 79).

seemed to be the *sine qua non* for permissibility in both cases. The provision stated as follows:

An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.¹⁰⁶⁶

(5) In response to the comments made by the Governments of Australia, Denmark and the United States,¹⁰⁶⁷ however, the Special Rapporteur reverted to the position taken by the Commission on first reading, omitting the reference to the criterion of compatibility from his proposed draft article 19, paragraph 3 (b).¹⁰⁶⁸ The contrary opinion was nonetheless supported once more by Sir Humphrey Waldock in the Commission's debates,¹⁰⁶⁹ but that did not prevent the Drafting Committee from once again leaving out any reference to the compatibility criterion—without, however, providing any explanation for its having done so.¹⁰⁷⁰ In accordance with that position, paragraph 4 (b) of draft article 19, adopted on second reading in 1965, merely provided that “[a]n objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State”.¹⁰⁷¹

(6) Despite the doubts voiced by a number of delegations,¹⁰⁷² the United Nations Conference on the Law of Treaties of 1968–1969 made no further reference to the lack of a connection between objections and the criteria of a reservation's permissibility. In response to a question raised by the Canadian representative, however, the Expert Consultant, Sir Humphrey Waldock, was particularly clear in his support for the position adopted by the Commission:

The second question was, where a reservation had not been expressly authorized, and at the same time was not one prohibited under article 16, paragraph (c), could a contracting State lodge an objection other than that of incompatibility with the object and purpose of the treaty? The answer was surely Yes. Each contracting State remained *completely free** to decide for itself, in accordance with its own interests, whether or not it would accept the reservation.¹⁰⁷³

(7) On this point, the Vienna regime deviates from the solution adopted by the International Court of Justice in its

¹⁰⁶⁶ *Yearbook ... 1962*, vol. II, document A/5209, p. 176.

¹⁰⁶⁷ Fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 45–47.

¹⁰⁶⁸ *Ibid.*, p. 52, para. 10.

¹⁰⁶⁹ *Ibid.*, vol. I, 799th meeting, p. 169, para. 65. See also Mr. Tsuruoka, *ibid.*, p. 169, para. 69. For an opposing view, see Mr. Tunkin, *ibid.*, p. 167, para. 37.

¹⁰⁷⁰ *Ibid.*, 813th meeting, pp. 265–268, paras. 30–71 and, in particular, pp. 267–268, paras. 57–66.

¹⁰⁷¹ *Yearbook ... 1965*, vol. II, document A/6009, p. 162.

¹⁰⁷² See, in particular, the United States amendment (A/CONF.39/C.1/L.127, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 135, para. 179) and the comments of the United States representative (*Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 21st meeting of the Committee of the Whole, p. 108, para. 11). See also the critical comments made by Japan (*ibid.*, 21st meeting, para. 29), Philippines (*ibid.*, para. 58), United Kingdom (*ibid.*, para. 74), Switzerland (*ibid.*, para. 41), Sweden (*ibid.*, 22nd meeting, para. 32) and Australia (*ibid.*, para. 49).

¹⁰⁷³ *Ibid.*, 25th meeting, para. 3.

1951 advisory opinion,¹⁰⁷⁴ which, in this regard, is certainly outdated and no longer corresponds to current positive law.¹⁰⁷⁵ A State or an international organization has the right to formulate an objection both to a reservation that does not meet the criteria for permissibility and to a reservation that it deems to be unacceptable “in accordance with its own interests”, even if it is permissible. In other words, States and international organizations are free to object for any reason whatsoever, and that reason may or may not have to do with the impermissibility of the reservation.¹⁰⁷⁶

(8) This solution is based on the principle of consent, which underlies the reservations regime and indeed all treaty law, as the Court recalled in its 1951 advisory opinion:

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto.¹⁰⁷⁷

(9) A State (or an international organization) is thus never bound by treaty obligations¹⁰⁷⁸ against its will. A State that formulates a reservation is simply proposing a modification of the treaty relations contemplated by the treaty.¹⁰⁷⁹ Conversely, no State is obliged to accept such modifications—other than those resulting from reservations expressly authorized by the treaty—as long as they are not contrary to the object and purpose of the treaty.¹⁰⁸⁰ Limiting the right to formulate objections to

¹⁰⁷⁴ See paragraph (3) above. See also Coccia, “Reservations to multilateral treaties ...” (footnote 196 above), pp. 8–9; Edwards, “Reservations to treaties” (footnote 59 above), p. 397; Lijnzaad, *Reservations to UN Human Rights Treaties ...* (footnote 463 above), p. 51; and K. Zemanek, “Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties”, *Études de droit international en l’honneur du Juge Manfred Lachs*, The Hague/Boston/Lancaster, Martinus Nijhoff Publishers, 1984, p. 333.

¹⁰⁷⁵ It is also unlikely that it reflected the state of positive law in 1951. No one seems ever to have claimed that the right to formulate objections in the context of the system of unanimity was subject to the reservation being contrary to the object and purpose of the treaty.

¹⁰⁷⁶ Subject, of course, to the general principles of law which may limit the exercise of the discretionary power of States at the international level and the principle prohibiting abuse of rights.

¹⁰⁷⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 21. The dissenting judges also stressed this principle in their joint opinion: “The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later” (*ibid.*, pp. 31–32). See also the famous dictum of the Permanent Court of International Justice in the case of the S.S. “*Lotus*”: “The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed” (*The case of the S.S. “Lotus”, Judgment, 1927, P.C.I.J., Series A, No. 10*, p. 18). See also the second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478, paras. 97 and 99.

¹⁰⁷⁸ This clearly does not mean that States are not bound by legal obligations emanating from other sources (see section 4.4 of the Guide to Practice).

¹⁰⁷⁹ See paragraph (6) of the commentary to guideline 3.1.

¹⁰⁸⁰ See Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 121, and C. Tomuschat, “Admissibility and legal effects of reservations to multilateral treaties. Comments on arts. 16 and 17 of the ILC’s 1966 draft articles on the law of treaties”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*, vol. 27 (1967), p. 466.

reservations that are contrary to one of the criteria for permissibility established in article 19 would violate the sovereign right to accept or refuse treaty obligations¹⁰⁸¹ and would contravene the very principle of the sovereign equality of States, since it would allow the reserving State (or international organization) to impose its will unilaterally on the other contracting States or international organizations.¹⁰⁸² In practice, this would render the mechanism of acceptances and objections meaningless.¹⁰⁸³

(10) It would thus seem that States and international organizations have the indisputable right to formulate in a discretionary manner objections to reservations. This is clear from guideline 2.6.1, which defines “objection” in terms of the intent of its author, irrespective of the reasons for or permissibility of the reservation to which the objection relates. It is thus acknowledged that the author may exercise that right regardless of the permissibility of the reservation—in other words, that the author may make an objection for any reason, be it simply political or of expediency, without having to explain that reason,¹⁰⁸⁴ unless the objection itself is to be regarded as impermissible on some grounds.¹⁰⁸⁵

(11) However, “discretionary” does not mean “arbitrary”,¹⁰⁸⁶ and even though this right undoubtedly stems from the power of a party to exercise its own judgment, it is not absolute. Above all, it must be exercised within the limits arising from the procedural and formal constraints as developed and set out in detail in the guidelines that follow in this section of the Guide to Practice. Thus, for example, a State or international organization that has accepted a reservation no longer has the right to make a subsequent objection to the same reservation. This rule derives implicitly from the presumption of acceptance of reservations established in article 20, paragraph 5, of the Vienna Conventions, a presumption spelt out in guideline 2.8.2, which concerns the procedure for acceptances. Moreover, guideline 2.8.13 expressly enunciates the final nature of acceptance.

(12) This absence of a link between the permissibility of a reservation and the objection does not, however, fully resolve the question of the validity of an objection. It goes without saying that the right to formulate an objection must be exercised in accordance with the provisions of the Vienna Conventions and this Guide—a point that did not seem to require mention in the text of guideline 2.6.2.

¹⁰⁸¹ Tomuschat, “Admissibility and legal effects of reservations ...” (see previous footnote).

¹⁰⁸² See, in this regard, the ninth of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted by the International Law Commission at its fifty-eighth session (footnote 249 above), p. 161.

¹⁰⁸³ See Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 513–514, para. 62; see also the statement made by Mr. Pal at the 653rd meeting of the Commission (*Yearbook ... 1962*, vol. I, p. 153, para. 5).

¹⁰⁸⁴ In this regard, however, see guideline 2.6.9.

¹⁰⁸⁵ See guideline 3.4.2 and commentary thereto.

¹⁰⁸⁶ See, in particular, S. Jovanović, *Restriction des compétences discrétionnaires des États en droit international*, Paris, Pedone, 1988, pp. 88 *et seq.*, in particular pp. 90–93; see also Judgment No. 191 of the ILO Administrative Tribunal in the case of *Ballo*. The text of the judgment may be consulted at www.ilo.org/tribunal.

2.6.3 Author of an objection

An objection to a reservation may be formulated by:

(a) any contracting State or contracting organization; and

(b) any State or international organization that is entitled to become a party to the treaty, in which case the objection does not produce any legal effect until the State or international organization has expressed its consent to be bound by the treaty.

Commentary

(1) Guideline 2.6.1 on the definition of objections to reservations does not resolve the question of which States or international organizations may formulate an objection to a reservation made by another State or another international organization. That is the purpose of guideline 2.6.3.

(2) The Vienna Conventions provide some guidance on the question of the possible authors of an objection. Article 20, paragraph 4 (b), of the 1986 Vienna Convention refers to “an objection by a contracting State or by a contracting organization to a reservation”. It is clear from this that contracting States and contracting international organizations within the meaning of article 2, paragraph 1 (f), of the 1986 Vienna Convention are without any doubt possible authors of an objection to a reservation. This hypothesis is covered by subparagraph (a) of guideline 2.6.3.

(3) According to one viewpoint, the fact that the Vienna Convention makes no reference to the right of other States or international organizations entitled to become parties to the treaty should be interpreted as excluding such a right. As a consequence, declarations formulated by States and international organizations, which thus far are entitled only to become parties to the treaty, should not be qualified as objections.¹⁰⁸⁷

(4) In fact, the Commission is of the view that the provisions of article 20, paragraphs 4 (b) and 5, of the Vienna Conventions, make no exclusion of any kind; on the contrary, they imply that States and international organizations that are entitled to become parties to the treaty may formulate objections within the meaning of the definition contained in guideline 2.6.1. Article 20, paragraph 4 (b), simply determines the possible effects of an objection raised by a contracting State or by a contracting organization; however, the fact that paragraph 4 does not specify the effects of objections formulated by States other than contracting States or by organizations other than contracting organizations in no way means that such other States or organizations may not formulate objections.¹⁰⁸⁸ The limitation on the possible authors of an objection that article 20, paragraph 4 (b), of the

Vienna Conventions might seem to imply is not in fact to be found in article 21, paragraph 3, on the effects of the objection on the application of the treaty in cases where the author of the objection has not opposed the entry into force of the treaty between itself and the reserving State. Moreover, as article 23, paragraph 1, clearly states, reservations, express acceptances and objections must be communicated not only to the contracting States and contracting international organizations but also to “other States and international organizations entitled to become parties to the treaty”.¹⁰⁸⁹ Such a notification has meaning only if these other States and international organizations can in fact react to the reservation by way of an express acceptance or an objection. Lastly, and most importantly, this position appeared to the Commission to be the only one that was compatible with the letter and spirit of guideline 2.6.1, which defines objections to reservations not in terms of the effects they produce but in terms of those that objecting States or international organizations intend for them to produce.¹⁰⁹⁰

(5) This point of view is confirmed by the advisory opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. In the operative part of its opinion, the Court clearly established that States that are entitled to become parties to the Convention can formulate objections:

The Court is of the opinion, ...

(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question 1 only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.¹⁰⁹¹

(6) In practice, non-contracting States often formulate objections to reservations. For example, Haiti objected to the reservations formulated by Bahrain to the Vienna Convention on Diplomatic Relations at a time when it had not even signed the Convention.¹⁰⁹² Similarly, the United States of America formulated two objections to the reservations

¹⁰⁸⁹ See also article 77, paragraph 1 (e) and (f), of the 1969 Vienna Convention (article 78 of the 1986 Vienna Convention), regarding the function of the depositary with regard to “States and international organizations entitled to become parties ...”.

¹⁰⁹⁰ The definition of the term “reservation” as set out in article 2, paragraph 1 (d), of the Vienna Conventions and reproduced in guideline 1.1 is formulated in the same manner: it concerns declarations that are intended to produce certain effects (but that do not necessarily do so).

¹⁰⁹¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 30, opinion on Question III (despite the wording of subparagraph (b), some members of the Commission are of the view that the Court was referring here only to signatory States). The same position was also taken by Sir Humphrey Waldock in his first report on the law of treaties. Draft article 19, which is devoted entirely to objections and their effects, provided that “any State which is or is entitled to become a party* to a treaty shall have the right to object ...” (*Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62). However, it is noted that this language was left out of the 1969 Vienna Convention in relation to objections.

¹⁰⁹² *Multilateral Treaties ...* (footnote 37 above), chap. III.3 (date of objection: 9 May 1972; date of accession: 2 February 1978).

¹⁰⁸⁷ This position seems to be defended by B. Clark, “The Vienna Convention reservations regime and the Convention on Discrimination Against Women”, *AJIL*, vol. 85, No. 2 (1991), p. 297.

¹⁰⁸⁸ In this regard, see Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 150.

made by the Syrian Arab Republic and Tunisia to the 1969 Vienna Convention even though it was not—and is not—a contracting State to this Convention.¹⁰⁹³ Likewise, in the following examples, the objecting States were, at the time they formulated their objections, mere signatories to the treaty (which they later ratified):

– objection of Luxembourg to the reservations made by the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic to the Vienna Convention on Diplomatic Relations;¹⁰⁹⁴

– objections of the United Kingdom of Great Britain and Northern Ireland to the reservations made by Czechoslovakia, Bulgaria, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, Romania, the Union of Soviet Socialist Republics, Iran and Tunisia to the Convention on the Territorial Sea and the Contiguous Zone¹⁰⁹⁵ and to those made by Bulgaria, Hungary, Poland, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, Romania, Czechoslovakia, the Union of Soviet Socialist Republics and Iran to the Convention on the High Seas;¹⁰⁹⁶ and

– objection of Belgium to the reservation made by Brazil to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹⁰⁹⁷

(7) In the practice of the Secretary-General as depositary, such objections formulated by States or international organizations that are entitled to become parties to the treaty are conveyed by means of “communications”¹⁰⁹⁸ and not “depositary notifications”; however, what is “communicated” are unquestionably objections within the meaning of guideline 2.6.1.

(8) It seems entirely possible that States and international organizations that are entitled to become parties to a treaty may formulate objections within the meaning of the definition contained in guideline 2.6.1 even though they have not expressed their consent to be bound by the treaty. This possibility is established in subparagraph (b) of guideline 2.6.3.

(9) In reality, it would seem not only possible but also prudent and useful for States or international organizations that intend to become parties but have not yet expressed their consent to be bound to express their opposition to a reservation and to make their views known on the reservation in question. As the International Court of Justice noted in its advisory opinion of 1951, such an objection “merely serves as a notice to the other State

of the eventual attitude of the signatory State”.¹⁰⁹⁹ Such notification may also prove useful both for the reserving State or organization and, in certain circumstances, for the treaty monitoring bodies.

(10) In any event, there is no doubt that an objection formulated by a State or organization that has not yet expressed its consent to be bound by the treaty does not immediately produce the legal effects intended by its author. This is evidenced also by the operative part of the advisory opinion of 1951, which states that such an objection “can have the legal effect indicated in the reply to Question I only upon ratification” by the State or the organization that formulated it.¹¹⁰⁰ The potential legal effect of an objection formulated by a State or an international organization prior to becoming a party to the treaty is realized only upon ratification, accession or approval of the treaty (if it is a treaty in solemn form) or signature (in the case of a treaty in simplified form). This does not preclude qualifying such statements as objections; however, they are “conditional” or “conditioned” in the sense that their legal effects are subordinate to a specific act: the expression of consent to be bound.

2.6.4 Objections formulated jointly

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

Commentary

(1) Even though, according to the definition contained in guideline 2.6.1, an objection is a unilateral statement, it is perfectly possible for a number of States and/or a number of international organizations to formulate an objection jointly. Practice in this area is not highly developed; it is not, however, non-existent.

(2) In the context of regional organizations, and in particular the Council of Europe, member States endeavour to coordinate and harmonize, to the extent possible, their reactions and objections to reservations. Even though these States continue to formulate objections individually, they coordinate not only on the appropriateness but also on the wording of objections.¹¹⁰¹ Technically, however, these objections remain unilateral declarations on the part of each author State.

(3) Yet it is also possible to cite cases in which States and international organizations have formulated objections in a truly joint fashion. For example, the European Community and its (at that time) nine member States objected, via a single instrument, to the “declarations” formulated by Bulgaria and the German Democratic Republic

¹⁰⁹³ *Ibid.*, chap. XXIII.1.

¹⁰⁹⁴ *Ibid.*, chap. III.3 (date of signature: 2 February 1962; date of objection: 18 January 1965; date of ratification: 17 August 1966).

¹⁰⁹⁵ *Ibid.*, chap. XXI.1 (date of signature: 9 September 1958; date of objection: 6 November 1959; date of ratification: 14 March 1960).

¹⁰⁹⁶ *Ibid.*, chap. XXI.2 (date of signature: 9 September 1958; date of objection: 6 November 1959; date of ratification: 14 March 1960).

¹⁰⁹⁷ *Ibid.*, chap. VI.19 (date of signature: 22 May 1989; date of objection: 27 December 1989; date of ratification: 25 October 1995).

¹⁰⁹⁸ *Summary of Practice of the Secretary-General ...* (footnote 75 above), para. 214.

¹⁰⁹⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), p. 30, opinion on Question III.

¹¹⁰⁰ *Ibid.*

¹¹⁰¹ See, for example, the objections of certain States members of the Council of Europe to the International Convention for the Suppression of Terrorist Bombings of 1997 (*Multilateral Treaties ...* (footnote 37 above), chap. XVIII.9) or to the International Convention for the Suppression of the Financing of Terrorism of 1999 (*ibid.*, chap. XVIII.11).

regarding article 52, paragraph 3, of the Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) of 14 November 1975, which offers customs unions and economic unions the possibility of becoming contracting parties.¹¹⁰² The European Community also formulated a number of objections “on behalf of the European Economic Community and of its member States”.¹¹⁰³

(4) It seemed to the Commission that there was no fault to be found with the joint formulation of an objection by several States or international organizations: it is difficult to imagine what might prevent them from doing jointly what they can doubtless do individually and under the same terms. Such flexibility is all the more desirable in that, given the growing number of common markets and customs and economic unions, precedents consisting of the objections or joint interpretative declarations cited above are likely to increase, as these institutions often exercise shared competence with their member States. Yet it would be quite unnatural to require that the latter should act separately from the institutions to which they belong. Thus, from a technical standpoint there is nothing to prevent the joint formulation of an objection, but this in no way affects the unilateral nature of the objection.

2.6.5 Form of objections

An objection must be formulated in writing.

Commentary

(1) Pursuant to article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, an objection to a reservation “must be formulated in writing and communicated to the contracting States [and contracting organizations] and other States [and international organizations] entitled to become parties to the treaty”.

(2) As is the case for reservations,¹¹⁰⁴ the requirement that an objection to a reservation must be formulated in writing was never called into question but was presented as self-evident in the debates in the Commission and at the United Nations Conferences on the Law of Treaties. Already in his first report on the law of treaties, Sir Humphrey Waldock, the first Special Rapporteur to draft provisions on objections, provided, in paragraph 2 (a) of draft article 19, that “[a]n objection to a reservation shall be formulated in writing”,¹¹⁰⁵ without making this formal requirement the subject of commentary.¹¹⁰⁶ Although the

procedural guidelines were comprehensively revised by the Special Rapporteur in the light of the comments of two Governments suggesting that “some simplification of the procedural provisions”¹¹⁰⁷ was desirable, the requirement of a written formulation for an objection to a reservation was always explicitly stipulated:

– in article 19, paragraph 5, adopted by the Commission on first reading (1962): “An objection to a reservation shall be formulated in writing and shall be notified”;¹¹⁰⁸

– in article 20, paragraph 5, proposed by the Special Rapporteur in his fourth report (1965): “An objection to a reservation must be in writing”;¹¹⁰⁹

– in article 20, paragraph 1, adopted by the Commission on second reading (1965): “A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other contracting States”;¹¹¹⁰

– in article 18, paragraph 1, as ultimately adopted by the Commission in 1966: “A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other States entitled to become parties to the treaty”.¹¹¹¹

Nor was the written form called into question at the 1968–1969 United Nations Conference on the Law of Treaties. On the contrary, all proposed amendments to the procedure in question retained the requirement that an objection to a reservation must be formulated in writing.¹¹¹²

(3) That objections must be in written form is well established. Notification, another procedural requirement applicable to objections (by virtue of article 23, paragraph 1, of the Vienna Conventions), requires a written document; oral communication alone cannot be filed or registered with the depositary of the treaty or communicated to the other States concerned. Furthermore, considerations of legal security justify and call for the written form. One must not forget that an objection has significant legal effects on the opposability of a reservation, the applicability of the provisions of a treaty as between the reserving State and the objecting State (article 21, paragraph 3, of the Vienna Conventions) and the entry into force of the treaty (article 20, paragraph 4). In addition, an objection reverses the presumption of acceptance arising from article 20, paragraph 5, of the Vienna Conventions, and

¹¹⁰² *Ibid.*, chap. XI.A.16.

¹¹⁰³ See, for example, the objection to the declaration made by the Union of Soviet Socialist Republics in respect of the Wheat Trade Convention, 1986 (*Multilateral Treaties ...* (footnote 37 above), chap. XIX.28 (a)) and the identical objection to the declaration made by the Union of Soviet Socialist Republics in respect of the International Tropical Timber Agreement, 1983 (*ibid.*, chap. XIX.26). In the same vein, see the practice followed at the Council of Europe since 2002 with respect to reservations to counter-terrorism conventions (para. (2) above).

¹¹⁰⁴ See guideline 2.1.1 (Form of reservations) and commentary thereto.

¹¹⁰⁵ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62.

¹¹⁰⁶ *Ibid.*, p. 68, paragraph (22) of the commentary to draft article 19, which simply refers the reader to the commentary to draft article 17 (*ibid.*, p. 66, para. (11)).

¹¹⁰⁷ These were the Governments of Sweden and Denmark. See the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 46–47 and p. 53, para. 13.

¹¹⁰⁸ *Yearbook ... 1962*, vol. II, document A/5209, p. 176.

¹¹⁰⁹ *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 53.

¹¹¹⁰ *Ibid.*, document A/6009, p. 162.

¹¹¹¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208.

¹¹¹² See the amendment by Spain: “A reservation, an acceptance of a reservation, and an objection to a reservation must be formulated in writing and duly communicated by the reserving, accepting or objecting State to the other States which are parties, or are entitled to become parties, to the treaty” (A/CONF.39/C.1/L.149, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 138).

written form is an important means of proving whether a State did indeed express an objection to a reservation during the period of time prescribed by this provision or whether, by default, it must be considered as having accepted the reservation.

(4) Guideline 2.6.5 therefore confines itself to reproducing the requirement of written form for the objections referred to in the first part of article 23, paragraph 1, of the Vienna Conventions, and parallels guideline 2.1.1 relating to the written form of reservations.

2.6.6 *Right to oppose the entry into force of the treaty vis-à-vis the author of the reservation*

A State or an international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the author of the reservation.

Commentary

(1) The right to formulate objections irrespective of the permissibility (or impermissibility) of the reservation, established in guideline 2.6.2, also encompasses the right to oppose the entry into force of the treaty as between the reserving State or international organization, on the one hand, and the author of the objection, on the other. This possibility has its origin in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, which specify the effects of an objection.

(2) Arriving at those provisions, in particular article 20, paragraph 4 (b), of the 1969 Vienna Convention, proved difficult. The Commission's early special rapporteurs, staunch supporters of the system of unanimity, had little interest in objections, the effects of which were, in their view, purely mechanical.¹¹¹³ It seemed self-evident to them that an objection prevented the reserving State from becoming a party to the treaty.¹¹¹⁴ Even though he came to support a more flexible system, Sir Humphrey Waldock still adhered to that view in 1962, as demonstrated by the draft article 19, paragraph 4 (c), presented in his first report on the law of treaties, which stated that "the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States".¹¹¹⁵

(3) The members of the Commission,¹¹¹⁶ including the Special Rapporteur,¹¹¹⁷ however, ultimately abandoned that categorical approach in favour of a simple presumption, in order to bring the wording of this provision more into line with the 1951 advisory opinion of the International Court of Justice, which stated:

¹¹¹³ See the commentary to guideline 4.3.1.

¹¹¹⁴ Reuter, *Introduction au droit des traités* (footnote 28 above), p. 73, para. 132.

¹¹¹⁵ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62.

¹¹¹⁶ See, in particular, Mr. Tunkin (*ibid.*, vol. I, 653rd meeting, p. 156, para. 26, and 654th meeting, pp. 161–162, para. 11), Mr. Rosenne (*ibid.*, 653rd meeting, pp. 156–157, para. 30), Mr. Jiménez de Aréchaga (*ibid.*, p. 158, para. 48), Mr. de Luna (*ibid.*, p. 160, para. 66) and Mr. Yasseen (*ibid.*, 654th meeting, p. 161, para. 6).

¹¹¹⁷ *Ibid.*, pp. 162 and 163, paras. 17 and 29.

As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it *will or will not**, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, *consider** the reserving State to be a party to the Convention.¹¹¹⁸

(4) Strictly aligning themselves with this position, the members of the Commission introduced a simple presumption in favour of the non-entry into force of the treaty as between the reserving State and the objecting State and initially limited the possibility of opposing the treaty's entry into force to cases where the reservation was contrary to the object and purpose of the treaty.¹¹¹⁹ Draft article 20, paragraph 2 (b), adopted on first reading, therefore provided as follows:

An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.¹¹²⁰

(5) Once the possibility of making an objection is no longer linked to the criterion of compatibility with the object and purpose of the treaty,¹¹²¹ the right of the objecting State to oppose the treaty's entry into force in its relations with the reserving State becomes unconditional. The objecting State may, therefore, exclude all treaty relations between itself and the reserving State for any reason. The wording ultimately retained by the Commission went so far as to make this effect automatic: an objection (whatever the reason) precluded the entry into force of the treaty, unless the State concerned expressed its contrary intention.¹¹²² During the United Nations Conference on the Law of Treaties, the thrust of that presumption was reversed, not without heated debate, in favour of the entry into force of the treaty as between the objecting State and the reserving State.¹¹²³

¹¹¹⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), p. 26.

¹¹¹⁹ See paragraph (4) of the commentary to guideline 2.6.2 above.

¹¹²⁰ *Yearbook ... 1962*, vol. II, document A/5209, p. 176; see also *ibid.*, p. 181 (paragraph (23) of the commentary).

¹¹²¹ On this point, see the explanation given in paragraphs (5)–(7) of the commentary to guideline 2.6.2 above.

¹¹²² Draft article 17, paragraph 4 (b), adopted on second reading, provided as follows: "An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State" (report of the International Law Commission on the work of its eighteenth session, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 202).

¹¹²³ The question had already been raised during the discussion of the draft articles adopted on first reading by the members of the International Law Commission and by the Czechoslovak and Romanian delegations in the Sixth Committee (see the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 48–49). The idea of reversing the presumption had been advocated by a number of Commission members (Mr. Tunkin (*ibid.*, vol. I, 799th meeting, p. 167, para. 39) and Mr. Lachs (*ibid.*, 813th meeting, p. 268, para. 62)). Nevertheless, the proposals made in this regard by Czechoslovakia (A/CONF.39/C.1/L.85, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (see footnote 54 above), p. 135), the Syrian Arab Republic (A/CONF.39/C.1/L.94, *ibid.*) and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115, *ibid.*, p. 133) were rejected by the Conference in 1968 (*Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 25th meeting, p. 135, paras. 35 *et seq.*). It was only in 1969 that a new Soviet amendment in this regard (A/CONF.39/L.3, in *Official Records of the United Nations*

(6) As open to criticism as this new approach may seem, the fact remains that the author of the objection is still free to oppose the entry into force of the treaty in its relations with the author of the reservation. The reversal of the presumption simply requires the author of the objection to make an express declaration to that effect, even though it remains completely free regarding its reasons for making it.

(7) In practice, States have been curiously eager to declare expressly that their objections do *not* prevent the treaty from entering into force *vis-à-vis* the reserving State, even though, by virtue of the presumption contained in article 20, paragraph 4 (b), of the Vienna Conventions, that would automatically be the case with regard to an objection to a permissible reservation.¹¹²⁴ Nor is this practice linked to the reason for the objection, since States make objections with minimum effect (specifically stating that the treaty will enter into force in their relations with the reserving State) even to reservations that they deem incompatible with the object and purpose of the treaty.¹¹²⁵ There are, however, some examples of objections in which States specifically declare that their objection does prevent the treaty from entering into force in their relations with the reserving State.¹¹²⁶ Such cases,

Conference on the Law of Treaties, First and Second Sessions ... (A/CONF.39/11/Add.2) (footnote 54 above), pp. 265–266) was finally adopted by 49 votes to 21, with 30 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Second Session ... (A/CONF.39/11/Add.1)* (footnote 332 above), 10th plenary meeting, p. 35, para. 79).

¹¹²⁴ Concerning invalid reservations, see guidelines 4.5.2 and 4.5.3.

¹¹²⁵ See the objections of Belgium to the Egyptian and Cambodian reservations to the Vienna Convention on Diplomatic Relations (*Multilateral Treaties ...* (footnote 37 above), chap. III.3) or the objections of the Federal Republic of Germany to several reservations to the same Convention (*ibid.*). It is, however, interesting to note that, even though Germany considered all the reservations in question as “incompatible with the letter and spirit of the Convention”, the German Government declared for only some objections that they did not prevent the entry into force of the treaty as between Germany and the reserving States; it did not take a position on the other cases. Many examples can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights, in particular the objections that were formulated to the reservation of the United States of America to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (*ibid.*, chap. IV.4). All these States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose its entry into force in their relations with the United States. Only Germany remained silent regarding the entry into force of the Covenant, despite its objection to the reservation (*ibid.*). The phenomenon is not, however, limited to human rights treaties: see, for example, the objections of Austria, France, Germany and Italy to the reservation of Viet Nam to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (*ibid.*, chap. VI.19) or the objections of States members of the Council of Europe to the reservations to the International Convention for the Suppression of Terrorist Bombings of 1997 (*ibid.*, chap. XVIII.9), or to the International Convention for the Suppression of the Financing of Terrorism of 1999 (*ibid.*, chap. XVIII.11).

¹¹²⁶ See, for example, the objections of Israel, Italy and the United Kingdom to the reservations formulated by Burundi to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973 (*ibid.*, chap. XVIII.7), the objections of France and Italy to the United States reservation to the Agreement on the international carriage of perishable foodstuffs and on the special equipment to be used for such carriage (ATP) (*ibid.*, chap. XI.B.22), or the objections of the United Kingdom to the Syrian and Vietnamese reservations and the objections of New Zealand to the Syrian reservation to the 1969 Vienna Convention (*ibid.*, chap. XXIII.1).

though rare,¹¹²⁷ show that States can and do make such objections when they see fit.

(8) It follows that the right to formulate an objection for any reason whatsoever also implies that the objecting State or international organization is free to oppose the entry into force of the treaty in its relations with the reserving State or organization. The author of the objection thus has considerable latitude in specifying the effect of its objection on the entry into force of the treaty as between itself and the author of the reservation;¹¹²⁸ in any case, in order to oppose the entry into force of the treaty in its relations with the author of the reservation, the author of the objection need only accompany its objection with an expression of that intention, pursuant to guideline 2.6.7, without having to state the reasons for its decision. The limitations on that right are explained in the Part of the Guide to Practice that deals with the effects of reservations.¹¹²⁹

(9) As was explained in connection with guideline 2.6.2,¹¹³⁰ the Commission considered it unnecessary in guideline 2.6.6 to state the self-evident proviso that the right of the author of the objection to oppose the entry into force of the treaty as between itself and the author of the reservation must be exercised in accordance with the conditions of form and procedure set out elsewhere in the Guide to Practice.

2.6.7 Expression of intention to preclude the entry into force of the treaty

When a State or an international organization formulating an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

Commentary

(1) As article 20, paragraph 4 (b), of the Vienna Conventions shows, a State or an international organization objecting to a reservation may oppose the entry into force of a treaty as between itself and the author of the reservation. In order for this to be so, according to the same provision, that intent must still be “definitely expressed by the objecting State or organization”. Following the reversal of the presumption regarding the effects of the objection on the entry into force of the treaty as between

¹¹²⁷ This is not to imply that maximum-effect objections accompanied by the declaration provided for in article 20, paragraph 4 (b), are a type of objection that is disappearing, as is suggested by Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 283. It has been argued that the thrust of the presumption retained at the United Nations Conference on the Law of Treaties (in favour of the entry into force of the treaty) and political considerations may explain the reluctance of States to resort to maximum-effect objections (see C. Redgwell, “Universality or integrity? Some reflections on reservations to general multilateral treaties”, *BYBIL*, vol. 64 (1993), p. 267). See, however, the explanations provided by States to the question posed by the Commission on this point (eleventh report on reservations to treaties, *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, pp. 189–190, paras. 33–38, in particular para. 37).

¹¹²⁸ See also guideline 4.3.5 and commentary thereto.

¹¹²⁹ See, in particular, guidelines 3.4.2 and 4.3.5 and commentaries thereto.

¹¹³⁰ See paragraph (12) of the commentary to guideline 2.6.2 above.

the reserving State and the objecting State decided at the 1969 United Nations Conference on the Law of Treaties,¹¹³¹ a clear and unequivocal statement is necessary in order to preclude the entry into force of the treaty in relations between the two States.¹¹³² This is how article 20, paragraph 4 (b), of the Vienna Conventions, on which the text of guideline 2.6.7 is largely based, should be understood.

(2) The objection of the Netherlands to the reservations to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide certainly meets the requirement of definite expression; it states that “the Government of the Kingdom of the Netherlands ... does not deem any State which has made or will make such reservation a party to the Convention”.¹¹³³ France also very clearly expressed such an intention regarding the reservation of the United States of America to the Agreement on the international carriage of perishable foodstuffs and on the special equipment to be used for such carriage (ATP) by declaring that it would not “be bound by the ATP Agreement in its relations with the United States of America”.¹¹³⁴ Similarly, the United Kingdom stated in its objection to the reservation of the Syrian Arab Republic to the 1969 Vienna Convention that it did “not accept the entry into force of the Convention as between the United Kingdom and Syria”.¹¹³⁵

(3) On the other hand, the mere fact that the reason for the objection is that the reservation is considered incompatible with the object and purpose of the treaty is not sufficient to exclude the entry into force of the treaty between the author of the objection and the author of the reservation. Practice is indisputable in this regard, since States quite frequently base their objections on such incompatibility, all the while clarifying that the finding does not prevent the treaty from entering into force as between them and the author of the reservation.¹¹³⁶

(4) Neither the Vienna Conventions nor the *travaux préparatoires* thereto give any useful indication regarding the time at which the objecting State or international organization must clearly express its intention to oppose the entry into force of the treaty as between itself and the reserving State. It is nevertheless possible to proceed by deduction. According to the presumption of article 20, paragraph 4 (b), of the Vienna Conventions, whereby an objection does not preclude the entry into force of a treaty in treaty relations between an objecting State or international organization and the reserving State or international organization unless the contrary is expressly stated, an objection that is not accompanied by such a declaration results in the treaty entering into force, subject to article 21, paragraph 3, of the Vienna Conventions

concerning the effect of a reservation on relations between the two parties. If the objecting State or organization expressed a different intention in a subsequent declaration, it would undermine its legal security.

(5) However, this is the case only if the treaty actually enters into force in relations between the two States or international organizations concerned. It may also happen that, although the author of the objection has not ruled out this possibility at the time of formulating the objection, the treaty does not enter into force immediately for other reasons.¹¹³⁷ In such cases, the Commission considered that there was no reason to prohibit the author of the objection from expressing the intention to preclude the entry into force of the treaty at a later date; such a solution is particularly necessary in situations where a long period of time may elapse between the formulation of the initial objection and the expression of consent to be bound by the treaty by the reserving State or international organization or by the author of the objection. Accordingly, while excluding the possibility that a declaration “maximizing” the scope of the objection can be made after the entry into force of the treaty between the author of the reservation and the author of the objection, the Commission made it clear that the intention to preclude the entry into force of the treaty must be expressed “before the treaty would otherwise enter into force” between them, without making expression of the will to oppose the entry into force of the treaty in all cases at the time the objection is formulated a prerequisite.

(6) Nevertheless, expression of the intention to preclude the entry into force of a treaty by the author of the objection or the absence thereof does not in any way prejudice the question of whether the treaty actually enters into force between the reserving State or international organization and the State or international organization that made an objection. This question concerns the combined legal effects of a reservation and the reactions it has prompted, and is to some extent separate from that of the intention of the States or international organizations concerned.

2.6.8 Procedure for the formulation of objections

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

Commentary

(1) The procedural rules concerning the formulation of objections are not notably different from those that apply to the formulation of reservations. This is perhaps the reason why the International Law Commission apparently did not pay much attention to these issues during the *travaux préparatoires* for the 1969 Vienna Convention.

(2) This lack of interest can easily be explained in the case of the Special Rapporteurs who advocated the traditional system of unanimity, namely Mr. Brierly, Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice.¹¹³⁸ While it was

¹¹³¹ See paragraph (5) of the commentary to guideline 2.6.6 above.

¹¹³² See Baratta, *Gli effetti delle riserve ...* (footnote 698 above), p. 352. The author states that: “There is no doubt that, in order for the expected consequence of the rule regarding a qualified objection to be produced, the author must state its intention to that effect.” See, however, paragraph (6) below.

¹¹³³ *Multilateral Treaties* (footnote 37 above), chap. IV.1.

¹¹³⁴ *Ibid.*, chap. XI.B.22. See also the objection of Italy (*ibid.*).

¹¹³⁵ *Ibid.*, chap. XXIII.1. See also the objection of the United Kingdom to the reservation of Viet Nam (*ibid.*).

¹¹³⁶ See footnote 1125 above.

¹¹³⁷ Insufficient number of ratifications or accessions, additional time provided under the provisions of the treaty itself.

¹¹³⁸ Even though Sir Hersch Lauterpacht’s proposals *de lege ferenda* envisaged objections, the Special Rapporteur did not consider it necessary to set out the procedure that should be followed when formulating

only logical, in their view, that an acceptance, which is at the heart of the traditional system of unanimity, should be provided with a legal framework, particularly where its temporal aspect was concerned, an objection, which they saw simply as a refusal of acceptance that prevented unanimity from taking place and thus preventing the reserving State from becoming a party to the instrument, did not seem to warrant specific consideration.

(3) Sir Humphrey Waldock's first report, which introduced the "flexible" system in which objections play a role that is, if not more important, then at least more ambiguous, contained an entire draft article on procedural issues relating to the formulation of objections.¹¹³⁹ Despite the very detailed nature of this provision, the report limits itself to a very brief commentary, indicating that "[t]he provisions of this article are for the most part a reflex of provisions contained in [the articles on the power to formulate and withdraw reservations (art. 17) and on consent to reservations and its effects (art. 18)] and do not therefore need further explanation".¹¹⁴⁰

(4) After a major reworking of the draft articles on acceptance and objection initially proposed by the Special Rapporteur,¹¹⁴¹ only draft article 18, paragraph 5,

them. See the alternative drafts of article 9 included in the [first] report on the law of treaties by Sir Hersch Lauterpacht, Special Rapporteur, *Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 91–92.

¹¹³⁹ This draft article 19 contained the following provision:

"2. (a) An objection to a reservation shall be formulated in writing by the competent authority of the objecting State or by a representative of the State duly authorized for that purpose.

"(b) The objection shall be communicated to the reserving State and to all other States, which are or are entitled to become parties to the treaty, in accordance with the procedure, if any, prescribed in the treaty for such communications.

"(c) If no procedure has been prescribed in the treaty but the treaty designates a depositary of the instruments relating to the treaty, then the lodging of the objection shall be communicated to the depositary whose duty it shall be:

"(i) To transmit the text of the objection to the reserving State and to all other States which are or are entitled to become parties to the treaty; and

"(ii) To draw the attention of the reserving State and the other States concerned to any provisions in the treaty relating to objections to reservations.

"3. (a) In the case of a plurilateral or multilateral treaty, an objection to a reservation shall not be effective unless it has been lodged before the expiry of twelve calendar months from the date when the reservation was formally communicated to the objecting State; provided that, in the case of a multilateral treaty, an objection by a State which at the time of such communication was not a party to the treaty shall nevertheless be effective if subsequently lodged when the State executes the act or acts necessary to enable it to become a party to the treaty.

"(b) In the case of a plurilateral treaty, an objection by a State which has not yet become a party to the treaty, either actual or presumptive, shall:

"(i) Cease to have effect, if the objecting State shall not itself have executed a definitive act of participation in the treaty within a period of twelve months from the date when the objection was lodged;

"(ii) Be of no effect, if the treaty is in force and four years have already elapsed since the adoption of its text."

(First report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62).

¹¹⁴⁰ *Ibid.*, p. 68, paragraph (22) of the commentary.

¹¹⁴¹ The only explanation that can be found in the work of the Commission for merging the draft articles initially proposed by

presented by the Drafting Committee in 1962, deals with the formulation and the notification of an objection,¹¹⁴² a provision that, in the view of the Commission, "do[es] not appear to require comment".¹¹⁴³ That lack of interest continued into 1965, when the draft received its second reading. And even though objections found a place in the new draft article 20 devoted entirely to questions of procedure, the Special Rapporteur still did not consider it appropriate to comment further on those provisions.¹¹⁴⁴

(5) The desirability of parallel procedural rules for the formulation, notification and communication of reservations, on the one hand, and of objections, on the other, was stressed throughout the debate in the Commission and was finally reflected in article 23, paragraph 1, of the 1969 Vienna Convention, which aligns the procedure for formulating an express acceptance or objection with the procedure applicable to reservations. In 1965, Mr. Castrén rightly observed as follows:

Paragraph 5 [of draft article 20, which, considerably shortened and simplified, was the source for article 23, paragraph 1] laid down word for word precisely the same procedural rules for objections to a reservation as those applicable under paragraph 1 to the proposal and notification of reservations. Preferably, therefore, the two paragraphs should be amalgamated or else paragraph 5 should say simply that the provisions of paragraph 1 applied also to objections to a reservation.¹¹⁴⁵

(6) Accordingly, the Commission considered it prudent simply to take note in the Guide to Practice of this procedural parallelism between the formulation of reservations and the formulation of objections. It is particularly important to note that the requirement of a marked formalism that is a consequence of these similarities between the procedure for the formulation of objections and the procedure for the formulation of reservations is justified by the highly significant effects that an objection may have on the reservation and its application as well as on the entry into force and the application of the treaty itself.¹¹⁴⁶

(7) This is particularly true of the rules applicable to reservations with regard to the authorities competent to formulate reservations at the international level and the consequences (or rather the absence of consequences) of the violation of rules of internal law when formulating reservations, the rules relating to the notification and communication of reservations and the rules relating to the functions of the depositary in this area. These rules would seem to be transposable *mutatis mutandis* to the formulation of objections. Rather than reproducing guidelines 2.1.3 (Representation for the purpose of formulating a reservation at the international level), 2.1.4

Sir Humphrey Waldock is found in his presentation of the report of the Drafting Committee at the 663rd meeting of the Commission. On that occasion, the Special Rapporteur stated that "the new article 18 covered both acceptance of and objection to reservations; the contents of the two former articles 18 and 19 had been considerably reduced in length without, however, leaving out anything of substance" (*ibid.*, vol. I, 663rd meeting, p. 223, para. 36).

¹¹⁴² *Ibid.*, 668th meeting, p. 258, para. 30. See also draft article 19, paragraph 5, adopted on first reading, *ibid.*, vol. II, p. 176.

¹¹⁴³ *Ibid.*, p. 180, paragraph (18) of the commentary.

¹¹⁴⁴ See the fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 53–54, in particular para. 19.

¹¹⁴⁵ *Ibid.*, vol. I, 799th meeting, p. 168, para. 53.

¹¹⁴⁶ See article 20, paragraph 4 (b), and article 23, paragraph 3, of the Vienna Conventions.

(Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations), 2.1.5 (Communication of reservations), 2.1.6 (Procedure for communication of reservations) and 2.1.7 (Functions of depositaries) by simply replacing “reservation” with “objection” in the text of the guidelines, the Commission considered it prudent to make a general reference in the texts of these guidelines,¹¹⁴⁷ which apply *mutatis mutandis* to objections.

2.6.9 Statement of reasons for objections

An objection should, to the extent possible, indicate the reasons why it is being formulated.

Commentary

(1) Neither of the Vienna Conventions contains a provision requiring States to give the reasons for their objection to a reservation. Furthermore, notwithstanding the link initially established between an objection, on the one hand, and the compatibility of the reservation with the object and purpose of the treaty, on the other hand,¹¹⁴⁸ Sir Humphrey Waldock never at any point envisaged requiring a statement of the reasons for an objection. This is regrettable.

(2) Under the Vienna Convention regime, the right to formulate an objection to a reservation is admittedly very broad, and a State or international organization may object to a reservation for any reason whatsoever, irrespective of the permissibility of the reservation: “No State can be bound by contractual obligations it does not consider suitable.”¹¹⁴⁹ Furthermore, during discussions in the Sixth Committee of the General Assembly, several States indicated that quite often the reasons a State has for formulating an objection are purely political.¹¹⁵⁰ When this is the case, stating reasons can unnecessarily place the objecting State or international organization in an awkward position, while gaining nothing for the author of the objection or the other States or international organizations concerned.

¹¹⁴⁷ The Commission proceeded in the same manner in guidelines 1.6.2 (cross reference to guidelines 1.2 and 1.4), 2.4.5 (cross reference to guidelines 2.1.5, 2.1.6 and 2.1.7) and 2.5.6 (cross reference to guidelines 2.1.5, 2.1.6 and 2.1.7).

¹¹⁴⁸ See paragraph (4) of the commentary to guideline 2.6.2.

¹¹⁴⁹ Tomuschat, “Admissibility and legal effects of reservations ...” (footnote 1080 above), p. 466.

¹¹⁵⁰ See, for example, the statement by the United States representative in the Sixth Committee during the fifty-eighth session of the General Assembly: “Practice demonstrated that States and international organizations objected to reservations for a variety of reasons, often political rather than legal in nature, and with different intentions” (*Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee, 20th meeting, A/C.6/58/SR.20*, p. 3, para. 9). During the sixtieth session, the representative of the Netherlands stated that “in the current system, the political aspect of an objection, namely, the view expressed by the objecting State on the desirability of a reservation, played a central role, and the legal effects of such an objection were becoming increasingly peripheral” (*ibid.*, *Sixtieth Session, Sixth Committee, 14th meeting, A/C.6/60/SR.14*, p. 6, para. 31); regarding the political aspect of an objection, see the statement of the representative of Portugal (*ibid.*, *Sixtieth Session, Sixth Committee, 16th meeting, A/C.6/60/SR.16*, pp. 7–8, para. 44). See also the Separate Opinion of Judge A. A. Cançado Trindade in the case *Caesar v. Trinidad and Tobago*, Judgment of 11 March 2005, Inter-American Court of Human Rights, Series C, No. 123, para. 24.

(3) Yet the issue is different where a State or international organization objects to a reservation because it considers it invalid (regardless of the reason for and merits of this position). Leaving aside the question as to whether there may be a legal obligation¹¹⁵¹ for States to object to reservations that are incompatible with the object and purpose of a treaty, it is nevertheless the case that in a “flexible” treaty regime objections play a significant role in the determination of the permissibility of a reservation. In the absence of a mechanism for monitoring reservations, the onus is on States and international organizations to express, including by means of objections, their view, which is necessarily subjective, on the permissibility of a given reservation.¹¹⁵² Such a function can only be fulfilled, however, if objections are motivated by considerations relating to the non-permissibility of the reservation in question. If only for this reason, it would seem reasonable to indicate, insofar as possible, the reasons for an objection. It is difficult to see why an objection formulated for purely political reasons should be taken into account when determining whether a reservation meets the requirements of article 19 of the Vienna Conventions.

(4) In addition, indicating the reasons for an objection not only allows a reserving State or international organization to understand the views of the other States and international organizations concerned regarding the impermissibility of the reservation but, like the statement of reasons for the reservation itself,¹¹⁵³ provides important evidence to the monitoring bodies called on to determine whether a reservation is in conformity with the treaty. Thus, in the *Loizidou* case, the European Court of Human Rights found its conclusions regarding the impermissibility of the reservation formulated by Turkey regarding its declaration of acceptance of the Court’s jurisdiction confirmed in the declarations and objections made by other States parties to the European Convention on Human Rights.¹¹⁵⁴ Similarly, in the

¹¹⁵¹ The Netherlands observed that “States parties, as guardians of a particular treaty, appeared to have a moral, if not legal, obligation to object to a reservation that was contrary to the object and purpose of that treaty” (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 14th meeting, A/C.6/60/SR.14*, para. 29). According to this line of reasoning, “a party is required to give effect to its undertakings in good faith and that would preclude it from accepting a reservation inconsistent with the objects and purposes of the treaty” (Final working paper on reservations to human rights treaties prepared by Ms. Françoise Hampson in 2004 (E/CN.4/Sub.2/2004/42), para. 24); Ms. Hampson observed, however, that “there appears to be no general obligation to object to incompatible reservations” (*ibid.*, para. 30).

¹¹⁵² Some treaty regimes go so far as to rely on the number of objections in order to determine the admissibility of a reservation. See, for example, article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, which states that: “A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it*.”

¹¹⁵³ See guideline 2.1.2 and paragraphs (4)–(6) of the commentary thereto.

¹¹⁵⁴ *Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995 (see footnote 304 above), Series A no. 310, pp. 28–29, para. 81. See also the statement of the representative of Sweden on behalf of the Nordic countries in the Sixth Committee, 26 October 2005, *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 14th meeting, A/C.6/60/SR.14*, para. 22.

working paper she submitted to the Sub-Commission on the Promotion and Protection of Human Rights in 2004, Ms. Hampson stated that “[i]n order for a treaty body to discharge its role, it will need to examine, amongst other materials, the practice of the parties to the treaty in question with regard to reservations and objections”.¹¹⁵⁵ The Human Rights Committee itself, in its general comment No. 24, demonstrates deep mistrust with regard to the practice of States concerning objections and with regard to the conclusions that one may draw from it in assessing the permissibility of a reservation, but nevertheless states that “an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant”.¹¹⁵⁶

(5) Moreover, State practice shows that States often indicate in their objections not only that they consider the reservation in question to be contrary to the object and purpose of the treaty but also, in more or less detail, how and why they reached that conclusion. At the sixtieth session of the General Assembly, the representative of Italy to the Sixth Committee expressed the view that the Commission should encourage States to make use of the formulas set forth in article 19 of the Vienna Convention, with a view to clarifying their objections.¹¹⁵⁷

(6) In the light of these considerations and notwithstanding the absence of an obligation in the Vienna regime to give the reasons for objections, the Commission considered it useful to include in the Guide to Practice guideline 2.6.9, which encourages States and international organizations to expand and develop the practice of stating reasons. It must be clearly understood, however, that such a provision is only a recommendation, a guideline for State practice, and that it does not in any way codify an established rule of international law.

(7) Guideline 2.6.9 is worded along the lines of guideline 2.1.2, concerning the statement of reasons for reservations, but does not go any further than that guideline in specifying the point at which the reasons for an objection must be given. Since the same causes produce the same effects,¹¹⁵⁸ it would nevertheless seem desirable for the objecting State or international organization to give the reasons for its opposition to the reservation in the instrument notifying the objection.

2.6.10 Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation

An objection to a reservation formulated by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

¹¹⁵⁵ Final working paper on reservations to human rights treaties (footnote 1151 above), para. 28; see, more generally, paragraphs 21–35 of this study.

¹¹⁵⁶ Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 124, para. 17.

¹¹⁵⁷ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 16th meeting*, 28 October 2005 (A/C.6/60/SR.16, para. 20).

¹¹⁵⁸ See paragraph (8) of the commentary to guideline 2.1.2.

Commentary

(1) While article 23, paragraph 2, of the Vienna Conventions requires formal confirmation of a reservation when the reserving State or international organization expresses its consent to be bound by the treaty,¹¹⁵⁹ objections do not need confirmation. Article 23, paragraph 3, of the Vienna Conventions provides:

An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

Guideline 2.6.10 reproduces some of the terms of this provision with the necessary editorial amendments to limit its scope to objections only.¹¹⁶⁰

(2) The provision contained in article 23, paragraph 3, of the 1969 Vienna Convention was included only at a very late stage of the *travaux préparatoires* for the Convention. The early draft articles relating to the procedure applicable to the formulation of objections did not refer to cases where an objection might be made to a reservation that had yet to be formally confirmed. It was not until 1966 that the non-requirement of confirmation of an objection was expressed in draft article 18, paragraph 3, adopted on second reading in 1966,¹¹⁶¹ without explanation or illustration; however, it was presented at that time as *lex ferenda*.¹¹⁶²

(3) This is a common-sense rule: the formulation of the reservation concerns all contracting States and contracting organizations as well as all States and international organizations entitled to become parties; acceptances and objections affect primarily the bilateral relations between the author of the reservation and each of the accepting or objecting States or organizations. The reservation is an “offer” addressed to all contracting States and contracting organizations, which may accept or reject it; it is the reserving State or organization that endangers the integrity of the treaty and risks reducing it to a series of bilateral relations. On the other hand, it is unimportant whether the acceptance or objection is made before or after confirmation of the reservation: what is important is that the author of the reservation be aware of its partners’ intentions,¹¹⁶³ which is the case if the communication procedure established in article 23, paragraph 1, has been followed.

(4) State practice regarding the confirmation of objections is sparse and inconsistent: sometimes States confirm their previous objections once the reserving State has itself confirmed its reservation, but at other times they

¹¹⁵⁹ See also guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty) and commentary thereto.

¹¹⁶⁰ Concerning the non-requirement of confirmation of an acceptance formulated prior to the formal confirmation of a reservation, see guideline 2.8.6 and commentary thereto.

¹¹⁶¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208.

¹¹⁶² “[T]he Commission did not consider that an objection to a reservation made previously to the latter’s confirmation would need to be reiterated after that event” (*ibid.*, paragraph (5) of the commentary).

¹¹⁶³ In its *Advisory Opinion of May 28th, 1951 on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice described the objection made by a signatory as a “warning” addressed to the author of the reservation (*I.C.J. Reports 1951*; footnote 604 above, p. 29).

refrain from doing so.¹¹⁶⁴ Although the latter approach seems to be more usual, the fact that these confirmations exist does not invalidate the positive quality of the rule laid down in article 23, paragraph 3: these are precautionary measures that are by no means dictated by a sense of legal obligation (*opinio juris*).

2.6.11 Confirmation of an objection formulated prior to the expression of consent to be bound by a treaty

An objection formulated prior to the expression of consent to be bound by the treaty does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization was a signatory to the treaty when it formulated the objection; it must be confirmed if the State or international organization had not signed the treaty.

Commentary

(1) Article 23, paragraph 3, of the Vienna Conventions does not, however, answer the question of whether an objection by a State or an international organization that, when formulating it, had yet to express its consent to being bound by the treaty must subsequently be confirmed if it is to produce the effects envisaged. Although Sir Humphrey Waldock did not overlook the possibility that an objection might be formulated by signatory States or by States only entitled to become parties to the treaty,¹¹⁶⁵ the question of the subsequent confirmation of such a reservation was never raised.¹¹⁶⁶ A proposal to that end made by Poland at the United Nations Conference on the Law of Treaties¹¹⁶⁷ was not considered. The Convention therefore has a gap that guideline 2.6.11 endeavours to fill.

(2) State practice in this regard is all but non-existent. One of the rare examples is provided by the objections

¹¹⁶⁴ For example, Australia and Ecuador did not confirm their objections to the reservations formulated at the time of the signing of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 by the Byelorussian Soviet Socialist Republic, Czechoslovakia, Ukraine and the Union of Soviet Socialist Republics when those States ratified that Convention while confirming their reservations (*Multilateral Treaties ...* (footnote 37 above), chap. IV.1). Similarly, Ireland and Portugal did not confirm the objections they made to the reservation formulated by Turkey at the time of the signing of the 1989 Convention on the rights of the child when Turkey confirmed its reservation in its instrument of ratification (*ibid.*, chap. IV.11).

¹¹⁶⁵ See, in particular, paragraph 3 (b) of draft article 19 proposed by Sir Humphrey Waldock in his first report on the law of treaties (*Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62) or paragraph 6 of the draft article 20 proposed in his fourth report (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1-2, p. 55).

¹¹⁶⁶ Except, perhaps, in a comment made incidentally by Mr. Tunkin: "It was clearly the modern practice that a reservation was valid only if made or confirmed at the moment when final consent to be bound was given, and that was the presumption reflected in the 1962 draft. The same applied to objections to reservations. The point was partially covered in paragraph 6 of the Special Rapporteur's new text for article 20" (*ibid.*, vol. I, 799th meeting, p. 167, para. 38).

¹¹⁶⁷ The Polish Government proposed that paragraph 2 of article 18 (which became article 23), should be worded as follows: "If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation as well as an eventual objection to it must be formally confirmed by the reserving and objecting States when expressing their consent to be bound by the treaty. In such a case the reservation and the objection shall be considered as having been made on the date of their confirmation" (A/CONF.39/6/Add.1, p. 18).

formulated by the United States of America to a number of reservations to the 1969 Vienna Convention itself.¹¹⁶⁸ In its objection to the Syrian reservation, the United States—which has yet to express its consent to be bound by the Convention—specified that it

intends, at such time as it may become a party to the Vienna Convention on the Law of Treaties, to reaffirm its objection* to the foregoing reservation and to reject treaty relations with the Syrian Arab Republic under all provisions in Part V of the Convention with regard to which the Syrian Arab Republic has rejected the obligatory conciliation procedures set forth in the Annex to the Convention.¹¹⁶⁹

Curiously, the second objection by the United States, formulated against the Tunisian reservation, does not contain the same statement.

(3) In its 1951 advisory opinion, the International Court of Justice also seemed to take the view that objections made by States that are not parties do not require confirmation. It considered:

Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification*.

... The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect.¹¹⁷⁰

The Court thereby seemed to accept that an objection automatically takes effect as a result of ratification alone, without the need for confirmation.¹¹⁷¹ It has yet to take a formal stand on this question, however, and the debate remains open.

(4) It is possible, however, to deduce from the omission from the text of the Vienna Conventions of any requirement that an objection made by a State or an international organization prior to ratification or approval should be confirmed that neither the members of the Commission nor the delegates at the United Nations Conference on the Law of Treaties¹¹⁷² considered that such a confirmation was necessary. The fact that the Polish amendment,¹¹⁷³ which aimed to bring objections in line with reservations in that regard, was not adopted further confirms this argument. These considerations are further strengthened if one bears in mind that, when the requirement of formal confirmation of reservations formulated when signing the treaty, an obligation now firmly embodied in article 23, paragraph 2, of the Vienna Conventions, was adopted by the Commission, it was more in the nature of progressive development than codification *stricto sensu*.¹¹⁷⁴ Thus, the

¹¹⁶⁸ The reservations in question are those formulated by the Syrian Arab Republic (point E) and Tunisia (*Multilateral Treaties ...* (footnote 37 above), chap. XXIII.1).

¹¹⁶⁹ *Ibid.*

¹¹⁷⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), pp. 28–29.

¹¹⁷¹ See, in this sense, Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 137.

¹¹⁷² *Ibid.*

¹¹⁷³ See footnote 1167 above.

¹¹⁷⁴ See Sir Humphrey Waldock's first report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 66,

disparity here between the procedural rules established for the formulation of reservations on the one hand and the formulation of objections on the other could not have been due to a simple oversight but should reasonably be considered to have been deliberate.

(5) There are other grounds for the non-requirement of formal confirmation of an objection made by a State or an international organization prior to the expression of its consent to be bound by the treaty. A reservation formulated before the reserving State or international organization becomes a contracting party to the treaty cannot produce any legal effect and remains a “dead letter” until such a time as the State’s consent to be bound by the treaty is effectively given. Requiring formal confirmation of the reservation is justified in this case in particular by the fact that the reservation, once accepted, modifies that consent. The same is not true of objections. Although objections also produce the effects provided for in article 20, paragraph 4, and article 21, paragraph 3, of the Vienna Conventions only after the objecting State or international organization has become a “contracting party”, they are not without significance even before then. They express their author’s opinion of a reservation’s permissibility and, as such, may be taken into consideration by the bodies having competence to assess the permissibility of reservations.¹¹⁷⁵ Moreover, and on this point the 1951 advisory opinion of the International Court of Justice remains valid, objections give reserving States an indication of the attitude of the objecting State *vis-à-vis* their reservation. As the Court observed:

The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation.¹¹⁷⁶

Such an objection, formulated prior to the expression of consent to be bound by the treaty, thus encourages the reserving State to reconsider, modify or withdraw its reservation in the same way as an objection raised by a contracting State. This notification would, however, become a mere possibility if the objecting State was required to confirm its objection at the time it expressed its consent to be bound by the treaty. The requirement of an additional formal confirmation would thus, in the Commission’s view, make it much less important for States and international organizations that are not yet contracting States or contracting organizations to the treaty to be able to make objections.

(6) Moreover, non-confirmation of an objection in such a situation poses no problem of legal security. Objections formulated by a signatory State or by a State entitled to become a party to the treaty must, like any notification

paragraph (11) of the commentary to draft article 17; see also Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 28; and Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 41. See also paragraph (8) of the commentary to guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty).

¹¹⁷⁵ See paragraph (4) of the commentary to guideline 2.6.9 above.

¹¹⁷⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 29.

or communication relating to the treaty,¹¹⁷⁷ be made in writing and communicated and notified, in the same way as objections emanating from a party. Furthermore, unlike a reservation, an objection modifies treaty relations only with respect to the bilateral relations between the reserving State—which has been duly notified—and the objecting State. The rights and obligations assumed by the objecting State *vis-à-vis* other States parties to the treaty are not affected in any way.

(7) As convincing as these considerations might seem, the Commission nevertheless felt it necessary to draw a distinction between two different cases: objections formulated by signatory States or international organizations and objections formulated by States or international organizations that had not yet signed the treaty at the time the objection was formulated. It would seem that, by signing the treaty, the first category of States and international organizations has legal standing *vis-à-vis* the instrument in question,¹¹⁷⁸ while the others have the status of third parties. Even though such third parties can formulate an objection to a reservation,¹¹⁷⁹ formal confirmation of such objections at the time the author State or international organization signs the treaty or expresses its consent to be bound by it is all the more necessary in that a significant amount of time can elapse between the time an objection is formulated by a State or international organization that had not signed the treaty when it made the objection and the time at which the objection produces its effects.

(8) The Vienna Conventions do not define the notion of a “signatory to the treaty”, which the Commission has used in guideline 2.6.11. It nevertheless follows from article 18, subparagraph (a), of the Vienna Conventions that what is meant is States and international organizations that have “signed the treaty or [have] exchanged instruments constituting the treaty subject to ratification, formal confirmation, acceptance or approval, until [they] shall have made [their] intention clear not to become a party to the treaty”.

2.6.12 Time period for formulating objections

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation within a period of twelve months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

Commentary

(1) The question of the time at which, or until which, a State or an international organization may raise an objection is partially and indirectly addressed in article 20, paragraph 5, of the Vienna Conventions. In its 1986 wording, this provision states:

¹¹⁷⁷ See article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention.

¹¹⁷⁸ See, in particular, article 18, subparagraph (a), of the Vienna Conventions.

¹¹⁷⁹ See guideline 2.6.3, subparagraph (b), above.

For the purposes of paragraphs 2 and 4,¹¹⁸⁰ and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

(2) Guideline 2.6.12 isolates those elements of the provision having to do specifically with the time period within which an objection can be formulated.¹¹⁸¹ Once again, a distinction is drawn between two possible situations.

(3) The first situation involves States and international organizations that are contracting States or international organizations at the time the reservation is notified. They have a period of 12 months within which to make an objection to a reservation, a period that runs from the time of receipt of the notification of the reservation by the States and international organizations for which it is intended, in accordance with guideline 2.1.6.

(4) The 12-month period established in article 20, paragraph 5, was the result of an initiative by Sir Humphrey Waldock and was not chosen arbitrarily. By proposing such a time period, he did, however, depart from the State practice of that time, which was quite diverse. The Special Rapporteur had found time periods of 90 days and of 6 months in treaty practice¹¹⁸² but preferred to follow the proposal of the Inter-American Council of Jurists.¹¹⁸³ He noted in this connection:

But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed.¹¹⁸⁴

(5) This 12-month period within which an objection must be formulated in order to reverse the presumption of acceptance, provided for in article 20, paragraph 5, of the Vienna Conventions, did not, however, seem to be a well-established customary rule at the time of the United Nations Conference on the Law of Treaties; nevertheless, it is still “the most acceptable” period.¹¹⁸⁵ Horn has noted in this regard:

A too long period could not be admitted, because this would result in a protracted period of uncertainty as to the legal relations between the reserving State and the confronted parties. Nor should the period be too

¹¹⁸⁰ Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, with reference to treaties with limited participation and the constituent acts of international organizations.

¹¹⁸¹ The Commission notes that from a strictly logical standpoint it would have been more appropriate to speak of the time period during which an objection can be “made”. It nevertheless chose to remain faithful to the letter of article 20, paragraph 5, of the Vienna Conventions.

¹¹⁸² First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 66–67, paragraph (14) of the commentary to article 18.

¹¹⁸³ *Ibid.*, p. 67, para. (16).

¹¹⁸⁴ *Ibid.*

¹¹⁸⁵ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 107. Greig considers that the 12-month period established in article 20, paragraph 5, of the Vienna Convention is at least “a guide to what is reasonable”, Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 128.

short. That again would not leave enough time for the confronted States to undertake the necessary analysis of the possible effects a reservation may have for them.¹¹⁸⁶

(6) In fact, this time period—which clearly emerged from the progressive development of international law when the Vienna Convention was adopted—has never fully taken hold as a customary rule that is applicable in the absence of text.¹¹⁸⁷ For a long time, the practice of the Secretary-General as depositary of multilateral treaties was difficult to reconcile with the provisions of article 20, paragraph 5, of the Vienna Conventions.¹¹⁸⁸ This is because in cases where a treaty was silent on the issue of reservations, the Secretary-General traditionally considered that if no objection to a duly notified reservation had been received within 90 days, the reserving State became a contracting State.¹¹⁸⁹ However, having decided that this practice delayed the entry into force of treaties and their registration,¹¹⁹⁰ the Secretary-General abandoned this practice and now considers any State that has formulated a reservation to be a contracting State as of the date of effect of the instrument of ratification or accession.¹¹⁹¹ In order to justify this position, the Secretary-General has pointed out that it is unrealistic to think that the conditions set out in article 20, paragraph 4 (b), could ever be met, since in order to preclude the entry into force of the treaty for the reserving State, all the contracting States and contracting organizations would have had to object to the reservation. The Secretary-General’s comments are, therefore, less about the presumption established in paragraph 5 than about the unrealistic nature of the three subparagraphs of paragraph 4. In 2000, the United Nations Legal Counsel also stated that he was in favour of the 12-month period specified in paragraph 5, which now applies to the necessarily unanimous acceptance of reservations formulated late.¹¹⁹² Moreover, State

¹¹⁸⁶ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 126.

¹¹⁸⁷ See Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 495–496, para. 16. See also Gaja, “Unruly treaty reservations” (footnote 28 above), p. 324; Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), pp. 127 *et seq.*; and Aust, *Modern Treaty Law and Practice* (footnote 155 above), p. 155.

¹¹⁸⁸ Imbert, “À l’occasion de l’entrée en vigueur de la Convention de Vienne ...” (footnote 601 above), pp. 524–541; Gaja, “Unruly treaty reservations” (footnote 28 above), pp. 323–324; Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 245–250; and Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 503–504, para. 43.

¹¹⁸⁹ *Summary of Practice of the Secretary-General ...* (see footnote 75 above), p. 55, para. 185.

¹¹⁹⁰ The 90-day period continued to be applied, however, to the acceptance of reservations formulated late for which unanimous acceptance by the contracting States is generally required (*ibid.*, pp. 61–62, paras. 205–206). See guideline 2.3.1 and commentary thereto.

¹¹⁹¹ *Summary of Practice of the Secretary-General ...* (see footnote 75 above), pp. 54–55, paras. 184–187.

¹¹⁹² *Note verbale* from the Legal Counsel of the United Nations addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000. See paragraphs (7)–(8) of the commentary to guideline 2.3.1. The practice of the Council of Europe regarding the acceptance of late reservations, however, is to give contracting States a period of only nine months to formulate an objection (see Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), p. 102).

practice shows that States formulate objections even if the 12-month period specified in article 20, paragraph 5, has elapsed. Whatever uncertainties there may be regarding the “positive quality” of the rule with regard to general international law, the rule is retained in the Vienna Conventions, and modifying it for the purposes of the Guide to Practice would undoubtedly give rise to more drawbacks than advantages: according to the practice adopted by the Commission during its work on reservations, there should be good reason for departing from the wording of the provisions of the Conventions on the law of treaties; surely no such reason exists in the present case.

(7) For the same reason, while the expression “unless the treaty otherwise provides” is self-evident, given that the relevant provisions of the Vienna Conventions are of a residuary, voluntary nature and apply only if the treaty does not otherwise provide, the Commission felt that it would be useful to retain this wording in guideline 2.6.12. A review of the *travaux préparatoires* of article 20, paragraph 5, of the 1969 Vienna Convention in fact explains why this expression was included and thus justifies its retention. Indeed, this phrase (“unless the treaty otherwise provides”) was included in response to an amendment proposed by the United States of America.¹¹⁹³ The United States representative to the Conference explained that an amendment had been proposed because

[t]he Commission’s text seemed to prevent the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months.¹¹⁹⁴

Thus, the United States amendment was not directed specifically at the 12-month period established by the Commission, but sought only to make it clear that it was merely a voluntary residual rule that in no way precluded treaty negotiators from establishing a different period.¹¹⁹⁵

(8) The second case covered by guideline 2.6.12 involves States and international organizations that do not acquire “contracting status” until after the 12-month time period following the date they received notification has elapsed. In this case, States and international organizations may make an objection up until the date on which they express their consent to be bound by the treaty, which, obviously, does not prevent them from doing so before that date.

(9) This solution of drawing a distinction between contracting States and organizations and those that have not yet acquired this status *vis-à-vis* the treaty was contemplated in Mr. Brierly’s proposals but was not taken up by either Sir Hersch Lauterpacht or Sir Gerald Fitzmaurice nor retained by the International Law Commission in the

articles adopted on first reading in 1962,¹¹⁹⁶ even though Sir Humphrey Waldock had included it in the draft article 18 presented in his 1962 report.¹¹⁹⁷ In the end, it was reintroduced during the second reading in order to address the criticism voiced by the Government of Australia, which was concerned about the practical problems that might arise when the principle of tacit acceptance was actually applied.¹¹⁹⁸

(10) However, this solution in no way places States and international organizations that are not contracting States or contracting organizations at the time the reservation is notified in a position of inequality *vis-à-vis* the contracting States and contracting organizations. On the contrary, one should not lose sight of the fact that, under article 23, paragraph 1, any reservation that has been formulated must be notified not only to the contracting States and contracting organizations but also to other States and international organizations entitled to become parties to the treaty.¹¹⁹⁹ States and international organizations “entitled to become parties to the treaty” thus have all the information they need with regard to reservations to a specific treaty and also have a period for reflection that is at least as long¹²⁰⁰ as that given to contracting States or contracting organizations (12 months).

2.6.13 Objections formulated late

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.12 does not produce all the legal effects of an objection formulated within that time period.

Commentary

(1) There is nothing to prevent States or international organizations from formulating objections late, in other words after the end of the 12-month period (or any other time period specified by the treaty) or after the expression of consent to be bound in the case of States and international organizations that accede to the treaty after the end of the 12-month period.¹²⁰¹

(2) This practice is far from uncommon. In a study published in 1988, Horn found that, of 721 objections surveyed, 118 had been formulated late,¹²⁰² and this figure

¹¹⁹³ A/CONF.39/C.1/L.127, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 136.

¹¹⁹⁴ *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 21st meeting of the Committee of the Whole, 10 April 1968, p. 108, para. 13.

¹¹⁹⁵ Ruda argues, however, that the United States amendment emphasizes the “residual character of article 20, paragraph 5” (Ruda, “Reservations to treaties” (footnote 56 above), p. 185).

¹¹⁹⁶ Indeed, draft article 19, paragraph 3, presented in the Commission’s report to the General Assembly, concerned only implied acceptance in the strict sense of the word. See *Yearbook ... 1962*, vol. II, document A/5209, p. 176.

¹¹⁹⁷ *Ibid.*, document A/CN.4/144 and Add.1, pp. 61–62.

¹¹⁹⁸ See the fourth report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 45 and p. 53, para. 17.

¹¹⁹⁹ See also guideline 2.1.5, paragraph 1.

¹²⁰⁰ Draft article 18, paragraph 3 (b), in Sir Humphrey Waldock’s first report formulated the same rule as an exception to observance of the 12-month period, stipulating that a State that was not a party to the treaty “shall not be deemed to have consented to the reservation if it shall subsequently [i.e. after the 12-month period has elapsed] lodge an objection to the reservation, when executing the act or acts necessary to qualify it to become a party to the treaty” (*Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 61).

¹²⁰¹ See guideline 2.6.12 and commentary thereto.

¹²⁰² Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 206. See also Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 264–265.

has since increased.¹²⁰³ Many examples can be found¹²⁰⁴ relating to human rights treaties¹²⁰⁵ but also to treaties covering subjects as diverse as the law of treaties¹²⁰⁶ or the fight against terrorism,¹²⁰⁷ as well as with respect to the Convention on the Safety of United Nations and Associated Personnel¹²⁰⁸ and the Rome Statute of the International Criminal Court of 1998.¹²⁰⁹

(3) This practice should certainly not be condemned. On the contrary, it allows States and international organizations to express—in the form of objections—their views as to the validity of a reservation, even when the reservation was formulated more than 12 months earlier, and this practice has its advantages, even if such late objections do not produce any immediate legal effect. As it happens, the position of the States and organizations concerned regarding the validity of a reservation is an important element for the interpreting body, whether a monitoring body or international court, to take into consideration when determining the validity of the reservation. The practice of the Secretary-General as the depositary of multilateral treaties confirms this view. The Secretary-General receives late objections and communicates them to the other States and organizations concerned, in general not as objections but as

¹²⁰³ Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 265.

¹²⁰⁴ The examples cited hereafter are solely cases identified by the Secretary-General and, consequently, notified as “communications”. The study is complicated by the fact that, in the collection of multilateral treaties deposited with the Secretary-General, the date indicated is not that of notification but of deposit of the instrument containing the reservation.

¹²⁰⁵ See the comprehensive list drawn up by Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 265 (footnote 316). See also the late objections made by Sweden (18 October 2010) and the United Kingdom (21 October 2010) to the reservation made by the Lao People’s Democratic Republic to the International Covenant on Civil and Political Rights (25 September 2009) (*Multilateral Treaties ...* (footnote 37 above), chap. IV.4).

¹²⁰⁶ Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 265 (footnote 317).

¹²⁰⁷ See the objections formulated late to the declaration made by Pakistan (13 August 2002) upon accession to the 1997 International Convention for the Suppression of Terrorist Bombings: Republic of Moldova (6 October 2003), Russian Federation (22 September 2003) and Poland (3 February 2004) (*Multilateral Treaties ...* (footnote 37 above), chap. XVIII.9); or the objections formulated late to the reservations formulated by the following States in regard to the 1999 International Convention for the Suppression of the Financing of Terrorism: reservation by Belgium (17 May 2004); Russian Federation (7 June 2005) and Argentina (22 August 2005); declaration by Jordan (28 August 2003); Belgium (24 September 2004), Russian Federation (1 March 2005), Japan (14 July 2005), Argentina (22 August 2005), Ireland (23 June 2006) and Czech Republic (23 August 2006); reservation by the Syrian Arab Republic (24 April 2005); Ireland (23 June 2006) and Czech Republic (23 August 2006); reservation by the Democratic People’s Republic of Korea (12 November 2001, at the time of signature; as the State has not ratified the Convention, the reservation has not been confirmed); Republic of Moldova (6 October 2003), Germany (17 June 2004) and Argentina (22 August 2005); reservation of Yemen (3 March 2010); Belgium (25 March 2011) (*ibid.*, chap. XVIII.11).

¹²⁰⁸ See the objections formulated late by Portugal (15 December 2005) concerning the declaration by Turkey (9 August 2004) (*ibid.*, chap. XVIII.8).

¹²⁰⁹ See the objections formulated late by Ireland (28 July 2003), the United Kingdom (31 July 2003), Denmark (21 August 2003) and Norway (29 August 2003) to the interpretative declaration (considered by objecting States to constitute a prohibited reservation) by Uruguay (28 June 2002) (*ibid.*, chap. XVIII.10).

“communications”,¹²¹⁰ Furthermore, an objection, even a late objection, is important in that it may lead or contribute to a reservations dialogue.¹²¹¹

(4) However, it follows from article 20, paragraph 5, of the Vienna Conventions that if a State or international organization has not raised an objection by the end of the 12-month time period following the formulation of the reservation or by the date on which it expresses its consent to be bound by the treaty, it is considered to have accepted the reservation, with all the consequences that that entails. Without going into the details of the effects of this type of tacit acceptance, suffice it to say that the effect of such an acceptance is, in principle, that the treaty enters into force between the reserving State or international organization and the State or organization considered as having accepted the reservation. This result cannot be called into question by an objection formulated after the treaty has entered into force between the two States or international organizations without seriously affecting legal security.

(5) States seem to be aware that a late objection cannot produce all the effects of an objection made in good time. The Government of the United Kingdom, in its objection (made within the required 12-month period) to the reservation of Rwanda to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, said that it wished “to place on record that they take the same view [in other words, that the Government was unable to accept the reservation] of the similar [to that of Rwanda] reservation made by the German Democratic Republic as notified by the circular letter [...] of 25 April 1973”.¹²¹² It is clear that the British objection to the reservation of the German Democratic Republic was late. The careful wording of the objection shows that the United Kingdom did not expect its objection to produce the legal effects of one formulated within

¹²¹⁰ “[T]aking into account the indicative value of this provision in the Vienna Convention [article 20, paragraph 5], the Secretary-General, when thus receiving an objection after the expiry of this time lapse, calls it a ‘communication’ when informing the parties concerned of the deposit of the objection” (*Summary of Practice of the Secretary-General ...* (see footnote 75 above), p. 63, para. 213). In *Multilateral Treaties Deposited with the Secretary-General*, however, several examples of late objections are given in the section entitled “Objections”. This is the case, for example, with the objection raised by Japan (27 January 1987) to the reservations formulated by Bahrain (2 November 1971) and Qatar (6 June 1986) to the 1961 Vienna Convention on Diplomatic Relations. While the objection was very late insofar as the reservation made by Bahrain was concerned, it was received in good time concerning the reservation made by Qatar; it was no doubt for that reason that the objection was communicated as such, and not simply as a “communication” (*Multilateral Treaties ...* (footnote 37 above), chap. III.3).

¹²¹¹ Following the late objection by Sweden, Thailand withdrew its reservation in respect of the Convention on the rights of the child (*ibid.*, chap. IV.11). Baratta considered that: “[L]’obiezione è strumento utilizzato non solo e non tanto per manifestare la propria disapprovazione all’atto-riserva altrui e per rilevarne, talvolta, l’incompatibilità con ulteriori obblighi posti dell’ordinamento internazionale, quanto e piuttosto per indurre l’autore della riserva a riconsiderarla e possibilmente a ritirarla” (“objections are a tool used not only and not chiefly to express disapproval of the reservation of another and sometimes to point out its incompatibility with further obligations under international law but also and mainly to induce the author of the reservation to reconsider and possibly to withdraw it”). Baratta, *Gli effetti delle riserve ...* (footnote 698 above), pp. 319–320.

¹²¹² *Multilateral Treaties ...* (footnote 37 above), chap. IV.1.

the period specified by article 20, paragraph 5, of the 1969 Vienna Convention.

(6) The communication of 21 January 2002 from the Government of Peru regarding a late—by only a few days—objection by Austria¹²¹³ concerning its reservation to the 1969 Vienna Convention is particularly interesting:

[The Government of Peru refers to the communication made by the Government of Austria relating to the reservation made by Peru upon ratification]. In this document, Member States are informed of a communication from the Government of Austria stating its objection to the reservation entered in respect of the Vienna Convention on the Law of Treaties by the Government of Peru on 14 September 2000 when depositing the corresponding instrument of ratification.

As the [Secretariat] is aware, article 20, paragraph 5, of the Vienna Convention states that “a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation (...).” The ratification and reservation by Peru in respect of the Vienna Convention were communicated to Member States on 9 November 2000.

Since the communication from the Austrian Government was received by the Secretariat on 14 November 2001 and circulated to Member States on 28 November 2001, the Peruvian Mission is of the view that there is tacit acceptance on the part of the Austrian Government of the reservation entered by Peru, the 12-month period referred to in article 20, paragraph 5, of the Vienna Convention having elapsed without any objection being raised. The Peruvian Government considers the communication from the Austrian Government as being without legal effect, since it was not submitted in a timely manner.¹²¹⁴

Although it would appear excessive to consider the Austrian communication as being completely devoid of legal effect, the Peruvian communication shows very clearly that a late objection cannot preclude the operation of the presumption of acceptance under article 20, paragraph 5, of the Vienna Conventions.

(7) It follows from the foregoing that, while an objection formulated late may constitute an element in determining the validity of a reservation, it cannot produce the “normal” effects of an objection of the type provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions.¹²¹⁵ Although these late objections are incapable of producing the effects of an objection, such declarations correspond to the definition of objections contained in guideline 2.6.1 as it relates to guideline 2.6.12. As the commentary to guideline 2.6.3 notes,¹²¹⁶ an objection (like a reservation) is defined not by the effects it produces but by those that its author wishes it to produce.

(8) The wording of guideline 2.6.13 is sufficiently flexible to accommodate established State practice where reservations formulated late are concerned. While it does not prohibit States or international organizations from formulating objections after the time period required by guideline 2.6.12 has elapsed, it spells out explicitly that they do not produce the legal effects of an objection made within that time period.

¹²¹³ This late objection was notified as a “communication” (*ibid.*, chap. XXIII.1).

¹²¹⁴ *Ibid.*

¹²¹⁵ This does not prejudice the question of whether, and how, a reservation that is presumed to be accepted produces the “normal” effect provided for under article 21, paragraph 1, of the Vienna Conventions.

¹²¹⁶ See paragraph (4) of the commentary.

2.7 Withdrawal and modification of objections to reservations

Commentary

(1) The question of the withdrawal of objections to reservations, like that of the withdrawal of reservations, is addressed only very cursorily in the Vienna Conventions.¹²¹⁷ There are merely some indications as to how objections may be withdrawn and when such withdrawals become operative. The modification of objections is not addressed at all.

(2) Article 22, paragraphs 2 and 3, of the 1986 Vienna Convention provides as follows:

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) ...

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23, paragraph 4, stipulates how objections may be withdrawn:

The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

(3) The *travaux préparatoires* of the Vienna Conventions relating to the withdrawal of objections are hardly more enlightening. The question is not dealt with at all in the work of the early special rapporteurs, which is hardly surprising, given their advocacy of the traditional theory of unanimity, which logically precluded the possibility of an objection being withdrawn. Just as logically, it was the first report by Sir Humphrey Waldock, who favoured the flexible system, which contained the first proposal for a provision concerning the withdrawal of objections to reservations. He proposed the following text for draft article 19, paragraph 5:

A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or in part, at any time. Withdrawal of the objection shall be effected by written notification to the depositary of the instruments relating to the treaty, and failing any such depositary, to every State which is or is entitled to become a party to the treaty.¹²¹⁸

After a major reworking of the provisions on the form and procedure relating to reservations and objections, this draft article—which simply reiterated *mutatis mutandis* the similar provision on the withdrawal of a reservation¹²¹⁹—was abandoned; the reasons for this are

¹²¹⁷ Especially concerning the effects of the withdrawal of reservations. See Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 314.

¹²¹⁸ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62.

¹²¹⁹ Draft article 17, paragraph 6, provided as follows: “A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty”

not clear from the Commission's work. No such provision is to be found in either the text adopted on first reading or in the Commission's final draft.

(4) It was only during the United Nations Conference on the Law of Treaties that the issue of the withdrawal of objections was reintroduced into the text of articles 22 and 23, following a Hungarian amendment¹²²⁰ which realigned the procedure for the withdrawal of objections with that for the withdrawal of reservations. As Ms. Bokor-Szegő explained on behalf of the Hungarian delegation:

[I]f a provision on the withdrawal of reservations was included, it was essential that there should also be a reference to the possibility of withdrawing objections to reservations, particularly since that possibility already existed in practice.¹²²¹

The representative of Italy at the Conference also argued in favour of aligning the procedure for the withdrawal of an objection to a reservation with that for the withdrawal of a reservation:

The relation[s] between a reservation and an objection to a reservation was the same as that between a claim and a counter-claim. The extinction of a claim, or the withdrawal of a reservation, was counter-balanced by the extinction of a counter-claim or the withdrawal of an objection to a reservation, which was equally a diplomatic and legal procedural stage in treaty-making.¹²²²

(5) However, there is virtually no State practice in this area. Horn could only identify one example of a clear, definite withdrawal of an objection:¹²²³ in 1982, the Government of Cuba notified the Secretary-General of the withdrawal of objections it had made when ratifying the Convention on the Prevention and Punishment of the Crime of Genocide with respect to the reservations to articles IX and XII formulated by several socialist States.¹²²⁴

(6) Although the provisions of the Vienna Convention do not go into detail on the issue of withdrawal of objections, it is clear from the *travaux préparatoires* that, in principle, the withdrawal of objections ought to follow the same rules as the withdrawal of reservations, just as the formulation of objections follows the same rules as the formulation of reservations.¹²²⁵ To make the relevant provisions clear and specific, the Commission based itself on the guidelines on the withdrawal (and modification) of reservations,¹²²⁶ making the necessary changes to take account of the

(Footnote 1219 continued.)

(*ibid.*, p. 61). The similarity between the two texts was highlighted by Waldock, who considered in the commentary on draft article 19, paragraph 5, that the latter provision reflected paragraph 6 of draft article 17 and "[did] not therefore need further explanation" (*ibid.*, p. 68, paragraph (22) of the commentary).

¹²²⁰ A/CONF.39/L.18, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 267. The Hungarian amendment was adopted, with a slight modification, by 98 votes to none (*Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (footnote 332 above), 11th plenary meeting, 30 April 1969, p. 38, para. 41).

¹²²¹ *Ibid.*, pp. 36 and 37, para. 14.

¹²²² *Ibid.*, pp. 37 and 38, para. 27.

¹²²³ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 227.

¹²²⁴ *Multilateral Treaties ...* (footnote 37 above), chap. IV.1.

¹²²⁵ See paragraphs (1)–(6) of the commentary to guideline 2.6.8.

¹²²⁶ See guidelines 2.5.1 to 2.5.9.

specific nature of objections. However, this should not be seen in any way as an attempt to implement the theory of parallelism of forms;¹²²⁷ it is not a matter of aligning the procedure for the withdrawal of objections with the procedure for their formulation, but of applying the same rules to the withdrawal of an objection as those applicable to the withdrawal of a reservation. The two acts doubtless have different effects on treaty relations and differ in their nature and their intended recipients. Nevertheless, they are similar enough to be governed by comparable formal systems and procedures, as was suggested during the *travaux préparatoires* of the 1969 Vienna Convention.

(7) Like those relating to the withdrawal and modification of reservations, the guidelines contained in this section concern, respectively: the form and procedure for withdrawal; the effects of withdrawal; the time at which withdrawal of an objection produces those effects; partial withdrawal; and the possible widening of the scope of an objection.

2.7.1 *Withdrawal of objections to reservations*

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

Commentary

(1) The question of the possibility of withdrawing an objection and the time at which it is withdrawn is answered in the Vienna Conventions, in particular in article 22, paragraph 2.¹²²⁸ Neither the possibility of withdrawing an objection at any time nor the time at which it may be withdrawn require further elaboration, and the provisions of article 22, paragraph 2, of the Vienna Conventions are in themselves sufficient. Moreover, there is virtually no State practice in this area. Guideline 2.7.1 thus simply reproduces the text of the Vienna Conventions.

(2) While in principle it would be prudent to align the provisions relating to the withdrawal of objections with those relating to the withdrawal of reservations,¹²²⁹ it must be noted that there is a significant difference in the wording of paragraph 1 (relating to the withdrawal of reservations) and that of paragraph 2 (relating to the withdrawal of objections) of article 22: whereas paragraph 1 is careful to state, with regard to a reservation, that "the consent of a State which has accepted the reservation is not required for its withdrawal",¹²³⁰ paragraph 2 does not make the same specification as far as objections are concerned. This difference in wording is logical: in the latter case, the purely unilateral character of the withdrawal is self-evident. This is in fact why the part of the Hungarian amendment¹²³¹ that would have brought the wording of paragraph 2 into line with that of paragraph 1 was set aside at the request of the British delegation

¹²²⁷ See paragraph (6) of the commentary to guideline 2.5.4.

¹²²⁸ See paragraph (2) of the introductory commentary to section 2.7.

¹²²⁹ *Ibid.*, *passim*.

¹²³⁰ On this point, see guideline 2.5.1 and commentary thereto.

¹²³¹ A/CONF.39/L.18, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 267. This amendment resulted in the inclusion of paragraph 2 in article 22 (see paragraph (4) of the introductory commentary to section 2.7 above).

in view of the differing nature of reservations and objections to reservations; the consent of the reserving State was self-evidently not required for the withdrawal of the objection, and an express provision to that effect might suggest that there was some doubt on the point.¹²³²

This is a convincing rationale for the different wording of the two provisions, which does not need to be revisited.

2.7.2 Form of withdrawal of objections to reservations

The withdrawal of an objection to a reservation must be formulated in writing.

Commentary

(1) The answer to the question of the form the withdrawal of an objection should take is likewise to be found in article 23, paragraph 4, of the Vienna Conventions.¹²³³ The requirement that it should be in writing does not call for any lengthy explanations, and the rules of the Vienna Conventions are adequate in themselves: although it is doubtful that the theory of parallelism of forms would be accepted in international law,¹²³⁴ it is certainly reasonable to require a certain degree of formality for the withdrawal of objections, which, like reservations themselves, must be formulated in writing.¹²³⁵ A verbal withdrawal would entail considerable uncertainty, which would not necessarily be limited to the bilateral relations between the reserving State or organization and the author of the initial objection.¹²³⁶

(2) Guideline 2.7.2 now reproduces the text of article 23, paragraph 4, of both the 1969 and 1986 Vienna Conventions, which have identical wording.

(3) The form of a withdrawal of an objection to a reservation is thus identical to the form of a withdrawal of a reservation.

2.7.3 Formulation and communication of the withdrawal of objections to reservations

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

Commentary

(1) Neither the 1969 nor the 1986 Vienna Conventions contains any specific provisions relating to the formulation and communication of a withdrawal. However, it is abundantly clear from the *travaux préparatoires* of the 1969 Vienna Convention¹²³⁷ that, as in the case of the formulation of objections and the formulation

of reservations,¹²³⁸ the procedure to be followed when withdrawing unilateral declarations must be identical to that followed when withdrawing a reservation.

(2) Accordingly, the Commission simply took note of this procedural parallelism between the withdrawal of a reservation and the withdrawal of an objection, which holds for the authority competent to make the withdrawal at the international level and the consequences (or rather the absence of consequences) of the violation of the rules of internal law at the time of formulation and those of notification and communication of the withdrawal. It would appear that they can be transposed *mutatis mutandis* to the withdrawal of objections. Rather than reproduce, by merely replacing the word “reservation” with the word “objection” in the text, guidelines 2.5.4 (Representation for the purpose of withdrawing a reservation at the international level), 2.5.5 (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations) and 2.5.6 (Communication of withdrawal of a reservation), with the last of these itself referring back to the guidelines concerning the communication of reservations and the role of the depositary, the Commission considered it preferable to refer to all of these guidelines,¹²³⁹ which apply *mutatis mutandis* to objections.

2.7.4 Effect on reservation of withdrawal of an objection

A State or an international organization that withdraws an objection formulated to a reservation is presumed to have accepted that reservation.

Commentary

(1) As it did with the withdrawal of reservations,¹²⁴⁰ the Commission considered the effects of the withdrawal of an objection in the part devoted to the procedure for withdrawal. However, the question proved to be infinitely more complex: whereas withdrawing a reservation simply restores the integrity of the treaty in its relations as between the author of the reservation and the other parties, the effects of withdrawing an objection are likely to be manifold.

(2) A State or an international organization that withdraws its objection to a reservation must be presumed to have accepted the reservation. This follows implicitly from the presumption of article 20, paragraph 5, of the Vienna Conventions, which considers the lack of an objection by a State or an international organization to be an acceptance. Professor Bowett has even asserted that the withdrawal of an objection to a reservation becomes equivalent to acceptance of the reservation.¹²⁴¹

¹²³² *Official Records of the United Nations Conference on the Law of Treaties, Second Session ... (A/CONF.39/11/Add.1)* (footnote 332 above), 11th plenary meeting, 30 April 1969, p. 38, para. 31.

¹²³³ See paragraph (2) of the introductory commentary to section 2.7.

¹²³⁴ See paragraph (6) of the commentary to guideline 2.5.4.

¹²³⁵ See paragraph (3) of the commentary to guideline 2.5.2.

¹²³⁶ Given that the withdrawal of an objection resembles an acceptance of a reservation, it might, in certain circumstances, lead to the entry into force of the treaty *vis-à-vis* the reserving State or organization.

¹²³⁷ See paragraphs (3)–(6) of the introductory commentary to section 2.7 above.

¹²³⁸ See guideline 2.6.8 and commentary thereto above.

¹²³⁹ The Commission proceeded in a similar manner with guidelines 1.6.2 (which refers back to guidelines 1.2 and 1.4), 2.4.5 (which refers back to guidelines 2.1.5, 2.1.6 and 2.1.7), 2.5.6 (which refers back to guidelines 2.1.5, 2.1.6 and 2.1.7) and 2.6.8 (which refers back to guidelines 2.1.3 to 2.1.7).

¹²⁴⁰ See guideline 2.5.7 (Effects of withdrawal of a reservation) and commentary thereto.

¹²⁴¹ Bowett, “Reservations to non-restricted ...” (footnote 150 above), p. 88. See also Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 314, and Migliorino, “La revoca di riserve ...” (footnote 809 above), p. 329.

(3) Yet it is not evident that with the withdrawal of an objection “the reservation has full effect”.¹²⁴² As it happens, the effects of the withdrawal of an objection or of the resulting “delayed” acceptance can be manifold and complex, depending on factors relating not only to the nature and validity of the reservation, but also—and above all—to the characteristics of the objection itself:¹²⁴³

– if the objection was not accompanied by the definitive declaration provided for in article 20, paragraph 4 (b), of the Convention, the reservation produces its “normal” effects as provided for in article 21, paragraph 1;

– if the objection was a “maximum-effect” objection, the treaty enters into force between the two parties and the reservation produces its full effects in accordance with the provisions of article 21;

– if the objection was a clause precluding the treaty from entering into force between all parties pursuant to article 20, paragraph 2, or with regard to the reserving State in application of article 20, paragraph 4, the treaty enters into force (and the reservation produces its effects).

This last situation in particular shows that the effects of the withdrawal of an objection not only relate to the establishment of the reservation, but may also have an impact on the entry into force of the treaty itself.¹²⁴⁴ The Commission nevertheless considered it preferable to restrict guideline 2.7.4 to the effects of an objection “on the reservation” and adopted the title of this guideline for that reason.

(4) Not only does it seem difficult to adopt a provision covering all the effects of the withdrawal of an objection, owing to the complexity of the question, but doing so might also prejudice the question of the effects of a reservation and the acceptance of a reservation. The Commission therefore considered that, owing to the complexity of the effects of the withdrawal of an objection, it would be better to regard the withdrawal of an objection to a reservation as being equivalent to an acceptance and to consider that a State that has withdrawn its objection must be considered to have accepted the reservation, without examining, at the present stage, the nature and substance of the effects of such an acceptance, which are the subject of Part 4 of the Guide to Practice. Such a provision implicitly refers to acceptances and their effects, which are the subject of guidelines 4.2.1–4.2.4. The question of when these effects occur is the subject of guideline 2.7.5.

2.7.5 *Effective date of withdrawal of an objection*

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

¹²⁴² Bowett, “Reservations to non-restricted ...” (footnote 150 above), p. 88.

¹²⁴³ In this connection, see Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 314, and Migliorino, “La revoca di riserve ...” (footnote 809 above), p. 329.

¹²⁴⁴ See paragraph (3) of the commentary to guideline 2.7.5 below.

Commentary

(1) The Vienna Conventions contain a very clear provision concerning the time at which the withdrawal of an objection becomes operative. Article 22, paragraph 3 (b), of the 1986 Vienna Convention states that:

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) ...

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

(2) This provision differs from the corresponding rule on the effective date of withdrawal of a reservation in that, in the latter case, the withdrawal becomes operative “in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization”. The reasons for this difference in wording can easily be understood. Whereas withdrawing a reservation hypothetically modifies the content of treaty obligations between the reserving State or international organization and all the other contracting States or organizations, withdrawing an objection to a reservation modifies in principle only the bilateral treaty relationship between the reserving State or organization and the author of the objection. Ms. Bokor-Szegó, the representative of Hungary at the 1969 United Nations Conference on the Law of Treaties, explained the difference in the wording between subparagraph (a) and subparagraph (b) as proposed by her delegation as follows:¹²⁴⁵

[W]ithdrawal of an objection directly concerned only the objecting State and reserving State.¹²⁴⁶

(3) However, the effects of withdrawing an objection to a reservation may go beyond this strictly bilateral relationship between the reserving party and the objecting party. Everything depends on the content and scale of the objection: its withdrawal may even result in the treaty entering into force between all the States and international organizations that ratified it. This occurs in particular when an objection has prevented the entry into force between the parties of a treaty with limited participation (article 20, paragraph 2, of the Vienna Conventions) or, a less likely scenario, when the withdrawal of an objection makes the reserving State or international organization a party to the treaty in question, thereby bringing the number of parties up to the number required for the treaty’s entry into force. In this case, one may well ask whether it is legitimate that the effective date of withdrawal of an objection to a reservation should depend solely on the notification of that withdrawal to the reserving State, which is certainly the chief, but not necessarily the only, interested party. In the above-mentioned situations, limiting the requirement to give notice in this way means that the other contracting States or organizations are not in a position to determine the exact date on which the treaty enters into force.

¹²⁴⁵ See paragraph (4) of the introductory commentary to section 2.7 above.

¹²⁴⁶ *Official Records of the United Nations Conference on the Law of Treaties, Second Session ... (A/CONF.39/11/Add.1)* (footnote 332 above), 11th plenary meeting, 30 April 1969, pp. 36–37, para. 14.

(4) This drawback appears to be more theoretical than real, however, since the withdrawal of an objection must be communicated not only to the reserving State but also to all the States and organizations concerned or to the depositary of the treaty, who will transmit the communication.¹²⁴⁷

(5) The other disadvantages of the rule setting the effective date at notification of the withdrawal were presented in the context of the withdrawal of reservations in the commentary to guideline 2.5.8 (Effective date of withdrawal of a reservation).¹²⁴⁸ They concern the immediacy of that effect on the one hand, and, on the other, the uncertainty facing the author of the withdrawal as to the date notification is received by the State or international organization concerned. The same considerations apply to the withdrawal of an objection, but there they pose far fewer problems. As far as the immediacy of the effect of the withdrawal is concerned, it will be recalled that the chief interested party is the author of the reservation, who would like the reservation to produce all its effects on another contracting party: the quicker the objection is withdrawn, the better it is from the author's perspective. It is the author of the objection, meanwhile, who determines this notification and who must make the necessary preparations (including the preparation of domestic law) to ensure that the withdrawal produces all its effects (and, in particular, that the reservation is applicable in the relations between the two States).

(6) In the light of these considerations and in keeping with the Commission's practice, it does not seem necessary to modify the rule set forth in article 22, paragraph 3 (b), of the Vienna Conventions. Taking into account the recent practice of the principal depositaries of multilateral treaties and, in particular, that of the Secretary-General of the United Nations,¹²⁴⁹ who use modern, rapid means of communication to transmit notifications, States and international organizations other than the reserving State or organization should normally receive the notification at the same time as the directly interested party. Simply reproducing this provision of the Vienna Convention would thus seem justified.

(7) In accordance with the practice followed by the Commission, guideline 2.7.5 is thus identical to article 22, paragraph 3 (b), of the 1986 Vienna Convention, which is more comprehensive than the corresponding 1969 provision in that it takes international organizations into account without altering the meaning in any way. It is for this very reason that the Commission decided not to replace the words "becomes operative" in the English text with the phrase "takes effect", which would seem to mean

the same thing.¹²⁵⁰ This linguistic problem arises only in the English version of the text.

2.7.6 *Cases in which the author of an objection may set the effective date of withdrawal of the objection*

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notice of it.

Commentary

(1) For the reasons given in the commentary to guideline 2.5.9 (Cases in which the author of a reservation may set the effective date of withdrawal of the reservation), the Commission felt it necessary to adopt a guideline that was analogous in order to cover the situation in which the objecting State or international organization unilaterally sets the effective date of withdrawal of its objection, without, however, entirely reproducing the former guideline.

(2) In fact, in the case where the author of the objection decides to set as the effective date of withdrawal of its objection a date earlier than that on which the reserving State received notification of the withdrawal, a situation corresponding *mutatis mutandis* to subparagraph (b) of guideline 2.5.9,¹²⁵¹ the reserving State or international organization is placed in a particularly awkward position. The State or international organization that has withdrawn its objection is considered as having accepted the reservation and may therefore, in accordance with the provisions of article 21, paragraph 1, invoke the effect of the reservation on a reciprocal basis; the reserving State or international organization would then have incurred international obligations without being aware of it, and this could seriously undermine legal security in treaty relations. It is for this reason that the Commission decided quite simply to rule out this possibility and to omit it from guideline 2.7.6. As a result, only a date later than the date of notification of the reservation may be set by an objecting State or international organization when withdrawing an objection.

(3) In the English version of guideline 2.7.6, the phrase "becomes operative" calls for the same comments as in the case of guideline 2.7.5.¹²⁵²

2.7.7 *Partial withdrawal of an objection*

1. Unless the treaty otherwise provides, a State or an international organization may partially withdraw an objection to a reservation.

2. The partial withdrawal of an objection is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions.

¹²⁴⁷ This follows from guideline 2.7.3 (Formulation and communication of the withdrawal of objections to reservations) and of guidelines 2.5.6 (Communication of withdrawal of a reservation) and 2.1.6 (Procedure for communication of reservations), to which it refers. Consequently, the withdrawal of the objection must be communicated "to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty".

¹²⁴⁸ See the commentary to guideline 2.5.8.

¹²⁴⁹ See paragraphs (14)–(18) of the commentary to guideline 2.1.6 (Procedure for communication of reservations). See also Kohona, "Some notable developments ..." (footnote 582 above), and "Reservations: discussion of recent developments ..." (*ibid.*).

¹²⁵⁰ See also paragraph (3) of the commentary to guideline 2.7.6 and paragraph (5) of the commentary to guideline 2.7.7.

¹²⁵¹ See paragraphs (4)–(5) of the commentary to guideline 2.5.9.

¹²⁵² See paragraph (7) of the commentary to guideline 2.7.5. See also paragraph (5) of the commentary to guideline 2.7.7.

Commentary

(1) As with the withdrawal of reservations, it is quite conceivable that a State (or international organization) might modify an objection to a reservation by partially withdrawing it. If a State or an international organization can withdraw its objection to a reservation at any time, it is hard to see why it could not simply narrow its scope. Two quite different situations illustrate this point:

– in the first place, a State might change an objection with “maximum”¹²⁵³ or “intermediate”¹²⁵⁴ effect into a “normal” or “simple” objection;¹²⁵⁵ in such cases, the modified objection will produce the effects foreseen in article 21, paragraph 3. Moving from an objection with maximum effect to a simple objection or one with intermediate effect also brings about the entry into force of the treaty as between the author of the reservation and the author of the objection;¹²⁵⁶ and

– in the second place, it would appear that there is nothing to prevent a State from “limiting” the actual content of its objection (by accepting certain aspects of reservations that lend themselves to being separated out in such a way)¹²⁵⁷ while maintaining its principle; in this case, the relations between the two States are governed by the new formulation of the objection.

(2) The Commission has no knowledge of a case in State practice involving such a partial withdrawal of an objection. This does not, however, appear to be a sufficient ground for ruling out such a hypothesis. In his first report, Sir Humphrey Waldock expressly provided for the possibility of a partial withdrawal of this kind. Paragraph 5 of draft article 19, which was devoted entirely to objections but subsequently disappeared in the light of changes made to the structure of the draft articles, states:

A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or *in part**, at any time.¹²⁵⁸

¹²⁵³ An objection with “maximum” effect is an objection in which its author expresses the intention of preventing the treaty from entering into force as between itself and the author of the reservation in accordance with the provisions of article 20, paragraph 4 (b), of the Vienna Conventions. See paragraph (22) of the commentary to guideline 2.6.1.

¹²⁵⁴ By making an objection with “intermediate” effect, a State expresses its intention to enter into treaty relations with the author of the reservation but considers that the exclusion of treaty relations should go beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions. See paragraph (23) of the commentary to guideline 2.6.1.

¹²⁵⁵ “Normal” or “simple” objections are those with “minimum” effect, as provided for in article 21, paragraph 3, of the Vienna Conventions. See paragraph (22) of the commentary to guideline 2.6.1.

¹²⁵⁶ If, on the contrary, an objection with “super-maximum” effect was abandoned and replaced by an objection with maximum effect, the treaty would no longer be in force between the States or international organizations concerned; even if an objection with “super-maximum” effect is held to be valid, this would enlarge the scope of the objection, which is not possible (see guideline 2.7.9 and commentary thereto). An objection with “super-maximum” effect states not only that the reservation to which the objection is made is not valid, but also that, as a result, the treaty applies *ipso facto* as a whole in the relations between the two States. See paragraph (24) of the commentary to guideline 2.6.1.

¹²⁵⁷ In some cases, the question of whether, in the latter hypothesis, it is really possible to speak of a “limitation” of this kind is debatable—although no more nor no less than the question of whether modifying a reservation is tantamount to its partial withdrawal.

¹²⁵⁸ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62.

The commentary to this provision¹²⁵⁹ presented by the Special Rapporteur offers no explanation of the reasons why he proposed it. Nonetheless, it is noteworthy that this draft article 19, paragraph 5, was again identical to the corresponding proposal concerning the withdrawal of reservations,¹²⁶⁰ as Sir Humphrey made explicit in his commentary.¹²⁶¹

(3) The arguments which led the Commission to allow for the possibility of partial withdrawal of reservations¹²⁶² may be transposed *mutatis mutandis* to the partial withdrawal of objections, even though what is intended in this case is not a more thorough application of the treaty but, on the contrary, to give full effect (or greater effect) to a reservation. Consequently, just as partial withdrawal of a reservation follows the rules applicable to full withdrawal,¹²⁶³ it would seem that the procedure for the partial withdrawal of an objection should be modelled on that of its total withdrawal. Guideline 2.7.7 has been formulated to reflect this.

(4) Given the problems inherent in determining the effects of total withdrawal of an objection in the abstract,¹²⁶⁴ the Commission felt that it was neither possible nor necessary to define the term “partial withdrawal” any further. It was enough to say that partial withdrawal is necessarily something less than full withdrawal and that it limits the legal effects of the objection *vis-à-vis* the reservation without wiping them out entirely: as the above examples show, the reservation is not simply accepted; rather, the objecting State or international organization merely seeks to alter slightly the effects of an objection which, in the main, is maintained.

(5) In the English version of guideline 2.7.7, the phrase “becomes operative” calls for the same comments as those expressed with reference to guideline 2.7.5.¹²⁶⁵

2.7.8 Effect of a partial withdrawal of an objection

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent provided by the new formulation of the objection.

Commentary

(1) It is difficult to determine *in abstracto* what effects are produced by the withdrawal of an objection and even more difficult to say with certainty what concrete effect a partial withdrawal of an objection is likely to produce. In

¹²⁵⁹ *Ibid.*, p. 68.

¹²⁶⁰ See draft article 17, paragraph 6, *ibid.*, p. 61.

¹²⁶¹ *Ibid.*, p. 68.

¹²⁶² See paragraphs (11)–(12) of the commentary to guideline 2.5.10 (Partial withdrawal of a reservation).

¹²⁶³ See paragraph 2 of guideline 2.5.10 (Partial withdrawal of a reservation): “The partial withdrawal of a reservation is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions.”

¹²⁶⁴ See the commentary to guideline 2.7.4 above.

¹²⁶⁵ See paragraph (7) of the commentary to guideline 2.7.5. See also paragraph (3) of the commentary to guideline 2.7.6.

order to cover all possible effects, the Commission wanted to adopt a guideline that was sufficiently broad and flexible. It considered that the wording of guideline 2.5.11 concerning the effects of a partial withdrawal of a reservation met this requirement. Consequently, guideline 2.7.8 is modelled on that guideline.

(2) While the text of guideline 2.7.8 does not explicitly say so, it is clear that the term “partial withdrawal” implies that by partially withdrawing its objection, the State or international organization that is the author of the objection intends to limit the legal effects of the objection, it being understood that this may prove fruitless if the legal effects of the reservation are already jeopardized as a result of problems relating to the validity of the reservation.

(3) The objection itself produces its effects independently of any reaction on the part of the author of the reservation. If States and international organizations can make objections as they see fit, they may similarly withdraw them or limit their legal effects at will.

2.7.9 Widening of the scope of an objection to a reservation

1. A State or an international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.12.

2. Such a widening of the scope of the objection cannot have an effect on the existence of treaty relations between the author of the reservation and the author of the objection.

Commentary

(1) Neither the *travaux préparatoires* of the 1969 and 1986 Vienna Conventions nor the text of the Conventions themselves contain any provisions or indications concerning the question of the widening of the scope of an objection made previously by a State or international organization, and there is no State practice in this area.

(2) In theory it is entirely conceivable that a State or international organization that has already raised an objection to a reservation may wish to widen the scope of its objection, for example by adding the declaration provided for in article 20, paragraph 4 (b), of the Vienna Conventions, thereby transforming it from a simple objection which does not preclude the entry into force of the treaty as between the objecting and reserving parties, into an objection with “maximum effect”, which precludes any treaty-based relations between the objecting and reserving parties.

(3) Since in principle the reserving party does not have the right to respond to an objection, there is a risk that allowing such a widening of the scope of an objection might amount to making the reserving State dependent on the goodwill of the author of the objection, who could decide to change the treaty relations between the two parties at any time. Moreover, the lack of State practice suggests that States and international organizations consider

that widening the scope of an objection to a reservation is simply not possible. It might also be argued that any declaration formulated after the prescribed period has elapsed is no longer considered to be an objection properly speaking but a renunciation of a prior acceptance, without regard for the commitment entered into with the reserving State,¹²⁶⁶ and the practice of the Secretary-General as depositary of multilateral treaties appears to bear out this conclusion.¹²⁶⁷

(4) However, a reading of the provisions of the Vienna Conventions does not justify such a categorical solution. Under article 20, paragraph 5, States and international organizations are given a specific time period within which to make their objections and there is nothing to prevent them from widening or reinforcing their objections during that period; for practical reasons, then, it is appropriate to give States such a period for reflection.

(5) Guideline 2.7.9 strikes a compromise between the two points of view. The Commission considered that the widening of the scope of an objection cannot call into question the very existence of treaty relations between the author of the reservation and the author of the objection. Making a simple objection that does not imply an intention to preclude the entry into force of the treaty between the author of the objection and the author of the reservation may indeed have the immediate effect of establishing treaty relations between the two parties, even before the time period allowed for the formulation of objections has elapsed. To call this *fait accompli* into question by subsequently widening the scope of the objection and accompanying it with a clear expression of intent to preclude the entry into force of the treaty in accordance with article 20, paragraph 4 (b), is inconceivable and seriously undermines legal security.

(6) This compromise solution does not prohibit the widening of the scope of objections within the time period prescribed in guideline 2.6.12—which simply reproduces the provision contained in article 20, paragraph 5, of the Vienna Conventions—provided that such widening does not call into question the existence of treaty relationships. Widening is thus possible if it is done before the expiry of the 12-month period (or any other period stipulated in the treaty) that follows notification of the reservation or before the date on which the State or international organization that made the objection expresses its consent to be bound by the treaty, if it is later and if it does not call into question the very existence of treaty relations acquired subsequently through the formulation of the initial objection.

2.8 Formulation of acceptances of reservations

2.8.1 Forms of acceptance of reservations

The acceptance of a reservation may arise from a unilateral statement to this effect or from silence of a contracting State or contracting organization during the periods specified in guideline 2.6.12.

¹²⁶⁶ See paragraphs (4)–(5) of the commentary to guideline 2.6.13, and guideline 2.8.13.

¹²⁶⁷ See paragraph (3) of the commentary to guideline 2.6.13.

Commentary

(1) In accordance with paragraph 5 of article 20¹²⁶⁸ of the 1986 Vienna Convention:

For the purposes of paragraphs 2 and 4,¹²⁶⁹ and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

(2) It emerges from this definition that acceptance of a reservation can be defined as the absence of any objection. With regard to permissible reservations,¹²⁷⁰ acceptance is presumed in principle from the absence of an objection, either at the end of the 12-month period following receipt of notification of the reservation or at the time of expression of consent to be bound, if it is later. In both cases, which are conceptually distinct but yield identical results in practice, silence is tantamount to acceptance without the need for a formal unilateral declaration. This does not mean, however, that acceptance is necessarily tacit; moreover, paragraphs 1 and 3 of article 23 make explicit reference to “express acceptance of a reservation”, and such express formulation may be obligatory, as is implied by the phrase “unless the treaty otherwise provides” in article 20, paragraph 5, even if this phrase was inserted in that provision for other reasons,¹²⁷¹ and the omission from the same provision of any reference to article 20, paragraph 3, concerning the acceptance of a reservation to the constituent instrument of an international organization, which does indeed require a particular form of acceptance.

(3) Guideline 2.8.1, which opens the section of the Guide to Practice dealing with the procedure and forms of acceptance of reservations, presents two distinct forms of acceptance:

– express acceptance, resulting from a unilateral statement to that effect; and

– tacit acceptance, resulting from silence or, more specifically, the absence of any objection to the reservation during a certain period of time. This time period corresponds to the time during which an objection may legitimately be made, that is, the period specified in guideline 2.6.12.

¹²⁶⁸ This article is entitled “Acceptance of and objection to reservations”. Unlike the English text, the French version of the two Vienna Conventions keeps the word “acceptance” in the singular but leaves “objections” in the plural. This distortion, which appeared in 1962 (see *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 223 (text adopted by the Drafting Committee); and *Yearbook ... 1962*, vol. II, document A/5209, p. 176), was never corrected or explained.

¹²⁶⁹ Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, treaties with limited participation and constituent acts of international organizations.

¹²⁷⁰ When a reservation is not permissible, acceptance does not affect the permissibility of the reservation; see guideline 3.3.3. It would therefore make little sense to draw a presumption of acceptance from the absence of any objection.

¹²⁷¹ See paragraph (7) of the commentary to guideline 2.6.12 above.

(4) It has been argued nevertheless that this binary distinction between formal acceptances and tacit acceptances of reservations disregards the necessary differentiation between two forms of acceptance without a unilateral statement, which could be either tacit or implicit. Furthermore, according to some authors, reference should be made to “early” acceptance when the reservation is authorized by the treaty:

Reservations may be accepted, according to the Vienna Convention, in three ways: in advance, by the terms of the treaty itself, in accordance with Article 20(1).¹²⁷²

While these distinctions may have some meaning in academic terms, the Commission did not feel that it was necessary to reflect them in the Guide to Practice, given that they did not have any concrete consequences.

(5) With respect to so-called “early” acceptances, the Commission’s commentary on draft article 17 (current article 20 of the Vienna Convention) clearly indicates as follows:

Paragraph 1 of this article covers cases where a reservation is expressly or impliedly authorized by the treaty; in other words, where the consent of the other contracting States has been given in the treaty. No further acceptance of the reservation by them is therefore required.¹²⁷³

Under this provision, and unless the treaty otherwise provides, an acceptance is not, in this case, a requirement for a reservation to be established: it is established *ipso facto* by virtue of the treaty, and the reaction of States—whether an express acceptance, tacit acceptance or even an objection—can no longer call this acquired acceptance into question. Although this does not prohibit States from expressly accepting a reservation of this kind, such an express acceptance is a redundant act, with no specific effect. Moreover, no examples of such an acceptance exist. This does not mean that article 20, paragraph 1, of the Vienna Conventions should not be reflected in the Guide to Practice; however, the provision has much more to do with the effects of a reservation than with the formulation or the form of acceptance; accordingly, it is reproduced in guideline 4.1.1 (Establishment of a reservation expressly authorized by a treaty).

(6) Similarly, the Commission did not feel it appropriate to reflect in the Guide to Practice the distinction made by some authors, based on the two cases provided for in article 20, paragraph 5, of the Vienna Conventions, between “tacit” and “implicit” acceptances, depending on whether or not the reservation has already been formulated at the time the other interested party expresses its consent to be bound. In the former case, the acceptance would be “implicit”; in the latter, it would be “tacit”.¹²⁷⁴ In the former

¹²⁷² Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 118. This article is perhaps the most thorough study of the rules that apply to the acceptance of reservations (see, in particular, pp. 118–135 and 153).

¹²⁷³ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 207, para. 18.

¹²⁷⁴ Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 120; Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 125–126; Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 501, para. 33.

case, States or international organizations are deemed to have accepted the reservation if they have raised no objection thereto when they express their consent to be bound by the treaty. In the latter case, the State or international organization has a period of 12 months in which to raise an objection, after which it is deemed to have accepted the reservation.

(7) Although the result is the same in both cases—the State or international organization is deemed to have accepted the reservation if no objection has been raised at a specific time—their grounds are different. With respect to States or international organizations which become contracting States or contracting organizations to a treaty after the formulation of a reservation, the presumption of acceptance is justified not by their silence but rather by the fact that this State or international organization, aware of the reservations formulated,¹²⁷⁵ accedes to the treaty without objecting to the reservations. The acceptance is thus *implied* in the act of ratification of or accession to the treaty, that is, in a positive act which fails to raise objections to reservations already formulated,¹²⁷⁶ hence the notion of “implicit” acceptances. In the case of States or international organizations that have already expressed their consent to be bound by a treaty when the reservation is formulated, however, the situation is different: it is their protracted silence—generally for a period of 12 months—or, more particularly, the absence of any objection on their part that is considered as being the equivalent of an acceptance of the reservation. This acceptance is therefore inferred only from the silence of the State or international organization concerned; it is tacit.

(8) In fact, this doctrinal distinction is of little real interest. It is sufficient, for practical purposes, to distinguish the States and international organizations which have a period of 12 months to raise an objection from those which, not yet being contracting States or contracting organizations to the treaty at the time the reservation is formulated, have time for reflection until the date on which they express their consent to be bound by the treaty, which nevertheless does not prevent them from formulating an acceptance or an objection before that date.¹²⁷⁷ The question is one of time period, however, and not one of definition.

(9) Another question relates to the very definition of tacit acceptances. One may well ask whether in some cases an objection to a reservation is not tantamount to a tacit acceptance thereof. This paradoxical question stems

from the wording of article 20, paragraph 4 (b). That paragraph states that:

an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization.

It thus seems to follow that in the event that the author of the objection raises no objection to the entry into force of the treaty between itself and the reserving State, an objection has the same effects as an acceptance of the reservation, at least where the entry into force of the treaty is concerned. This question, which involves much more than purely hypothetical issues, nevertheless primarily concerns the problem of the respective effects of acceptances and objections to reservations.¹²⁷⁸

(10) Guideline 2.8.1 limits the potential authors of an acceptance to contracting States or contracting organizations alone. The justification for this is to be found in article 20, paragraph 4, which takes into consideration only acceptances made by a contracting State or contracting international organization, and in article 20, paragraph 5, which provides that the presumption of acceptance applies only to contracting States and contracting organizations to the treaty. Thus, a State or an international organization which on the date that notice of the reservation is given is not yet “contracting” to the treaty will be considered as having accepted the reservation only on the date when it expresses its consent to be bound—that is, on the date when it definitively becomes a contracting State or contracting organization.

(11) It is a different matter, however, for acceptances of reservations to the constituent instruments of international organizations referred to in paragraph 3 of the same article on the one hand and express acceptances on the other. In the latter case, there is nothing to prevent a State or an international organization that has not yet expressed its consent to be bound by the treaty from making an express declaration accepting a reservation formulated by another State, even though such an express acceptance cannot produce the same legal effects as those described in article 20, paragraph 4, for acceptances made by contracting States or contracting organizations. The same holds true for any express acceptances by a State or international organization of a reservation to the constituent instrument of an international organization: there is nothing to prevent such express acceptances from being formulated, but they cannot produce the same effects as the acceptance of a reservation to a treaty that does not take this form.

(12) Furthermore, it can be seen both from the text of the Vienna Conventions and their *travaux préparatoires*, as well as from practice that tacit acceptance is the rule and express acceptance the exception. Guideline 2.8.1, however, is purely descriptive and is not intended to establish cases in which it is possible or necessary to resort to either of the two possible forms of acceptances.

¹²⁷⁵ See article 23, paragraph 1, of the Vienna Convention of 1986, which stipulates that reservations must be “formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”. See also guideline 2.1.5 and paragraphs (1)–(16) of the commentary thereto.

¹²⁷⁶ See Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 501, para. 34. See also draft article 10, paragraph 5, of the draft convention on the law of treaties proposed by Mr. Brierly, Special Rapporteur, in his [first] report on the law of treaties, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 241, para. 100.

¹²⁷⁷ See also paragraphs (8)–(9) of the commentary to guideline 2.6.3 and paragraphs (8)–(9) of the commentary to guideline 2.6.12 above.

¹²⁷⁸ See guidelines 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation) and 4.3.3 (Entry into force of the treaty between the author of a reservation and the author of an objection), and commentaries thereto.

2.8.2 Tacit acceptance of reservations

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.12.

Commentary

(1) Guideline 2.8.2 supplements guideline 2.8.1 by specifying the conditions under which one of the two forms of acceptance of reservations mentioned in the latter provision (absence of any objection by a contracting State or contracting organization) constitutes acceptance of a reservation. It reproduces—with a slight editorial adaptation—the rule expressed in article 20, paragraph 5, of the 1986 Vienna Convention.

(2) How a reservation's permissibility is related to the tacit or express acceptance of a reservation by States and international organizations does not require elucidation in the section of the Guide to Practice concerning procedure. It concerns the effects of reservations, acceptances and objections, which will be the subject of Part 4 of the Guide.

(3) In the advisory opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court emphasized that the “very great allowance made for tacit assent to reservations”¹²⁷⁹ characterized international practice, which was becoming more flexible with respect to reservations to multilateral conventions. Although traditionally express acceptance alone had been considered as expressing the consent of the other contracting States to the reservation,¹²⁸⁰ this solution, already outdated in 1951, no longer seemed practicable owing, as the Court stated, to “the very wide degree of participation” in some of these conventions.¹²⁸¹

(4) Despite the different opinions expressed by the members of the Commission during the discussion of article 10 of the draft convention on the law of treaties proposed by Mr. Brierly, Special Rapporteur, in 1950,¹²⁸² which asserted, to a limited degree,¹²⁸³ the possibility of consent to reservations by tacit

agreement,¹²⁸⁴ Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice also allowed for the principle of tacit acceptance in their drafts.¹²⁸⁵ This should come as no surprise. Under the traditional system of unanimity widely defended by the Commission's first three Special Rapporteurs on the law of treaties, the principle of tacit acceptance was necessary in order to avoid excessive periods of legal uncertainty: in the absence of a presumption of acceptance, the protracted silence of a State party to a treaty could tie up the fate of the reservation and leave the status of the reserving State in relation to the treaty in doubt for an indefinite period, or even prevent the treaty from entering into force for a considerable time.

(5) Yet while the principle of tacit consent is not as imperative under the “flexible” system ultimately adopted by the Commission's fourth Special Rapporteur on the law of treaties, it still has some merits and advantages. Even in his first report, Sir Humphrey Waldock incorporated the principle in the draft articles that he had submitted to the Commission.¹²⁸⁶ He put forward the following explanation for doing so:

It is ... true that, under the “flexible” system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State.¹²⁸⁷

(6) The provision that would become the future article 20, paragraph 5, was ultimately adopted by the Commission without debate.¹²⁸⁸ During the 1968–1969 United Nations Conference on the Law of Treaties, article 20, paragraph 5, also raised no problem and was adopted with only one change: inclusion of the words¹²⁸⁹ “unless the treaty otherwise provides”.¹²⁹⁰

(7) The work of the Commission on the law of treaties between States and international organizations or between international organizations did not greatly change

¹²⁸⁴ This was actually a matter of implicit acceptance; see paragraph (6) of the commentary to guideline 2.8.1.

¹²⁸⁵ See the summary of the position of the Special Rapporteurs and of the Commission in the first report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 66–67, para. 14.

¹²⁸⁶ See draft article 18, paragraph 3, of his first report (*ibid.*, p. 61 and pp. 66–68, paras. 14–17), reproduced in draft article 19, paragraph 5, in his fourth report (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 54).

¹²⁸⁷ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 67, para. 15.

¹²⁸⁸ *Yearbook ... 1965*, vol. I, 816th meeting, 2 July 1965, pp. 283–284, paras. 43–53; see also Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 105.

¹²⁸⁹ On the meaning of this part of the provision, see paragraph (11) below.

¹²⁹⁰ United States amendment (A/CONF.39/C.1/L.127), *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 136. Two other amendments which would have deleted the reference to paragraph 4 (Australia) (A/CONF.39/C.1/L.166, *ibid.*, p. 136) and replaced article 17 with new wording limiting the period for the presumption to six months (Union of Soviet Socialist Republics) (A/CONF.39/C.1/L.115, *ibid.*, p. 133) were either not adopted or withdrawn.

¹²⁷⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 21.

¹²⁸⁰ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 104. The author refers to the work of D. Kappeler, *Les réserves dans les traités internationaux*, Berlin, Verlag für Recht und Gesellschaft, 1958, pp. 40–41.

¹²⁸¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 21.

¹²⁸² *Yearbook ... 1950*, vol. I, 53rd meeting, 23 June 1950, pp. 92–95, paras. 41–84. Mr. El-Khoury argued for the contrary view that the mere silence of a State should not be regarded as implying acceptance but rather as a refusal to accept the reservation (*ibid.*, p. 94, para. 67); this view remained, however, an isolated one.

¹²⁸³ Mr. Brierly's draft article 10 in fact contemplated only cases of implicit acceptance, that is, cases in which a State accepted all existing reservations to a treaty of which it was aware when it acceded thereto. For the text of draft article 10, see the first report on the law of treaties by J. L. Brierly, Special Rapporteur, *Yearbook ... 1950*, vol. II, document A/CN.4/23, pp. 241–242.

or challenge the principle of tacit consent. Nevertheless, the Commission had decided to assimilate international organizations to States with regard to the issue of tacit acceptance.¹²⁹¹ In the light of criticisms from some States,¹²⁹² the Commission decided to refrain “from saying anything in paragraph 5 of article 20 concerning the problems raised by the protracted absence of any objection by an international organization”, but “without thereby rejecting the principle that even where treaties are concerned, obligations can arise for an organization from its conduct”.¹²⁹³ Draft article 20, paragraph 5, as adopted by the Commission thus reproduced article 20, paragraph 5, of the 1969 Vienna Convention word for word.¹²⁹⁴ During the United Nations Conference on the Law of Treaties, however, the idea of assimilating international organizations to States was reintroduced on the basis of several amendments to that effect¹²⁹⁵ and after thorough debate.¹²⁹⁶

(8) In line with the position it has taken since adopting paragraph 1 of guideline 1.1 (which reproduces the wording of article 2, paragraph 1 (*d*), of the 1986 Vienna Convention), the Commission has decided that it is necessary to include in the Guide to Practice a guideline reflecting article 20, paragraph 5, of the 1986 Vienna Convention. The latter provision cannot be reproduced word for word, however, as it refers to other paragraphs in the same article that do not belong in the part of the Guide to Practice having to do with the formulation of reservations, acceptances and objections; the paragraphs 2 and 4 mentioned in paragraph 5 of article 20 relate not to the procedure for formulating reservations but to the conditions under which they produce their effects—in other words, the conditions necessary in order for them to be “established” in the sense of the opening phrase of paragraph 1 of article 21 of the Vienna Conventions.¹²⁹⁷ What is pertinent here is that article 20, paragraph 2, requires unanimous acceptance of reservations to certain treaties; that question is dealt with, from a purely procedural perspective, in guideline 2.8.7 below.

(9) In addition, the adoption of guideline 2.6.12 (Time period for formulating objections) makes it redundant to repeat in guideline 2.8.2 the specific conditions *ratione temporis* contained in article 20, paragraph 5, of the 1969 Vienna Convention.¹²⁹⁸ It therefore seemed sufficient for guideline 2.8.2 simply to refer to guideline 2.6.12.

(10) In the Commission’s view, this wording also has the advantage of bringing out more clearly the dialectic between (tacit) acceptance and objection—objection excludes acceptance and vice versa.¹²⁹⁹ During the 1968 United Nations Conference on the Law of Treaties, the representative of France expressed this idea in the following terms:

[A]cceptance and objection are the obverse and reverse sides of the same idea. A State which accepts a reservation thereby surrenders the right to object to it; a State which raises an objection thereby expresses its refusal to accept a reservation.¹³⁰⁰

(11) The Commission did consider, however, whether the expression “unless the treaty otherwise provides”, found in article 20, paragraph 5, of the Vienna Conventions, ought to be retained in guideline 2.8.2. That proviso does not really need to be spelled out, since all the provisions of the Vienna Conventions are of a residuary, voluntary nature.¹³⁰¹ Moreover, it seems redundant, since the same phrase appears in guideline 2.6.12, where its inclusion is justified by the *travaux préparatoires* for article 20, paragraph 5, of the 1969 Vienna Convention.¹³⁰² The Commission nevertheless decided that it was useful to recall that the rule set out in guideline 2.8.2 applied “unless the treaty otherwise provides”, to remain in keeping with the text of the Vienna Conventions.

2.8.3 Express acceptance of reservations

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

Commentary

(1) It is certainly true that “the ... acceptance of a reservation is, in the case of multilateral treaties, almost invariably implicit or tacit”.¹³⁰³ Nevertheless, it can be

¹²⁹¹ See draft articles 20 and 20 *bis* adopted on first reading, *Yearbook ... 1977*, vol. II (Part Two), pp. 111–113.

¹²⁹² See *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.2 (Byelorussian Soviet Socialist Republic), sect. A.12 (Ukrainian Soviet Socialist Republic), sect. A.13 (Union of Soviet Socialist Republics) and sect. C.1 (Council for Mutual Economic Assistance); see also the summary by Mr. Paul Reuter, Special Rapporteur, in his tenth report, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, p. 61, para. 75.

¹²⁹³ See *Yearbook ... 1982*, vol. II (Part Two), p. 36 (paragraph (6) of the commentary to draft article 20).

¹²⁹⁴ *Ibid.*, p. 36.

¹²⁹⁵ China (A/CONF.129/C.1/L.18, proposing a period of 18 months applicable to States and international organizations), Austria (A/CONF.129/C.1/L.33) and Cape Verde (A/CONF.129/C.1/L.35), *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986, vol. II, Documents of the Conference* (A/CONF.129/16/Add.1, United Nations publication, Sales No. E.94.V.5), p. 70, para. 70 (*a*), (*c*) and (*d*). See also the amendment proposed by Australia (A/CONF.129/C.1/L.32), which was ultimately withdrawn but proposed a more nuanced solution (*ibid.*, pp. 70–71, para. 70 (*b*)).

¹²⁹⁶ *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations ...* (A/CONF.129/16) (footnote 635 above), 12th to 14th meetings, 27 and 28 February 1986, pp. 104–114.

¹²⁹⁷ See section 4.1 of the Guide to Practice.

¹²⁹⁸ “For the purposes of paragraphs 2 and 4, and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later*.”

¹²⁹⁹ See Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 504, para. 44.

¹³⁰⁰ *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 22nd meeting, 11 April 1968, p. 116, para. 14.

¹³⁰¹ For similar comments on the same issue, see, for example, paragraph (15) of the commentary to guideline 2.5.1 (Withdrawal of reservations), which reproduces the provisions of article 22, paragraph 1, of the 1986 Vienna Convention.

¹³⁰² See paragraph (7) of the commentary to guideline 2.6.12 above.

¹³⁰³ Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 120. In the same sense, see also Horn, *Reservations and*

express, and there are situations in which a State expressly makes known the fact that it accepts the reservation.

(2) The existence of the presumption postulated in article 20, paragraph 5, of the Vienna Conventions in no way prevents States and international organizations from expressly stating their acceptance of reservations that have been formulated. That might seem to be debatable in cases where a reservation does not satisfy the conditions of permissibility established in article 19 of the Vienna Conventions.¹³⁰⁴

(3) Unlike the reservation itself and unlike an objection, an express acceptance may be declared at any time. This presents no problem for the reserving State, since a State or an international organization that does not expressly accept a reservation will nevertheless be deemed to have accepted it at the end of the 12-month period specified in article 20, paragraph 5, of the Vienna Conventions; the consequences of this are considered in guideline 2.8.2.

(4) Even a State or an international organization that has previously raised an objection to a reservation remains free to accept it expressly (or implicitly, by withdrawing its objection) at any time.¹³⁰⁵ This amounts to a complete withdrawal of the objection, which produces the same effects as an acceptance.

(5) In any case, despite these broad possibilities, State practice in the area of express acceptances is practically non-existent. There are only a few isolated examples to be found, and some of those are not without problems.

(6) An example often cited in the literature¹³⁰⁶ is the acceptance by the Federal Republic of Germany of a French reservation, communicated on 7 February 1979, to the Convention providing a Uniform Law for Cheques of 1931. It should be noted, however, that this reservation on the part of the French Republic was formulated late, some 40 years after the accession of France to the Convention in question. The German communication¹³⁰⁷ clearly states that the Federal Republic “raises no objections”¹³⁰⁸

to it and thus clearly constitutes an acceptance.¹³⁰⁹ The text of the communication from the Federal Republic of Germany does not make it clear, however, whether it is accepting the deposit of the reservation despite its late formulation¹³¹⁰ or the content of the reservation itself, or both.

(7) There are other, less ambiguous examples as well, such as the declarations and communications of the United States of America in response to the reservations formulated by Bulgaria,¹³¹¹ the Union of Soviet Socialist Republics and Romania to article 21, paragraphs 2 and 3, of the Convention concerning Customs Facilities for Touring of 1954, in which the United States made it clear that it had no objection to those reservations. The United States further stated that it would apply the reservation reciprocally with respect to each of the reserving States,¹³¹² which it was entitled to do in any case under article 21, paragraph 1 (b), of the Vienna Conventions.¹³¹³ A Yugoslav declaration concerning a reservation by the Soviet Union was similar in intent¹³¹⁴ but expressly referred to article 20, paragraph 7, of the Convention, relating to the reciprocal application of reservations.¹³¹⁵ That being said, and even if the United States and Yugoslav declarations were motivated by a concern to emphasize the reciprocal application of the reservation and thus refer to article 20, paragraph 7, of the Convention concerning Customs Facilities for Touring of 1954, the fact remains that they are without a doubt express acceptances. The same holds true in the case of the United States declarations regarding the reservations of Romania and the Union of Soviet Socialist Republics to the Convention on road traffic of 1949,¹³¹⁶ which are virtually identical to the United States declarations relating to the Convention concerning Customs Facilities for Touring, notwithstanding the fact that the 1949 Convention does not include a provision comparable to article 20, paragraph 7, of the 1954 Convention.¹³¹⁷

¹³⁰⁹ In fact, so long as no objection has been raised, the State is considered to have accepted the reservation; see article 20, paragraph 5, of the Vienna Conventions.

¹³¹⁰ On this point, see guideline 2.3 (Late formulation of reservations) and commentary thereto.

¹³¹¹ Bulgaria ultimately withdrew this reservation. See *Multilateral Treaties ...* (footnote 37 above), chap. XI.A.6.

¹³¹² *Ibid.*

¹³¹³ On the question of reciprocity of reservations, see guideline 4.2.4. See also Müller, “1969 Vienna Convention. Article 21: Legal effects of reservations and of objections to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 548–551, paras. 32–36.

¹³¹⁴ See *Multilateral Treaties ...* (footnote 37 above), chap. XI.A.6.

¹³¹⁵ Article 20, paragraph 7, of the Convention concerning Customs Facilities for Touring provides that “[n]o Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies”, and that “[a]ny State availing itself of this right shall notify the Secretary-General accordingly”.

¹³¹⁶ *Multilateral Treaties ...* (footnote 37 above), chap. XI.B.1. The declarations by Greece and the Netherlands concerning the Russian reservation are considerably less clear in that they limit themselves to stating that the two Governments “do not consider themselves bound by the provisions to which the reservation is made, as far as the Soviet Union is concerned” (*ibid.*). Nevertheless, this effect might be produced by an acceptance as well as by an objection.

¹³¹⁷ Article 54, paragraph 1, of the Convention on Road Traffic of 1968 simply provides for the reciprocity of a reservation concerning article 52 (Settlement of disputes), without requiring a declaration to that effect on the part of States accepting the reservation.

(Footnote 1303 continued.)

Interpretative Declarations ... (footnote 25 above), p. 124; Lijnzaad, *Reservations to UN Human Rights Treaties ...* (footnote 463 above), p. 46; Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 211 *et seq.*; Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 498, para. 25.

¹³⁰⁴ See paragraph (2) of the commentary to guideline 2.8.2 above.

¹³⁰⁵ See guideline 2.7.1 (Withdrawal of objections to reservations).

¹³⁰⁶ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 124; Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 212.

¹³⁰⁷ This communication was issued on 20 February 1980, more than 12 months after the notification of the reservation by the Secretary-General of the United Nations, depositary of the Convention. At that time, in any case, the (new) French reservation was “considered to have been accepted” by Germany on the basis of the principle set out in article 20, paragraph 5, of the Vienna Conventions. Furthermore, the Secretary-General had already considered the French reservation as having been accepted as of 11 May 1979, three months after its deposit. See paragraph (12) of the commentary to guideline 2.3.

¹³⁰⁸ *Multilateral Treaties ...* (footnote 37 above), League of Nations Treaties, Part II, chap. 11.

(8) In the absence of any significant practice in the area of express acceptances, one must rely almost exclusively on the provisions of the Vienna Conventions and their *travaux préparatoires* to work out the principles and rules for formulating express acceptances and the procedures applicable to them.

2.8.4 Form of express acceptance of reservations

The express acceptance of a reservation must be formulated in writing.

Commentary

(1) Article 23, paragraph 1, of the 1986 Vienna Convention provides:

A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

(2) The *travaux préparatoires* for this provision were analysed in connection with guidelines 2.1.1 and 2.1.5.¹³¹⁸ It is thus unnecessary to duplicate that general presentation, except to recall that the question of form and procedure for acceptance of reservations was touched upon only incidentally during the elaboration of the 1969 Vienna Convention.

(3) As in the case of objections, this provision places express acceptances on the same level as reservations themselves in matters concerning written form and communication with the States and international organizations involved. For the same reasons as those given for objections, it is therefore sufficient, in the context of the Guide to Practice, to take note of this convergence of procedures and to stipulate in a separate guideline, for the sake of clarity, that an express acceptance must by definition¹³¹⁹ be in written form.

(4) Despite appearances, guideline 2.8.4 can in no way be considered superfluous. The mere fact that an acceptance is express does not necessarily imply that it is in writing. The written form is not only called for by article 23, paragraph 1, of the Vienna Conventions, from which the wording of guideline 2.8.4 is taken, but is also necessitated by the importance of acceptances to the legal regime of reservations to treaties, in particular their permissibility and effects. Although the various proposals of the Special Rapporteurs on the law of treaties never specifically required that express acceptances must be in writing, it can be seen from their work that they always leaned towards the maintenance of a certain formality. Sir Humphrey Waldock's various proposals and drafts require that an express acceptance should be made in the instrument, or by any other appropriate formal procedure, at the time of ratification or approval by the State concerned, or, in other cases, by formal notification; hence a written version would

¹³¹⁸ See paragraphs (2)–(7) of the commentary to guideline 2.1.1 and paragraphs (5)–(11) of the commentary to guideline 2.1.5; see also paragraphs (3)–(4) of the commentary to guideline 2.1.6.

¹³¹⁹ See guideline 2.8.1 and commentary thereto, in particular paragraphs (2)–(3).

be required in every case. Following the simplification and reworking of the articles concerning the form and procedure for reservations, express acceptances and objections, the Commission decided to include the matter of written form in draft article 20, paragraph 1 (which became article 23, paragraph 1). The harmonization of provisions applicable to the written form and to the procedure for formulating reservations, objections and express acceptances did not give rise to debate in the Commission or at the United Nations Conference on the Law of Treaties.

2.8.5 Procedure for formulating express acceptance of reservations

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 apply *mutatis mutandis* to express acceptances.

Commentary

(1) Guideline 2.8.5 is, in a sense, the counterpart of guideline 2.6.8 on objection procedure and is based on the same rationale.¹³²⁰ It is clear from the work of the Commission that culminated in the wording of article 23 of the Vienna Convention that reservations, express acceptances and objections are all subject to the same rules of notification and communication.¹³²¹

2.8.6 Non-requirement of confirmation of an acceptance formulated prior to formal confirmation of a reservation

An express acceptance of a reservation formulated by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

Commentary

(1) Even though the practice of States with regard to the confirmation of express acceptances formulated prior to the confirmation of reservations appears to be non-existent, article 23, paragraph 3, of the Vienna Conventions¹³²² clearly states:

An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

(2) As the Commission already noted with regard to the confirmation of objections,¹³²³ this is a common-sense rule that has been reproduced in guideline 2.8.6 in a form adapted to the logic of the Guide to Practice:

¹³²⁰ See the commentary to guideline 2.6.8.

¹³²¹ See, in particular, the proposal of Mr. Rosenne, *Yearbook ... 1965*, vol. II, document A/CN.4/L.108, p. 73, and *ibid.*, vol. I, 803rd meeting, 16 June 1965, pp. 197–199, paras. 30–56. See also *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 270, paragraph (1) of the commentary to draft article 73. For a summary of the work of the International Law Commission, see Pellet and Schabas, "1969 Vienna Convention. Article 23: Procedure regarding reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 596, para. 5.

¹³²² Concerning the *travaux préparatoires* to this provision, see paragraph (1) of the commentary to guideline 2.6.11.

¹³²³ See paragraphs (4)–(6) of the commentary to guideline 2.6.11.

– it is limited to the confirmation of acceptances and does not refer to objections;¹³²⁴ and

– instead of containing the formulation “made previously to confirmation of the reservation”, it refers to guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty).¹³²⁵

(3) On the other hand, it would seem inappropriate to include in the Guide to Practice a guideline on express acceptance of reservations that was analogous to guideline 2.6.11 (Confirmation of an objection formulated prior to the expression of consent to be bound by a treaty). Not only is the idea of formulating an acceptance prior to the expression of consent to be bound by the treaty excluded by the very wording of article 20, paragraph 5, of the Vienna Conventions, which allows the formulation of acceptances only by contracting States or international organizations,¹³²⁶ but it is also difficult in practice to imagine that a State or international organization would actually formulate such an acceptance. In any case, such a practice (which would be tantamount to soliciting reservations) should surely be discouraged, and would not serve the purpose of “advance objections”: namely, the advance “warning” given to States and international organizations seeking to formulate reservations unacceptable to the objecting State.

2.8.7 *Unanimous acceptance of reservations*

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such acceptance, once obtained, is final.

Commentary

(1) The time period for tacit acceptance of a reservation by States or international organizations that are entitled to become parties to the treaty is subject to a further limitation when unanimous acceptance is necessary in order to establish a reservation. That limitation is established in guideline 2.8.7.

(2) *A priori*, article 20, paragraph 5, of the Vienna Conventions seems to mean that the general rule applies when unanimity is required: paragraph 5 explicitly refers to article 20, paragraph 2, which requires acceptance of a reservation by all parties to a treaty with limited participation. However, that interpretation would have unreasonable consequences. Allowing States and international organizations that are entitled to become parties to the treaty but have not yet expressed their consent to be bound by the treaty when the reservation is formulated to raise an objection on the

date that they become parties to the treaty (even if this date is later than the date on which the objection is notified) would have extremely damaging consequences for the reserving State and, more generally, for the stability of treaty relations. The reason for this is that in such a scenario it could not be presumed, at the end of the 12-month period, that a State that was a signatory of, but not a party to, a treaty with limited participation had agreed to the reservation, and that situation would prevent unanimous acceptance, even if the State had not formally objected to the reservation. The application of the presumption implicit in article 20, paragraph 5, would thus have exactly the opposite effect to the one desired, that is, the rapid stabilization of treaty relations and of the standing of the reserving State or international organization *vis-à-vis* the treaty.

(3) This issue was addressed by Sir Humphrey Waldock in the draft article 18 presented in his first report, which drew a clear distinction between tacit acceptance and implicit acceptance in the case of multilateral treaties (subject to the “flexible” system) on the one hand and plurilateral treaties (subject to the traditional system of unanimity) on the other. Indeed, paragraph 3 (c) of that draft article stipulated as follows:

A State which acquires the right to become a party to a treaty after a reservation has already been formulated¹³²⁷ shall be presumed to consent to the reservation:

- (i) In the case of a plurilateral treaty, if it executes the act or acts necessary to enable it to become a party to the treaty;
- (ii) In the case of a multilateral treaty, if it executes the act or acts necessary to qualify it to become a party to the treaty without signifying its objection to the reservation.¹³²⁸

(4) Sir Humphrey also noted, with reference to the scenario envisaged in paragraph 3 (c) (i), in which unanimity remains the rule, that lessening the rigidity of the 12-month rule for States that are not already parties to the treaty

is not possible in the case of plurilateral treaties because there the delay in taking a decision does place in suspense the status of the reserving State *vis-à-vis* all the States participating in the treaty.¹³²⁹

(5) It follows that wherever unanimity remains the rule, a State or international organization that accedes to the treaty may not validly object to a reservation that has already been accepted by all the States and international organizations that are already parties to the treaty, once the period of 12 months from the time it received notification of the reservation has elapsed. This does not mean, however, that the State or international organization may never object to the reservation: it may do so within the stipulated time period as a State entitled to become a party to the treaty.¹³³⁰ If, however, it has not taken that step and subsequently accedes to the treaty, it has no choice but to consent to the reservation.

¹³²⁴ On the question of the (non-)confirmation of objections, see guideline 2.6.10 (Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation).

¹³²⁵ “If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been formulated on the date of its confirmation.”

¹³²⁶ See paragraph (10) of the commentary to guideline 2.8.1.

¹³²⁷ The term “made” would undoubtedly be more appropriate: if the period within which an objection can be raised following the *formulation* of a reservation has not yet elapsed, there is no reason why the new contracting State could not object.

¹³²⁸ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 61.

¹³²⁹ *Ibid.*, p. 67, paragraph (16) of the commentary.

¹³³⁰ As to the limited effect of such an objection, see guideline 2.6.3, subparagraph (b), and commentary thereto.

(6) Guideline 2.8.7 says nothing about situations in which a State or an international organization is prevented from objecting to a reservation at the time that it accedes to the treaty. It merely notes that, when the special conditions imposed by the treaty are fulfilled, the particular reservation is established and cannot be called into question through an objection.

(7) The reference to “some” States or international organizations is intended to cover the scenario in which the requirement of acceptance is limited to certain parties. That might be the case, for example, if a treaty establishing a nuclear-weapon-free zone stipulated that reservations could be established only if all nuclear-weapon States that were parties to the treaty accepted them; the subsequent accession of another nuclear Power would not call into question a reservation thus made.

2.8.8 Acceptance of a reservation to the constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

Commentary

(1) Article 20, paragraph 3, of the Vienna Conventions has the same wording:

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

(2) This provision originated in the first report of Sir Humphrey Waldock, who proposed a draft article 18, paragraph 4 (c), which read as follows:

In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument, and to constitute the reserving State a party to the instrument.¹³³¹

The same idea was taken up in the Special Rapporteur’s fourth report, but the wording of draft article 19, paragraph 3, was simpler and more concise:

Subject to article 3 (bis) [the origin of the current article 5], when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization.¹³³²

(3) The very principle of recourse to the competent organ of an international organization for a ruling on the acceptance of a reservation made regarding its constituent instrument was severely criticized at the 1969 Vienna

Conference on the Law of Treaties, in particular by the Union of Soviet Socialist Republics, which said:

Paragraph 3 of the Commission’s article 17 should also be deleted, since the sovereign right of States to formulate reservations could not be made dependent on the decisions of international organizations.¹³³³

(4) Other delegations, while less hostile to the principle of intervention by an organization’s competent organ in accepting a reservation to its constituent instrument, were of the view that this particular regime was already covered by what would become article 5 of the 1969 Vienna Convention. Article 5 does in fact make the 1969 Vienna Convention applicable to the constituent instruments of international organizations “without prejudice to any relevant rules of the organization”, including provisions concerning the admission of new members or the assessment of reservations that may arise.¹³³⁴ Nevertheless, the provision was adopted by the 1986 United Nations Conference on the Law of Treaties.¹³³⁵

(5) The commentary to the draft articles on the law of treaties between States and international organizations or between international organizations also clearly shows that article 5 of the Convention and article 20, paragraph 3, are neither mutually exclusive nor redundant. In fact, it was after the reintroduction, following much hesitation, of a provision corresponding to article 5 of the 1969 Vienna Convention, which had been initially omitted, that it appeared necessary to the Commission to also reintroduce paragraph 3 of article 20 in the draft which led to the 1986 Vienna Convention.¹³³⁶

(6) In principle, recourse to the competent organ of an organization for acceptance of reservations formulated with regard to the constituent instrument of that organization is perfectly logical. The constituent instruments of international organizations do not by nature lend themselves to the flexible system.¹³³⁷ Their main objective

¹³³³ *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 21st meeting, 10 April 1968, p. 107, para. 6.

¹³³⁴ See the Swiss amendment (A/CONF.39/C.1/L.97), *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 135; and the joint amendment by France and Tunisia (A/CONF.39/C.1/L.113), *ibid.* See also interventions by France, *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 22nd meeting, 11 April 1968, p. 116, para. 16; by Switzerland (*ibid.*), 21st meeting, 10 April 1968, p. 111, para. 40); by Tunisia (*ibid.*, para. 45); and by Italy (*ibid.*, 22nd meeting, 11 April 1968, p. 120, para. 77). In the same sense, see Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 122; and M. H. Mendelson, “Reservations to the constitutions of international organizations”, *BYBIL 1971*, p. 151.

¹³³⁵ *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations ...* (A/CONF.129/16) (footnote 635 above), 27th meeting, 12 March 1986, p. 187, para. 14.

¹³³⁶ See *Yearbook ... 1982*, vol. II (Part Two), p. 36, paragraph (3) of the commentary to draft article 20. See also the debate within the Commission, *ibid.*, vol. I, 1727th meeting, 15 June 1982, pp. 177–178.

¹³³⁷ Mendelson has demonstrated that “[t]he charter of an international organization differs from other treaty regimes in bringing into being, as it were, a living organism, whose decisions, resolutions, regulations, appropriations and the like constantly create new rights and obligations for the members” (Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), p. 148).

¹³³¹ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 61. See also draft article 20, paragraph 4, as adopted by the Commission on first reading, which restated the principle of intervention of the competent organ of an organization but which appeared to subsume it under cases in which an objection had effectively been raised against the reservation concerned (*ibid.*, document A/5209, p. 176; see also *ibid.*, p. 181, paragraph (25) of the commentary to draft article 20).

¹³³² *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 50.

is the establishment of a new juridical person, and in that context a diversity of bilateral relations between member States or organizations is essentially inconceivable. There cannot be numerous types of “membership”, much less numerous decision-making procedures. The practical value of the principle is particularly obvious if one tries to imagine a situation in which a reserving State is considered a “member” of the organization by some of the other States members and, at the same time, as a third party in relation to the organization and its constituent instrument by other States that have made a qualified objection opposing the entry into force of the treaty in their bilateral relations with the reserving State.¹³³⁸ A solution of this sort, creating a hierarchy among or a bilateralization of the organization’s membership, would paralyse the work of the international organization in question and so would be unacceptable. Accordingly, the Commission, basing itself largely on the practice of the Secretary-General in the matter, rightly noted in its commentary to draft article 20, paragraph 4, adopted on first reading, that

in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable.¹³³⁹

(7) Furthermore, it is only logical that States or member organizations should take a collective decision concerning acceptance of a reservation, given that they take part, through the competent organ of the organization, in the admissions procedure for all new members and must assess at that time the terms and extent of commitment of the State or organization applying for membership. It is thus up to the organization, and to it alone, and more particularly to the competent organ, to interpret its own constituent instrument and to decide on the acceptance of a reservation formulated by a candidate for admission.

(8) This principle is confirmed, moreover, by practice in the matter. Despite some variation in the practice of depositaries other than the Secretary-General of the United Nations,¹³⁴⁰ the latter clearly sets out his position in the case of the Indian reservation to the Convention on the Inter-Governmental Maritime Consultative Organization.¹³⁴¹ On that occasion, it was specifically stated that the Secretary-General “has invariably treated the matter as one for reference to the body having the

authority to interpret the convention in question”.¹³⁴² However, there are very few examples of acceptances by the competent organ of the organization concerned to be found in the collection *Multilateral Treaties Deposited with the Secretary-General*, particularly as the depositary does not generally communicate acceptances. Yet it is worth noting that the reservations formulated by the Federal Republic of Germany and the United Kingdom to the Agreement establishing the African Development Bank, as amended in 1979, were expressly accepted by the Bank.¹³⁴³ Similarly, the French reservation to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development of 1977 was expressly accepted by the Institute’s Governing Council.¹³⁴⁴ The instrument of ratification of Chile of the Statutes of the International Centre for Genetic Engineering and Biotechnology of 1983 also took effect on the date that the reservations formulated in that instrument were accepted by the Centre’s Board of Governors.¹³⁴⁵

(9) In keeping with its usual practice, the Commission therefore considered it necessary to reproduce article 20, paragraph 3, of the Vienna Conventions in guideline 2.8.8 in order to stress the special nature of the rules applicable to the constituent instruments of international organizations with regard to the acceptance of reservations.

2.8.9 *Organ competent to accept a reservation to a constituent instrument*

Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to:

- (a) **decide on the admission of a member to the organization; or**
- (b) **amend the constituent instrument; or**
- (c) **interpret this instrument.**

Commentary

(1) The question of determining which organ is competent to decide on the acceptance of a reservation is not answered either in the Vienna Conventions themselves or in their *travaux préparatoires*. It was therefore thought useful to indicate in the Guide to Practice what is meant by the “competent organ” of an organization for the purposes of applying article 20, paragraph 3, of the Vienna Conventions, the wording of which is reproduced in guideline 2.8.8.

(2) The silence of the Vienna Conventions on this point is easily explained: it is impossible to determine in a general and abstract way which organ of an international organization is competent to decide on the acceptance of

¹³³⁸ See Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 522, para. 85; see also Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), pp. 149–151.

¹³³⁹ *Yearbook ... 1962*, vol. II, document A/5209, p. 181, paragraph (25) of the commentary to draft article 20.

¹³⁴⁰ For example, the United States of America has always applied the principle of unanimity for reservations to constituent instruments of international organizations (see the examples given by Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), pp. 149 and 158–160, and Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 122–123 (footnote 186)), while the United Kingdom has embraced the Secretary-General’s practice of referring the question back to the competent organ of the organization concerned (*ibid.*, p. 121).

¹³⁴¹ See Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), pp. 162–169, and Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 123–125.

¹³⁴² See *Official Records of the General Assembly, Fourteenth Session, Annexes*, document A/4235, para. 21. See also *Yearbook ... 1965*, vol. II, document A/5687, para. 22, and *Summary of Practice of the Secretary-General ...* (footnote 75 above), p. 59, paras. 197–198.

¹³⁴³ *Multilateral Treaties ...* (footnote 37 above), chap. X.2.b.

¹³⁴⁴ *Ibid.*, chap. XXV.3.

¹³⁴⁵ *Ibid.*, chap. XIV.7.

a reservation. This question is covered by the “without prejudice” clause in article 5, according to which the provisions of the Conventions apply to constituent instruments of international organizations “without prejudice to any relevant rules of the organization”.

(3) It is thus the rules of the organization that determine the organ competent to accept the reservation, as well as the applicable voting procedure and required majorities. If the rules are silent on this point, given the circumstances in which a reservation can be formulated, it can be assumed that “competent organ” means the organ that decides on the reserving State’s application for admission or the organ competent to amend the constituent instrument of the organization or to interpret it, although the Commission has not been able to determine a hierarchy among those different organs.

(4) The wide diversity of practice has not been of much help in this regard. For example, the Indian “reservation” to the Constitution of the Inter-Governmental Maritime Consultative Organization (IMCO)—once the controversy over the procedure to be followed was resolved¹³⁴⁶—was accepted by the IMCO Council under article 27 of the Convention,¹³⁴⁷ whereas the Turkish reservation to the same Convention was (implicitly) accepted by the Assembly. With regard to the reservation by the United States of America to the Constitution of the World Health Organization, the Secretary-General referred the matter to the World Health Assembly, which was competent under article 75 of the Constitution to decide on any disputes with regard to the interpretation of that instrument. In the end, the Assembly unanimously accepted the United States reservation.¹³⁴⁸

2.8.10 Modalities of the acceptance of a reservation to a constituent instrument

1. Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

2. For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

Commentary

(1) Guideline 2.8.10 sets out, in a single provision, the consequences of the principle laid down in article 20, paragraph 3, of the Vienna Conventions and reproduced in guideline 2.8.7:

¹³⁴⁶ See Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), pp. 162–169, and Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 123–125.

¹³⁴⁷ Under this provision, the Council assumes the functions of the organization if the Assembly does not meet.

¹³⁴⁸ Concerning this case see, in particular, Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), pp. 161–162. For other examples, see paragraph (8) of the commentary to guideline 2.8.8.

– the principle that, with but one exception, the acceptance of a reservation by the competent organ of the organization must be express; and

– the fact that this acceptance is necessary but sufficient and that, consequently, individual acceptance of the reservation by the member States is not required.

(2) Article 20, paragraph 3, of the Vienna Conventions is scarcely more than a “safeguard clause”¹³⁴⁹ that excludes the case of constituent instruments of international organizations from the scope of the flexible system, including the principle of tacit acceptance,¹³⁵⁰ while specifying that acceptance by the competent organ is necessary to “establish” the reservation within the meaning of article 21, paragraph 1, of the Vienna Conventions. Moreover, as guidelines 2.8.8 and 2.8.9 show, article 20, paragraph 3, far from resolves all the problems that can arise with regard to the legal regime applicable to reservations to constituent instruments: not only does it not define either the notion of a constituent instrument or the competent organ which must decide, but it also fails to say anything about the modalities of the organ’s acceptance of reservations.

(3) One thing is certain, however: the acceptance by the competent organ of an international organization of a reservation to its constituent instrument cannot be presumed. Under article 20, paragraph 5, of the Vienna Conventions, the presumption that a reservation is accepted at the end of a 12-month period applies only to the cases described in paragraphs 2 and 4 of that article. Thus the case set out in article 20, paragraph 3, is excluded, which is tantamount to saying that, unless the treaty (in this case, the constituent instrument of the organization) otherwise provides, acceptance must necessarily be express.

(4) In practice, even leaving aside the problem of the 12-month period stipulated in article 20, paragraph 5, of the Vienna Conventions, which would be difficult, if not impossible, to respect in some organizations where the organs competent to decide on the admission of new members meet only at intervals of more than 12 months,¹³⁵¹ the failure by the competent organ of the organization concerned to take a position is scarcely conceivable in view of the very special nature of constituent instruments. In any case, an organ of the organization must, at some time or another, take a position on the admission of a new member that wishes to accompany its accession to the constituent instrument with a reservation; without such a decision, the State cannot be considered a member of the organization. Even if the admission of the State in question is not subject to a formal act of the organization but is simply reflected in accession to the constituent instrument, article 20, paragraph 3, of the Vienna Conventions requires that the competent organ rule on the question.

¹³⁴⁹ Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 523, para. 88.

¹³⁵⁰ Article 20, paragraph 5, of the Vienna Conventions excludes from its scope the case of reservations to constituent instruments of international organizations, specifying that it applies solely to the situations referred to in paragraphs 2 and 4 of article 20.

¹³⁵¹ One example is the case of the General Assembly of the World Tourism Organization which, under article 10 of its Statutes, meets only every other year.

(5) It is possible, however, to imagine cases in which the organ competent to decide on the admission of a State implicitly accepts the reservation by allowing the candidate State to participate in the work of the organization without formally ruling on the reservation.¹³⁵² The phrase “[s]ubject to the rules of the organization” at the beginning of paragraph 1 of the guideline is designed to introduce some additional flexibility into the principle stated in the guideline.

(6) The fact remains that there is one exception to the rule of tacit acceptance prescribed in article 20, paragraph 5, of the Vienna Conventions and reproduced in guideline 2.8.2. It therefore seems useful to recall in a separate guideline that the presumption of acceptance does not apply with regard to the constituent instruments of international organizations, at least as far as acceptance expressed by the competent organ of the organization is concerned.

(7) The inevitable logical consequence of the principle established in article 20, paragraph 3, of the Vienna Conventions and the exception it introduces to the general principle of tacit acceptance is that acceptance of the reservation by contracting States or international organizations is not a prerequisite for the establishment of the reservation. This is the idea expressed in paragraph 2 of guideline 2.8.10. It does not mean that contracting States or international organizations are precluded from formally accepting the reservation in question if they so wish. It follows from guideline 2.8.12 that acceptance will simply not produce the effects normally attendant upon such a declaration.

2.8.11 *Acceptance of a reservation to a constituent instrument that has not yet entered into force*

In the case set forth in guideline 2.8.8 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation within a period of twelve months after they were notified of that reservation. Such a unanimous acceptance, once obtained, is final.

Commentary

(1) A particular problem arises with regard to reservations to the constituent instrument of an organization in cases where the competent organ does not yet exist because the treaty may not yet have entered into force or the organization may not yet have been established. In this respect, guideline 2.8.11 clarifies article 20, paragraph 3, of the Vienna Conventions on a matter which

¹³⁵² See the example of the reservation formulated by Turkey to the IMCO Convention. This reservation was not officially accepted by the Assembly. Nonetheless, the Assembly allowed the Turkish delegation to participate in its work. This implied acceptance of the instrument of ratification and the reservation (Bishop, “Reservations to treaties” (footnote 288 above), pp. 297–298; and Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), p. 163). Technically, however, this is not a “tacit” acceptance as Mendelson seems to think (*ibid.*), but rather an “implicit” acceptance (concerning this distinction, see paragraph (6) of the commentary to guideline 2.8.1).

may seem to be of minor importance, but which has posed certain fairly substantial difficulties in certain cases in the past.

(2) This situation occurred with respect to the Convention on the International Maritime Organization (IMO)—at the time still the Inter-Governmental Maritime Consultative Organization (IMCO)—to which some States had formulated reservations or declarations in their instruments of ratification,¹³⁵³ and with respect to the Constitution of the International Refugee Organization, which the United States of America, France and Guatemala intended to ratify with reservations,¹³⁵⁴ before the respective constituent instruments of the two organizations had entered into force. The Secretary-General of the United Nations, in his capacity as depositary of these conventions and unable to submit the question of declarations and/or reservations to the International Refugee Organization (as it did not yet exist), decided to consult the States most immediately concerned—in other words, the States that were already parties to the Convention—and, in the absence of any objections, to admit the reserving States as members of the organization.¹³⁵⁵

(3) It should also be noted that, while article 20, paragraph 3, of the Vienna Conventions precludes the application of the “flexible” system in the case of reservations to a constituent instrument of an international organization, it does not place it under the traditional system of unanimity. The practice of the Secretary-General, however, which is to consult all the States that are already parties to the constituent instrument, leans in that direction. Had it been adopted, an Austrian amendment to this provision, submitted at the United Nations Conference on the Law of Treaties, would have led to a different solution:

When the reservation is formulated while the treaty is not yet in force, the expression of the consent of the State which has formulated the reservation takes effect only when such competent organ is properly constituted and has accepted the reservation.¹³⁵⁶

¹³⁵³ See, in particular, the declarations of Switzerland, the United States of America, Mexico and Ecuador (*Multilateral Treaties ...* (footnote 37 above), chap. XII.1; United Nations, *Treaty Series*, vol. 289, pp. 107–109).

¹³⁵⁴ These declarations are cited in Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 40 (footnote 6).

¹³⁵⁵ See Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), pp. 162–163. In this same spirit, the United States of America, during the United Nations Conference on the Law of Treaties, proposed replacing article 20, paragraph 3, with the following text: “When a treaty is a constituent instrument of an international organization, it shall be deemed to be of such a character that, pending its entry into force and the functioning of the organization, a reservation may be established if none of the signatory States objects, unless the treaty otherwise provides” (*Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 24th meeting, 16 April 1968, pp. 130–131, para. 54). This amendment, which was not adopted, would have considerably enlarged the circle of States entitled to decide.

¹³⁵⁶ A/CONF.39/C.1/L.3, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 135. An amendment was very much along these lines, but could have meant that the reserving State becomes a party to the instrument regardless. It stipulated that “When the reservation is made before the entry into force of the treaty, the reservation shall be subject to subsequent acceptance by the competent organ after such competent organ has been properly instituted” (A/CONF.39/C.1/L.162, *ibid.*).

This approach, which was not followed by the Drafting Committee at the time of the Conference,¹³⁵⁷ is supported by M. H. Mendelson, who considers, moreover, that “[t]he fact that ... the instrument containing the reservations should not count towards bringing the treaty into force, is a small price to pay for ensuring the organization’s control over reservations”.¹³⁵⁸

(4) The organization’s control over the question of reservations is certainly one advantage of the solution advocated by the Austrian amendment. Nevertheless, the undeniable disadvantage of this solution—which was rejected by the United Nations Conference on the Law of Treaties—is that it leaves the reserving State in what can be a prolonged undetermined status with respect to the organization, until such time as the treaty enters into force. One might well ask, then, whether the practice of the Secretary-General does not constitute a more reasonable solution. Indeed, asking States that are already parties to the constituent instrument to assess the reservation with a view to obtaining unanimous acceptance (absence of protest or objection) places the reserving State in a more comfortable situation. Its status with respect to the constituent instrument of the organization and with respect to the organization itself is determined much more rapidly.¹³⁵⁹ It should be borne in mind, moreover, that the organization’s consent is nothing more than the sum total of the acceptances of the States members of the organization. Requiring unanimity before the competent organ comes into being can, of course, put the reserving State at a disadvantage, since, in most cases—at least in the case of international organizations having a global mandate—a decision will probably be taken by majority vote. Nevertheless, if there is no unanimity among the contracting States or international organizations, there is nothing to prevent the author of the reservation from resubmitting its instrument of ratification and accompanying reservation to the competent organ of the organization once it is established.

(5) Both solutions seem to yield an identical outcome. The difference, however—and it is not negligible—is that the reserving State is spared an intermediate and uncertain status until such time as the organization is established and its reservation can be examined by the competent organ. This is a major advantage from the standpoint of legal certainty.

(6) The Commission has pondered the question of which States and international organizations should be called upon to decide on the fate of a reservation in

¹³⁵⁷ Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), pp. 152–153. See also *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), pp. 137–138 and 240.

¹³⁵⁸ Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), p. 153.

¹³⁵⁹ The example of the Argentine reservation to the constituent instrument (Statute) of the International Atomic Energy Agency shows that the status of the reserving State can be determined very rapidly and depends essentially on the depositary (the United States of America in this case). The Argentine instrument was accepted after a period of only three months. See Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), p. 160.

such circumstances. It seemed to the Commission that allowing only contracting States and international organizations to do so could, in some cases, unduly facilitate the establishment of a reservation since, ultimately, a single contracting State could seal its fate. For this reason, the Commission finally settled on the States and international organizations signatories of the constituent instrument. It is understood that the term “signatory” means those that are signatories at the time the reservation is formulated.

(7) The clarification in the last sentence of the guideline that “[s]uch a unanimous acceptance, once obtained, is final” is intended to ensure the stability of the legal situation resulting from acceptance. It is predicated on the same rationale as that underlying guideline 2.8.7. Generally speaking, the rules relating to acceptance continue to apply here, and the reservation must be deemed to have been accepted if no signatory State or signatory international organization has objected to it within the 12-month period stipulated in guideline 2.6.12.

(8) Although it seemed unnecessary to spell out such details in the guideline itself, the Commission considers that, if the constituent act enters into force during the 12-month period in question, guideline 2.8.11 is no longer applicable, and it is the general rule laid down in guideline 2.8.8 that shall apply.

(9) In any event, it seems desirable that, during the negotiations, States or international organizations should come to an agreement on a *modus vivendi* for the period of uncertainty between the time of signature and the entry into force of the constituent instrument, for example by transferring the competence necessary to accept or reject reservations to the interim committee responsible for setting up the new international organization.¹³⁶⁰

2.8.12 Reaction by a member of an international organization to a reservation to its constituent instrument

Guideline 2.8.10 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

Commentary

(1) According to the terms of paragraph 2 of guideline 2.8.10, “For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that

¹³⁶⁰ This solution was contemplated by the Secretary-General of the United Nations in a document prepared for the Third United Nations Conference on the Law of the Sea. In his report, the Secretary-General stated that “before entry into force of the Convention on the Law of the Sea, it would of course be possible to consult a preparatory commission or some organ of the United Nations” (A/CONF.62/L.13, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. VI (United Nations publication, Sales No. E.77.V.2), p. 128, footnote 26). For a brief discussion of the difficulty, in certain circumstances, of determining the “organ qualified to accept a reservation”, see the second paragraph of guideline 2.1.5 (Communication of reservations) and paragraphs (28)–(29) of the commentary thereto.

are members of the organization is not required". However, as explained in the commentary to that provision,¹³⁶¹ this principle does not mean that "contracting States or international organizations are precluded from formally accepting the reservation in question if they so wish". Guideline 2.8.12 confirms this point.

(2) The answer to the question of whether the competence of the organ of the organization to rule on the acceptance of a reservation to the constituent instrument precludes individual reactions by other members of the organization may seem obvious. Why allow States to express their individual views if they must make a collective decision on acceptance of the reservation within the competent organ of the organization? Would that not give the green light to a reopening of the debate on the reservation, particularly for States that had been unable to "impose" their point of view within the competent organ, thereby creating a dual or parallel system of acceptance of such reservations that would in all likelihood create an impasse if the two processes led to different outcomes?

(3) During the United Nations Conference on the Law of Treaties, the United States of America introduced an amendment to article 17, paragraph 3 (which became article 20, paragraph 3), specifying that "such acceptance shall not preclude any Contracting State from objecting to the reservation".¹³⁶² Adopted by a slim majority at the 25th meeting of the Committee of the Whole¹³⁶³ and incorporated by the Drafting Committee in the provisional text of article 17, this passage was ultimately deleted from the final text of the Convention by the Committee of the Whole "on the understanding that the question of objections to reservations to constituent instruments of international organizations formed part of a topic already before the International Law Commission [the question of relations between international organizations and States], and that meanwhile the question would continue to be regulated by general international law".¹³⁶⁴ It became apparent in the work of the Drafting Committee that the formulation of the United States amendment was not very clear and left open the question of the legal effects of such an objection.¹³⁶⁵

(4) In truth, it is hard to understand why member States or international organizations could not take individual positions on a reservation outside the framework of the international organization and communicate their views to the interested parties, including the organization. In all likelihood, taking such a position would probably have no concrete legal effect; however, it has happened more than once, and the absence of a legal effect *stricto sensu* of such

declarations does not rob them of their importance¹³⁶⁶—they provide an opportunity for the reserving State, in the first instance, and subsequently for other interested States to become aware of and assess the position of the State that is the author of the unilaterally formulated acceptance or objection, and this might ultimately make a useful contribution to the debate within the competent organ of the organization and form the basis for launching a "reservations dialogue" among the protagonists. Such a position could also be taken into consideration, where appropriate, by a third party who might have to decide on the permissibility or scope of the reservation.

(5) In the Commission's opinion, guideline 2.8.12, which does not question the necessary and sufficient nature of the acceptance of a reservation by the competent organ of the international organization,¹³⁶⁷ is in no way contrary to the Vienna Conventions, which take no position on the matter.

2.8.13 *Final nature of acceptance of a reservation*

The acceptance of a reservation cannot be withdrawn or amended.

Commentary

(1) Although they deal with objections, neither the 1969 nor the 1986 Vienna Convention contains provisions concerning the withdrawal of the acceptance of a reservation. They neither authorize it nor prohibit it.

(2) The fact remains that article 20, paragraph 5, of the Vienna Conventions and its *ratio legis* logically exclude calling into question a tacit (or implicit) acceptance through an objection formulated once the 12-month time period stipulated in that paragraph (or any other time period specified by the treaty in question) has elapsed: to allow a "change of heart" that might call into question the treaty relations between the States or international organizations concerned many years after an acceptance had taken effect because a contracting State or an international organization had remained silent until one of the "critical dates" had passed would pose a serious threat to legal certainty. While States parties are completely free to express their disagreement with a reservation after the end of the 12-month period (or of any other time period specified by the treaty in question), their late "objections" can no longer have the normal effects of an objection, as provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions. A comparable conclusion must be drawn with regard to the question of widening the scope of an objection to a reservation.

(3) There is no reason to approach express acceptances any differently. Without having to undertake an in-depth analysis of the effects of an express acceptance—which are no different from those of a tacit acceptance—suffice it to say that, like tacit acceptances, the effect of such an express acceptance should in theory be the entry into force of the treaty between the reserving State or

¹³⁶¹ Paragraph (7).

¹³⁶² A/CONF.39/C.1/L.127, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 135, para. 179 (iv) (d).

¹³⁶³ By 33 votes to 22, with 29 abstentions, *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 25th meeting, 16 April 1968, p. 135, para. 32.

¹³⁶⁴ *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), pp. 137–138, para. 186.

¹³⁶⁵ *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 72nd meeting, 15 May 1968, pp. 425–426, paras. 4–14.

¹³⁶⁶ See also paragraph (30) of the commentary to guideline 2.6.1.

¹³⁶⁷ See article 20, paragraph 3, of the Vienna Conventions and guideline 2.8.8.

international organization and the State or international organization that has accepted the reservation and even, in certain circumstances, among all States or international organizations parties to the treaty. It goes without saying that to call the legal consequences into question *a posteriori* would seriously undermine legal certainty and the status of the treaty in the bilateral relations between the author of the reservation and the author of the acceptance. This is certainly true where acceptance has been made expressly: even if there is no doubt that a State's silence in a situation where it should have expressed its view has legal effects by virtue of the principle of good faith (and, here, the express provisions of the Vienna Conventions), it is even more obvious when the State's position takes the form of a unilateral declaration; the reserving State, as well as the other States parties, can count on the manifestation of the will of the State author of the express acceptance.

(4) The dialectical relationship between objection and acceptance, established and affirmed by article 20, paragraph 5, of the Vienna Conventions, and the imposition of controls on the objection mechanism with the aim of stabilizing the treaty relations that have been disturbed, in a sense, by the reservation necessarily imply that acceptance (whether tacit or express) is final. This is the principle firmly stated in guideline 2.8.13 in the interests of the certainty of treaty-based legal relations.

2.9 Formulation of reactions to interpretative declarations

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 reaction 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 formulated in that declaration.

Commentary

(1) It appears that practice with respect to positive reactions to interpretative declarations is virtually non-existent, as if States considered it prudent not to expressly approve an interpretation given by another party. This may be due to the fact that article 31, paragraph 3 (a), of the Vienna Conventions provides that, for the interpretation of a treaty:

There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

(2) The few instances of express reactions that can be found combine elements of approval and disapproval or have a conditional character, subordinating approval of the initial interpretation to the interpretation given to it by the reacting State.

(3) For example, the *Multilateral Treaties Deposited with the Secretary-General* include the text of a reaction by Israel to a declaration submitted by the Arab Republic

of Egypt¹³⁶⁸ concerning the United Nations Convention on the Law of the Sea that is drafted in a positive fashion, even though it is probably an expression of disagreement or a warning:

The concerns of the Government of Israel, with regard to the law of the sea, relate principally to ensuring maximum freedom of navigation and overflight everywhere and particularly through straits used for international navigation.

In this regard, the Government of Israel states that the regime of navigation and overflight, confirmed by the 1979 Treaty of Peace between Israel and Egypt, in which the Strait of Tiran and the Gulf of Aqaba are considered by the Parties to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight, is applicable to the said areas. Moreover, being fully compatible with the United Nations Convention on the Law of the Sea, the regime of the Peace Treaty will continue to prevail and to be applicable to the said areas.

It is the understanding of the Government of Israel that the declaration of the Arab Republic of Egypt in this regard, upon its ratification of the [said] Convention, is consonant with the above declaration.¹³⁶⁹

It appears from this declaration that the interpretation put forward by Egypt is regarded by Israel as correctly reflecting the meaning of chapter III of the United Nations Convention on the Law of the Sea, assuming that it is itself compatible with the Israeli interpretation. The Egyptian interpretation is, in a manner of speaking, confirmed by the reasoned “*approbatory declaration*” made by Israel.

(4) Another example that can be cited is the reaction of the Government of Norway to a declaration made by France concerning the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), published by the Secretary-General of the IMO:

[T]he Government of Norway has taken due note of the communication, which is understood to be a declaration on the part of the Government of France and not a reservation to the provisions of the Convention with the legal consequence such a formal reservation would have had, if reservations to Annex I had been admissible.¹³⁷⁰

It appears that this statement may be interpreted to mean that Norway accepts the French declaration insofar as (and on the condition that) it does not constitute a reservation.

(5) Even though examples are lacking, it is clear that a situation may arise in which a State or an international organization simply expresses its agreement with a specific interpretation proposed by another State or international organization in an interpretative declaration. Such agreement

¹³⁶⁸ “The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general régime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general régime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait” (*Multilateral Treaties ...* (footnote 37 above), chap. XXI.6). The Peace Treaty was signed in Washington, D.C. on 26 March 1979 (United Nations, *Treaty Series*, vol. 1136, No. 17813, p. 100).

¹³⁶⁹ *Multilateral Treaties ...* (footnote 37 above), chap. XXI.6. In fact, this statement expresses approval of both the classification and the substance of the Egyptian declaration; given the wording of these declarations, one may wonder whether they might not have been made as a result of a diplomatic agreement.

¹³⁷⁰ United Nations, *Treaty Series*, vol. 1341, p. 330; IMO, *Status of Multilateral Conventions and Instruments ...* (footnote 693 above), p. 108 (footnote 1).

between the respective interpretations of two or more parties corresponds to the situation contemplated in article 31, paragraph 3 (a), of the Vienna Conventions,¹³⁷¹ it being unnecessary at the present stage to specify the weight that should be given to this “subsequent agreement between the parties regarding the interpretation of the treaty”.¹³⁷²

(6) It is sufficient to note that such agreement with an interpretative declaration is not comparable to acceptance of a reservation, if only because under article 20, paragraph 4, of the Vienna Conventions such acceptance entails the entry into force of the treaty for the reserving State—which is evidently not the case of a positive reaction to an interpretative declaration. To underscore the differences between the two, the Commission thought it would be wise to use different terms. The term “approval”, which expresses the idea of agreement or acquiescence without prejudging the legal effect actually produced,¹³⁷³ is used to denote a positive reaction to an interpretative declaration.

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 reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization disagrees with the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

Commentary

(1) Examples of negative reactions to an interpretative declaration, in other words, of a State or an international organization disagreeing with the interpretation given in an interpretative declaration, while not quite as exceptional as positive reactions, are nonetheless sporadic. The reaction of the United Kingdom of Great Britain and Northern Ireland to the interpretative declaration of the Syrian Arab Republic¹³⁷⁴ in respect of article 52 of the 1969 Vienna Convention is an illustration of this:

The United Kingdom does not accept that the interpretation of Article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act.¹³⁷⁵

(2) The various conventions on the law of the sea also generated negative reactions to the interpretative declarations made in connection with them. Upon ratification of the Convention on the Continental Shelf, concluded in

Geneva in 1958, Canada declared “[t]hat it does not find acceptable the declaration made by the Federal Republic of Germany with respect to article 5, paragraph 1”.¹³⁷⁶

(3) The United Nations Convention on the Law of the Sea, by virtue of its articles 309 and 310, which prohibit reservations but authorize interpretative declarations, gave rise to a considerable number of “interpretative declarations”, which also prompted an onslaught of negative reactions by other contracting States. Tunisia, for example, in its communication of 22 February 1994, made it known that

in that declaration [of Malta], articles 74 and 83 of the Convention are interpreted to mean that, in the absence of any agreement on delimitation of the exclusive economic zone, the continental shelf or other maritime zones, the search for an equitable solution assumes that the boundary is the median line, in other words, a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters is measured.

The Tunisian Government believes that such an interpretation is not in the least consistent with the spirit and letter of the provisions of these articles, which do not provide for automatic application of the median line with regard to delimitation of the exclusive economic zone or the continental shelf.¹³⁷⁷

Another clear-cut example can be found in the statement of Italy regarding the interpretative declaration of India in respect of the United Nations Convention on the Law of the Sea:

Italy wishes to reiterate the declaration it made upon signature and confirmed upon ratification according to which “the rights of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them”. According to the declaration made by Italy upon ratification, this declaration applies as a reply to all past and future declarations by other States concerning the matters covered by it.¹³⁷⁸

(4) Examples can also be found in the practice relating to conventions adopted within the Council of Europe. Thus, the Russian Federation, referring to numerous declarations by other States parties in respect of the Framework Convention for the protection of national minorities of 1995, in which they specified the meaning to be ascribed to the term “national minority”, declared that it

considers that none [State?] is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the protection of national minorities, a definition of the term “national minority”, which is not contained in the Framework Convention. In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States parties to

¹³⁷¹ See paragraph (1) above.

¹³⁷² See section 4.7 below.

¹³⁷³ See Salmon (ed.), *Dictionnaire de droit international public* (footnote 1013 above), pp. 74–75 (*Approbation*).

¹³⁷⁴ This declaration reads as follows: “The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

The expression ‘the threat or use of force’ used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests” (*Multilateral Treaties ...* (footnote 37 above), chap. XXIII.1).

¹³⁷⁵ *Ibid.*

¹³⁷⁶ *Ibid.*, chap. XXI.4. The German interpretative declaration reads as follows: “[T]he Federal Republic of Germany declares with reference to article 5, paragraph 1, of the Convention on the Continental Shelf that in the opinion of the Federal Government, article 5, paragraph 1, guarantees the exercise of fishing rights (*Fischerei*) in the waters above the continental shelf in the manner hitherto generally in practice” (*ibid.*).

¹³⁷⁷ *Ibid.*, chap. XXI.6. The relevant part of the Maltese declaration reads as follows: “The Government of Malta interprets article 74 and article 83 to the effect that in the absence of agreement on the delimitation of the exclusive economic zone or the continental shelf or other maritime zones, for an equitable solution to be achieved, the boundary shall be the median line, namely a line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial waters of Malta and of such other States is measured” (*ibid.*).

¹³⁷⁸ *Ibid.*

the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the protection of national minorities.¹³⁷⁹

(5) Furthermore, the example of the statement by Italy regarding the interpretative declaration of India¹³⁸⁰ shows that, in practice, States that react negatively to an interpretative declaration formulated by another State or another international organization often propose in the same breath another interpretation that they believe is “more accurate”. This practice of “constructive” refusal was also followed by Italy in its statement in reaction to the interpretative declarations of several other States parties to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal:

The Government of Italy, in expressing its objection *vis-à-vis* the declarations made, upon signature, by the Governments of Colombia, Ecuador, Mexico, Uruguay and Venezuela, as well as other declarations of similar tenor that might be made in the future, considers that no provision of this Convention should be interpreted as restricting navigational rights recognized by international law. Consequently, a State party is not obliged to notify any other State or obtain authorization from it for simple passage through the territorial sea or the exercise of freedom of navigation in the exclusive economic zone by a vessel showing its flag and carrying a cargo of hazardous wastes.¹³⁸¹

Germany and Singapore, which had made interpretative declarations comparable to that of Italy, remained silent in respect of declarations interpreting the Basel Convention differently without deeming it necessary to react in the same way as the Italian Government.¹³⁸²

(6) The practice also evoked reactions that, *prima facie*, were not outright rejections. In some cases, States seemed to accept the proposed interpretation on the condition that it was consistent with a supplementary interpretation.¹³⁸³ The conditions set by Austria, Germany and Turkey for consenting to the interpretative declaration of Poland in respect of the European Convention on Extradition of 13 December 1957¹³⁸⁴ offer a good example of this. Germany, for example, considered

the placing of persons granted asylum in Poland on an equal standing with Polish nationals in Poland’s declaration with respect to Article 6, paragraph 1 (a), of the Convention to be compatible with the object and purpose of the Convention only with the proviso that it does not exclude extradition of such persons to a state other than that in respect of which asylum has been granted.¹³⁸⁵

¹³⁷⁹ United Nations, *Treaty Series*, vol. 2152, p. 297; Council of Europe, *European Treaty Series*, No. 157 (available from <http://conventions.coe.int>).

¹³⁸⁰ See paragraph (3) above.

¹³⁸¹ *Multilateral Treaties ...* (footnote 37 above), chap. XXVII.3.

¹³⁸² On the question of “silence”, see guideline 2.9.9 and commentary thereto.

¹³⁸³ This practice coincides with the practice described above of partial or conditional approval (see paragraphs (3)–(5) of the commentary to guideline 2.9.1).

¹³⁸⁴ Declaration of 15 June 1993: “The Republic of Poland declares, in accordance with paragraph 1 (a) of Article 6, that it will under no circumstances extradite its own nationals. The Republic of Poland declares that, for the purposes of this Convention, in accordance with paragraph 1 (b) of Article 6, persons granted asylum in Poland will be treated as Polish nationals” (United Nations, *Treaty Series*, vol. 1862, p. 474; Council of Europe, *European Treaty Series*, No. 24 (available from <http://conventions.coe.int>)).

¹³⁸⁵ United Nations, *Treaty Series*, vol. 1862, p. 476; Council of Europe, *European Treaty Series*, No. 24. See also the identical reaction of Austria to the interpretative declarations of Romania (*Treaty Series*, vol. 2045, pp. 198–202; *European Treaty Series*, No. 24).

(7) A number of States had a comparable reaction to the declaration made by Egypt upon ratification of the International Convention for the Suppression of Terrorist Bombings of 1997.¹³⁸⁶ Considering that the declaration by the Arab Republic of Egypt “aims ... to broaden the scope of the Convention”—which excludes assigning the status of “reservation”¹³⁸⁷—the German Government declared that it

is of the opinion that the Government of the Arab Republic of Egypt is only entitled to make such a declaration unilaterally for its own armed forces, and it interprets the declaration as having binding effect only on armed forces of the Arab Republic of Egypt. In the view of the Government of the Federal Republic of Germany, such a unilateral declaration cannot apply to the armed forces of other States Parties without their express consent. The Government of the Federal Republic of Germany therefore declares that it does not consent to the Egyptian declaration as so interpreted with regard to any armed forces other than those of the Arab Republic of Egypt, and in particular does not recognize any applicability of the Convention to the armed forces of the Federal Republic of Germany.¹³⁸⁸

(8) In the context of the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), a declaration by Canada concerning Arctic waters also triggered conditional reactions.¹³⁸⁹ France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and the United Kingdom of Great Britain and Northern Ireland declared that they

take[] note of this declaration by Canada and consider[] that it should be read in conformity with Articles 57, 234 and 236 of the United Nations Convention on the Law of the Sea. In particular, the ... Government recalls that Article 234 of that Convention applies within the limits of the exclusive economic zone or of a similar zone delimited in conformity with Article 57 of the Convention and that the laws and regulations contemplated in Article 234 shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.¹³⁹⁰

(9) The declaration made by the Czech Republic further to the interpretative declaration of the Federal Republic of Germany¹³⁹¹ in respect of Part X of the United Nations Convention on the Law of the Sea should be viewed

¹³⁸⁶ The Egyptian “reservation” is formulated as follows: “The Government of the Arab Republic of Egypt declares that it shall be bound by article 19, para. 2, of the Convention to the extent that the armed forces of a State, in the exercise of their duties, do not violate the norms and principles of international law” (*Multilateral Treaties ...* (footnote 37 above), chap. XVIII.9).

¹³⁸⁷ See paragraphs (9)–(10) of the commentary to guideline 1.5.

¹³⁸⁸ *Multilateral Treaties ...* (footnote 37 above), chap. XVIII.9. See also comparable declarations by the United States of America (*ibid.*), the Netherlands (*ibid.*), the United Kingdom of Great Britain and Northern Ireland (*ibid.*) and Canada (*ibid.*).

¹³⁸⁹ For the text of the Canadian declaration, see IMO, *Status of Multilateral Conventions and Instruments ...* (footnote 693 above), p. 106.

¹³⁹⁰ *Ibid.*

¹³⁹¹ The relevant part of the German declaration reads as follows: “As to the regulation of the freedom of transit enjoyed by land-locked States, transit through the territory of transit States must not interfere with the sovereignty of these States. In accordance with article 125, paragraph 3, the rights and facilities provided for in Part X in no way infringe upon the sovereignty and legitimate interests of transit States. The precise content of the freedom of transit has in each single case to be agreed upon by the transit State and the land-locked State concerned. In the absence of such agreement concerning the terms and modalities for exercising the right of access of persons and goods to transit through the territory of the Federal Republic of Germany[, the said right] is only regulated by national law, in particular, with regard to means and ways of transport and the use of traffic infrastructure” (*Multilateral Treaties ...* (footnote 37 above), chap. XXI.6).

from a slightly different perspective in that it is difficult to determine whether it is opposing the interpretation upheld by Germany or recharacterizing the declaration as a reservation:

The Government of the Czech Republic having considered the declaration of the Federal Republic of Germany of 14 October 1994 pertaining to the interpretation of the provisions of Part X of the [said Convention], which deals with the right of access of land-locked States to and from the sea and freedom of transit, states that the [said] declaration of the Federal Republic of Germany cannot be interpreted with regard to the Czech Republic in contradiction with the provisions of Part X of the Convention.¹³⁹²

(10) Such “conditional acceptances” do not constitute “approvals” within the meaning of guideline 2.9.1 and must be regarded as negative reactions. In fact, the authors of such declarations are not approving the proposed interpretation but rather are putting forward another which, in their view, is the only one in conformity with the treaty.

(11) All these examples show that a negative reaction to an interpretative declaration can take varying forms: it can be an out and out rejection of the interpretation formulated in the declaration, a counterproposal for an interpretation of the contested provision(s), or an attempt to limit the scope of the initial declaration, which was in turn interpreted. In any case, reacting States or international organizations are seeking to prevent or limit the scope of the interpretative declaration or its legal effect on the treaty, its application or its interpretation. In this connection, then, a negative reaction is somewhat comparable to an objection to a reservation without, however, producing the same effect. Thus, a State or an international organization cannot oppose the entry into force of a treaty between itself and the author of the interpretative declaration on the pretext that it disagrees with the interpretation contained in the declaration. The author views its negative reaction as a safeguard measure, a protest against the establishment of an interpretation of the treaty that could be used against it, and against which it must speak out, as it considers it to be inappropriate.¹³⁹³

(12) This is why, just as it preferred the term “approval” to “acceptance” to designate a positive reaction to an interpretative declaration,¹³⁹⁴ the Commission decided to use the term “opposition”,¹³⁹⁵ rather than “objection”, to refer to a negative reaction, even though this word has sometimes been used in practice.¹³⁹⁶

¹³⁹² *Ibid.*

¹³⁹³ In this connection, see A. McNair, *The Law of Treaties*, Oxford, Clarendon, 1961, pp. 430–431.

¹³⁹⁴ See guideline 2.9.1.

¹³⁹⁵ The definition of “opposition” thus understood is very similar to the definition of the term “protestation” as provided in the *Dictionnaire de droit international public*: “Act by which one or more subjects of international law express their intention not to recognize the validity or opposability of acts, conduct or claims issuing from third parties” (Salmon (ed.) (footnote 1013 above), p. 907).

¹³⁹⁶ See, for example, the reaction of Italy to the interpretative declarations of Colombia, Ecuador, Mexico, Uruguay and Venezuela to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (See *Multilateral Treaties ...* (footnote 37 above), chap. XXVII.3). The reaction of Canada to the interpretative declaration of the Federal Republic of Germany to the Convention on the Continental Shelf (*ibid.*, chap. XXI.4) was also registered in the “objection” category by the Secretary-General.

(13) The Commission considered how it might most appropriately designate oppositions that reflected a different interpretation than the one contained in the initial interpretative declaration. It rejected the adjectives “incompatible” and “inconsistent”, choosing instead the word “alternative” so as not to constrict the definition to oppositions to interpretative declarations unduly.

(14) Adhering strictly to the subject matter of the second part, the definition selected avoids any reference to the possible effects of either interpretative declarations themselves or reactions to them. Guidelines are formulated in respect of both of these in Part 4 of the Guide to Practice.¹³⁹⁷

(15) The Commission also found that, contrary to the approach it had taken when drafting guideline 2.6.1 on the definition of objections to reservations, it was not advisable to include in the definition of oppositions to interpretative declarations a reference to the intention of the author of the reaction, which was felt to be too subjective.

2.9.3 *Recharacterization of an interpretative declaration*

1. “Recharacterization” of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization purports to treat the declaration as a reservation.

2. A State or an international organization that intends to treat an interpretative declaration as a reservation should take into account guidelines 1.3 to 1.3.3.

Commentary

(1) Even though in certain respects the recharacterization of an interpretative declaration as a reservation resembles an opposition to the initial interpretation, it constitutes a sufficiently distinct manifestation of a divergence of opinion to warrant devoting a separate guideline to it. This is the subject matter of guideline 2.9.3.

(2) As the definitions of reservations and interpretative declarations make clear, the naming or phrasing of a unilateral statement by its author as a “reservation” or an “interpretative declaration” is irrelevant for the purposes of characterizing such a unilateral statement,¹³⁹⁸ even if it provides a significant clue¹³⁹⁹ as to its nature. This principle is conveyed by the phrase “however phrased or named” in guideline 1.1 (replicating article 2, paragraph 1 (d), of the Vienna Conventions).

(3) What frequently occurs in practice is that interested States do not hesitate to react to unilateral statements

¹³⁹⁷ See, in particular, guideline 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration).

¹³⁹⁸ See also guidelines 1.1 (Definition of reservations) and 1.2 (Definition of interpretative declarations).

¹³⁹⁹ In this connection, guideline 1.3.2 (Phrasing and name) provides that: “The phrasing or name of a unilateral statement provides an indication of the purported legal effect.”

which their authors call interpretative, and to expressly regard them as reservations.¹⁴⁰⁰ These reactions, which might be called “recharacterizations” to reflect their purpose, in no way resemble approval or opposition, since they (obviously) do not refer to the actual content of the unilateral statement in question but rather to its form and to the applicable legal regime.

(4) There are numerous examples of this phenomenon:

(a) The reaction of the Netherlands to the interpretative declaration of Algeria in respect of article 13, paragraphs 3 and 4, of the International Covenant on Economic, Social and Cultural Rights of 1966:

In the opinion of the Government of the Kingdom of the Netherlands, the interpretative declaration concerning article 13, paragraphs 3 and 4, of the International Covenant on Economic, Social and Cultural Rights must be regarded as a reservation to the Covenant. From the text and history of the Covenant, it follows that the reservation with respect to article 13, paragraphs 3 and 4, made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government of the Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it.¹⁴⁰¹

(b) The reactions of many States to the declaration made by Pakistan with respect to the same Covenant of 1966, which, after lengthy statements of reasons, conclude:

The Government of ... therefore regards the above-mentioned declarations as reservations and as incompatible with the object and purpose of the Covenant.

The Government of ... therefore objects to the above-mentioned reservations made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and the Islamic Republic of Pakistan.¹⁴⁰²

(c) The reactions of many States to the declaration made by the Philippines with respect to the United Nations Convention on the Law of the Sea of 1982:

The ... considers that the statement which was made by the Government of the Philippines upon signing the United Nations Convention on the Law of the Sea and confirmed subsequently upon ratification of that Convention in essence contains reservations and exceptions to the said Convention, contrary to the provisions of article 309 thereof.¹⁴⁰³

(d) The recharacterization formulated by Mexico, which considered that

the third declaration [formally classified as interpretative] submitted by the Government of the United States of America ... constitutes a unilateral claim to justification, not envisaged in the Convention [the United Nations Convention against Illicit Traffic in Narcotic Drugs

¹⁴⁰⁰ Nor do the tribunals or treaty monitoring bodies hesitate to recharacterize an interpretative declaration as a reservation (see paragraphs (5)–(7) of the commentary to guideline 1.3.2).

¹⁴⁰¹ *Multilateral Treaties ...* (footnote 37 above), chap. IV.3. See also the objection of Portugal to the declaration of Algeria (*ibid.*) and the objection of the Netherlands to the declaration of Kuwait (*ibid.*).

¹⁴⁰² *Ibid.* See also the objections registered by Denmark (*ibid.*), Finland (*ibid.*), France (*ibid.*), Latvia (*ibid.*), the Netherlands (*ibid.*), Norway (*ibid.*), Spain (*ibid.*), Sweden (*ibid.*) and the United Kingdom of Great Britain and Northern Ireland (*ibid.*).

¹⁴⁰³ Belarus, *ibid.*, chap. XXI.6; see also the reactions similar in letter or in spirit from Australia, Bulgaria, the Russian Federation and Ukraine (*ibid.*).

and Psychotropic Substances, of 1988], for denying legal assistance to a State that requests it, which runs counter to the purposes of the Convention.¹⁴⁰⁴

(e) The reaction of Germany to a declaration whereby the Government of Tunisia indicated that it would not, in implementing the Convention on the rights of the child of 20 November 1989, “adopt any legislative or statutory decision that conflicts with the Tunisian Constitution”:

The Federal Republic of Germany considers the first of the declarations deposited by the Republic of Tunisia to be a reservation. It restricts the application of the first sentence [*sic*] of article 4.¹⁴⁰⁵

(f) The reactions of 19 States to the declaration made by Pakistan with regard to the International Convention for the Suppression of Terrorist Bombings of 1997, whereby Pakistan specified that “nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination”:

The Government of Austria considers that the declaration made by the Government of the Islamic Republic of Pakistan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its objective and purpose.¹⁴⁰⁶

(g) The reactions of Germany and the Netherlands to the declaration made by Malaysia upon accession to the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents of 1973, whereby Malaysia made the implementation of article 7 of the Convention subject to its domestic legislation:

The Government of the Federal Republic of Germany considers that in making the interpretation and application of Article 7 of the Convention subject to the national legislation of Malaysia, the Government of Malaysia introduces a general and indefinite reservation that makes it impossible to clearly identify in which way the Government of Malaysia intends to change the obligations arising from the Convention. Therefore the Government of the Federal Republic of Germany hereby objects to this declaration which is considered to be a reservation that is incompatible with the object and purpose of the Convention. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and Malaysia.¹⁴⁰⁷

(h) The reaction of Sweden to the declaration by Bangladesh indicating that article 3 of the Convention on the Political Rights of Women of 1953 could only be implemented in accordance with the Constitution of Bangladesh:

In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government of Sweden considers that the declarations made by the Government of Bangladesh, in the absence of further clarification, in substance constitute reservations to the Convention.

¹⁴⁰⁴ *Ibid.*, chap. VI.19.

¹⁴⁰⁵ *Ibid.*, chap. IV.11.

¹⁴⁰⁶ *Ibid.*, chap. XVIII.9. See the reactions similar in letter or in spirit from Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States (*ibid.*). See also the reactions of Germany and the Netherlands to the unilateral declaration made by Malaysia (*ibid.*).

¹⁴⁰⁷ *Ibid.*, chap. XVIII.7.

The Government of Sweden notes that the declaration relating to article III is of a general kind, stating that Bangladesh will apply the said article in consonance with the relevant provisions of its Constitution. The Government of Sweden is of the view that this declaration raises doubts as to the commitment of Bangladesh to the object and purpose of the Convention and would recall that, according to well-established international law, a reservation incompatible with the object and purpose of a treaty shall not be permitted.¹⁴⁰⁸

(5) These examples show that recharacterization consists of considering that a unilateral statement submitted as an “interpretative declaration” is in reality a “reservation”, with all the legal effects that this entails. Thus, recharacterization seeks to identify the legal status of the unilateral statement in the relationship between the State or organization having submitted the statement and the “recharacterizing” State or organization. As a general rule, such declarations, which are usually extensively reasoned,¹⁴⁰⁹ are based essentially on the criteria for distinguishing between reservations and interpretative declarations.¹⁴¹⁰

(6) These recharacterizations are “attempts”, proposals made with a view to qualifying as a reservation a unilateral statement which its author has submitted as an interpretative declaration and to imposing on it the legal status of a reservation. However, it should be understood that a “recharacterization” does not in and of itself determine the status of the unilateral statement in question. A divergence of views between the States or international organizations concerned can be resolved only through the intervention of an impartial third party with decision-making authority. The last phrase of paragraph 1 of guideline 2.9.3 (“whereby the former State or organization purports to treat the declaration as a reservation”) clearly establishes the subjective nature of such a position, which does not bind either the author of the initial declaration or the other contracting or concerned parties.

(7) The second paragraph of guideline 2.9.3 refers the reader to guidelines 1.3 to 1.3.3, which indicate the criteria for distinguishing between reservations and interpretative declarations and the method of implementing them.

(8) Even though contracting States and international organizations are free to react to the interpretative declarations of other parties, which is why paragraph 2 is worded in the form of a recommendation, as evidenced by the conditional verb “should”, they are taking a risk if they fail to follow these guidelines, which should guide the position of any decision-making body competent to give an opinion on the matter.

2.9.4 Right to formulate approval or opposition, or to recharacterize

An approval, opposition or recharacterization in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting organization and by any State or any

¹⁴⁰⁸ *Ibid.*, chap. XVI.1. See also the identical declaration by Norway (*ibid.*).

¹⁴⁰⁹ For a particularly striking example, see the reactions to the interpretative declaration of Pakistan in relation to the International Covenant on Economic, Social and Cultural Rights (see paragraph (4) (b) above and *Multilateral Treaties ...* (footnote 37 above), chap. IV.3).

¹⁴¹⁰ See guidelines 1.3–1.3.3.

international organization that is entitled to become a party to the treaty.

Commentary

(1) In keeping with the basic principle of consensualism, guideline 2.9.4 conveys the wide range of possibilities open to States and international organizations in reacting to an interpretative declaration, whether they accept it, oppose it or consider it to be an actual reservation.

(2) With respect to time frames, reactions to interpretative declarations may in principle be formulated at any time. Interpretation occurs throughout the life of the treaty, and there does not seem to be any reason why reactions to interpretative declarations should be confined to any specific time frame when the declarations themselves are not, as a general rule (and if the treaty does not otherwise provide), subject to any particular time frame.¹⁴¹¹

(3) Moreover, and here reactions to interpretative declarations resemble acceptances of and objections to reservations, both contracting States and contracting international organizations and States and international organizations that are entitled to become parties to the treaty should be able to formulate an express reaction to an interpretative declaration at least from the time they become aware of it, on the understanding that the author of the declaration is responsible for disseminating it (or not)¹⁴¹² and that the reactions of non-contracting States or non-contracting international organizations will not necessarily produce the same legal effect as those formulated by contracting States or contracting organizations (and most likely no effect at all so long as the author State or international organization has not expressed its consent to be bound). It is thus perfectly logical that the Secretary-General should have accepted the communication of Ethiopia of its opposition to the interpretative declaration formulated by the Yemen Arab Republic with respect to the United Nations Convention on the Law of the Sea, even though Ethiopia had not ratified the Convention.¹⁴¹³

2.9.5 Form of approval, opposition and recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should preferably be formulated in writing.

Commentary

(1) While reactions to interpretative declarations differ considerably from acceptances of or objections to reservations, it seems appropriate to ensure, to the extent possible, that such reactions are publicized widely, on the understanding that States and international organizations have no legal obligation in this regard¹⁴¹⁴ but that any legal effects that they may expect to arise from such reactions will depend in large part on how widely they disseminate those reactions.

¹⁴¹¹ See paragraphs (21)–(32) of the commentary to guideline 1.2 and also guideline 2.4.4 and commentary thereto.

¹⁴¹² See paragraph (4) of the commentary to guideline 2.9.5.

¹⁴¹³ See *Multilateral Treaties ...* (footnote 37 above), chap. XXI.6.

¹⁴¹⁴ See paragraph (4) below.

(2) Although the legal effects of such reactions (combined with those of the initial declaration) on the interpretation and application of the treaty in question will not be discussed at the present stage,¹⁴¹⁵ it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their *raison d'être* and the purpose for which they are formulated by States and international organizations. The International Court of Justice has highlighted the importance of these statements in practice:

Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerably probative value when they contain recognition by a party of its own obligations under an instrument.¹⁴¹⁶

(3) In a study on unilateral statements, Rosario Sapienza also underlined the importance of reactions to interpretative declarations, which

contribute usefully to the settlement [of a dispute]. Statements will be even more useful to the interpreter when there is no dispute, but only a problem of interpretation.¹⁴¹⁷

(4) Notwithstanding the undeniable usefulness of reactions to interpretative declarations not only for the interpreter or judge but also in enabling the other States and international organizations concerned to determine their own position with respect to the declaration, the Vienna Convention does not require that such reactions be communicated. As has already been indicated in the commentary to guideline 2.4.1 on the form of interpretative declarations:

The rules governing the form and communication of reservations cannot ... be purely and simply transposed to simple interpretative declarations, which may be formulated orally, and it would thus be paradoxical to insist that they be formally communicated to the other States or international organizations concerned.¹⁴¹⁸

(5) There is no reason to take a different approach with respect to reactions to such interpretative declarations, and it would be inappropriate to impose more stringent formal requirements on them than on the interpretative declarations to which they respond. The same caveat applies, however: if States or international organizations do not adequately publicize their reactions to an interpretative declaration, they run the risk that the intended effects may not be produced. If the authors of such reactions want their position to be taken into account in the treaty's application, particularly when there is a dispute, it would probably be in their interest to formulate the reaction in writing in order to meet the requirements of legal security and ensure notification of the reaction. This alternative does not leave room for any intermediate solutions. Accordingly, the Commission was of the view that the word "preferably" was more appropriate than the expression "to the extent possible", used in the text of guidelines 2.1.2 (Statement of reasons for reservations), 2.6.9 (Statement of reasons for objections) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization), which might convey the idea that such intermediate solutions existed.

(6) The Commission adopted guideline 2.9.5 in the form of a simple recommendation addressed to States and international organizations: it does not reflect a binding legal norm but conveys what the Commission considers to be, in most cases, the real interests of the contracting States or contracting organizations, or of any State or international organization that is entitled to become a party to a treaty in respect of which an interpretative declaration has been made.¹⁴¹⁹ It goes without saying—as indicated by the use of the conditional ("should")—that such entities (States or international organizations) are still free simply to formulate an interpretative declaration, if that is what they prefer.

(7) Guideline 2.9.5 corresponds to guideline 2.4.1, which recommends that the authors of interpretative declarations formulate them in writing.

2.9.6 Statement of reasons for approval, opposition and recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should, to the extent possible, indicate the reasons why it is being made.

Commentary

(1) For the same reasons that, in its view, made it preferable to formulate interpretative declarations in writing,¹⁴²⁰ the Commission adopted guideline 2.9.6, which recommends that States and international organizations entitled to react to an interpretative declaration state their reasons for an approval, opposition or recharacterization. This recommendation is modelled on those adopted, for example, with respect to statements of reasons for reservations¹⁴²¹ and objections to reservations.¹⁴²²

(2) Moreover, as may be seen from the practice described above,¹⁴²³ States generally take care to explain, sometimes in great detail, the reasons for their approval, opposition or recharacterization. These reasons are useful not only for the interpreter: they can also alert the State or the international organization that submitted the interpretative declaration to the points found to be problematic in the declaration and, potentially, induce the author to revise or withdraw the declaration. This constitutes, with respect to interpretative declarations, the equivalent of the "reservations dialogue".

(3) The Commission wondered, however, whether the recommendation to provide a statement of reasons ought to be extended to cover the approval of an interpretative declaration. Besides the fact that practice in the matter is extremely rare,¹⁴²⁴ it may be assumed that approvals are formulated for the same reasons that prompted

¹⁴¹⁹ Concerning the entities that may formulate an approval, opposition or recharacterization, see guideline 2.9.4.

¹⁴²⁰ See guideline 2.9.5 and commentary thereto.

¹⁴²¹ See guideline 2.1.2 and commentary thereto.

¹⁴²² See guideline 2.6.9 and commentary thereto.

¹⁴²³ See paragraphs (1)–(9) of the commentary to guideline 2.9.2 and paragraph (4) of the commentary to guideline 2.9.3.

¹⁴²⁴ See the commentary to guideline 2.9.1 above.

¹⁴¹⁵ See, in particular, guidelines 4.7.1, paragraph 2, and 4.7.3.

¹⁴¹⁶ *Advisory Opinion of 11 July 1950, International Status of South-West Africa ...* (see footnote 167 above), pp. 135–136.

¹⁴¹⁷ Sapienza, *Dichiarazioni interpretative unilaterali ...* (footnote 129 above), p. 275.

¹⁴¹⁸ Paragraph (1) of the commentary.

the declaration itself and generally even use the same wording.¹⁴²⁵ Although some members considered that stating the reasons for an approval might cause confusion (if, for example, reasons were given for the interpretative declaration itself and the two reasons differed), the majority of the Commission considered that there should be no distinction in that regard between the various categories of reaction to interpretative declarations, particularly in the present case, since guideline 2.9.6 is a simple recommendation that has no binding force for the author of the approval.

(4) The same applies to opposition or recharacterization. In all cases, incidentally, an explanation of the reasons for a reaction may be a useful element in the dialogue among the contracting States or contracting organizations and entities entitled to become parties.

2.9.7 *Formulation and communication of approval, opposition or recharacterization*

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to an approval, opposition or recharacterization in respect of an interpretative declaration.

Commentary

(1) The formulation in writing of a reaction to an interpretative declaration, whether approval, opposition or recharacterization,¹⁴²⁶ makes it easier to disseminate it to the other entities concerned, contracting States or contracting organizations or States and international organizations entitled to become parties.

(2) Although there is no legal requirement to disseminate a reaction, the Commission strongly believes that it is in the interests of both the authors of a reaction to a unilateral declaration and all the entities concerned to do so and that the formulation and communication of a reaction could follow the procedure for other types of declarations relating to a treaty, which is actually very similar—namely, guidelines 2.1.3–2.1.7 in the case of reservations, 2.4.1 and 2.4.7 in the case of interpretative declarations and 2.6.8 and 2.8.5, in the case of, respectively, objections to reservations and their express acceptance. Given that all these guidelines are modelled on those relating to reservations, it seemed sufficient to refer the user to the rules on reservations, *mutatis mutandis*.

(3) Unlike the effect produced by the formulation of reservations, however, these rules on the formulation and communication of reactions to interpretative declarations are of an optional nature only, and guideline 2.9.7 is simply a recommendation, as the use of the conditional (“should”) indicates.

(4) The Commission wondered whether reference should be made in guideline 2.9.7 to guideline 2.1.7 concerning the functions of depositaries. It was decided that, since the provision is based on the idea that “the depositary

shall examine whether a reservation to a treaty ... is in due and proper form” and that interpretative declarations do not have to take any particular form, such a reference was unnecessary. Since there may be cases, however, in which an interpretative declaration is not permissible (where the treaty precludes such a declaration),¹⁴²⁷ it was deemed necessary to include the formulation of guideline 2.1.7, which sets out the course to take in the event of a divergence of views in cases of this kind.

2.9.8 *Non-presumption of approval or opposition*

1. An approval of, or an opposition to, an interpretative declaration shall not be presumed.

2. Notwithstanding guidelines 2.9.1 and 2.9.2, an approval of an interpretative declaration or an opposition thereto may be inferred, in exceptional cases, from the conduct of the States or international organizations concerned, taking into account all relevant circumstances.

Commentary

(1) Guideline 2.9.8 establishes a general framework and should be read in conjunction with guideline 2.9.9, which relates more specifically to the role that may be played by the silence of a State or an international organization with regard to an interpretative declaration.

(2) As is clear from the definitions of an approval of and an opposition to an interpretative declaration contained in guidelines 2.9.1 and 2.9.2, both essentially take the form of a unilateral declaration made by a State or an international organization whereby the author expresses agreement or disagreement with the interpretation formulated in the interpretative declaration.

(3) In the case of reservations, silence, according to the presumption provided for in article 20, paragraph 5, of the Vienna Conventions, means consent. The International Court of Justice, in its 1951 advisory opinion, noted the “very great allowance made for tacit assent to reservations”,¹⁴²⁸ and the work of the Commission has from the outset acknowledged the considerable part played by tacit acceptance.¹⁴²⁹ Sir Humphrey Waldock justified the principle of tacit acceptance by pointing out:

It is (...) true that, under the “flexible” system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State.¹⁴³⁰

¹⁴²⁷ See guideline 3.5 (Permissibility of an interpretative declaration).

¹⁴²⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 21.

¹⁴²⁹ See Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 499–500, paras. 29–30.

¹⁴³⁰ First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 67, para. 15.

¹⁴²⁵ It is primarily for this reason that the Commission did not consider it useful to include in the Guide to Practice a recommendation that reasons should be given for interpretative declarations themselves.

¹⁴²⁶ See guideline 2.9.5.

(4) In the case of simple interpretative declarations (as opposed to conditional interpretative declarations¹⁴³¹), there is no rule comparable to that contained in article 20, paragraph 5, of the Vienna Conventions (the principle of which is reflected in guideline 2.8.2), so these concerns do not arise. By definition, an interpretative declaration purports only to “specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof”, but it in no way imposes conditions on its author’s consent to be bound by the treaty.¹⁴³² Whether or not other States or international organizations consent to the interpretation put forward in the declaration has no effect on the author’s legal status with respect to the treaty; the author becomes or remains a contracting party regardless. Continued silence on the part of the other parties has no effect on the status as a party of the State or organization that formulates an interpretative declaration: such silence cannot prevent the latter from becoming or remaining a party, in contrast to what could occur in the case of reservations under article 20, paragraph 4 (c), of the Vienna Conventions were it not for the presumption provided for in paragraph 5 of that article.

(5) Thus, since one cannot proceed by analogy with reservations, the issue of whether, in the absence of an express reaction, there is a presumption of approval of or opposition to interpretative declarations remains unresolved. In truth, however, this question can only be answered in the negative. In fact, it is inconceivable that silence could in itself produce such a legal effect.

(6) Moreover, this appears to be the position most widely supported in the literature. Horn states:

Interpretative declarations must be treated as unilaterally advanced interpretations and should therefore be governed only by the principles of interpretation. The general rule is that a unilateral interpretation cannot be opposed to any other party in the treaty. Inaction on behalf of the confronted states does not result in an automatic construction of acceptance. It will only be one of many cumulative factors which together may evidence acquiescence. The institution of estoppel may become relevant, though this requires more explicit proof of the readiness of the confronted states to accept the interpretation.¹⁴³³

(7) Although inaction cannot in itself be construed as either approval or opposition—neither of which can be presumed in any way (this is stated more specifically in guideline 2.9.9 on the silence of a State or an international organization with respect to an interpretative declaration)—the position taken by Horn also suggests that silence can, under certain conditions, be taken to signify acquiescence in accordance with the principles of good faith and, more particularly in the context of treaty interpretation, through the operation of article 31, paragraph 3 (b), of the Vienna Conventions, which provides for the consideration, in interpreting a treaty, of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. Further, the concept of acquiescence itself is not unknown in treaty law: article 45 of the 1969 Vienna Convention provides that:

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) ...

(b) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

Article 45 of the 1986 Vienna Convention reproduces this provision, adapting it to the specific case of international organizations.

(8) However, this provision does not define the “conduct” in question, and it would seem extremely difficult, if not impossible, to determine in advance the circumstances in which a State or an organization is bound to protest expressly in order to avoid being considered as having acquiesced to an interpretative declaration or to a practice that has been established on the basis of such a declaration.¹⁴³⁴ In other words, it is particularly difficult to determine when and in what specific circumstances inaction with respect to an interpretative declaration is tantamount to consent. As the Eritrea–Ethiopia Boundary Commission stressed:

The nature and extent of the conduct effective to produce a variation of the treaty is, of course, a matter of appreciation by the tribunal in each case. The decision of the International Court of Justice in the *Temple* case is generally pertinent in this connection. There, after identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was stopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule—whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first.¹⁴³⁵

(9) It therefore seems impossible to provide, in the abstract, clear guidelines for determining when a silent State has, by its inaction, created an effect of acquiescence or estoppel. This can only be determined on a case-by-case basis in the light of the circumstances in question.

(10) For this reason, paragraph 1 of guideline 2.9.8, which complements guidelines 2.9.1 and 2.9.2, unequivocally states that the presumption provided for in article 20, paragraph 5, of the Vienna Conventions is not applicable. Paragraph 2, however, acknowledges that, as an exception to the principle arising from these two guidelines, the conduct of the States or international organizations concerned may be considered, depending on the circumstances, as constituting approval of, or opposition to, the interpretative declaration.

¹⁴³⁴ See, in particular, Rousseau, *Droit international public* (footnote 351 above), p. 430, No. 347.

¹⁴³⁵ Decision regarding delimitation of the border between Eritrea and Ethiopia, decision of 13 April 2002, Permanent Court of Arbitration, United Nations, *Reports of International Arbitral Awards*, vol. XXV (United Nations publication, Sales No. E/F.05.V.5), p. 111, para. 3.9; see also the well-known separate opinion of Judge Alfaro in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 40.

¹⁴³¹ See guideline 1.4.

¹⁴³² The situation is evidently different with respect to conditional interpretative declarations. See *ibid.*

¹⁴³³ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 244 (footnotes omitted); see also McRae, “The legal effect of interpretative declarations” (footnote 129 above), p. 168.

(11) Given the wide range of “relevant circumstances” (a cursory sample of which is given in the preceding paragraphs), the Commission did not think it possible to describe them in greater detail.

2.9.9 *Silence with respect to an interpretative declaration*

An approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization.

Commentary

(1) The practice (or, more accurately, the absence of practice) described in the commentary to guidelines 2.9.2 and, in particular, 2.9.1, shows the considerable role that States allow silence to play in the context of interpretative declarations. Express positive—and even negative—reactions are extremely rare. One wonders therefore whether it is possible to infer from such overwhelming silence consent to the interpretation proposed by the State or international organization making the interpretative declaration.

(2) As was noted in a study on silence in response to a violation of a rule of international law, which is fully applicable here: “silence in itself says nothing because it is capable of ‘saying’ too many things at once”.¹⁴³⁶ Silence can express either agreement or disagreement with the proposed interpretation. States may consider it unnecessary to respond to an interpretative declaration because they share the view expressed therein, or they may feel that the interpretation is erroneous but that there is no point in saying so since, in any event, the interpretation would not, in their view, be upheld by an impartial third party in case of a dispute. It is impossible to determine which of these two hypotheses is correct.¹⁴³⁷

(3) Guideline 2.9.9 expresses this idea by applying the general principle established in guideline 2.9.8, paragraph 1, specifically to silence.

(4) Although silence is not in principle equivalent to approval of or acquiescence to an interpretative declaration, it is conceivable that, in some circumstances, the silent State is nonetheless considered as having acquiesced to the declaration by reason of its conduct, or lack of conduct in circumstances where conduct is

required, in relation to the interpretative declaration. This is an inverse derogation from the general principle, the existence of which must not be affirmed lightly and is by no means automatic. Silence must therefore be viewed as merely one aspect of the general conduct of the State or international organization in question.

3. *Permissibility of reservations and interpretative declarations*

General commentary

(1) The purpose of Part 3, which comes after Part 1, devoted to definitions, and Part 2, dealing with the procedure for formulating reservations and interpretative declarations, is to determine the conditions for the permissibility of reservations to treaties (and of interpretative declarations).

(2) After extensive debate, the Commission decided to retain the term “permissibility of reservations” to describe the intellectual operation consisting in determining whether a unilateral statement made¹⁴³⁸ by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty¹⁴³⁹ in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation.

(3) Adhering to the definition found in article 2, paragraph 1 (*d*), of the Vienna Conventions, reproduced in guideline 1.1, the Commission accepted that all unilateral statements meeting that definition constituted reservations. But, as the Commission states very clearly in its commentary to guideline 1.8, “[d]efining is not the same as regulating ... a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established”.¹⁴⁴⁰ It goes on to say: “Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime and, above all, for the assessment of its validity. It is only once a particular instrument has been defined as a reservation ... that one can decide whether it is valid, evaluate its legal scope and determine its effect.”¹⁴⁴¹

(4) At an early stage, the Commission opted for in French the words “*licéité*” and “*illicéité*” in preference to “*validité*” (“validity”) and “*invalidité*” (“invalidity”) in order to respond to the concerns expressed by some members of the Commission and some States who considered that the term “validity” cast doubt on the nature of statements that fit the definition of reservations given in article 2, paragraph 1 (*d*), of the Vienna Conventions

¹⁴³⁶ G. P. Buzzini, “Abstention, silence et droit international général”, *Rivista di diritto internazionale*, vol. 88/2 (2005), p. 382.

¹⁴³⁷ See, in this connection, H. Drost, “Grundfragen der Lehre vom internationalen Rechtsgeschäft”, in D. S. Constantopoulos and H. Wehberg (eds.), *Gegenwartsprobleme des internationalen Rechtes und der Rechtsphilosophie, Festschrift für Rudolf Laun zu seinem siebenzigsten Geburtstag*, Hamburg, Girardet, 1953, p. 218: “Wann Schweigen als eine Anerkennung angesehen werden kann, ist Tatfrage. Diese ist nur dann zu bejahen, wenn nach der Sachlage—etwa nach vorhergegangener Notifikation—Schweigen nicht nur als ein objektiver Umstand, sondern als schlüssiger Ausdruck des dahinterstehenden Willens aufgefaßt werden kann” (“The question as to when silence can be construed as acceptance is a question of circumstances. The answer cannot be affirmative unless, given the factual circumstances—following prior notification, for example—silence cannot be understood simply as an objective situation, but as a conclusive expression of the underlying will”).

¹⁴³⁸ Since the mere formulation of a reservation does not allow it to produce the effects intended by its author, the word “formulated” would have been more appropriate (see below the commentary to guideline 3.1, paragraphs (6)–(7)); but the Vienna Conventions use the word “made” and as a matter of principle the Commission does not wish to revisit the Vienna text.

¹⁴³⁹ Or of the treaty as a whole with respect to certain specific aspects (see paragraph 2 of guideline 1.1).

¹⁴⁴⁰ Paragraph (1) of the commentary.

¹⁴⁴¹ Paragraph (2) of the commentary. See also paragraph (16) of the commentary to guideline 1.1.

but did not fulfil the conditions set forth in article 19.¹⁴⁴² Actually, the word “validity” is quite neutral in that regard. It would have had the advantage of not leading to mistaken conclusions as to the position of the Commission with regard to the doctrinal controversy,¹⁴⁴³ central to the question of reservations, between the proponents of “permissibility”, who hold that “the issue of ‘permissibility’ is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether as a matter of policy, other Parties find the reservations acceptable or not”,¹⁴⁴⁴ and the proponents of “opposability”, who hold that “the validity of a reservation depends solely on the acceptance of the reservation by another contracting State” and who therefore view article 19, subparagraph (c), of the 1969 Vienna Convention “as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that”.¹⁴⁴⁵

(5) Moreover, it was thought that the French term “*illicite*” was not appropriate in any case to characterize reservations that did not fulfil the conditions of form or substance set by the Vienna Conventions. The Commission considers in this regard that, in international law, an internationally wrongful act entails its author’s responsibility, and this is plainly not the case with regard to the formulation of reservations that are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose.¹⁴⁴⁶

(6) It thus appeared to the Commission:

– first, that the term “*licite*” implied that the formulation of reservations contrary to the provisions of article 19 of the Vienna Conventions would engage the responsibility of the reserving State or international organization, which was certainly not the case.¹⁴⁴⁷ That is in fact why the Commission, which had at first used the term “*illicite*” as an equivalent to the English word “impermissible” to describe reservations formulated notwithstanding the provisions of article 19, decided, at its fifty-eighth session, to replace the words “*licite*”, “*illicite*”, “*licéité*” and “*illicéité*” with “*valide*”, “*non-valide*”, “*validité*” and “*non-validité*” and to modify the commentary to all the guidelines of the Guide to Practice accordingly;¹⁴⁴⁸

¹⁴⁴² See the statement of the United Kingdom in the Sixth Committee on 2 November 1993, *Official Records of the General Assembly, Forty-eighth Session, Sixth Committee, 24th meeting, A/C.6/48/SR.24*, para. 42.

¹⁴⁴³ On this doctrinal dispute, see, in particular, J. K. Koh, “Reservations to multilateral treaties: how international legal doctrine reflects world vision”, *Harvard International Law Journal*, vol. 23, No. 1 (1982), pp. 71–116, *passim*, in particular pp. 75–77; see also Redgwell, “Universality or integrity? ...” (footnote 1127 above), pp. 245–282, in particular pp. 263–269; and Sinclair, *The Vienna Convention on the Law of Treaties* (footnote 129 above), pp. 81–82, footnote 78.

¹⁴⁴⁴ Bowett, “Reservations to non-restricted ...” (footnote 150 above), p. 88.

¹⁴⁴⁵ Ruda, “Reservations to treaties” (footnote 56 above), p. 190.

¹⁴⁴⁶ See guideline 3.3.2 (Non-permissibility of reservations and international responsibility) and commentary thereto.

¹⁴⁴⁷ See paragraph (5) above.

¹⁴⁴⁸ *Yearbook ... 2006*, vol. II (Part Two), pp. 143–145, para. 159. See also paragraphs (2)–(7) of the present commentary.

– secondly, that the term “permissible” used in the English text of the guidelines and the commentaries thereto might imply that the issue is exclusively one of permissibility and not of opposability, which has the disadvantage of unnecessarily taking a position in the doctrinal controversy discussed above.¹⁴⁴⁹

(7) However, the term “permissibility” was retained to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions, since, according to the English speakers, the term did not imply taking a position as to the consequences of non-fulfilment of those conditions. The term was rendered in French by the term “*validité substantielle*” and in Spanish by the phrase “*validez sustantiva*”.

(8) Part 3 of the Guide to Practice deals successively with the questions relating to:

- permissibility of reservations;
- competence to assess the permissibility of reservations;
- consequences of the impermissibility of a reservation; and
- permissibility of reactions to reservations.

An additional section is devoted to the same questions in relation to interpretative declarations.

3.1 Permissible reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) **the reservation is prohibited by the treaty;**
- (b) **the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or**
- (c) **in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.**

Commentary

(1) Guideline 3.1 faithfully reproduces the wording of article 19 of the 1986 Vienna Convention, which is patterned after the corresponding provision of the 1969 Vienna Convention with just two additions, which were needed in order to cover treaties concluded by international organizations.¹⁴⁵⁰

(2) By providing that, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty,

¹⁴⁴⁹ See paragraph (4) above.

¹⁴⁵⁰ On the *travaux préparatoires* of article 19 of the 1986 Vienna Convention, see Pellet, “1986 Vienna Convention. Article 19: Formulation of reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 483–488.

“[a] State or an international organization may ... formulate a reservation”, albeit under certain conditions, that provision sets out “the general principle that the formulation of reservations is permitted”.¹⁴⁵¹ This is an essential element of the “flexible system” stemming from the advisory opinion of the International Court of Justice of 1951,¹⁴⁵² and it is no exaggeration to say that, on this point, it reverses the traditional presumption resulting from the system of unanimity,¹⁴⁵³ the stated aim being to facilitate the widest possible participation in treaties and, ultimately, their universality.

(3) In this regard, the text of article 19 finally adopted in 1969 resulted directly from Sir Humphrey Waldock’s proposals and takes the opposite view from the drafts prepared by the Special Rapporteurs on the law of treaties who preceded him, all of whom started from the inverse assumption, expressing in negative or restrictive terms the principle that a reservation might only be formulated (or “made”)¹⁴⁵⁴ if certain conditions were met.¹⁴⁵⁵ Waldock,¹⁴⁵⁶ on the other hand, presents the principle as the “power to formulate, that is, to *propose*, a reservation”, which a State has “in virtue of its sovereignty”.¹⁴⁵⁷

(4) However, this right is not unlimited:

– first, it is limited in time, since a reservation may only be formulated “when signing, ratifying, formally

¹⁴⁵¹ Commentary to draft article 18 of the draft articles on the law of treaties, adopted on first reading by the Commission in 1962, *Yearbook ... 1962*, vol. II, p. 180, para. 15; see also the commentary to draft article 16 adopted on second reading, *Yearbook ... 1966*, vol. II, p. 207, para. 17. For the 1986 Vienna Convention, see the commentaries to draft articles 19 (Formulation of reservations in the case of treaties between several international organizations) adopted by the Commission in 1977, *Yearbook ... 1977*, vol. II (Part Two), p. 106, para. 1, and 19 bis (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States), *ibid.*, p. 108, para. 3.

¹⁴⁵² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), p. 15.

¹⁴⁵³ This concept, which had undoubtedly become the customary norm in the period between the wars (see the joint dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo, appended to the advisory opinion issued in the case *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), pp. 34–35), significantly restricted the right to make reservations: this was possible only if all the other parties to the treaty accepted the reservation, otherwise the author remained outside the treaty. In its comments on the draft article 18 adopted by the Commission in 1962 (see footnote 1451 above), Japan proposed reverting to the opposite presumption (see the fourth report on the law of treaties, of Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 46).

¹⁴⁵⁴ On this point, see paragraphs (6)–(7) below.

¹⁴⁵⁵ See, for example, draft article 10, paragraph 1, of the draft convention on the law of treaties proposed by Mr. Briery, Special Rapporteur (*Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 238); the various drafts of article 9 proposed by Sir Hersch Lauterpacht, Special Rapporteur, in his first report (*Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 91–92); and his second report (*Yearbook ... 1954*, vol. II, document A/CN.4/87, p. 131); or draft article 39, paragraph 1, of the draft proposed by Sir Gerald Fitzmaurice, Special Rapporteur (*Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115). See also the comments of Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 88–89.

¹⁴⁵⁶ “A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation ... unless:” (first report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, art. 17, para. 1 (a), p. 60).

¹⁴⁵⁷ Commentary to article 17, *ibid.*, p. 65, para. 9.

confirming, accepting, approving or acceding to a treaty”¹⁴⁵⁸;

– secondly, the formulation of reservations may be incompatible with the object of some treaties, either because they are limited to a small group of States—a situation that is taken into account in article 20, paragraph 2, of the 1969 Vienna Convention, which reverts to the system of unanimity where such instruments are concerned¹⁴⁵⁹—or, in the case of instruments of universal scope, because the parties intend to make the integrity of the treaty take precedence over its universality or, at any rate, to limit the right of States to formulate reservations; on this issue, as on all others, the Vienna Convention is only intended to be residual in nature, and there is nothing to prevent the negotiators from inserting in the treaty “reservations clauses” that limit or modify the right set out as a principle in article 19.¹⁴⁶⁰

(5) Although the view has sometimes been expressed that it was excessive to speak of a “right to reservations”, the 1969 Vienna Convention proceeds from the principle that there is a presumption in favour of their permissibility. This, moreover, is the significance of the very title of article 19 of the 1969 and 1986 Vienna Conventions (Formulation of reservations),¹⁴⁶¹ which is confirmed by its *chapeau*: “A State may ... formulate* a reservation unless* ...”. It should, however, be noted that by using the verb “may”, the introductory clause of article 19 recognizes that States have a right, but it is only the right to “formulate” reservations.¹⁴⁶²

¹⁴⁵⁸ See paragraph (9) below.

¹⁴⁵⁹ “When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.”

¹⁴⁶⁰ With regard to the residual nature of the Vienna regime, see Aust, *Modern Treaty Law and Practice* (footnote 155 above), pp. 151–153; J. K. Gamble, Jr., “Reservations to multilateral treaties: a macroscopic view of State practice”, *AJIL*, vol. 74 (1980), pp. 383–391; Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 162–230; McNair, *The Law of Treaties* (footnote 1393 above), pp. 169–173; Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), pp. 85–90 and 101–104; and Riquelme Cortado, *Las reservas a los tratados* (footnote 150 above), pp. 89–136.

¹⁴⁶¹ Concerning the modification of this title in the context of the Guide to Practice, see paragraph (10) below.

¹⁴⁶² See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 83; see also Reuter, *Introduction au droit des traités* (footnote 28 above), p. 75; or Riquelme Cortado, *Las reservas a los tratados* (footnote 150 above), p. 84. It may also be noted that a proposal by Mr. Briggs to replace the word “free” in Sir Humphrey Waldock’s draft (see footnote 1456 above) with the words “legally entitled” (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 22) was not accepted, nor was an amendment along the same lines proposed by the Union of Soviet Socialist Republics at the United Nations Conference on the Law of Treaties (A/CONF.39/C.1/L.115, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (see footnote 54 above), p. 133, para. 175). The current wording (“A State may ... formulate a reservation unless ...”) was adopted by the Commission’s Drafting Committee (see *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 221, para. 3), then by the Commission in plenary meeting in 1962 (*ibid.*, vol. II, pp. 175–176, art. 18, para. 1). No amendments were made in 1966, other than the replacement of the words “*Tout État*” [in the French text] with the words “*Un État*” (see *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, pp. 263–264, para. 1 (text adopted by the Drafting Committee), and *Yearbook ... 1966*, vol. II, p. 202 (article 16 adopted on second reading)).

(6) The words “formulate” and “formulation” were carefully chosen. They indicate that a “formulated” reservation is not “made”, in the sense that a reservation does not produce its effects simply by virtue of its formulation. For that reason an amendment seeking to replace the words “formulate a reservation” with the words “make reservations”¹⁴⁶³ was rejected by the Drafting Committee of the United Nations Conference on the Law of Treaties.¹⁴⁶⁴ As Waldock noted, “there is an inherent ambiguity in saying (...) that a State may ‘make*’ a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively ‘made’ unless and until it has been assented to by the other interested States”.¹⁴⁶⁵ Now, not only is a reservation only “established”¹⁴⁶⁶ if certain procedural conditions—admittedly, not very restrictive ones¹⁴⁶⁷—are met, but it must also comply with the substantive conditions set forth in the three subparagraphs of article 19 of the Vienna Conventions itself, as the word “unless” clearly demonstrates.¹⁴⁶⁸

(7) According to some authors, the terminology used in this provision is not consistent in that regard, since “[l]orsque le traité autorise certaines réserves (article 19, alinéa b), elles n’ont pas besoin d’être acceptées par les autres États (...). Elles sont donc ‘faites’ dès l’instant de leur ‘formulation’ par l’État réservataire” [“if the treaty permits specified reservations (article 19, subparagraph (b)), they do not need to be accepted by the other States ... They are thus ‘made’ from the moment of their ‘formulation’ by the reserving State”].¹⁴⁶⁹ According to that logic, while subparagraph (b) correctly states that such reservations “may be *made**”, the *chapeau* of article 19 of the Vienna Conventions could be misleading by implying that they, too, are merely “formulated” by their author.¹⁴⁷⁰ But

¹⁴⁶³ A/CONF.39/C.1/L.161 (*Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (see footnote 54 above), pp. 133–134, para. 177).

¹⁴⁶⁴ See *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (see footnote 35 above), 23rd meeting of the Committee of the Whole, 11 April 1968, p. 121, para. 2, and 24th meeting, 16 April 1968, p. 126, para. 13 (statement by the Expert Consultant, Sir Humphrey Waldock).

¹⁴⁶⁵ First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62, paragraph (1) of the commentary to draft articles 17, 18 and 19.

¹⁴⁶⁶ See article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions: “A reservation established with regard to another party in accordance with articles 19, 20 and 23”; see also guidelines 4.1–4.1.3.

¹⁴⁶⁷ See article 20, paragraphs 3–5, article 21, paragraph 1, and article 23 of the Vienna Conventions; see also guidelines 2.1–2.2.4. See also Coccia, *Reservations to multilateral treaties ...* (footnote 196 above), p. 28, and Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations” and “1969 Vienna Convention. Article 21: Legal effects of reservations and of objections to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 489–534 and pp. 538–564.

¹⁴⁶⁸ “This article states the general principle that the *formulation** of reservations is permitted except in three cases” (*Yearbook ... 1966*, vol. II, p. 207, paragraph (17) of the commentary to article 16; the use of the word “*faire*” in the French text of the commentary is open to criticism, but it is probably a translation error, rather than a deliberate choice—*contra*: Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 90. In any case, the English text of the commentary is correct).

¹⁴⁶⁹ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 84–85.

¹⁴⁷⁰ See also Ruda, “Reservations to treaties” (footnote 56 above), pp. 179–180; see also the far more restrained criticism by Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 111–112.

this is an empty argument:¹⁴⁷¹ subparagraph (b) is not about reservations that are established (or made) simply by virtue of being formulated, but rather about reservations that are not permitted by the treaty. As in the situation in subparagraph (a), such reservations may not be formulated: in one case (subpara. (a)), the prohibition is explicit; in the other (subpara. (b)), it is implied.

(8) Moreover, the principle of the right to formulate reservations cannot be separated from the exceptions to the principle. For this reason, the Commission, which in general has avoided modifying the wording of the provisions of the Vienna Conventions that it has carried over into the Guide to Practice, decided against devoting a separate guideline to the principle of the presumption of the validity of reservations.

(9) For the same reason, the Commission chose not to leave out of guideline 3.1 a reference to all the different moments “in which a reservation may be formulated”. As discussed above,¹⁴⁷² article 19 of the Vienna Conventions reproduces the temporal limitations included in the definition of reservations in article 2, paragraph 1 (d), of the Vienna Conventions,¹⁴⁷³ and this repetition is no doubt superfluous, as was stressed by Denmark during the consideration of the draft articles on the law of treaties adopted in 1962.¹⁴⁷⁴ However, the Commission did not think it necessary to correct the anomaly when the final draft was adopted in 1966, and the repetition is not sufficiently inconvenient to merit rewriting the 1969 Vienna Convention, which allowed this drawback to remain.

(10) The repetition also provides a discreet reminder that the validity of reservations does not depend solely on the substantive conditions set forth in article 19 of the Vienna Conventions but is also dependent on conformity with conditions of form and timeliness. However, those formal conditions are dealt with in Part 2 of the Guide to Practice, so that Part 3 deals with the substantive validity, that is, the permissibility of reservations—hence the title of “Permissible reservations” chosen by the Commission for guideline 3.1, for which it was not possible to retain the title of article 19 of the Vienna Conventions (Formulation of reservations), since it was already used for guideline 2.1.3¹⁴⁷⁵ and would, in any case, tend to put the accent, inappropriately, on the formal conditions for the validity of reservations.

¹⁴⁷¹ One may, however, question the use of the verbs “formulate” and “make” in article 23, paragraph 2, of the Vienna Conventions; it is not consistent to state, at the end of this provision, that, if a reservation formulated when signing [a treaty] is confirmed at the time of the expression of consent to be bound, “the reservation shall be considered as having been *made** on the date of its confirmation”. In elaborating the Guide to Practice on reservations, the Commission has endeavoured to adopt consistent vocabulary in this regard (the criticisms directed at it by Riquelme Cortado, *Las reservas a los tratados* (footnote 150 above), p. 85, appear to be based on a translation error in the Spanish text).

¹⁴⁷² Paragraph (4).

¹⁴⁷³ See guideline 1.1 (Definition of reservations) and commentary thereto.

¹⁴⁷⁴ See the fourth report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 46.

¹⁴⁷⁵ “Representation for the purpose of formulating a reservation at the international level”.

3.1.1 Reservations prohibited by the treaty

A reservation is prohibited by the treaty if it contains a provision:

- (a) prohibiting all reservations;
- (b) prohibiting reservations to specified provisions to which the reservation in question relates; or
- (c) prohibiting certain categories of reservations including the reservation in question.

Commentary

(1) According to Reuter, the situations envisaged in subparagraphs (a) and (b) of article 19 of the 1969 and 1986 Vienna Conventions (reproduced in guideline 3.1) constitute “very simple cases”.¹⁴⁷⁶ However, that is not at all certain. It is true that these provisions refer to cases where the treaty to which a State or an international organization wishes to make a reservation contains a special clause prohibiting or permitting the formulation of reservations. But, aside from the fact that not all possibilities are explicitly covered,¹⁴⁷⁷ delicate problems can arise regarding the exact scope of a clause prohibiting reservations and the effects of a reservation formulated despite that prohibition.

(2) Guideline 3.1.1 is intended to clarify the scope of subparagraph (a) of guideline 3.1, which does not spell out what is meant by “reservation ... prohibited by the treaty”, while guidelines 3.1.2 and 3.1.4 undertake to clarify the meaning and the scope of the expression “specified reservations” contained in subparagraph (b).

(3) In draft article 17, paragraph 1 (a), which he submitted to the Commission in 1962, Waldock distinguished three situations:

- reservations “prohibited by the terms of the treaty, or excluded by the nature of the treaty or by the established usage of an international organization”;
- reservations not provided for by a clause that restricts the reservations that can be made; or
- reservations not provided for by a clause that authorizes certain reservations.¹⁴⁷⁸

What these three cases had in common was that, unlike reservations incompatible with the object and purpose of

the treaty,¹⁴⁷⁹ “when a reservation is formulated that is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself”.¹⁴⁸⁰

(4) Even though it was taken up again, in a slightly different form, by the Commission,¹⁴⁸¹ this categorization was unnecessarily complicated and, at the rather general level at which the authors of the 1969 Vienna Convention intended to operate, there was no point in drawing a distinction between the first two situations identified by the Special Rapporteur.¹⁴⁸² In the draft article 18, paragraph 2, which he proposed in 1965 in the light of the observations by Governments, he limited himself to distinguishing reservations prohibited by the terms of the treaty (or “by the established rules of an international organization”)¹⁴⁸³ from those implicitly prohibited as a result of the authorization of specified reservations by

¹⁴⁷⁹ Situation envisaged in paragraph 2 of draft article 17 included in the first report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (*ibid.*), but in a rather different form than in the current text.

¹⁴⁸⁰ *Ibid.*, p. 65, paragraph (9) of the commentary.

¹⁴⁸¹ Draft article 18, paragraph 1 (b), (c) and (d), *ibid.*, document A/5209, p. 176 (see also paragraph (15) of the commentary to this article, *ibid.*, p. 180).

¹⁴⁸² On the contrary, during the debate on the draft, Mr. Briggs considered that “the distinction was between the case set out in subparagraph (a), where all reservations were prohibited, and the case set out in subparagraphs (b) and (c), where only some reservations were either expressly prohibited or impliedly excluded” (*ibid.*, vol. I, 663rd meeting, 18 June 1962, p. 222, para. 12); *contra*: Sir Humphrey Waldock, *ibid.*, p. 223, para. 32; as the example of article 12 of the 1958 Convention on the Continental Shelf indicates (see paragraph (6) of the commentary to guideline 3.1.2 below), this comment is highly relevant.

¹⁴⁸³ Although the principle had not been disputed at the time of the debate in the plenary session in 1965 (but had been disputed by Lachs in 1962, *ibid.*, 651st meeting, 25 May 1962, p. 142, para. 53) and had been retained in the text adopted during the first part of the seventeenth session (see *Yearbook ... 1965*, vol. II, p. 162), this indication disappeared without explanation from draft article 16 as finally adopted by the Commission in 1966 following the “final cleanup” by the Drafting Committee (see *Yearbook ... 1966*, vol. I (Part Two), 887th meeting, 11 July 1966, p. 295, para. 91). The deletion of this phrase should be seen in the context of the general safeguards clause concerning constituent instruments of international organizations or treaties adopted within an international organization appearing in article 5 of the Convention and adopted the same day in its final form by the Commission (*ibid.*, p. 294, para. 79). In practice, it is very unusual to allow reservations to be formulated to the constituent instruments of an international organization (see Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), pp. 137–171). As for treaties concluded within the context of international organizations, the best example of (purported) exclusion of reservations is that of the ILO, whose consistent practice is not to accept the deposit of instruments of ratification of international labour conventions when accompanied by reservations (see the memorandum submitted by the Director of the International Labour Office to the Council of the League of Nations on the admissibility of reservations to general conventions, *Official Journal of the League of Nations*, vol. 8, July 1927, p. 882, or the memorandum submitted by the ILO to the International Court of Justice in 1951 in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above) in *I.C.J. Reports 1951, Pleadings, Oral Arguments and Documents*, pp. 227–228, or the statement of Wilfred Jenks, Legal Adviser of the ILO, during the oral pleadings in that case, *ibid.*, p. 234) (see footnote 105 above in that regard); for a discussion and critique of this position, see paragraphs (3)–(5) of the commentary to guideline 1.1.6 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty).

¹⁴⁷⁶ Reuter, “Solidarité et divisibilité ...” (footnote 405 above), p. 625, also reproduced in Reuter, *Le développement ...* (footnote 405 above), p. 363. For the contrary view on the complexity of the issue, see Pellet, “1969 Vienna Convention. Article 19: Formulation of reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 433–441, paras. 75–91.

¹⁴⁷⁷ See footnote 1479 and paragraph (9) of the commentary to guideline 3.1.3 below.

¹⁴⁷⁸ First report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, art.17, para. 1 (a), p. 60.

the treaty.¹⁴⁸⁴ This distinction is found in a more refined form¹⁴⁸⁵ in article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention, without any distinction being made as to whether the treaty prohibits, or fully or partially authorizes reservations.¹⁴⁸⁶

(5) According to Mr. Tomuschat, the prohibition in subparagraph (a), as it is worded, should be understood as covering both express prohibitions and implicit prohibitions of reservations.¹⁴⁸⁷ Some justification for this interpretation can be found in the *travaux préparatoires* of this provision:

– in the original wording, proposed by Sir Humphrey Waldock in 1962,¹⁴⁸⁸ it was specified that the provision concerned reservations that were “prohibited by the terms of the treaty”, a clarification that was abandoned in 1965 without explanation by the Special Rapporteur and with little light being shed by the discussions in the Commission on this matter;¹⁴⁸⁹

– in the commentary to draft article 16 adopted by the Commission on second reading in 1966, the Commission in effect seems to place on the same footing “reservations expressly or implicitly prohibited by the provisions of the treaty”.¹⁴⁹⁰

(6) This interpretation, however, is open to question. The idea that certain treaties could “by their nature”, exclude reservations was discarded by the Commission in 1962, when it rejected the proposal along those lines made

¹⁴⁸⁴ Fourth report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 50.

¹⁴⁸⁵ On the editorial changes made by the Commission, see the debate on draft article 18 (*ibid.*, vol. I, especially the 797th and 798th meetings, 8 and 9 June 1965, pp. 147–163) and the text adopted by the Drafting Committee (*ibid.*, 813th meeting, 29 June 1965, pp. 263–264, para. 1) and the debate on it (*ibid.*, pp. 264–265). The final texts of article 16 (a) and (b) adopted on second reading by the Commission read as follows: “A State may ... formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty authorizes specified reservations which do not include the reservation in question” (*Yearbook ... 1966*, vol. II, p. 202). See also the commentary to guideline 3.1.2.

¹⁴⁸⁶ The “alternative proposals” *de lege ferenda* in 1953 in the first report submitted by Sir Hersch Lauterpacht all refer to treaties that “[do] not expressly prohibit or restrict the faculty of making reservations” (*Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 91–92 and 124).

¹⁴⁸⁷ Tomuschat, “Admissibility and legal effects of reservations ...” (footnote 1080 above), p. 469.

¹⁴⁸⁸ See paragraph (3) above.

¹⁴⁸⁹ See, however, the statement by Yasseen during the discussions of the Commission at its seventeenth session, *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 19: “the words ‘the terms of’ (*expressément*) could be deleted and it could read simply: ‘[unless] the making of reservations is prohibited by the treaty ...’. For it was enough that the treaty was not silent on the subject; it did not matter whether it referred to reservations implicitly or expressly”—but Yasseen was referring to the 1962 text.

¹⁴⁹⁰ Like, moreover, “those expressly or impliedly authorized”, *Yearbook ... 1966*, vol. II, p. 205, paragraph (10) of the commentary; see also p. 207, paragraph (17). In the same vein, article 19, paragraph 1 (a) of the draft articles on the law of treaties concluded between States and international organizations or between two or more international organizations adopted by the Commission in 1981 places on equal footing cases where reservations are prohibited by treaties and those where it is “otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited” (*Yearbook ... 1981*, vol. II (Part Two), p. 137).

by Waldock.¹⁴⁹¹ Thus, apart from the case of reservations to the constituent instruments of international organizations—which is dealt with in guideline 2.8.8—it is hard to see what prohibitions could derive “implicitly” from a treaty, except in the cases covered by subparagraphs (b) and (c)¹⁴⁹² of article 19,¹⁴⁹³ and it must be recognized that subparagraph (a) concerns only reservations expressly prohibited by the treaty. Moreover, this interpretation appears to be compatible with the relative flexibility that pervades all the provisions of the 1969 Vienna Convention that deal with reservations.

(7) There is no problem—other than determining whether or not the declaration in question constitutes a reservation¹⁴⁹⁴—if the prohibition is clear and precise, in particular when it is a general prohibition, on the understanding, however, that there are relatively few such examples¹⁴⁹⁵ even if some are famous, such as that in article 1 of the Covenant of the League of Nations:

¹⁴⁹¹ See paragraph (4) above. The Special Rapporteur indicated that, in drafting this clause, “what he had had in mind ... was the Charter of the United Nations, which, by its nature, was not open to reservations” (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 143, para. 60). This exception is covered by the safeguard clause of article 5 of the 1969 Vienna Convention (see footnote 1483 above). The words “nature of the treaty” drew little attention during the discussion (Mr. Castrén, however, found the expression imprecise—*ibid.*, 652nd meeting, 28 May 1962, p. 148, para. 28; see also the statement by Mr. Verdross, *ibid.*, p. 149, para. 35); it was deleted by the Drafting Committee (*ibid.*, 663rd meeting, 18 June 1962, p. 221, para. 3).

¹⁴⁹² The amendments of Spain (A/CONF.39/C.1/L.147) and of the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1), *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 134, para. 177, aimed at reintroducing the idea of the “nature” of the treaty in subparagraph (c) were withdrawn by their authors or rejected by the Drafting Committee (see the reaction of the United States in *Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (footnote 332 above), 11th plenary meeting, p. 35, paras. 2–3). During the Commission’s discussion of guideline 3.1.1, some members stated the view that certain treaties, such as the Charter of the United Nations, by their very nature excluded any reservations. The Commission nonetheless concluded that this idea was consistent with the principle enunciated in subparagraph (c) of article 19 of the Vienna Conventions and that, where the Charter was concerned, the requirement of the acceptance of the competent organ of the organization (see article 20, paragraph 3, of the Vienna Conventions) provided sufficient guarantees.

¹⁴⁹³ This is also the final conclusion arrived at by Tomuschat, “Admissibility and legal effects of reservations ...” (footnote 1080 above), p. 471.

¹⁴⁹⁴ See guideline 1.3.1 (Method of determining the distinction between reservations and interpretative declarations) and commentary thereto.

¹⁴⁹⁵ Even in the area of human rights (see Imbert, “Reservations and human rights conventions”, *The Human Rights Review*, vol. 6, No. 1 (1981), p. 28, or Schabas, “Reservations to human rights treaties ...” (footnote 966 above), p. 46); see, however, for example, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 7 September 1956 (art. 9), the Convention against discrimination in education of 15 December 1960 (art. 9), Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty of 28 April 1983 (art. 4), or the European Convention for the prevention of torture and inhuman or degrading treatment or punishment of 26 November 1987 (art. 21), which all prohibit any reservations to their provisions. Reservation clauses in human rights treaties sometimes refer to the provisions of the 1969 Vienna Convention concerning reservations (see article 75 of the American Convention on Human Rights)—which conventions containing no reservation clauses do implicitly—or reproduce its provisions (see article 28, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women of 1979, or article 51, paragraph 2, of the Convention on the rights of the child of 1989).

The original Members of the League of Nations shall be those of the Signatories (...) as shall accede without reservation to this Covenant.¹⁴⁹⁶

Likewise, article 120 of the Rome Statute of the International Criminal Court of 1998 states:

No reservations may be made to this Statute.¹⁴⁹⁷

And, similarly, article 26, paragraph 1, of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal of 1989 states:

No reservation or exception may be made to this Convention.¹⁴⁹⁸

(8) Sometimes, however, the prohibition is more ambiguous. Thus, in accordance with paragraph 14 of the Final Act of the Special Meeting of Plenipotentiaries for the purpose of negotiating and signing a European Convention on International Commercial Arbitration of 1961, “the delegations taking part in the negotiation of the European Convention on International Commercial Arbitration declare that their respective countries do not intend to make any reservations to the Convention”¹⁴⁹⁹ not only is it not a categorical prohibition, but this declaration of intention is even made in an instrument separate from

¹⁴⁹⁶ It could be maintained that this rule was set aside when the Council of the League recognized the neutrality of Switzerland (in this respect, see Mendelson, “Reservations to the constitutions of international organizations” (footnote 1334 above), pp. 140–141).

¹⁴⁹⁷ However straightforward it may seem, this prohibition is not actually totally devoid of ambiguity: the highly regrettable article 124 of the Rome Statute, which authorizes “a State, on becoming a party [to] declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court” with respect to war crimes, constitutes an exception to the rule stated in article 120, for such declarations amount to reservations (see A. Pellet, “Entry into force and amendment of the Statute”, in A. Cassese, P. Gaeta and J. R. W. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, vol. I, p. 157; see also the European Convention on the service abroad of documents relating to administrative matters, article 21 of which prohibits reservations, while several other provisions authorize certain reservations. For other examples, see Åkermark, “Reservation clauses in treaties ...” (footnote 101 above), pp. 493–494; Daillier, Forteau and Pellet, *Droit international public ...* (footnote 254 above), p. 199; Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 165–166; Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 113; Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 105–108; and Schabas, “Reservations to human rights treaties (footnote 966 above), p. 46.

¹⁴⁹⁸ For a very detailed commentary, see A. Fodella, “The declarations of States parties to the Basel Convention”, in P. Ziccardi *et al.* (eds.), *Comunicazioni e Studi*, vol. 22, Milan, Giuffrè, 2002, pp. 111–148; article 26, paragraph 2, of the Convention authorizes States parties to make “declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State”. The distinction between the reservations of paragraph 1 and the declarations of paragraph 2 can prove laborious, but this is a problem of definition that does not in any way restrict the prohibition stated in paragraph 1: if a declaration made under paragraph 2 proves to be a reservation, it is prohibited. The combination of articles 309 and 310 of the United Nations Convention on the Law of the Sea of 1982 poses the same problems and calls for the same responses (see, in particular, A. Pellet, “Les réserves aux conventions sur le droit de la mer”, in *La mer et son droit—Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, Paris, Pedone, 2003, pp. 505–517); see also the commentary to guideline 3.1.2.

¹⁴⁹⁹ Final Act of the Special Meeting of Plenipotentiaries for the purpose of negotiating and signing a European Convention on International Commercial Arbitration, United Nations, *Treaty Series*, vol. 484, No. 7041, p. 353. Example given by Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 166–167.

the treaty. In a case of this type, it could seem that reservations are not strictly speaking prohibited, but that if a State formulates a reservation, the other parties should, logically, object to it.

(9) More often, the prohibition is partial and relates to one or more specified reservations or one or more categories of reservations. The simplest (but rather rare) situation is that of clauses listing the provisions of the treaty to which reservations are not permitted.¹⁵⁰⁰ Examples are article 42 of the Convention relating to the Status of Refugees of 28 July 1951,¹⁵⁰¹ and article XIV of the International Convention for Safe Containers (CSC) of 1972.

(10) The situation where the treaty does not prohibit reservations to specified provisions but excludes certain categories of reservations is more complicated. An example of this type of clause is provided by article 78, paragraph 3, of the International Sugar Agreement of 1977:

Any Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which do not affect the economic functioning of this Agreement.

(11) The distinction between reservation clauses of this type and those excluding “specified reservations” was made in Sir Humphrey Waldock’s draft in 1962.¹⁵⁰² The Vienna Conventions themselves do not draw such distinctions, and, despite the uncertainty that prevailed while they were being drafted, it should certainly be assumed that subparagraph (a) of article 19 covers all the three situations that a more precise analysis can discern:

- reservation clauses prohibiting all reservations;
- reservation clauses prohibiting reservations to specified provisions;
- lastly, reservation clauses prohibiting certain categories of reservations.

(12) This clarification seems particularly helpful in that the third of these situations poses problems (of interpretation)¹⁵⁰³ of the same nature as those arising from the criterion of compatibility with the object and purpose of the treaty, which certain clauses actually reproduce

¹⁵⁰⁰ This situation is very similar to that in which the treaty specifies the provisions to which reservations are permitted—see paragraph (5) of the commentary to guideline 3.1.2 and the comments by Mr. Briggs with regard to article 17 of the draft articles on the law of treaties submitted by the Drafting Committee during the fourteenth session of the Commission, *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222.

¹⁵⁰¹ With regard to this provision, Imbert notes that “the influence of the opinion [issued two months previously by the International Court of Justice in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above)] is very clear, since such a clause effectively protects the provisions which cannot be the object of reservations” (Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 167); see the other examples given, *ibid.*, or in paragraphs (5)–(8) of the commentary to guideline 3.1.2 below.

¹⁵⁰² See the first report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 60–61.

¹⁵⁰³ “Whether a reservation is permissible under exceptions (a) or (b) will depend on interpretation of the treaty” (Aust, *Modern Treaty Law and Practice* (footnote 155 above), p. 136).

expressly.¹⁵⁰⁴ By indicating that these reservations, prohibited without reference to a specific provision of the treaty, still fall under article 19, subparagraph (a), of the Vienna Conventions, the Commission seeks from the outset to emphasize the unity of the legal regime applicable to the reservations mentioned in the three subparagraphs of article 19.

3.1.2 Definition of specified reservations

For the purposes of guideline 3.1, the expression “specified reservations” means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

Commentary

(1) A cursory reading of article 19, subparagraph (b), of the 1969 and 1986 Vienna Conventions might suggest that it represents one side of the coin and subparagraph (a) represents the other. The symmetry is far from total, however. To have total symmetry, it would have been necessary to stipulate that reservations other than those expressly provided for in the treaty were prohibited. But that is not the case. Subparagraph (b) contains two additional elements which prevent oversimplification. The implicit prohibition of certain reservations arising from this provision, which is considerably more complex than it seems, depends on the fulfilment of three conditions:

(a) the treaty’s reservation clause must permit the formulation of reservations;

(b) the reservations permitted must be “specified”;

(c) it must be specified that “only” those reservations “may be made”.¹⁵⁰⁵

The purpose of guideline 3.1.2 is to clarify the meaning of the expression “specified reservations”, which is not defined by the Vienna Conventions, since this clarification could have important consequences for the applicable legal regime; among other things, reservations which are not “specified” must pass the test of compatibility with the object and purpose of the treaty.¹⁵⁰⁶

(2) The origin of article 19, subparagraph (b), of the Vienna Conventions can be traced back to paragraph 3 of draft article 37 submitted to the Commission in 1956 by Sir Gerald Fitzmaurice:

In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted.¹⁵⁰⁷

Sir Humphrey Waldock took up that concept again in paragraph 1 (a) of draft article 17, which he proposed in 1962 and which the Commission used in paragraph 1 (c) of draft

article 18. That draft article was adopted the same year¹⁵⁰⁸ and, following a number of minor drafting changes, was incorporated into article 16, subparagraph (b), of the 1966 draft,¹⁵⁰⁹ then into article 19 of the 1969 Vienna Convention. That course of action did not go unchallenged, however, as during the United Nations Conference on the Law of Treaties a number of amendments were submitted with a view to deleting the provision¹⁵¹⁰ on the pretext that it was “too rigid”¹⁵¹¹ or redundant because it duplicated subparagraph (a),¹⁵¹² or that it had not been confirmed by practice;¹⁵¹³ all those amendments were, however, withdrawn or rejected.¹⁵¹⁴

(3) The only change to subparagraph (b) was introduced by a Polish amendment inserting the word “only” after the word “authorizes”, which was accepted by the Drafting Committee of the United Nations Conference on the Law of Treaties “in the interest of greater clarity”.¹⁵¹⁵ This bland description should not obscure the vast practical implications of this clarification, which actually

¹⁵⁰⁸ See paragraphs (3)–(4) of the commentary to guideline 3.1.1 above.

¹⁵⁰⁹ See footnote 1485 above.

¹⁵¹⁰ Amendments by the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) and the Federal Republic of Germany (A/CONF.39/C.1/L.128), which were specifically designed to delete subparagraph (b), and by the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115), France (A/CONF.39/C.1/L.169), Ceylon (A/CONF.39/C.1/L.139) and Spain (A/CONF.39/C.1/L.147), which proposed major revisions of article 16 (or of articles 16 and 17) that would also have led to the disappearance of that provision (for the text of these amendments, see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), pp. 133–134, paras. 174–177). During the Commission’s discussion of the draft, certain members had also taken the view that that provision was unnecessary (see *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, Mr. Yasseen, p. 149, para. 18; Mr. Tunkin, *ibid.*, p. 150, para. 29; but, for a more nuanced position, see Mr. Tunkin, *ibid.*, p. 151, para. 33; or Mr. Ruda, p. 154, para. 70).

¹⁵¹¹ According to the representatives of the United States of America and Poland at the 21st and 22nd meetings of the Committee of the Whole (10–11 April 1968, respectively, *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), p. 108, para. 8, and p. 118, para. 42); see also the statement made by the representative of the Federal Republic of Germany (*ibid.*, p. 109, para. 23).

¹⁵¹² See the statement made by the representative of Colombia, *ibid.*, p. 113, para. 68.

¹⁵¹³ See the statement made by the representative of Sweden, *ibid.*, p. 117, para. 29.

¹⁵¹⁴ See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), pp. 136–138, paras. 181–188, and the explanations of the Expert Consultant, Sir Humphrey Waldock, *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 24th meeting, 16 April 1968, p. 126, para. 6, and the results of the votes on those amendments, *ibid.*, 25th meeting, 16 April 1968, p. 135, paras. 23–25.

¹⁵¹⁵ A/CONF.39/C.1/L.136; *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 134, para. 177, and p. 137, para. 183; see also *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), Committee of the Whole, 70th meeting, 14 May 1968, p. 415, para. 16. Already in 1965, during the Commission’s discussion of draft article 18, as reviewed by the Drafting Committee, Mr. Castrén proposed inserting “only” after “expressly authorizes” in subparagraph (b) (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 14, and 813th meeting, 29 June 1965, p. 264, para. 13); see also the similar proposal made by Mr. Yasseen, *ibid.*, p. 264, para. 11, which, in the end, was not accepted following a further review by the Drafting Committee (*ibid.*, 816th meeting, p. 283, para. 41).

¹⁵⁰⁴ See the examples given in footnote 1495 above. This is one specific example of “categories of prohibited reservations”: quite vague in nature, it is true.

¹⁵⁰⁵ On the word “made”, see paragraphs (6)–(7) of the commentary to guideline 3.1 above.

¹⁵⁰⁶ See guideline 3.1.4 below.

¹⁵⁰⁷ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115; see also p. 127, para. 95.

reverses the presumption made by the Commission and, in keeping with some Eastern countries' persistent effort to facilitate the formulation of reservations as much as possible, offers the possibility of doing so even when the negotiators have taken the precaution of expressly indicating the provisions in respect of which a reservation is permitted.¹⁵¹⁶ This amendment does not, however, exempt a reservation which is neither expressly permitted nor implicitly prohibited from the requirement to observe the criterion of compatibility with the object and purpose of the treaty.¹⁵¹⁷ Such a reservation may also be subject to objections on other grounds. This is why, in the wording of guideline 3.1.2, the Commission favoured the word "envisaged" over the word "authorized" to qualify the reservations in question, in contrast to the expression "reservation expressly authorized", as found in article 20, paragraph 1, of the Vienna Conventions.

(4) In practice, the types of clauses permitting reservations are comparable to those containing prohibitive provisions and pose the same kind of difficulties with regard to determining a *contrario* those reservations which may not be formulated:¹⁵¹⁸

- some of them authorize reservations to particular provisions, expressly and limitatively listed either affirmatively or negatively;
- others authorize specified categories of reservations;
- lastly, others (few in number) authorize reservations in general.

(5) Article 12, paragraph 1, of the Convention on the Continental Shelf of 1958 appears to illustrate the first of those categories:

At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive.¹⁵¹⁹

¹⁵¹⁶ See Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 114; Lijnzaad, *Reservations to UN Human Rights Treaties ...* (footnote 463 above), p. 39; Ruda, "Reservations to treaties" (footnote 56 above), p. 181; or Szafarz, "Reservations to multilateral treaties" (footnote 27 above), pp. 299–300. Such restrictive formulas are not unusual—see, for example, article 17 of the Convention on the reduction of statelessness of 1961 ("1. At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15. 2. No other reservations to this Convention shall be admissible.") and the other examples given by Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 128–129, or Pellet, "1969 Vienna Convention. Article 19: Formulation of reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 437–439, paras. 83–87. On the significance of the reversal of the presumption, see also the statement made by Mr. Robinson during the discussions of the Commission on the law and practice relating to reservations to treaties at its forty-seventh session, *Yearbook ... 1995*, vol. I, 2402nd meeting, p. 158, para. 17.

¹⁵¹⁷ See guideline 3.1.3 and commentary thereto, in particular paragraphs (2)–(3).

¹⁵¹⁸ See guideline 3.1.1 and commentary thereto above.

¹⁵¹⁹ Article 309 of the United Nations Convention on the Law of the Sea provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention" (on this provision, see Pellet, "Les réserves aux conventions sur le droit de la mer" (footnote 1498 above) pp. 505–511). A treaty may set a maximum number of reservations or provisions that can be subject to reservations (see, for example, article 25 of the European

As Sir Ian Sinclair noted, "Article 12 of the 1958 Convention did not provide for *specified reservations*, even though it may have specified articles to which reservations might be made",¹⁵²⁰ and neither the scope nor the effects of that authorization are self-evident, as demonstrated by the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases¹⁵²¹ and, above all, by the arbitral award rendered in 1977 in the *Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*.¹⁵²²

(6) In that case, the Arbitral Tribunal emphasized:

Article 12 [of the Convention on the Continental Shelf of 1958], by its clear terms, authorised any contracting State, including the French Republic, to make its consent to be bound by the Convention subject to reservations to articles other than Articles 1 to 3 inclusive.¹⁵²³

However,

Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 and 3 ... Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance. But this is not the case with Article 12, which authorises the making of reservations to articles other than Article 1 to 3 in quite general terms.¹⁵²⁴

(7) The situation is different when the reservation clause defines the categories of permissible reservations. Article 39 of the General Act of Arbitration (Pacific Settlement of International Disputes) of 1928 provides an example of this:

1. In addition to the power given in the preceding article¹⁵²⁵, a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession.

2. These reservations may be such as to exclude from the procedure described in the present Act:

(a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute;

(b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;

(c) Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories.

Convention on the adoption of children of 1967). These provisions may be compared with those authorizing parties to accept certain obligations or to choose between the provisions of a treaty, which are not reservation clauses *stricto sensu* (see guideline 1.5.3 and commentary thereto).

¹⁵²⁰ Sinclair, *The Vienna Convention on the Law of Treaties* (footnote 129 above), p. 73. On the distinction between specified and non-specified reservations, see also paragraphs (11)–(13) below.

¹⁵²¹ *Judgment of 20 February 1969, North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–41.

¹⁵²² Decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), pp. 32–35, paras. 39–44.

¹⁵²³ *Ibid.*, pp. 32–33, para. 39.

¹⁵²⁴ *Ibid.*

¹⁵²⁵ Article 38 provides that Parties may accede to only parts of the General Act.

As the International Court of Justice pointed out in its judgment of 1978 in the *Aegean Sea Continental Shelf* case:

When a multilateral treaty thus provides in advance for the making only of particular, designated categories of reservations, there is clearly a high probability, if not an actual presumption, that reservations made in terms used in the treaty are intended to relate to the corresponding categories in the treaty,

even when States do not “meticulously” follow the “pattern” set out in the reservation clause.¹⁵²⁶

(8) Another particularly famous and widely discussed example¹⁵²⁷ of a clause authorizing reservations (which falls under the second category mentioned above)¹⁵²⁸ is found in article 57 (formerly article 64) of the European Convention on Human Rights:

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

¹⁵²⁶ Judgment of 19 December 1978, *Aegean Sea Continental Shelf* (see footnote 210 above), p. 23, para. 55.

¹⁵²⁷ See A. Bonifazi, “La disciplina delle riserve alla Convenzione europea dei diritti dell’uomo”, in *Les clauses facultatives de la Convention européenne des droits de l’homme* (Minutes of the round table organized in Bari on 17–18 December 1973 by the Faculty of Law of the University of Bari (Italy)), Bari, Levante, 1974, pp. 301–319; G. Cohen-Jonathan, *La Convention européenne des droits de l’homme*, Paris, Economica, 1989, pp. 85–93; J. A. Frowein, “Reservations to the European Convention on Human Rights”, in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda*, Cologne, Carl Heymanns Verlag, 1988, pp. 193–200; P.-H. Imbert, “Reservations to the European Convention on Human Rights before the Strasbourg Commission: the *Temeltasch* case”, *International and Comparative Law Quarterly*, vol. 33 (1984), pp. 558–595; R. Kühner, “Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention. Die Problematik des Art. 64 MRK am Beispiel der schweizerischen ‘auslegenden Erklärung’ zu Art. 6 Abs. 3 lit. e MRK”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*, vol. 42 (1982), pp. 58–92 (summary in English); S. Marcus-Helmons, “L’article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l’homme”, *Revue de droit international et de droit comparé*, 1968, Brussels, 45th year, No. 1, 1968, pp. 7–26; M. J. Morais Pires, *As reservas à Convenção europeia dos direitos do homem*, Coimbra, Portugal, Livraria Almedina, 1997, p. 493; R. Sapienza, “Sull’ammissibilità di riserve all’accettazione della competenza della Commissione europea dei diritti dell’uomo”, *Rivista di diritto internazionale*, vol. 70, Nos. 3–4 (1987), pp. 641–653; Schabas, “Article 64” (footnote 137 above), pp. 923–942; Susan Marks, “Three regional human rights treaties and their experience of reservations”, in J. P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions*, London, British Institute of International and Comparative Law, 1997, pp. 35–63; and J. Dhommeaux, “La coordination des réserves et des déclarations à la Convention européenne des droits de l’homme et au Pacte international relatif aux droits civils et politiques”, in J.-F. Flauss and M. de Salvia (eds.), *La Convention européenne des droits de l’homme: développements récents et nouveaux défis*, Brussels, Bruylant, 1997, pp. 13–37.

¹⁵²⁸ Paragraph (4). For other examples, see Aust, *Modern Treaty Law and Practice* (footnote 155 above), pp. 135–136; Åkermark, “Reservation clauses in treaties ...” (footnote 101 above), pp. 495–496; Bishop, “Reservations to treaties” (footnote 288 above), pp. 323–324; or Daillier, Forteau and Pellet, *Droit international public* (footnote 254 above), p. 181; see also the table of Council of Europe conventions showing clauses falling into each of the first two categories of permissible reservation clauses mentioned in paragraph (4) above, in Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 125, and the other examples of partial authorizations given by this author, pp. 126–129.

2. Any reservation made under this Article shall contain a brief statement of the law concerned.

In this instance, the right to formulate reservations is limited by conditions relating to both form and content; in addition to the usual limitations *ratione temporis*,¹⁵²⁹ a reservation to the European Convention on Human Rights must:

- refer to a particular provision of the Convention;
- be justified by the state of the legislation in the reserving State at the time that the reservation is formulated;
- not be “couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope”;¹⁵³⁰ and
- be accompanied by a brief statement explaining “the scope of the Convention provision whose application a State intends to prevent by means of a reservation”.¹⁵³¹

Assessing whether each of these conditions has been met raises problems. It must surely be considered, however, that the reservations authorized by the European Convention on Human Rights are “specified” within the meaning of article 19 (b) of the Vienna Conventions and that only such reservations are permissible.

(9) It has been noted that the wording of article 57 of the European Convention on Human Rights “is not fundamentally different”¹⁵³² from that used, for example, in article 26, paragraph 1, of the European Convention on Extradition of 1957:

Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention[.]

even though the latter could be interpreted as a general authorization. While, however, the type of reservations that can be formulated to the European Convention on Human Rights is “specified”, here the authorization is restricted only by the exclusion of across-the-board reservations.¹⁵³³

(10) In fact, a general authorization of reservations¹⁵³⁴ itself does not necessarily resolve all the problems. It leaves unanswered the question of whether the other parties may still object to reservations¹⁵³⁵ and whether

¹⁵²⁹ See paragraph (4) of the commentary to guideline 3.1.

¹⁵³⁰ European Court of Human Rights, Judgment of 29 April 1988, *Belilos v. Switzerland* case (see footnote 192 above), p. 26, para. 55.

¹⁵³¹ European Commission of Human Rights, Decision of 5 May 1982, *Temeltasch v. Switzerland* case (see footnote 24 above), p. 150, para. 90.

¹⁵³² Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 186; see also Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 122.

¹⁵³³ Regarding this concept, see guideline 1.1, paragraph 2, and paragraphs (16)–(22) of the commentary thereto.

¹⁵³⁴ For another even clearer example, see article 18, paragraph 1, of the European Convention on the compensation of victims of violent crimes of 1983: “Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more reservations.”

¹⁵³⁵ This is sometimes expressly stated (see, for example, article VII of the Convention on the Political Rights of Women of 1953, and the comments in that regard of Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 121).

these authorized reservations¹⁵³⁶ are subject to the test of compatibility with the object and purpose of the treaty.¹⁵³⁷ The latter question is addressed by guideline 3.1.4, which draws a distinction between specified reservations whose reservation clause defines the content and those which leave the content relatively open.

(11) This distinction is not self-evident. It caused particular controversy following the 1977 arbitral award in the *Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*. Some authors thought that a reservation was “specified” if the treaty set precise limits within which it could be formulated; those criteria then superseded (but only in that instance) the criterion of the object and purpose.¹⁵³⁸ Others pointed out that that occurred very exceptionally, perhaps only in the rare case of “negotiated reservations”,¹⁵³⁹ and, furthermore, that the Commission had not retained Rosenne’s proposal that the expression “specified reservations”, which he considered “unduly narrow”, should be replaced by “reservations to specific provisions”,¹⁵⁴⁰ accordingly, it would be unrealistic to require the content of specified reservations to be established with precision by the treaty, otherwise subparagraph (b) would be rendered meaningless.¹⁵⁴¹ According to a third view, a compromise was possible between the undoubtedly excessive position that would require the content of the reservations envisaged to be precisely stated in the reservation clause and the position that equated a specified reservation with a “reservation expressly authorized by the treaty”,¹⁵⁴² even though article 19, subparagraph (b), and article 20, paragraph 1, of the Vienna Conventions use different expressions. Consequently, it was suggested that it should be recognized that reservations that were specified within the meaning of article 19, subparagraph (b) (and of guideline 3.1,

¹⁵³⁶ It cannot be reasonably argued that subparagraph (b) could include “implicitly authorized” reservations—other than on the grounds that any reservations that are not prohibited are, *a contrario*, authorized, subject to the provisions of subparagraph (c).

¹⁵³⁷ See the questions raised by Åkermark, “Reservation clauses in treaties ...” (footnote 101 above), pp. 496–497, or Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 124.

¹⁵³⁸ See Bowett, “Reservations to non-restricted multilateral treaties” (footnote 150 above), pp. 71–72.

¹⁵³⁹ On this concept, see paragraph (10) of the commentary to guideline 1.1.6 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty). See also Gormley, “The modification of multilateral conventions ...” (footnote 115 above), pp. 59 *et seq.*, in particular pp. 75–76. See the annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles, which accords to Belgium the faculty over a period of three years to make a specific reservation, or article 32, paragraph 1 (b), of the European Convention on transfrontier television of 1989, which exclusively grants the United Kingdom the ability to formulate a specified reservation; examples provided by Åkermark, “Reservation clauses in treaties ...” (footnote 101 above), p. 499. The main example given by Bowett to illustrate his theory relates precisely to a “negotiated reservation” (Bowett “Reservations to non-restricted ...” (footnote 150 above), p. 71).

¹⁵⁴⁰ *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 264, para. 7. Imbert (“La question des réserves dans la décision arbitrale du 30 juin 1977 ...” (footnote 1016 above), p. 52) points out, however, that, even though Mr. Rosenne’s proposal was not accepted, Sir Humphrey Waldock himself had also drawn this parallel (*Yearbook ... 1965*, vol. I, 813th meeting, p. 265, para. 27).

¹⁵⁴¹ Imbert, “La question des réserves dans la décision arbitrale du 30 juin 1977 ...” (footnote 1016 above), pp. 50–53.

¹⁵⁴² In this connection, see *ibid.*, p. 53.

subparagraph (b)), must, on the one hand, relate to specific provisions and, on the other, fulfil certain conditions specified in the treaty, but without going so far as to require their content to be predetermined—that was the position finally taken by the Commission.

(12) The case law is not very helpful in reconciling those opposing views. The arbitral award of 1977, invoked by the proponents of both arguments, says more about what a specified reservation is not than what it is.¹⁵⁴³ The conclusion to be drawn is that the mere fact that a reservation clause authorizes reservations to particular provisions of the treaty is not enough to “specify” these reservations within the meaning of article 19, subparagraph (b), of the Vienna Conventions.¹⁵⁴⁴ The Tribunal, however, confined itself to requiring reservations to be “specific”,¹⁵⁴⁵ without indicating what the test of that specificity was to be. In addition, during the United Nations Conference on the Law of Treaties, Yasseen, Chairperson of the Drafting Committee, assimilated specified reservations to those which were expressly authorized by the treaty¹⁵⁴⁶ with no further clarification.

(13) Accordingly, the Commission considered that a reservation should be considered specified if a reservation clause indicated the treaty provisions in respect of which a reservation was possible or, to take account of the across-the-board reservations envisaged in guideline 1.1, paragraph 2,¹⁵⁴⁷ indicated that reservations were possible to the treaty as a whole with respect to certain specific aspects. The divergence between these different points of view should not be overstated, however; while the expression “reservations envisaged”, which was preferred to “reservations authorized”, undoubtedly gives more weight to the broad-brush approach favoured by the Commission, at the same time, in guideline 3.1.4, the Commission introduced a distinction between specified reservations with defined content and those whose content is not defined, the latter being subject to the test of compatibility with the object and purpose of the treaty.

3.1.3 *Permissibility of reservations not prohibited by the treaty*

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

Commentary

(1) Guidelines 3.1.3 and 3.1.4 specify the scope of article 19, subparagraphs (a) and (b), of the Vienna

¹⁵⁴³ See paragraph (6) above.

¹⁵⁴⁴ See paragraphs (6)–(7) above.

¹⁵⁴⁵ In reality, it is the authorization that must apply to specific or specified reservations—terms which the Tribunal considered to be synonymous, in the *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above).

¹⁵⁴⁶ *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 70th meeting, 14 May 1968, p. 416, para. 23.

¹⁵⁴⁷ See guideline 1.1 and paragraphs (16)–(22) of the commentary thereto.

Conventions (the 1986 text of which is repeated in guideline 3.1). They make explicit what the Conventions leave implicit, that is, that failing a contrary provision in the treaty—and in particular if the treaty authorizes specified reservations as defined in guideline 3.1.2—any reservation must satisfy the basic requirement, set forth in article 19, subparagraph (c), of not being incompatible with the object and purpose of the treaty.

(2) This principle is one of the fundamental elements of the flexible system established by the Vienna regime, moderating the “radical relativism”¹⁵⁴⁸ resulting from the pan-American system, which reduces multilateral treaties to a network of bilateral relations,¹⁵⁴⁹ while avoiding the rigidity resulting from the system of unanimity.

(3) Since its first appearance in connection with reservations in the advisory opinion of the International Court of Justice of 1951,¹⁵⁵⁰ the notion of the object and purpose of the treaty¹⁵⁵¹ has become increasingly accepted. It has become a means of striking a balance between the need to preserve the essence of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of States. There is, however, a major difference between the role of the criterion of compatibility with the object and purpose of the treaty according to the 1951 advisory opinion, on the one hand, and article 19, subparagraph (c), of the 1969 Vienna Convention, on the other.¹⁵⁵² In the advisory opinion, the criterion was applied equally to the formulation of reservations and to objections:

The object and purpose [of the Convention on the Prevention and Punishment of the Crime of Genocide] thus limit both the freedom of making reservations and that of objecting to them.¹⁵⁵³

In the Vienna Conventions, it is restricted to reservations: article 20 does not restrict the ability of other contracting States and organizations to formulate objections.

(4) While there is no doubt that this requirement that a reservation must be compatible with the object

and purpose of the treaty now represents a rule of customary law which is unchallenged,¹⁵⁵⁴ its content remains vague¹⁵⁵⁵ and there is some uncertainty as to the consequences of incompatibility.¹⁵⁵⁶ Moreover, article 19 does not dispel the ambiguity as to its scope of application.

(5) The principle set forth in article 19, subparagraph (c), whereby a reservation incompatible with the object and purpose of the treaty may not be formulated, is of a subsidiary nature since it applies only in cases not covered in article 20, paragraphs 2 and 3, of the Convention¹⁵⁵⁷ and where the treaty itself does not resolve the reservations issue.

(6) If the treaty does regulate reservations, a number of cases must be distinguished which offer different answers to the question of whether the reservations concerned are subject to the test of compatibility with the object and purpose of the treaty. In two of these cases the answer is clearly negative:

- there is no doubt that a reservation expressly prohibited by the treaty cannot be held to be valid on the pretext that it is compatible with the object and purpose of the treaty;¹⁵⁵⁸

- the exception also applies to “specified” reservations that are expressly authorized by the treaty, with a defined content: they are automatically valid without having to be accepted by the other contracting States and

¹⁵⁴⁸ Reuter, *Introduction au droit des traités* (footnote 28 above), p. 73, para. 130. This author applies the term to the system adopted by the International Court of Justice in its 1951 advisory opinion in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 15; the criticism applies perfectly well, however, to the pan-American system.

¹⁵⁴⁹ On the pan-American system, see the bibliography in Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 485–486. In addition, aside from the description by Imbert himself (*ibid.*, pp. 33–38), see Whiteman, *Digest of International Law* (footnote 25 above), pp. 141–144, or Ruda, “Reservations to treaties” (footnote 56 above), pp. 115–133.

¹⁵⁵⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), pp. 24–26.

¹⁵⁵¹ This notion is defined in guideline 3.1.5.

¹⁵⁵² See Coccia, “Reservations to multilateral treaties on human rights” (footnote 196 above), p. 9; Lijnzaad, *Reservations to UN Human Rights Treaties ...* (footnote 463 above), p. 40; M. Ramamontaldo, “Human rights conventions and reservations to treaties”, in *Héctor Gros Espiell Amicorum Liber. Persona humana y derecho internacional*, vol. II, Brussels, Bruylant, 1997, pp. 1265–1266; or Sinclair, *The Vienna Convention on the Law of Treaties* (footnote 129 above), p. 61.

¹⁵⁵³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 24.

¹⁵⁵⁴ See the many arguments to that effect given by Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 138–143. See also the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, adopted by the Commission in 1997, in which it reiterated its view that the 1969 and 1986 Vienna Conventions “govern the regime of reservations to treaties” and that, “in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations” (*Yearbook ... 1997*, vol. II (Part Two), p. 57, first conclusion). See also Pellet, “1969 Vienna Convention. Article 19: Formulation of reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 443–451, paras. 95–115. The word “*licéité*” should be understood as corresponding to “validity”, the term that the Commission ultimately adopted to refer collectively to the conditions to which reservations, some objections and interpretative declarations are subject (with regard to the choice of this term, see *Yearbook ... 2006*, vol. II (Part Two), pp. 143–145, para. 159. See also paragraphs (4)–(7) of the general commentary to Part 3 of the Guide to Practice.

¹⁵⁵⁵ See guidelines 3.1.5–3.1.5.7.

¹⁵⁵⁶ See guidelines 3.3–3.3.3.

¹⁵⁵⁷ In the case of treaties with limited participation and the constituent instruments of international organizations. These cases do not constitute instances where there is an implicit prohibition against formulating reservations; they reintroduce the system of unanimity for particular types of treaties.

¹⁵⁵⁸ In its observations on the draft articles on the law of treaties adopted on first reading by the Commission, Canada had suggested that “consideration should be given to extending the criterion of ‘compatibility with the object and purpose of the treaty’ equally to reservations made pursuant to express treaty provisions in order not to have different criteria for cases where the treaty is silent on the making of reservations and cases where it permits them” (fourth report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 46). That proposal, which was not very clear, was not retained by the Commission; see the clearer proposals along the same lines by Mr. Briggs in *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222, paras. 13–14, and *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 264, para. 10; *contra*: Mr. Ago, *ibid.*, para. 16.

organizations¹⁵⁵⁹ and they are not subject to the test of compatibility with the object and purpose of the treaty.¹⁵⁶⁰

In the Commission's view, these obvious truths are not worth mentioning in separate provisions of the Guide to Practice; they follow directly and inevitably from article 19, subparagraph (c), of the Vienna Conventions, the text of which is repeated in guideline 3.1.

(7) The same is not true of two other cases which arise *a contrario* out of the provisions of article 19, subparagraphs (a) and (b):

– those in which a reservation is authorized because it does not fall under the category of prohibited reservations (subparagraph (a));

– those in which a reservation is authorized without being “specified” within the meaning of subparagraph (b) as spelt out in guideline 3.1.2.

(8) In both these cases, it cannot be presumed that treaty-based authorization to formulate reservations offers States or international organizations *carte blanche* to formulate any reservation they wish, even if it would be incompatible with the object and purpose of the treaty.

(9) On the subject of implicitly authorized reservations, Waldock recognized, in his fourth report on the law of treaties, that “A conceivable exception [to the principle of the automatic permissibility of reservations permitted by the treaty] might be where a treaty expressly forbids certain specified reservations and thereby impliedly permits others; for it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations”. However, he excluded that eventuality not because this was untrue but because “this may, perhaps, go too far in refining the rules regarding the intentions of the parties, and there is something to be said for keeping the rules in article 18 [which became article 19 of the Convention] as simple as possible”.¹⁵⁶¹ These considerations do not apply to the Guide to Practice, the aim of which is precisely to provide States with coherent answers to all questions they may have in the area of reservations.

(10) This is why guideline 3.1.3 stipulates that reservations which are “implicitly authorized” because they are not formally excluded by the treaty must be compatible with the object and purpose of the treaty. It would be paradoxical, to say the least, if reservations to treaties containing reservations clauses should be admitted more freely than in the case of treaties which contain no such clauses.¹⁵⁶² Thus the criterion of compatibility with the object and purpose of the treaty applies.

¹⁵⁵⁹ See article 20, paragraph 1, of the 1969 Vienna Convention.

¹⁵⁶⁰ See guideline 3.1.2 and commentary thereto.

¹⁵⁶¹ *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 50, para. 4.

¹⁵⁶² In that vein, see the statement by Mr. Rosenne made during the Commission's discussions at its seventeenth session, *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, pp. 148–149, para. 10. Tomuschat gives a pertinent example: “If, for example, a convention on the protection of human rights prohibits in a ‘colonial clause’ the exception of dependent territories from the territorial scope of the treaty, it would be

3.1.4 Permissibility of specified reservations

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

Commentary

(1) Guideline 3.1.3 explains that reservations not prohibited by the treaty are still subject to the criterion of compatibility with the object and purpose of the treaty. Guideline 3.1.4 makes the same clarification with regard to specified reservations in the sense of guideline 3.1.2 where the treaty does not define the content of the reservation: the same problem arises, and the considerations put forward in support of guideline 3.1.3 apply *mutatis mutandis*.

(2) The Polish amendment to article 19, subparagraph (b), adopted by the 1968 United Nations Conference on the Law of Treaties, restricted the possibility of implicit prohibition of reservations to treaties which provided “that *only* specified reservations, which do not include the reservation in question, may be formulated”.¹⁵⁶³ But it does not follow that reservations thus authorized may be made at will: the arguments applicable to non-prohibited reservations¹⁵⁶⁴ apply here, and if one accepts the broad definition of specified reservations adopted by the Commission,¹⁵⁶⁵ a distinction must be drawn between reservations whose content is defined in the treaty itself and those which are permitted in principle but which there is no reason to suppose should be allowed to deprive the treaty of its object or purpose. The latter must be subject to the same general conditions as reservations to treaties which do not contain specific clauses.

(3) The modification made to article 19, subparagraph (c), of the 1969 Vienna Convention following the Polish amendment in fact supports that conclusion. In the Commission's text, subparagraph (c) was drafted as follows:

(c) *In cases where the treaty contains no provisions regarding reservations**, the reservation is incompatible with the object and purpose of the treaty.¹⁵⁶⁶

This was consistent with subparagraph (b), which prohibited the formulation of reservations other than those authorized by a reservations clause. Once an authorization was no longer interpreted *a contrario* as automatically excluding other reservations, the formula could not be retained;¹⁵⁶⁷ it was therefore changed to the

absurd to suppose that consequently reservations of any kind, including those relating to the most elementary guarantees of individual freedom, are authorised, even if by these restrictions the treaty would be deprived of its very substance” (Tomuschat, “Admissibility and legal effects of reservations ...” (footnote 1080 above), p. 474).

¹⁵⁶³ See paragraph (3) of the commentary to guideline 3.1.2.

¹⁵⁶⁴ See paragraph (9) of the commentary to guideline 3.1.3.

¹⁵⁶⁵ See paragraph (13) of the commentary to guideline 3.1.2.

¹⁵⁶⁶ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 202 (art. 16).

¹⁵⁶⁷ Poland had not, however, put forward any amendment to subparagraph (c) drawing the consequences from the amendment it had successfully proposed for subparagraph (b). An amendment by Viet Nam, however, intended to delete the phrase “in cases where the

current wording by the Drafting Committee of the United Nations Conference on the Law of Treaties.¹⁵⁶⁸ The result is, *a contrario*, that if a reservation does not fall within the scope of subparagraph (b) (because its content is not specified), it is subject to the test of compatibility with the object and purpose of the treaty.

(4) That was, indeed, the reasoning followed by the Arbitral Tribunal which settled the dispute concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* in deciding that the mere fact that article 12 of the Convention on the Continental Shelf authorized certain reservations without specifying their content¹⁵⁶⁹ did not necessarily mean that such reservations were automatically permissible.¹⁵⁷⁰ In such cases, the permissibility of the reservation “cannot be assumed simply on the ground that it is, or purports to be, a reservation to an article to which reservations are permitted”.¹⁵⁷¹ Its permissibility must be assessed in the light of its compatibility with the object and purpose of the treaty.

(5) *A contrario*, it goes without saying that when the content of a specified reservation is indeed indicated in the reservations clause itself, a reservation consistent with that provision is not subject to the test of compatibility with the object and purpose of the treaty.

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d'être* of the treaty.

treaty contains no provisions regarding reservations” (A/CONF.39/C.1/L.125, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 134, para. 177), was rejected by the Committee of the Whole (*ibid.*, p. 136, para. 182).

¹⁵⁶⁸ Curiously, the reason given by the Chairperson of the Drafting Committee makes no connection between the modifications made to subparagraphs (b) and (c). Mr. Yasseen merely stated that “[s]ome members of the Committee had considered that a treaty might conceivably contain a provision on reservation which did not fall into any of the categories contemplated in subparagraphs (a) and (b)” (*Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 70th meeting of the Committee of the Whole, 14 May 1968, p. 415, para. 17). See a remark made by Mr. Briggs in 1965 to the same effect during the Commission’s discussions at its seventeenth session (*Yearbook ... 1965*, vol. I, 796th meeting, 4 June 1965, p. 146, para. 37).

¹⁵⁶⁹ See paragraph (5) of the commentary to guideline 3.1.2.

¹⁵⁷⁰ See the *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (footnote 24 above), pp. 32–33, para. 39. See also paragraph (6) of the commentary to guideline 3.1.2.

¹⁵⁷¹ Bowett, “Reservations to non-restricted ...” (footnote 150 above), p. 72. In the same vein, see Ruda “Reservations to treaties” (footnote 56 above), p. 182; or G. Teboul, “Remarques sur les réserves aux conventions de codification”, *RGDIP* (1982), pp. 691–692. *Contra*: Imbert, “La question des réserves dans la décision arbitrale du 30 juin 1977 ...” (footnote 1016 above), pp. 50–53; this opinion, very well argued, does not sufficiently take into account the consequences of the modification made to article 19, subparagraph (c), of the 1969 Vienna Convention at the United Nations Conference on the Law of Treaties (see paragraph (3) of the commentary to the present guideline above).

Commentary

(1) The compatibility of a reservation with the object and purpose of the treaty constitutes, in the terms of article 19, subparagraph (c), of the Vienna Convention, reflected in guideline 3.1, subparagraph (c), the fundamental criterion for the permissibility of a reservation. It is also the criterion that poses the most difficulties.

(2) In fact, the concept of the object and purpose of the treaty is far from being confined to reservations. In the Vienna Convention, it occurs in eight provisions,¹⁵⁷² only two of which—articles 19, subparagraph (c), and 20, paragraph 2—concern reservations. However, none of them defines the concept of the object and purpose of the treaty or provides any particular “clues” for this purpose.¹⁵⁷³ At most, one can infer that a fairly general approach is required: it is not a question of “dissecting” the treaty in minute detail and examining its provisions one by one, but of extracting the “essence”, the overall “mission” of the treaty:

– it is unanimously accepted that article 18, subparagraph (a), of the Vienna Convention does not oblige a signatory State to comply with the treaty, but merely to refrain from rendering the treaty inoperative prior to its expression of consent to be bound;¹⁵⁷⁴

– article 58, paragraph 1 (b) (ii), is drafted in the same spirit: one can assume that it is not a case of compelling respect for the treaty, the very object of this provision being to determine the conditions in which the operation of the treaty may be suspended, but rather of preserving what is essential in the eyes of the contracting States;

– article 41, paragraph 1 (b) (ii), is also aimed at safeguarding the “effective execution ... of the treaty *as a whole*”¹⁵⁷⁵ in the event that it is modified between certain of the contracting States only;

– likewise, article 60, paragraph 3 (b), defines a “material breach” of the treaty, in contrast to other breaches, as “the violation of a provision *essential*” [to the treaty]; and

¹⁵⁷² See articles 18, 19, subparagraph (c), 20, paragraph 2, 31, paragraph 1, 33, paragraph 4, 41, paragraph 1 (b) (ii), 58, paragraph 1 (b) (ii), and 60, paragraph 3 (b). A connection can be made with the provisions relating to the “essential bases” or “conditions of the consent to be bound” (Reuter, “Solidarité et divisibilité ...” (footnote 405 above), p. 627; reproduced in Reuter, *Le développement ...* (footnote 405 above), p. 366).

¹⁵⁷³ As I. Buffard and K. Zemanek have noted, the Commission’s commentaries to the draft article in 1966 are virtually silent on the matter (see I. Buffard and K. Zemanek, “The ‘object and purpose’ of a treaty: an enigma?”, *Austrian Review of International and European Law*, vol. 3, No. 3 (1998), pp. 311–343, at p. 322). With regard to the draft articles on the law of treaties with their commentaries adopted by the Commission in 1966, see *Yearbook ... 1966*, vol. II, pp. 177–274.

¹⁵⁷⁴ See, for example, Reuter, *Introduction au droit des traités* (footnote 28 above), p. 62, who defines the obligation arising from article 18 as an obligation of conduct; P. Cahier, “L’obligation de ne pas priver un traité de son objet et de son but avant son entrée en vigueur”, *Mélanges Fernand Dehousse*, Paris, Nathan, 1979, vol. 1, p. 31; or P. Palchetti, “Article 18 of the 1969 Vienna Convention: a vague and ineffective obligation or a useful means for strengthening legal co-operation”, in Cannizzaro (ed.), *The Law of Treaties ...* (footnote 1045 above), pp. 25–36.

¹⁵⁷⁵ In this provision, the words “of the object and purpose”, which are replaced by an ellipsis in the above quotation, obscure rather than clarify the meaning.

– according to articles 31, paragraph 1, and 33, paragraph 4, the object and purpose of the treaty are supposed to “clarify” its overall meaning, thereby facilitating its interpretation.¹⁵⁷⁶

(3) There is little doubt that the expression “object and purpose of the treaty” has the same meaning in all of these provisions: one indication of this is that Sir Humphrey Waldock, who without exaggeration can be considered to be the father of the law of reservations to treaties in the Vienna Convention, referred to them¹⁵⁷⁷ explicitly in order to justify the inclusion of this criterion in article 19, subparagraph (c), through a kind of *a fortiori* reasoning: since “the objects and purposes of the treaty ... are criteria of fundamental importance for the interpretation ... of a treaty” and since “the Commission has proposed that a State which has signed, ratified, acceded to, accepted or approved a treaty should, even before it comes into force, be required to refrain from acts calculated to frustrate its objects”, it would seem “somewhat strange if ... a freedom to make reservations incompatible with the objects and purposes of the treaty were to be recognized”.¹⁵⁷⁸ However, this does not solve the problem: it simply demonstrates that there is a criterion, a unique and versatile criterion, but as yet no definition. As has been noted, “the object and purpose of a treaty are indeed something of an enigma”.¹⁵⁷⁹ It is certainly true that the attempt made in article 19, subparagraph (c), pursuant to the 1951 advisory opinion of the International Court of Justice,¹⁵⁸⁰ to introduce an element of objectivity into a largely subjective system is not entirely convincing.¹⁵⁸¹

¹⁵⁷⁶ See Pajzs, Csáky and Esterházy, Judgment of 16 December 1936, *P.C.I.J., Series A/B, No. 68*, p. 30, at p. 60; see also S. Bastid, *Les traités dans la vie internationale—conclusion et effets*, Paris, Economica, 1985, p. 131, or Sur, *L'interprétation ...* (footnote 155 above), pp. 227–230.

¹⁵⁷⁷ More precisely, to (the current) articles 18 and 31.

¹⁵⁷⁸ Fourth report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 51, para. 6.

¹⁵⁷⁹ Buffard and Zemanek, “The ‘object and purpose’ ...” (footnote 1573 above), p. 342. The uncertainties surrounding this criterion have been noted (and criticized with varying degrees of harshness) in all the scholarly writing: see, for example, Aust, *Modern Treaty Law and Practice* (footnote 155 above), p. 111; P.-M. Dupuy, *Droit international public*, 8th ed., Paris, Dalloz, 2006, p. 286; G. G. Fitzmaurice, “Reservations to multilateral conventions”, *International and Comparative Law Quarterly*, vol. 2 (1953), p. 12; Ramamontaldo, “Human rights conventions ...” (footnote 1552 above), p. 1265; Rousseau, *Droit international public* (footnote 351 above), p. 126; or Teboul, “Remarques sur les réserves ...” (footnote 1571 above), pp. 695–696. See also the first report on the law and practice relating to reservations to treaties by Mr. Alain Pellet, Special Rapporteur, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, para. 109. See also F. Coulée, “A propos d’une controverse autour d’une codification en cours: les réactions aux réserves incompatibles avec l’objet et le but des traités de protection des droits de l’homme”, in *Libertés, justice, tolérance: Mélanges en hommage au Doyen Gérard Cohen-Jonathan*, vol. I, Brussels, Bruylant, 2004, pp. 501–521.

¹⁵⁸⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above): “It follows that it is the compatibility of a reservation with the object and purpose of the Convention [on the Prevention and Punishment of the Crime of Genocide] that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation” (p. 24).

¹⁵⁸¹ According to J. K. Koh, “[t]he International Court thereby introduced purposive words into the vocabulary of reservations which

“The claim that a particular reservation is contrary to object and purpose is easier made than substantiated.”¹⁵⁸² In their joint opinion, the dissenting judges in 1951 had criticized the solution retained by the majority in the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, emphasizing that it could not “produce final and consistent results”,¹⁵⁸³ and that had been one of the main reasons for the Commission’s resistance to the flexible system adopted by the Court in 1951:

Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively.¹⁵⁸⁴

(4) Sir Humphrey Waldock himself still expressed hesitation in his all-important first report on the law of treaties in 1962:¹⁵⁸⁵

... the principle applied by the Court is essentially subjective and unsuitable for use as a general test for determining whether a reserving State is or is not entitled to be considered a party to a multilateral treaty. The test is one which might be workable if the question of “compatibility with the object and purpose of the treaty” could always be brought to independent adjudication; but that is not the case ...

Nevertheless, the Court’s criterion of “compatibility with the object and purpose of the convention” does express a valuable concept to be taken into account both by States formulating a reservation and by States deciding whether or not to consent to a reservation that has been formulated by another State ... The Special Rapporteur, although also of the opinion that there is value in the Court’s principle as a general concept, feels that there is a certain difficulty in using it as a *criterion* of a reserving State’s status as a party to a treaty in combination with the objective criterion of the acceptance or rejection of the reservation by other States.¹⁵⁸⁶

had previously been dominated by the term ‘consent’” (Koh, “Reservations to multilateral treaties ...” (footnote 1443 above), p. 85).

¹⁵⁸² Lijnzaad, *Reservations to UN Human Rights Treaties ...* (footnote 463 above), pp. 82–83.

¹⁵⁸³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), p. 44.

¹⁵⁸⁴ Report of the International Law Commission covering the work of its third session, *Yearbook ... 1951*, vol. II, document A/1858, p. 123, at p. 128.

¹⁵⁸⁵ It was in this first report that he introduced the “flexible system” to the Commission and vigorously defended it (*Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 63–66).

¹⁵⁸⁶ *Ibid.*, pp. 65–66, para. 10; along the same lines, see Sir Humphrey Waldock’s oral statement, *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 139, paras. 4–6; however, during the discussion the Special Rapporteur did not hesitate to characterize the principle of compatibility as a “test” (see p. 145, para. 85—this paragraph also shows that, from the outset, in Sir Humphrey Waldock’s mind, this test was decisive as far as the formulation of reservations was concerned (in contrast to objections, for which the consensual principle alone appeared practicable to him)). The wording used in draft article 17, paragraph 2 (a), as proposed by the Special Rapporteur, reflects this uncertainty: “When formulating a reservation under the provisions of paragraph 1 (a) of this article [with respect to this provision, see paragraph (3) of the commentary to guideline 3.1.1], a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty” (*ibid.*, vol. II, p. 60). This principle met with general approval during the Commission’s debates in 1962 (see, in particular, Mr. Briggs (*ibid.*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 23); Mr. Lachs (p. 142, para. 54); Mr. Rosenne (pp. 144–145, para. 79), who has no hesitation in speaking of a “test” (see also p. 145, para. 82, and 653rd meeting, 29 May 1962, p. 156, para. 27); Mr. Castrén (652nd meeting, 28 May 1962, p. 148, para. 25)) and in 1965 (see Mr. Yasseen (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, pp. 149–150, para. 20); Mr. Tunkin (p. 150, para. 25); see, however, the objections by Mr. de Luna (*Yearbook ... 1962*, vol. I, 652nd meeting, 28 May 1962, p. 148, para. 18,

However, the same Special Rapporteur's endorsement of compatibility with the object and purpose of the treaty, not only as a criterion for the permissibility of reservations but also as a key element to be taken into account in interpretation,¹⁵⁸⁷ was swift.¹⁵⁸⁸

(5) The criterion has considerable merit. Notwithstanding the inevitable "margin of subjectivity", which is limited, however, by the general principle of good faith, article 19, subparagraph (c), is undoubtedly a useful guideline capable of resolving in a reasonable manner most problems that arise.

(6) The *travaux préparatoires* on this provision are of little assistance in determining the meaning of the expression.¹⁵⁸⁹ As has been noted,¹⁵⁹⁰ the commentary to draft article 16, adopted in 1966 by the Commission, usually more prolix, is limited to a single paragraph and does not even allude to the difficulties involved in defining the object and purpose of the treaty, other than very indirectly, through a simple reference to draft article 17:¹⁵⁹¹ "The admissibility or otherwise of a reservation under paragraph (c) ... is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States."¹⁵⁹²

(7) The discussion of subparagraph (c) in the Commission¹⁵⁹³ and subsequently at the United Nations Conference on the Law of Treaties¹⁵⁹⁴ does not shed any further light on the meaning of the expression "object and purpose of the treaty" for the purposes of this provision. Nor does international jurisprudence enable us to define it, even though it is in common use.¹⁵⁹⁵ There are, however, some helpful hints, particularly in the 1951 advisory opinion of the International Court of Justice on

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

(8) The expression seems to have been used for the first time in its current form¹⁵⁹⁶ in the advisory opinion of the Permanent Court of International Justice of 31 July 1930 in the *Greco-Bulgarian "Communities"* case.¹⁵⁹⁷ However, it was not until 1986 in the *Military and Paramilitary Activities in and against Nicaragua* case¹⁵⁹⁸ that the Court put an end to what has been described as "terminological chaos",¹⁵⁹⁹ no doubt influenced by the 1969 Vienna Convention.¹⁶⁰⁰ It is difficult, however, to infer a great deal from this relatively abundant case law regarding the

¹⁵⁹⁶ Buffard and Zemanek note ("The 'object and purpose' of a treaty: an enigma?" (footnote 1573 above), p. 315) that the expression "the aim and the scope" had already been used in the advisory opinion of the Permanent Court of International Justice of 23 July 1926 on *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* in reference to Part XIII of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), 1926, *P.C.I.J., Series B, No. 13*, p. 18. The same authors, after citing exhaustively the relevant decisions of the Court, describe the difficulty of establishing definitive terminology (especially in English) in the Court's case law (Buffard and Zemanek, "The 'object and purpose' of a treaty: an enigma?" (footnote 1573 above), pp. 315–316).

¹⁵⁹⁷ *The Greco-Bulgarian "Communities", 1930, P.C.I.J., Series B, No. 17*. The terms are inverted, however: the Court bases itself on "the aim and object" of the Convention between Greece and Bulgaria respecting Reciprocal Emigration, signed at Neuilly-sur-Seine on 27 November 1919 (*ibid.*, p. 21). For the text of the Convention, see *ibid.*, p. 37).

¹⁵⁹⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986*, p. 14, at pp. 135–137, paras. 271–273, p. 138, para. 275, or pp. 140–141, para. 280.

¹⁵⁹⁹ Buffard and Zemanek, "The 'object and purpose' of a treaty: an enigma?" (footnote 1573 above), p. 316.

¹⁶⁰⁰ Henceforth, the terminology used by the Court seems to have been firmly established; see: *Border and Transborder Armed Actions* (footnote 670 above), p. 89, para. 46; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment of 14 June 1993, I.C.J. Reports 1993*, p. 38, at pp. 49–51, paras. 25–27; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994, I.C.J. Reports 1994*, p. 6, at pp. 25–26, para. 52; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment of 12 December 1996, I.C.J. Reports 1996*, p. 803, at p. 813, para. 27; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997*, p. 7, at p. 64, para. 104, and p. 67, para. 110; *Land and Maritime Boundary between Cameroon and Nigeria* (footnote 199 above), p. 318, para. 98; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment of 13 December 1999, I.C.J. Reports 1999*, p. 1045, at pp. 1072–1073, para. 43; *LaGrand (Germany v. United States of America), Judgment of 27 June 2001, I.C.J. Reports 2001*, p. 466, at pp. 502–503, para. 102; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Merits, Judgment of 17 December 2002, I.C.J. Reports 2002*, p. 625, at p. 652, para. 51; *Avena and Other Mexican Nationals (Mexico v. United States of America), Interim Measures, Judgment of 31 March 2004, I.C.J. Reports 2004*, p. 12, at p. 48, para. 85; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109; *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004*, p. 279, at p. 319, para. 102; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006*, p. 6, at pp. 32 and 35, paras. 66–67 and 77; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007*, p. 43, at pp. 109–110 and 126, paras. 160 and 198; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009, I.C.J. Reports 2009*, p. 213, at p. 246, para. 79; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, I.C.J. Reports 2010*, p. 14, at pp. 48, 55, 66 and 105–106, paras. 75, 98, 143 and 281.

and 653rd meeting, p. 160, para. 67); Mr. Gros (652nd meeting, p. 150, paras. 47–51); Mr. Ago (653rd meeting, p. 157, para. 34); or, during the debate in 1965, those of Mr. Ruda (*Yearbook ... 1965*, vol. I, 796th meeting, 4 June 1965, p. 147, para. 55, and 797th meeting, 8 June 1965, p. 154, para. 69); and Mr. Ago (798th meeting, 9 June 1965, p. 161, para. 71)). To the end, Mr. Tsuruoka opposed subparagraph (c) and, for that reason, abstained in the voting on draft article 18 as a whole (adopted by 16 votes to none with one abstention on 2 July 1965 (*ibid.*, 816th meeting, 2 July 1965, p. 283, para. 42)).

¹⁵⁸⁷ See article 31, paragraph 1, of the 1969 Vienna Convention.

¹⁵⁸⁸ See Buffard and Zemanek, "The 'object and purpose' of a treaty: an enigma?" (footnote 1573 above), pp. 320–321.

¹⁵⁸⁹ *Ibid.*, pp. 319–321.

¹⁵⁹⁰ C. Redgwell, "The law of reservations in respect of multilateral conventions", in Gardner (ed.), *Human Rights as General Norms ...* (footnote 1527 above), p. 7.

¹⁵⁹¹ Future article 20 of the 1969 Vienna Convention. The article in no way resolves the issue, which is left pending.

¹⁵⁹² *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 207, para. 17. The commentary to the corresponding provision adopted in 1962 (art. 18, para. 1 (d)) is no more forthcoming (see *Yearbook ... 1962*, vol. II, document A/5209, p. 180, para. (15)).

¹⁵⁹³ See footnote 1586 above.

¹⁵⁹⁴ It is significant that none of the amendments proposed to the Commission's draft article 16—including the most radical ones—called this principle into question. At most, the amendments by Spain, the United States of America and Colombia proposed adding the concept of the "nature" of the treaty or substituting it for that of the object (see paragraph (6) of the commentary to guideline 3.1.1).

¹⁵⁹⁵ See Buffard and Zemanek, "The 'object and purpose' of a treaty: an enigma?" (footnote 1573 above), pp. 312–319; see also footnotes 1596 and 1599 below.

method to be followed for determining the object and purpose of a given treaty: the Court often proceeds by simple affirmations¹⁶⁰¹ and, when it seeks to justify its position, it does so empirically.¹⁶⁰²

(9) It has been asked whether, in order to get around the difficulties resulting from such uncertainty, there is a need to break down the concept of the “object and purpose of the treaty” by looking first at the object and then at the purpose. For example, during the discussion of draft article 55 concerning the rule *pacta sunt servanda*, Reuter emphasized that “the object of an obligation was one thing and its purpose was another”.¹⁶⁰³ While the distinction is common in French (or francophone) legal literature,¹⁶⁰⁴ it meets with scepticism among authors trained in the German or English systems.¹⁶⁰⁵

(10) However, one (French) author has shown convincingly that “the question cannot be settled” by reference to international jurisprudence,¹⁶⁰⁶ particularly since neither the object—defined as the actual content of the treaty¹⁶⁰⁷—still less the purpose—the outcome sought¹⁶⁰⁸—remain immutable over time, as the theory of emergent purpose advanced by Sir Gerald Fitzmaurice clearly demonstrates: “The notion of object and purpose is itself not a fixed and static one, but is liable to change, or rather develop as experience is gained in the operation and working of the convention.”¹⁶⁰⁹ Thus, it is hardly surprising that the attempts made in scholarly writing to define a general method for determining the object and purpose of the treaty have proved to be disappointing.¹⁶¹⁰

¹⁶⁰¹ See, for example, the cases *Jurisdiction of the European Commission of the Danube between Galatz and Braila, Advisory Opinion of 8 December 1927, P.C.I.J., Series B, No. 14*, p. 64: “It is obvious that the object of the Treaty of Paris [of 1856] ... has been to assure freedom of navigation ...”; *International Status of South-West Africa, Advisory Opinion of 11 July 1950* (see footnote 167 above), pp. 136–137, and the following judgments cited in the previous note: *Maritime Delimitation in the Area between Greenland and Jan Mayen (Judgment of 14 June 1993)*, p. 50, para. 27; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment of 25 September 1997)*, p. 67, para. 110; *Land and Maritime Boundary between Cameroon and Nigeria (Judgment of 11 June 1998)*, p. 318, para. 98; *LaGrand (Judgment of 27 June 2001)*, p. 502, para. 102; and *Legality of Use of Force (Judgment of 15 December 2004)*, p. 319, para. 102.

¹⁶⁰² See paragraph (3) of the commentary to guideline 3.1.5.1 below.

¹⁶⁰³ *Yearbook ... 1964*, vol. I, 19 May 1964, 726th meeting, p. 26, para. 77. Elsewhere, however, the same author manifests a certain scepticism regarding the utility of the distinction (see Reuter, “Solidarité et divisibilité ...” (footnote 405 above), p. 628 (also reproduced in Reuter, *Le développement ...* (footnote 405 above), p. 367)).

¹⁶⁰⁴ See Buffard and Zemanek, “The ‘object and purpose’ of a treaty: an enigma?” (footnote 1573 above), pp. 325–327; see also the previous footnote.

¹⁶⁰⁵ See Buffard and Zemanek, “The ‘object and purpose’ of a treaty: an enigma?” (footnote 1573 above), pp. 322–325 and 327–328.

¹⁶⁰⁶ Teboul, “Remarques sur les réserves ...” (footnote 1571 above), p. 696.

¹⁶⁰⁷ See, for example, J.-P. Jacqué, *Éléments pour une théorie de l’acte juridique en droit international public*, Paris, Librairie générale de droit et de jurisprudence, 1972, p. 142: “The object of an instrument resides in the rights and obligations to which it gives rise.”

¹⁶⁰⁸ *Ibid.*

¹⁶⁰⁹ Sir Gerald Fitzmaurice, “The law and procedure of the International Court of Justice ...” (footnote 421 above), p. 208. See also Teboul, “Remarques sur les réserves ...” (footnote 1571 above), p. 697, or W. A. Schabas, “Reservations to the Convention on the Rights of the Child”, *Human Rights Quarterly*, vol. 18 (1996), p. 479.

¹⁶¹⁰ The most successful method, devised by Buffard and Zemanek, would involve a two-stage process: in the first stage, one would have

(11) As Ago argued during the debate in the Commission on draft article 17 (now article 19 of the 1969 Vienna Convention):

The question of the admissibility of reservations could only be determined by reference to the terms of the treaty as a whole. As a rule it was possible to draw a distinction between the essential clauses of a treaty, which normally did not admit of reservations, and the less important clauses, for which reservations were possible.¹⁶¹¹

These are the two fundamental elements: the object and purpose can only be determined by an examination of the treaty as a whole;¹⁶¹² and, on that basis, reservations to the “essential”¹⁶¹³ clauses, and only to such clauses, are rejected.

(12) In other words, it is the “*raison d’être*”¹⁶¹⁴ of the treaty, its “*noyau fondamental*” [fundamental core]¹⁶¹⁵

“recourse to the title, preamble and, if available, programmatic articles of the treaty”; in the second stage, the conclusion thus reached *prima facie* would have to be tested in the light of the text of the treaty (Buffard and Zemanek, “The ‘object and purpose’ of a treaty: an enigma?” (footnote 1573 above), p. 333). However, the application of this apparently logical method (even though it reverses the order stipulated in article 31 of the Vienna Convention, under which the “terms of the treaty” are the starting point for any interpretation; see also the advisory opinion of the Inter-American Court of Human Rights of 8 September 1983 in *Restrictions to the Death Penalty* (footnote 197 above), para. 50) to concrete situations turns out to be rather unconvincing: the authors admit that they are unable to determine objectively and simply the object and purpose of four out of five treaties or groups of treaties used to illustrate their method (the Charter of the United Nations, the Vienna Convention on Diplomatic Relations, the 1969 Vienna Convention on the Elimination of All Forms of Discrimination against Women, as well as the other human rights treaties dealing with specific rights; the method proposed proves convincing only in the latter instance (Buffard and Zemanek, “The ‘object and purpose’ of a treaty: an enigma?” (footnote 1573 above), pp. 334–342)) and conclude that the concept indeed remains an “enigma” (see paragraph (3) above). Other scholarly attempts are scarcely more convincing, despite the fact that their authors are often categorical in defining the object and purpose of the treaty studied. Admittedly, they are often dealing with human rights treaties, which lend themselves easily to conclusions influenced by ideologically oriented positions, one symptom of which is the insistence that all the substantive provisions of such treaties reflect their object and purpose (which, taken to its logical extremes, is tantamount to precluding any reservation from being valid)—for a critique of this extreme view, see W. A. Schabas, “Reservations to the Convention on the Rights of the Child”, footnote 1609 above, pp. 476–477, or, by the same author, “Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a party?”, *Brooklyn Journal of International Law*, vol. 21, No. 2 (1995), pp. 291–293. On the position of the Human Rights Committee, see paragraph (3) of the commentary to guideline 3.1.5.6. See also B. Simma and G. I. Hernández, “Legal consequences of an impermissible reservation to a human rights treaty: where do we stand?”, in Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (footnote 1045 above), pp. 70–71.

¹⁶¹¹ *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 141, para. 35.

¹⁶¹² What is entailed is to examine whether the reservation is compatible “with the general tenor” of the treaty (Bartoš, *ibid.*, pp. 141–142, para. 40).

¹⁶¹³ And not those that related “to detail only” (Paredes, *ibid.*, p. 146, para. 90).

¹⁶¹⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), p. 21: “none of the contracting parties is entitled to frustrate or impair ... the purpose and *raison d’être* of the convention”.

¹⁶¹⁵ Statement by the representative of France to the Third Committee at the General Assembly, *Official Records of the General Assembly, Eleventh Session, Third Committee, 703rd meeting*, 6 December 1956, quoted in A.-C. Kiss, *Répertoire de la pratique française en matière de droit international public*, Paris, Centre national de la recherche scientifique, 1962, vol. I, p. 277, No. 552.

that is to be preserved in order to avoid undermining the “effectiveness”¹⁶¹⁶ of the treaty as a whole. “It implies a distinction between all obligations in the treaty and the core obligations that are the treaty’s *raison d’être*.”¹⁶¹⁷

(13) Even if the general approach is fairly clear, it is no easy matter to reflect this in a simple formulation. The “threshold” may seem to have been set too high in guideline 3.1.5 and to facilitate unduly the formulation of reservations. By definition, any reservation “purports to exclude or modify the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects in their application” to the author of the reservation;¹⁶¹⁸ therefore, the definition of the object and purpose of the treaty should not be so broad as to impair the right to formulate reservations. By limiting the incompatibility of the reservation with the object and purpose of the treaty to cases in which (a) it impairs an essential element, (b) necessary to the general tenor of the treaty, (c) thereby compromising the *raison d’être* of the treaty, the formulation in guideline 3.1.5 strikes an acceptable balance between the need to preserve the integrity of the treaty and the concern to facilitate the broadest possible participation in multilateral conventions.¹⁶¹⁹

(14) Although a definition of each of these three inseparable elements is doubtless not possible, some clarification may be useful:

(a) The term “essential element” is not necessarily limited to a specific provision. An “essential element” may be a norm, a right or an obligation which, interpreted in context,¹⁶²⁰ is essential to the general tenor of the treaty and whose exclusion or modification would compromise the treaty’s *raison d’être*. That would generally be the case if a State sought to exclude or significantly modify a provision of the treaty which embodied the object and purpose of the treaty. Thus a reservation which excluded the application of a provision comparable to article I of the Treaty of Amity, Economic Relations and Consular Rights, signed in Tehran on 15 August 1955, by the United States of America and Iran¹⁶²¹ would certainly impair an “essential element” within the meaning of guideline 3.1.5, given that this provision “must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied”.¹⁶²²

¹⁶¹⁶ See European Court of Human Rights, *Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995 (footnote 304 above), Series A no. 310, p. 27, para. 75: acceptance of separate regimes of enforcement of the European Convention on Human Rights “would ... diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)”.

¹⁶¹⁷ Lijnzaad, *Reservations to UN Human Rights Treaties ...* (footnote 463 above), p. 83; see also p. 59; see also L. Sucharipa-Behrmann, “The legal effects of reservations to multilateral treaties”, *Austrian Review of International and European Law*, vol. 1, No. 1 (1996), p. 76.

¹⁶¹⁸ See paragraph 2 of guideline 1.1.

¹⁶¹⁹ See A. Pellet and D. Müller, “Reservations to human rights treaties: not an absolute evil”, in U. Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma*, Oxford University Press, 2011, pp. 524–530.

¹⁶²⁰ See guideline 3.1.5.1.

¹⁶²¹ United Nations, *Treaty Series*, vol. 284, No. 4132, p. 93.

¹⁶²² International Court of Justice, *Oil Platforms, Judgment of 12 December 1996* (see footnote 1600 above), p. 814, para. 28.

(b) This “essential element” must thus be “necessary to the general tenor of the treaty”, that is the balance of rights and obligations which constitute its substance or the general concept underlying the treaty.¹⁶²³ While the Commission has had no difficulty in adopting, in French, the term “*économie générale du traité*”, which seems to accurately reflect the concept that the essential nature of the point to which the reservation applies must be assessed in the context of the treaty as a whole, it has been somewhat more hesitant as regards the English expression to be used. After having vacillated between “general framework”, “general structure” and “overall structure”, it appeared to the Commission that the expression “general tenor” had the merit of placing the emphasis on the global nature of the assessment to be made and of not imposing too rigid an interpretation. Thus the International Court of Justice has determined the object and purpose of a treaty by reference not only to its preamble, but also to its “structure”, as represented by the provisions of the treaty taken as a whole;¹⁶²⁴

(c) Similarly, in an endeavour to avoid too high a “threshold”, the Commission chose the adjective “necessary” in preference to the stronger term “indispensable”, and decided on the verb “impair” (rather than “deprive”) to apply to the “*raison d’être*” of the treaty, it being understood that it may be simple and unambiguous (the *raison d’être* of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 is clearly defined by its title) or much more complex (in the case of a convention entailing many interdependent rights and obligations, such as general human rights treaties¹⁶²⁵ or a convention on environmental protection or investments covering a broad range of issues) and that the question could even arise of whether the *raison d’être* might change over time.¹⁶²⁶

(15) The fact remains that guideline 3.1.5 indicates a direction rather than establishing a clear criterion that can be directly applied in all cases. Accordingly, it seems appropriate to complement it in two ways: on the one hand, by seeking to specify means of determining the object and purpose of a treaty, as in guideline 3.1.5.1, and, on the other hand, by illustrating the methodology more clearly by means of a series of examples chosen from areas in which the question of the permissibility of reservations frequently arises (guidelines 3.1.5.2–3.1.5.7).

3.1.5.1 Determination of the object and purpose of the treaty

The object and purpose of the treaty is to be determined in good faith, taking account of the terms

¹⁶²³ Since not all treaties are necessarily or entirely based on a balance of rights and obligations (see, in particular, those treaties relating to “integral obligations”, including the human rights treaties, second report on the law of treaties, by Sir Gerald Fitzmaurice, Special Rapporteur, *Yearbook ... 1957*, vol. II, document A/CN.4/107, pp. 54–55, paras. 125–128).

¹⁶²⁴ See the cases concerning *Oil Platforms* (footnote 1600 above), p. 813, para. 27, and *Sovereignty over Pulau Ligitan and Pulau Sipadan, Judgment of 17 December 2002*, *ibid.*, p. 652, para. 51.

¹⁶²⁵ See guideline 3.1.5.6 below. See also Pellet, “1969 Vienna Convention. Article 19: Formulation of reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 454–455, paras. 123–125.

¹⁶²⁶ See paragraph (10) above and paragraph (7) of the commentary to guideline 3.1.5.1 below.

of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.

Commentary

(1) It is by no means easy to put together in a single formula all the elements to be taken into account, in each specific case, in determining the object and purpose of the treaty. Such a process undoubtedly requires more “*esprit de finesse*” than “*esprit de géométrie*”,¹⁶²⁷ like any act of interpretation, for that matter—and this process is certainly one of interpretation.

(2) Given the great variety of situations and their susceptibility to change over time,¹⁶²⁸ it would appear to be impossible to devise a single set of methods for determining the object and purpose of a treaty, and admittedly a certain amount of subjectivity is inevitable—however, that is not uncommon in law in general and in international law in particular.

(3) In this context, it may be observed that the International Court of Justice has deduced the object and purpose of a treaty from a number of highly disparate elements, taken individually or in combination:

- from its title;¹⁶²⁹
- from its preamble;¹⁶³⁰
- from an article placed at the beginning of the treaty that “must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied”;¹⁶³¹

¹⁶²⁷ B. Pascal, *Pensées*, in *Oeuvres complètes*, Paris, Bibliothèque de la Pléiade, N.R.F.-Gallimard, 1954, p. 1091.

¹⁶²⁸ See paragraph (10) of the commentary to guideline 3.1.5 above. The question could also be raised whether the cumulative weight of separate reservations, each of which, taken alone, would be admissible, might not ultimately result in their incompatibility with the object and purpose of the treaty (see Clark, “The Vienna Convention reservations regime ...” (footnote 1087 above), p. 314; or Cook, “Reservations to the Convention ...” (footnote 44 above), pp. 706–707).

¹⁶²⁹ See *Case of Certain Norwegian Loans (France v. Norway)*, Judgment of 6 July 1957, *I.C.J. Reports 1957*, p. 9, at p. 24; but see the cases *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment of 27 June 1986* (footnote 1598 above), pp. 136–137, para. 273, and *Oil Platforms* (footnote 1600 above), p. 814, para. 28.

¹⁶³⁰ See the advisory opinion of the Permanent Court of International Justice of 31 July 1930, in the case *Greco-Bulgarian “Communities”* (footnote 1597 above), p. 19; or the judgments of the International Court of Justice in the cases *Rights of Nationals of the United States of America in Morocco, Judgment of 27 August 1952* (footnote 157 above), p. 196; *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment of 27 June 1986* (footnote 1598 above), p. 138, para. 275; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (footnote 1600 above), pp. 25–26, para. 52; and *Sovereignty over Pulau Ligitan and Pulau Sipadan, Merits, Judgment of 17 December 2002, ibid.*, p. 652, para. 51; see also the dissenting opinion of Judge Anzilotti appended to the advisory opinion of 15 November 1932 in *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, P.C.I.J., Series A/B, No. 50*, p. 384.

¹⁶³¹ *Oil Platforms, Judgment of 12 December 1996* (see footnote 1600 above), p. 814, para. 28.

– from an article of the treaty that demonstrates “the major concern of each contracting party” when it concluded the treaty;¹⁶³²

- from the preparatory work on the treaty;¹⁶³³ and
- from its overall tenor.¹⁶³⁴

(4) It is difficult, however, to regard this as a “method” properly speaking: these disparate elements are taken into consideration, sometimes separately, sometimes together, and the Court forms a “general impression”, in which subjectivity inevitably plays a considerable part.¹⁶³⁵ Since, however, the basic problem is one of interpretation, it would appear to be legitimate, *mutatis mutandis*, to transpose the principles in articles 31–32 of the Vienna Conventions applicable to the interpretation of treaties—the “general rule of interpretation” set forth in article 31 and the “supplementary means of interpretation” set forth in article 32¹⁶³⁶—and to adapt them to the determination of the object and purpose of the treaty.

(5) The Commission is fully aware that this position is to some extent tautological,¹⁶³⁷ since paragraph 1 of article 31 reads:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*.

¹⁶³² *Kasikili/Sedudu Island, Judgment of 13 December 1999* (see footnote 1600 above), pp. 1072–1073, para. 43.

¹⁶³³ Often, as a way of confirming an interpretation based on the text itself; see the judgments of the International Court of Justice in the cases *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* of 3 February 1994 (footnote 1600 above), pp. 27–28, paras. 55–56, *Kasikili/Sedudu Island* of 13 December 1999, *ibid.*, p. 1074, para. 46, or the *Advisory Opinion of 9 July 2004* in the case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ibid.*, p. 179, para. 109; see also the dissenting opinion of Judge Anzilotti in the case *Interpretation of the Convention of 1919 concerning the Employment of Women during the Night* (footnote 1630 above), pp. 388–389. In its advisory opinion of 28 May 1951, relating to the case *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 23, the Court gives some weight to the “origins” of the Convention on the Prevention and Punishment of the Crime of Genocide.

¹⁶³⁴ See the advisory opinions of the Permanent Court of International Justice in the cases *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* of 23 July 1926 (footnote 1596 above), p. 18, or *The Greco-Bulgarian “Communities”* of 31 July 1930 (footnote 1597 above), p. 20; see also the judgments of the International Court of Justice in the cases *Oil Platforms* of 12 December 1996 (footnote 1600 above), p. 813, para. 27, and *Sovereignty over Pulau Ligitan and Pulau Sipadan* of 17 December 2002, *ibid.*, p. 652, para. 51.

¹⁶³⁵ “One could just as well believe it was simply by intuition” (Buffard and Zemanek, “The ‘object and purpose’ of a treaty: an enigma?” (footnote 1573 above), p. 319).

¹⁶³⁶ See the advisory opinion of 8 September 1983 of the Inter-American Court of Human Rights on *Restrictions to the Death Penalty* (footnote 197 above), para. 63; see also Sucharipa-Behrmann “The legal effects of reservations to multilateral treaties” (footnote 1617 above), p. 76. While showing that it was aware that the rules on interpretation of treaties could not be directly transposed to unilateral statements formulated by the parties concerning a treaty (reservations and interpretative declarations), the International Law Commission recognizes that those rules constitute useful guidelines in that regard (see guideline 1.3.1 (Method of determining the distinction between reservations and interpretative declarations)). This is true *a fortiori* when the aim is to assess the compatibility of a reservation with the object and purpose of the treaty itself.

¹⁶³⁷ See Schabas, “Reservations to human rights treaties ...” (footnote 966 above), p. 48.

(6) That said, however, the determination of the object and purpose of a treaty is indeed a question of interpretation, whereby the treaty must be interpreted as a whole, in good faith, in its entirety, in accordance with the ordinary meaning to be given to the terms of the treaty in their context, including the preamble, taking into account the preparatory work of the treaty and the “circumstances of its conclusion”¹⁶³⁸ and, where appropriate, the subsequent practice of the parties.¹⁶³⁹

(7) These are the parameters underlying guideline 3.1.5.1, which partly reproduces the terms of articles 31 and 32 of the Vienna Conventions in that it highlights the need for determination in good faith based on the terms of the treaty in their context. Although the Commission adhered closely to the wording of article 31, paragraph 2, of the Vienna Conventions, which lists the elements constituting the context to be taken into consideration for the purpose of interpreting the treaty, it thought that it was worthwhile to stress two specific elements, namely, the preamble—mentioned in article 31, paragraph 2—and the title of the treaty, which is of particular importance in determining the object and purpose.¹⁶⁴⁰ Reference to the preparatory work and the circumstances of the treaty’s conclusion is also certainly of greater importance for the determination of the object and purpose of the treaty than for the interpretation of one of its provisions. The phrase “the subsequent practice of the parties” reflects paragraphs 2, 3 (a) and 3 (b) of article 31, since the Commission was of the view that the object and purpose of a treaty was likely to evolve over time.¹⁶⁴¹ Furthermore, even though the reference to subsequent practice might seem superfluous, since objections, if any, must be made during the year following the formulation of the reservation, it could nonetheless be pertinent, since assessment of the reservation by a third party might come at any time, even years after its formulation.

(8) In some cases, the application of these methodological guidelines raises no problems. It is obvious that a reservation to the Convention on the Prevention and Punishment of the Crime of Genocide by which a State sought to reserve the right to commit some of the prohibited acts in its territory or in certain parts thereof would be incompatible with the object and purpose of the Convention.¹⁶⁴²

(9) Germany and a number of other European countries presented the following arguments in support of their objections to a reservation formulated by Viet Nam to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988:

¹⁶³⁸ Article 32.

¹⁶³⁹ See article 31, paragraph 3.

¹⁶⁴⁰ The mention of “the terms of the treaty” seemed sufficient in determining the general objectives of the treaty; but they could, however, have a particular importance in assessing the “general tenor” of the treaty (see footnote 1610 above).

¹⁶⁴¹ See paragraph (10) of the commentary to guideline 3.1.5 below and paragraph (2) above.

¹⁶⁴² The question arises in particular with regard to the scope of the “colonial clause” in article XII of the Convention, a clause contested by the Soviet bloc countries, which had made reservations to it (see *Multilateral Treaties ...* (footnote 37 above), chap. IV.1); but the focus here is on the permissibility of that quasi-reservation clause.

The reservation made in respect of article 6 is contrary to the principle “*aut dedere aut judicare*” which provides that offences are brought before the court or that extradition is granted to the requesting States.

The Government of the Federal Republic of Germany is therefore of the opinion that the reservation jeopardizes the intention of the Convention, as stated in article 2, paragraph 1, to promote cooperation among the parties so that they may address more effectively the international dimension of illicit drug trafficking.

The reservation may also raise doubts as to the commitment of the Government of the Socialist Republic of Viet Nam to comply with fundamental provisions of the Convention.¹⁶⁴³

(10) It can also happen that the prohibited reservation relates to less central provisions but is nonetheless contrary to the object and purpose of the treaty because it makes its implementation impossible. That is the rationale behind the wariness the Vienna Convention displays towards reservations to constituent instruments of international organizations.¹⁶⁴⁴ For example, the German Democratic Republic, when ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, declared that it would only bear its share of the expenses of the Committee against Torture for activities for which it recognized that the Committee had competence.¹⁶⁴⁵ Luxembourg objected to that “declaration” (which was actually a reservation), arguing that the effect would be “to inhibit activities of the Committee in a manner incompatible with the purpose and the goal of the Convention”.¹⁶⁴⁶

(11) It is clearly impossible to draw up an exhaustive list of the potential problems that may arise concerning the compatibility of a reservation with the object and purpose of the treaty. It is also clear, however, that reservations to

¹⁶⁴³ *Ibid.*, chap. VI.19; in the same vein, see also the objections of Belgium, Denmark, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, and the less explicitly justified objections of Austria and France, *ibid.* See also the objection of Norway, and the less explicit objections of Germany and Sweden to the Tunisian declaration concerning the application of the Convention on the reduction of statelessness of 1961, *ibid.*, chap. V.4. Another significant example is provided by the declaration of Pakistan concerning the International Convention for the Suppression of Terrorist Bombings of 1997, which excluded from the application of the Convention “struggles, including armed struggle, for the realization of the right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law”, *ibid.*, chap. XVIII.9. A number of States considered that “declaration” to be contrary to the object and purpose of the Convention, which is “the suppression of terrorist bombings, irrespective of where they take place and of who carries them out”; see the objections of Australia, Austria, Canada, Denmark, Finland, France, Germany, India, Italy, Japan (with a particularly clear statement of reasons), the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America, *ibid.* Similarly, Finland justified its objection to the reservation made by Yemen to article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 by the argument that “provisions prohibiting racial discrimination in the granting of such fundamental political rights and civil liberties as the right to participate in public life, to marry and choose a spouse, to inherit and to enjoy freedom of thought, conscience and religion are central in a convention against racial discrimination”, *ibid.*, chap. IV.2.

¹⁶⁴⁴ See article 20, paragraph 3: “When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization”: the text of the provision is reproduced in guideline 2.8.8.

¹⁶⁴⁵ See *Multilateral Treaties ...* (footnote 37 above), chap. IV.9; see also Edwards, “Reservations to treaties” (footnote 59 above), pp. 391–393 and 400.

¹⁶⁴⁶ *Multilateral Treaties ...* (footnote 37 above), chap. IV.9. Fifteen other States raised objections on the same grounds.

certain categories of treaties or treaty provisions or reservations having certain specific characteristics pose particular problems of permissibility that should be examined, one by one, in an attempt to develop guidelines that would be helpful to States in formulating or responding to reservations of that kind in a fully informed manner. This is the intent of guidelines 3.1.5.2–3.1.5.7, the preparation of which was prompted by the relative frequency with which problems arise; these guidelines are of a purely illustrative nature.

3.1.5.2 *Vague or general reservations*

A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty.

Commentary

(1) Since, under article 19 (c) of the 1969 and 1986 Vienna Conventions, reproduced in guideline 3.1, a reservation must be compatible with the object and purpose of the treaty, and since other States are required, under article 20, to take a position on this compatibility, it must be possible for them to do so. This will not be the case if the reservation in question is worded in such a way as to preclude any determination of its scope, in other words, if it is vague or general, as indicated in the title of guideline 3.1.5.2. This is not, strictly speaking, a case in which the reservation is incompatible with the object and purpose of the treaty: it is rather a hypothetical situation in which it is impossible to assess this compatibility. This shortcoming seemed sufficiently serious to the Commission for it to come up with particularly strong wording: “shall be worded” rather than “should be worded” or “is worded”. Furthermore, use of the term “worded” highlights the fact that this is a requirement of substance and not merely one of form.

(2) In any event, the requirement for precision in the wording of reservations is implicit in their very definition. It is clear from article 2, paragraph 1 (d), of the Vienna Conventions, from which the text in guideline 1.1 of the Guide to Practice is taken, that the object of reservations is to exclude or to modify “the legal effect of *certain provisions** of the treaty in their application” to their authors.¹⁶⁴⁷ Thus, it cannot be maintained that the effect of reservations could possibly be to prevent a treaty as a whole from producing its effects. And, although “across-the-board” reservations are common practice, they are, as specified in guideline 1.1, paragraph 2,¹⁶⁴⁸ valid only if they purport “to

¹⁶⁴⁷ See the comments of the Government of Israel on the Commission’s first draft on the law of treaties, which caused the English text of the definition of reservations to be brought into line with the French text by changing the word “some” to “certain” (fourth report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 15); see also the statement of Chile at the United Nations Conference on the Law of Treaties, *Official Records of the United Nations Conference on the Law of Treaties, First Session ... (A/CONF.39/11)* (footnote 35 above), 4th meeting of the Committee of the Whole, 29 March 1968, p. 21, para. 5: “the words ‘to vary the legal effect of certain provisions of the treaty’ (subparagraph (d)) meant that the reservation must state clearly what provisions it related to. Imprecise reservations must be avoided.”

¹⁶⁴⁸ See paragraphs (16)–(22) of the commentary to guideline 1.1. See also the remarks by Riquelme Cortado, *Las reservas a los*

exclude or to modify the legal effect ... of the treaty as a whole *with respect to certain specific aspects**”.

(3) Furthermore, it follows from the inherently consensual nature of the law of treaties in general,¹⁶⁴⁹ and the law of reservations in particular,¹⁶⁵⁰ that, although States are free to formulate (not to *make*¹⁶⁵¹) reservations, the other parties must be entitled to react by accepting the reservation or objecting to it. That is not the case if the text of the reservation does not allow its meaning to be understood.

(4) That often happens when a reservation invokes the internal law of the State that has formulated it without identifying the provisions in question or specifying whether they are to be found in its constitution or its civil or criminal code. In such cases, it is not the reference to the domestic law of the reserving State *per se* that is the problem,¹⁶⁵² but rather the frequent vagueness and generality of the reservations referring to domestic law, which make it impossible for the other States parties to take a position on them. That was the thinking behind an amendment submitted by Peru at the United Nations Conference on the Law of Treaties seeking to add the following subparagraph (d) to future article 19 of the Convention:

(d) The reservation renders the treaty inoperative by making its application subject, in a general and indeterminate manner, to national law.¹⁶⁵³

tratados ... (footnote 150 above), p. 172; or Pellet, “1969 Vienna Convention. Article 19: Formulation of reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 457–460, paras. 129–135.

¹⁶⁴⁹ See Reuter, *Introduction au droit des traités* (footnote 28 above), pp. 20–21, and Tomuschat, “Admissibility and legal effects of reservations ...” (footnote 1080 above), p. 466. See also, for example, the judgment issued on 17 August 1923 by the Permanent Court of International Justice in the case of *The S.S. “Wimbledon”, 1923, P.C.I.J., Series A No. 1*, p. 25, or the International Court of Justice *Advisory Opinion of 11 July 1950 in the case International Status of South-West Africa* (footnote 167 above), p. 139.

¹⁶⁵⁰ The International Court of Justice specified in this connection in its advisory opinion of 1951 on the case *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above) that “It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto” (p. 21). The authors of the joint dissenting opinion accompanying the advisory opinion express this idea still more strongly: “The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later” (*ibid.*, pp. 31–32). See also the arbitral award of 30 June 1977 in the *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (footnote 24 above), pp. 41–42, paras. 60–61; see also Bishop, “Reservations to treaties” (footnote 288 above), p. 255.

¹⁶⁵¹ See paragraph (6) of the commentary to guideline 3.1.

¹⁶⁵² See paragraph (4) of the commentary to guideline 3.1.5.5.

¹⁶⁵³ *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ... (A/CONF.39/11/Add.2)* (footnote 54 above), Report of the Committee of the Whole on its work at the first session of the Conference (A/CONF.39/14), p. 133, para. 177; see the explanations of the representative of Peru at the 21st meeting of the Committee of the Whole, on 10 April 1968, *Official Records of the United Nations Conference on the Law of Treaties, First Session ... (A/CONF.39/11)* (see footnote 35 above), p. 109, para. 25. The amendment was rejected by 44 votes to 16 with 26 abstentions (25th meeting of the Committee of the Whole, 16 April 1968, *ibid.*, p. 135, para. 26); a reading of the debate gives little explanation for the rejection: no doubt a number

(5) The objections of Finland to the reservations of several States parties to the Convention on the rights of the child would certainly be on firmer ground with that argument than by a reference to article 27 of the 1969 Vienna Convention,¹⁶⁵⁴ in fact, in response to the reservation by Malaysia, which had accepted a number of the provisions of the Convention on the rights of the child “only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia”,¹⁶⁵⁵ Finland considered that the “broad nature” of that reservation left open “to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention”.¹⁶⁵⁶ The interpretative declaration of Thailand to the effect that it “does not interpret and apply the provisions of this Convention [the International Convention on the Elimination of All Forms of Racial Discrimination of 1965] as imposing upon the Kingdom of Thailand any obligation beyond the confines of [its] Constitution and [its] laws”¹⁶⁵⁷ also prompted an objection on the part of Sweden that, in so doing, Thailand was making the application of the Convention subject to a general reservation which made reference to the limits of national legislation the content of which was not specified.¹⁶⁵⁸

(6) The same applies when a State reserves the general right to have its constitution prevail over a treaty,¹⁶⁵⁹ as for instance in the reservation by the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide:

of delegations, like Italy, considered it “unnecessary to state that case expressly, since it was a case of reservations incompatible with the object of the treaty” (22nd meeting of the Committee of the Whole, 11 April 1968, *ibid.*, p. 120, para. 75); along these same lines, see Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 302.

¹⁶⁵⁴ See paragraph (4) of the commentary to guideline 3.1.5.5. Similarly, the reason given by the Netherlands and the United Kingdom in support of their objections to the second United States reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, namely, that it created “uncertainty as to the extent of the obligations which the Government of the United States of America is prepared to assume with regard to the Convention” (*Multilateral Treaties ...* (footnote 37 above), chap. IV.1) is more convincing than the argument based on an invocation of domestic law (see paragraph (4) (footnotes 1752–1753 below) of the commentary to guideline 3.1.5.5).

¹⁶⁵⁵ *Multilateral Treaties ...* (footnote 37 above), chap. IV.11.

¹⁶⁵⁶ *Ibid.* See also the objections by Finland and several other States parties to comparable reservations by several other States, *ibid.*

¹⁶⁵⁷ *Ibid.*, chap. IV.2.

¹⁶⁵⁸ *Ibid.* See, along the same lines, the Norwegian and Swedish objections of 15 March and 14 December 1999, respectively, with regard to the reservation of Bangladesh to the Convention on the Political Rights of Women of 31 March 1953 (*ibid.*, chap. XVI.1), or the objections by Finland to a reservation formulated by Guatemala to the 1969 Vienna Convention and by the Netherlands, Sweden and Austria to a comparable reservation formulated by Peru to the same Convention (*ibid.*, chap. XXIII.1). See also the objection by Poland to the reservation formulated by Pakistan to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: “The Islamic Republic of Pakistan refers in the above-mentioned reservations to the Sharia laws and to its domestic legislation as possibly affecting the application of the Convention. Nonetheless it does [not] specify the exact content of these laws and legislation. As a result, it is impossible to clearly define the extent to which the reserving State has accepted the obligations of the Convention” (*ibid.*, chap. IV.9).

¹⁶⁵⁹ See the reservation of Pakistan to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid.*, chap. IV.8), and the objections made by Austria, Finland, Germany, the Netherlands, Norway and Portugal (*ibid.*).

[N]othing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.¹⁶⁶⁰

(7) Some of the so-called “sharia reservations”¹⁶⁶¹ give rise to the same objection, a case in point being the reservation by which Mauritania approved the Convention on the Elimination of All Forms of Discrimination against Women in New York in 1979, “in each and every one of its parts which are not contrary to Islamic Sharia”.¹⁶⁶² Here again, the problem lies not in the fact that Mauritania is invoking a law of religious origin which it applies,¹⁶⁶³ but, rather that, as Denmark noted, “the general reservation[s] with reference to the provisions of Islamic law ... are of unlimited scope and undefined character”.¹⁶⁶⁴ Thus, as the United Kingdom put it, such a reservation “which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention”.¹⁶⁶⁵

¹⁶⁶⁰ *Ibid.*, chap. IV.1.

¹⁶⁶¹ For a discussion of the various schools of thought, see, in particular, A. Sassi, “General reservations to multilateral treaties” *Comunicazioni e Studi*, vol. 22 (2002), pp. 96–99. With regard specifically to the application of the reservation to the Convention on the Elimination of All Forms of Discrimination against Women of 1979, see Clark, “The Vienna Convention reservations regime ...” (footnote 1087 above), pp. 299–302 and pp. 310–311; J. Connors, “The women’s Convention in the muslim world”, in Gardner (ed.), *Human Rights as General Norms ...* (footnote 1527 above), pp. 85–103; Cook, “Reservations to the Convention ...” (footnote 44 above), pp. 690–692; J. McBride, “Reservations and the capacity of States to implement human rights treaties”, in Gardner (ed.), *Human Rights as General Norms ...* (footnote 1527 above), pp. 149–156 (with a great many examples); or Y. Tyagi, “The conflict of law and policy on reservations to human rights treaties”, *BYBIL*, vol. 71 (2000), pp. 198–201 and, more specifically: Jenefsky, “Permissibility of Egypt’s reservations ...” (footnote 44 above), pp. 200–233.

¹⁶⁶² *Multilateral Treaties ...* (footnote 37 above), chap. IV.8. See also the reservations by Saudi Arabia (citing “the norms of Islamic law”—*ibid.*) and by Malaysia (*ibid.*), or the reservation made by the Republic of Maldives upon accession: “The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives [are] founded” (*ibid.*); the latter reservation having elicited several objections, the Government of the Republic of Maldives modified it in a more restrictive sense, but Germany once again objected to it and Finland criticized the new reservation (*ibid.*). Likewise, several States formulated objections to the reservation by Saudi Arabia to the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, which made the application of its provisions subject to the condition that “these do not conflict with the precepts of the Islamic Shariah” (*ibid.*, chap. IV.2).

¹⁶⁶³ The Holy See ratified the Convention on the rights of the child of 1989, provided that “the application of the Convention be compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law” (*ibid.*, chap. IV.11). As has been pointed out (Schabas, “Reservations to the Convention on the Rights of the Child” (footnote 1609 above), pp. 478–479), this text raises, *mutatis mutandis*, the same problems as the “sharia reservation”.

¹⁶⁶⁴ *Multilateral Treaties ...* (footnote 37 above), chap. IV.8.

¹⁶⁶⁵ *Ibid.* See also the objections by Austria, Finland, Germany, Norway, the Netherlands, Portugal and Sweden (*ibid.*). The reservations of some Islamic States to specific provisions of the Convention, on the grounds of their incompatibility with the sharia, are certainly less open to criticism on that basis, although a number of them also drew objections from some States. For example, whereas Clark, “The Vienna Convention reservations regime ...” (footnote 1087 above), p. 300, observes that the reservation of Iraq to article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, based on the sharia, is specific and entails a regime more favourable than that of the Convention, this reservation nonetheless elicited the objections of Mexico, the Netherlands and Sweden, *Multilateral Treaties ...* (footnote 37 above), chap. IV.8.

(8) Basically, it is the impossibility of assessing the compatibility of such reservations with the object and purpose of the treaty, and not the certainty that they are incompatible, which makes them fall within the purview of article 19 (c) of the 1969 Vienna Convention. As the Human Rights Committee pointed out:

Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the [International] Covenant [on Civil and Political Rights] and indicate in precise terms its scope in relation thereto.¹⁶⁶⁶

(9) According to article 57 (formerly article 64) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), “[r]eservations of a general character shall not be permitted”. The European Court of Human Rights, in the *Belilos* case, declared invalid the interpretative declaration (equivalent to a reservation) by Switzerland on article 6, paragraph 1, of the European Convention because it was “couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope”.¹⁶⁶⁷ But it is unquestionably the European Commission of Human Rights that most clearly formulated the principle applicable here when it judged that “a reservation is of a general nature ... when it is worded in such a way that it does not allow its scope to be determined”.¹⁶⁶⁸

(10) Guideline 3.1.5.2 reflects this fundamental notion. Its title gives an indication of the (alternative) characteristics which a reservation needs to exhibit to fall within its scope: it applies to reservations which are either “vague” or “general”. An example of the former might be a reservation which leaves some uncertainty as to the circumstances in which it might be applicable¹⁶⁶⁹ or to the extent of the obligations effectively entered into by its author. The latter type would correspond to the examples given above.¹⁶⁷⁰

(11) Although the present commentary may not be the right place for a discussion of the effects of vague or general reservations,¹⁶⁷¹ it must still be noted that they raise

particular problems. It would seem difficult, *a priori*, to maintain that they are invalid *ipso jure*: the main criticism that can be levelled against them is that they make it impossible to assess whether or not they satisfy the conditions for permissibility.¹⁶⁷² For that reason, they should lend themselves particularly well to a “reservations dialogue”.

3.1.5.3 Reservations to a provision reflecting a customary rule

The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision.

Commentary

(1) Guideline 3.1.5.3 relates to a problem which arises fairly often in practice: that of the permissibility of a reservation to a treaty provision which simply reflects a rule of customary international law—the word “reflect” is preferred here to “enunciate” in order to stress that the process of enshrining the rule in question in a treaty has no effect on its continued operation as a customary rule. Guideline 3.1.5.3 therefore sets out the principle that a reservation to a treaty rule which reflects a customary rule is not *ipso jure* incompatible with the object and purpose of the treaty, even if due account must be taken of that element in assessing such compatibility.

(2) On occasion, States parties to a treaty have objected to reservations and challenged their compatibility with its object and purpose on the pretext that they were contrary to well-established customary rules. Thus, Austria declared, in cautious terms, that it was

of the view that the Guatemalan reservations [to the Vienna Convention on the law of treaties of 1969] refer almost exclusively to general rules of [the said Convention] many of which are solidly based on international customary law. The reservations could call into question well-established and universally accepted norms. Austria is of the view that the reservations also raise doubts as to their compatibility with the object and purpose of the [said Convention].¹⁶⁷³

The Netherlands objected to the reservations formulated by several States in respect of various provisions of the Vienna Convention on Diplomatic Relations of 1961, and took “the view that this provision remains in force in relations between it and the said States in accordance with international customary law”.¹⁶⁷⁴

¹⁶⁶⁶ General comment No. 24, Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), vol. I, annex V, para. 584; see also paragraph 577, which links the issue of the invocation of domestic law to that of “widely formulated reservations”.

¹⁶⁶⁷ Judgment of 29 April 1988, *Belilos v. Switzerland* case (see footnote 192 above), p. 26, para. 55. See paragraph (8) of the commentary to guideline 3.1.2. For a detailed analysis of the generality condition posed by article 57 of the Convention, see especially Cameron and Horn, “Reservations to the European Convention on Human Rights ...” (footnote 205 above), pp. 97–109, and R. St. J. MacDonald, “Reservations under the European Convention on Human Rights”, *Revue belge de droit international*, vol. 21 (1988), pp. 433–438 and 443–448.

¹⁶⁶⁸ Decision of 5 May 1982, *Temeltasch v. Switzerland* case (see footnote 24 above), p. 138. See Imbert, “Reservations to the European Convention on Human Rights ...” (footnote 1527 above), pp. 574–581.

¹⁶⁶⁹ See the reservation of Malta to the International Covenant on Civil and Political Rights of 1966: “While the Government of Malta accepts the principle of compensation for wrongful imprisonment, it is not possible at this time to implement such a principle in accordance with article 14, paragraph 6, of the Covenant” (*Multilateral Treaties ...* (footnote 37 above), chap. IV.4).

¹⁶⁷⁰ See paragraphs (5)–(9) above.

¹⁶⁷¹ On the effects of reservations in general, see Part 4 of the Guide to Practice.

¹⁶⁷² See paragraphs (1) or (4) above.

¹⁶⁷³ *Multilateral Treaties ...* (footnote 37 above), chap. XXIII.1; see also the objections formulated in similar terms by Belgium, Denmark, Finland, Germany, Sweden and the United Kingdom, *ibid.* In the arbitration concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (see footnote 24 above), the United Kingdom maintained that the reservation of France to article 6 of the Convention on the Continental Shelf was aimed at “the rules of customary international law” and was “inadmissible as a reservation to Article 6” (p. 38, para. 50).

¹⁶⁷⁴ *Multilateral Treaties ...* (footnote 37 above), chap. III.3; strictly speaking, it is not the provisions in question that remain in force, but rather the rules of customary law that they express (see guideline 4.4.2 (Absence of effect on rights and obligations under customary international law) below). See also the objections of Poland to the reservations of Bahrain and the Libyan Arab Jamahiriya (*ibid.*) (*Multilateral Treaties ...* (footnote 37 above), chap. III.3) and Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 88.

(3) It has often been thought that this inability to formulate reservations to treaty provisions which codify customary rules could be deduced from the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases.¹⁶⁷⁵

[S]peaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.¹⁶⁷⁶

(4) While the wording adopted by the Court is certainly not the most felicitous, the conclusion that some have drawn from it seems incorrect if this passage is put back into its context. The Court, in fact, is quite circumspect about the deductions called for by the exclusion of certain reservations. Noting that the faculty to formulate reservations to article 6 (on delimitation) of the Convention on the Continental Shelf of 1958 was not excluded by article 12 on reservations,¹⁶⁷⁷ as it was in the case of articles 1–3, the Court considered it a “normal” and

legitimate inference that it was considered to have a different and less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law.¹⁶⁷⁸

(5) Thus, it is not true that the Court affirmed the inadmissibility of reservations in respect of customary law;¹⁶⁷⁹ it simply stated that, in the case under consideration, the different treatment which the authors of the Convention accorded to articles 1–3, on the one hand, and article 6, on the other, suggested that they did not consider that the latter codified a customary rule which, moreover, confirms the Court’s own conclusion.

(6) Furthermore, the judgment itself states, in an often-neglected dictum, that “no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention [on

the Continental Shelf]”.¹⁶⁸⁰ Judge Morelli, dissenting, does not contradict this when he writes: “Naturally the power to make reservations affects only the contractual obligation flowing from the convention ... It goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified.”¹⁶⁸¹ This clearly implies that the customary nature of the rule reflected in a treaty provision in respect of which a reservation is formulated does not in itself constitute grounds for invalidating the reservation: “the faculty of making reservations to a treaty provision has no necessary connection with the question of whether or not the provision can be considered as expressing a generally recognized rule of law”.¹⁶⁸²

(7) Moreover, although this principle is sometimes challenged,¹⁶⁸³ it is recognized in the preponderance of the literature,¹⁶⁸⁴ and rightly so:

– customary rules are binding on States, independently of their expression of consent to a treaty rule¹⁶⁸⁵ but, unlike the case of peremptory norms, States may opt out by agreement *inter se*; it is not clear why they could not do so through a reservation¹⁶⁸⁶—providing that the latter is permissible—but this is precisely the question at hand;

– a reservation concerns only the expression of the rule in the context of the treaty, not its existence as a customary rule, even if, in some cases, it may cast doubt on the rule’s general acceptance “as law”,¹⁶⁸⁷ as the

¹⁶⁸⁰ *Ibid.*, p. 40, para. 65.

¹⁶⁸¹ *Ibid.*, p. 198.

¹⁶⁸² Dissenting opinion of *ad hoc* Judge Sørensen, *ibid.*, p. 248.

¹⁶⁸³ See the position taken by Mr. Briggs in the declaration which he attached to the arbitral award of 30 June 1977 in the *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (footnote 24 above), pp. 123–124.

¹⁶⁸⁴ See Coccia, “Reservations to multilateral treaties on human rights” (footnote 196 above), pp. 31–32; G. Gaja, “Le riserve al Patto sui diritti civili e politici e il diritto consuetudinario”, *Rivista di diritto internazionale*, vol. 79 (1996), pp. 451–452; Imbert, “La question des réserves dans la décision arbitrale du 30 juin 1977 ...” (footnote 1016 above), p. 48; Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 159–171; and Sucharipa-Behrmann, “The legal effects of reservations ...” (footnote 1617 above), pp. 76–77.

¹⁶⁸⁵ See the objection of Finland to the reservations of Yemen to article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965: “By making a reservation a State cannot contract out from universally binding human rights standards [but this is true as a general rule]” (*Multilateral Treaties ...* (footnote 37 above), chap. IV.2).

¹⁶⁸⁶ In that regard, see the dissenting opinion of *ad hoc* Judge Sørensen in the *North Sea Continental Shelf* cases (footnote 1521 above) p. 248; see also Coccia, “Reservations to multilateral treaties on human rights” (footnote 196 above), p. 32.

¹⁶⁸⁷ See article 38, paragraph 1 (b), of the Statute of the International Court of Justice. In that regard, see R. R. Baxter, “Treaties and customs”, *Collected Courses of the Hague Academy of International Law, 1970-I*, vol. 129 (1971), p. 50; Coccia, “Reservations to multilateral treaties on human rights” (footnote 196 above), p. 31; Gaja, “Le riserve al Patto sui diritti civili e politici ...” (footnote 1684 above), p. 451; and Teboul, “Remarques sur les réserves ...” (footnote 1571 above), pp. 711–714. Under certain (but not all) circumstances, the same may be true of the existence of a reservation clause (see Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 246, and Reuter, “Solidarité et divisibilité ...” (footnote 405 above), p. 631, footnote 16 (also reproduced in Reuter, *Le développement ...* (footnote 405 above), pp. 370–371)).

¹⁶⁷⁵ *Judgment of 20 February 1969, North Sea Continental Shelf* (see footnote 1521 above). See, in particular, the dissenting opinion of Judge Morelli, appended to the judgment (pp. 198–199); see also the many commentaries cited in Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 244; see also Teboul, “Remarques sur les réserves ...” (footnote 1571 above), p. 685.

¹⁶⁷⁶ *North Sea Continental Shelf* (see footnote 1521 above), pp. 38–39, para. 63.

¹⁶⁷⁷ See paragraph (5) of the commentary to guideline 3.1.2.

¹⁶⁷⁸ *North Sea Continental Shelf* (see footnote 1521 above), p. 40, para. 66; see also pp. 38–39, para. 63. In support of this position, see the individual opinion of Judge Padilla Nervo, *ibid.*, p. 89; *contra*, see the dissenting opinion of Judge Korotkiy, *ibid.*, p. 163.

¹⁶⁷⁹ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 244, footnote 22, and, in the same vein, see A. Pellet, “La C.I.J. et les réserves aux traités: remarques cursives sur une révolution jurisprudentielle”, in N. Ando, E. McWhinney and R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda*, The Hague, Kluwer Law International, 2002, vol. 1, pp. 507–508. In his dissenting opinion, Judge Tanaka takes the opposing position with respect to “the application of the provision for settlement by agreement, since this is required by general international law, notwithstanding the fact that Article 12 of the Convention does not expressly exclude Article 6, paragraphs 1 and 2, from the exercise of the reservation faculty” (*North Sea Continental Shelf* (see footnote 1521 above), p. 182); this confuses the question of the faculty to make a reservation with that of the reservation’s effects, where the provision that the reservation concerns is of a customary, and even a peremptory, nature (strangely, Judge Tanaka considers that the equidistance principle “must be recognized as *jus cogens*”—*ibid.*, p. 182).

United Kingdom remarked in its observations on general comment No. 24 of the Human Rights Committee, “there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law”;¹⁶⁸⁸

– if the customary nature of the rule is well-established, States remain bound by it, independently of the treaty;¹⁶⁸⁹

– despite appearances, States may have a rationale for their action—for example, the desire to avoid placing the obligations in question within the purview of the monitoring or dispute settlement mechanisms envisaged in the treaty or to limit the role of domestic judges, who may have different competences with respect to treaty rules, on the one hand, and customary rules, on the other;¹⁶⁹⁰

– moreover, as noted by France in its observations on general comment No. 24, “the State’s duty to observe a general customary principle should [not] be confused with its agreement to be bound by the expression of that principle in a treaty, especially with the developments and clarifications that such formalization involves”;¹⁶⁹¹

– and, lastly, a reservation may be the means by which a “persistent objector” manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a rule which cannot be invoked against it under general international law.¹⁶⁹²

(8) The question has been raised, however, whether this solution can be transposed to the field of human rights.¹⁶⁹³ The Human Rights Committee challenged this view on the basis of the specific characteristics of human rights treaties:

Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.¹⁶⁹⁴

¹⁶⁸⁸ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), pp. 131–132, para. 7.

¹⁶⁸⁹ See guideline 4.4.2 and commentary thereto.

¹⁶⁹⁰ Such is the case in France, where treaties (under article 55 of the Constitution), but not customary norms, take precedence over laws; see the 20 October 1989 decision by the Assembly of the French Council of State in the *Nicolo* case, *Recueil des décisions du Conseil d’État, 1989*, p. 190, Frydman’s conclusions, and the 6 June 1997 decision in the *Aquarone* case, *Recueil des décisions du Conseil d’État, 1997*, p. 206, Bachelier’s conclusions.

¹⁶⁹¹ *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40 (A/51/40)*, vol. I, p. 104, para. 5; in the same vein, see the comment by the United States of America (in the Committee’s 1996 report, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), pp. 126–130). See also G. Cohen-Jonathan, “Les réserves dans les traités institutionnels relatifs aux droits de l’homme. Nouveaux aspects européens et internationaux”, *RGDIP*, vol. 100 (1996), pp. 932–933.

¹⁶⁹² See the final working paper on reservations to human rights treaties prepared by Ms. Françoise Hampson in 2004 (footnote 1151 above), footnote 45.

¹⁶⁹³ See the second report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur, *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478, paras. 143–147. See also Simma and Hernández, “Legal consequences of an impermissible reservation ...” (footnote 1610 above), pp. 63–68.

¹⁶⁹⁴ General comment No. 24, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), para. 8.

(9) First, it should be noted that the Committee confirmed that reservations to customary rules are not excluded *a priori*. In arguing to the contrary in the specific case of human rights treaties, it simply notes that these instruments are designed to protect the rights of individuals. But this premise does not have the consequences that the Committee attributes to it¹⁶⁹⁵—first, because a reservation to a human rights treaty provision which reflects a customary rule in no way absolves the reserving State of its obligation to respect the rule as such¹⁶⁹⁶ and, secondly, because in practice it is quite likely that a reservation to such a rule (especially if it is a peremptory norm) will be incompatible with the object and purpose of the treaty by virtue of the applicable general rules.¹⁶⁹⁷

(10) On the more general issue of codifying conventions, it might be wondered whether reservations to them are not incompatible with their object and purpose. There is no doubt that “*le désir de codifier s’accompagne normalement du souci de préserver la règle qui est affirmée*” [the desire to codify is normally accompanied by a concern to preserve the rule being affirmed].¹⁶⁹⁸ “*En*

¹⁶⁹⁵ For an opposing view, see Thomas Giegerich, “Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungs-kompetenzen von Vertragsgremien—Ein Konstitutioneller Ansatz” [Reservations to human rights agreements—admissibility, validity, and review powers of treaty bodies: a constitutional approach], *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*, vol. 55 (1995), p. 744 (English summary, pp. 778–782, at pp. 779–780). See also Pellet and Müller, “Reservations to human rights treaties: not an absolute evil” (footnote 1619 above), pp. 531–533.

¹⁶⁹⁶ See paragraph (7) above and guideline 4.4.2 (Absence of effect on rights and obligations under customary international law). According to the Human Rights Committee, “a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language” (general comment No. 24, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), para. 8). This is certainly true, but it does not automatically mean that reservations to the relevant provisions of the International Covenant on Civil and Political Rights are prohibited; if these rights must be respected, it is because of their customary and, in some cases, peremptory nature, not because of their inclusion in the Covenant. For a similar view, see Gaja, “Le riserve al Patto sui diritti civili e politici ...” (footnote 1684 above), p. 452. Furthermore, the Committee simply makes assertions; it does not justify its identification of customary rules attached to these norms; in another context, it has been said that “[t]he ‘ought’ merges with the ‘is’, the *lex ferenda* with the *lex lata*” (T. Meron, “The Geneva Conventions as customary norms”, *AJIL*, vol. 81 (1987) p. 361); see also Schabas’s well-argued critique concerning articles 6 and 7 of the Covenant (“Invalid reservations ...” (footnote 1610 above), pp. 296–310).

¹⁶⁹⁷ In that regard, see Ms. Françoise Hampson’s working paper on reservations to human rights treaties (E/CN.4/Sub.2/1999/28, para. 17) and her final working paper on that topic (footnote 1151 above): “In theory, a State may make a reservation to a treaty provision without necessarily calling into question the customary status of the norm or its willingness to be bound by the customary norm. Nevertheless, in practice, reservations to provisions which reflect customary international law norms are likely to be viewed with considerable suspicion.”

¹⁶⁹⁸ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 246; see also Teboul, “Remarques sur les réserves aux conventions de codification” (footnote 1571 above) p. 680, who notes: “Toutes deux utiles, les notions de réserve et de convention de codification s’accommodent mal l’une de l’autre” [while both are useful, the concepts of reservation and codification convention are hard to

effet, si l'on peut, à l'occasion d'un traité de codification, formuler une réserve portant sur une disposition d'origine coutumière, le traité de codification aura (...) manqué son but" [If it were possible to formulate a reservation to a provision of customary origin in the context of a codification treaty, the codification treaty would ... fail in its objectives],¹⁶⁹⁹ to the point that reservations and, at all events, multiple reservations, have been viewed as "la négation même du travail de codification" [the very negation of the work of codification].¹⁷⁰⁰

(11) This does not mean that, in essence, any reservation to a codification treaty is incompatible with its object and purpose:

– it is true that reservations are hardly compatible with the desired objective of standardizing and clarifying customary law but, "à bien y réfléchir, l'équilibre d'ensemble auquel la réserve porte atteinte, constitue non l'objet et le but du traité lui-même, mais l'objet et le but de la négociation dont ce traité émane" [on reflection, the overall balance which the reservation threatens is not the object and purpose of the treaty itself, but the object and purpose of the negotiations which gave rise to the treaty];¹⁷⁰¹

– the very concept of a "codification convention" is tenuous. As the Commission has often stressed, it is impossible to distinguish between the codification *stricto sensu* of international law and its progressive development.¹⁷⁰² "Quel quantum de règles d'origine coutumière un traité doit-il contenir pour être qualifié de 'traité de codification'?" [how many rules of customary origin must a treaty contain in order to be defined as a "codification treaty"?],¹⁷⁰³

– the status of the rules included in a treaty is not unchangeable over time: a rule which falls under the heading of progressive development may become pure codification and a "codification convention" often crystallizes as rules of general international law rules which did not have that status at the time of its adoption.¹⁷⁰⁴

reconcile with one another]. His study provides a clear overview of the whole question of reservations to codification conventions (*ibid.*, pp. 679–717, *passim*).

¹⁶⁹⁹ Reuter, "Solidarité et divisibilité ..." (footnote 405 above), pp. 630–631 (also reproduced in Reuter, *Le développement ...* (footnote 405 above), p. 370). The author adds that, for this reason, the treaty would also give rise to a situation further from its object and purpose than if it had not existed, since the scope of application of a general rule would be restricted (*ibid.*). This second statement is more debatable: it seems to assume that the reserving State, by virtue of its reservation, is exempt from the application of the rule; this is not the case (see footnote 2315 below).

¹⁷⁰⁰ Mr. Ago in *Yearbook ... 1965*, vol. I, 797th meeting of the Commission, 8 June 1965, p. 153, para. 58.

¹⁷⁰¹ Teboul, "Remarques sur les réserves aux conventions de codification" (footnote 1571 above), p. 700.

¹⁷⁰² See, for example, the Commission's reports on its eighth (1956) and forty-eighth (1996) sessions, *Yearbook ... 1956*, vol. II, pp. 255–256, para. 26, and *Yearbook ... 1996*, vol. II (Part Two), p. 86, paras. 156–157.

¹⁷⁰³ Reuter, "Solidarité et divisibilité ..." (footnote 405 above), p. 632, also reproduced in Reuter, *Le développement ...* (footnote 405 above), p. 371.

¹⁷⁰⁴ See paragraph (13) below; on the issue of the death penalty with regard to articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights (taking a contrary position), see Schabas, "Invalid reservations ..." (footnote 1610 above), pp. 308–310.

(12) Thus, the nature of codification conventions does not, as such, constitute an obstacle to the formulation of reservations to some of their provisions on the same grounds (and with the same limits) as any other treaty, and the arguments that can be put forward, in general terms, in support of the right to formulate reservations to a treaty provision that sets forth a customary rule¹⁷⁰⁵ are also fully transposable to them. Moreover, there is well-established practice in this area: there are more reservations to human rights treaties and codification treaties than to any other type of treaty.¹⁷⁰⁶ And while some objections may have been based on the customary nature of the rules concerned,¹⁷⁰⁷ the specific nature of these conventions seems never to have been invoked in support of a declaration of incompatibility with their object and purpose.

(13) The customary nature of the rule "reflected" by the treaty provision to which a reservation is formulated must be assessed at the time of formulation. It is not out of the question that the adoption of the treaty contributed to crystallizing the customary nature of the rule, especially if the reservation is formulated long after the treaty was concluded.¹⁷⁰⁸

(14) The Commission did not consider it necessary to draft a specific guideline on reservations to a treaty provision reflecting a peremptory norm of general international law (*jus cogens*). Such a norm is, in almost all cases, customary in nature.¹⁷⁰⁹ It follows that the reasoning applicable to reservations to treaty provisions reflecting "normal" customary rules can be transposed to reservations to provisions reflecting *jus cogens* norms.

(15) However, according to Reuter, since a reservation, through acceptance by other parties, establishes a "contractual relationship" among the parties, a reservation to a treaty provision that sets forth a peremptory norm of general international law is inconceivable: the resulting agreement would automatically be null and void as a consequence of the principle established in article 53 of the Vienna Convention.¹⁷¹⁰

¹⁷⁰⁵ See paragraph (2) above.

¹⁷⁰⁶ For example, as of 20 June 2011, the Vienna Convention on Diplomatic Relations was the object of 51 reservations or declarations by 31 States parties (*Multilateral Treaties ...* (footnote 37 above), chap. III.3) and the 1969 Vienna Convention was the object of 68 reservations or declarations by 34 States (*ibid.*, chap. XXIII.1). For its part, the International Covenant on Civil and Political Rights of 1966 has attracted 196 reservations or declarations by 62 States (*ibid.*, chap. IV.4).

¹⁷⁰⁷ See paragraph (2) above.

¹⁷⁰⁸ In its *Judgment of 20 February 1969* in the *North Sea Continental Shelf* cases (see footnote 1521 above), the International Court of Justice also recognized that "a norm-creating provision [may constitute] the foundation of, or [generate] a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed" (p. 41, para. 71).

¹⁷⁰⁹ Although the wording of article 53 of the 1969 and 1986 Vienna Conventions does not exclude the possibility that a treaty rule may, by itself, be a peremptory norm.

¹⁷¹⁰ Reuter, "Solidarité et divisibilité ..." (footnote 405 above), pp. 630–631 (also reproduced in Reuter, *Le développement ...* (footnote 405 above), p. 370). See also Teboul, "Remarques sur les réserves aux conventions de codification" (footnote 1571 above), pp. 691–692 and 707.

(16) This reasoning is far from self-evident: it is based on one of the postulates of the “opposability” school, according to which the question of the validity of reservations is left entirely to the subjective judgment of the contracting States or contracting organizations and depends only on the provisions of article 20 of the 1969 and 1986 Vienna Conventions.¹⁷¹¹ This assumption meets with serious objections;¹⁷¹² above all, it likens the reservations mechanism to the process by which a treaty is concluded, whereas a reservation is a *unilateral* act; although linked to the treaty, it has no exogenous effects. By definition, it “purports to exclude or to modify the legal effect of *certain provisions of the treaty** in their application” to the reserving State¹⁷¹³ and, if it is accepted, those are indeed its consequences;¹⁷¹⁴ however, whether or not it is accepted, “surrounding” international law remains intact; the legal situation of interested States is affected by it only in their *treaty relations*.¹⁷¹⁵ Other, more numerous authors assert the incompatibility of any reservation with a provision which reflects a peremptory norm of general international law, either without giving any explanation,¹⁷¹⁶ or arguing that such a reservation would, *ipso facto*, be contrary to the object and purpose of the treaty.¹⁷¹⁷

(17) This is also the position of the Human Rights Committee in its general comment No. 24:

Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant.¹⁷¹⁸

This formulation is debatable¹⁷¹⁹ and, in any case, cannot be generalized: it is perfectly conceivable that a treaty

¹⁷¹¹ “The validity of a reservation depends, under the Convention’s system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty” (Ruda, “Reservations to treaties” (footnote 56 above), p. 190).

¹⁷¹² See the first report on the law and practice relating to reservations to treaties by Mr. Alain Pellet, Special Rapporteur, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, paras. 100–105. See also paragraph (4) of the general commentary to Part 3 of the Guide to Practice and paragraph (11) of the commentary to guideline 4.1.

¹⁷¹³ See article 2, paragraph 1 (*d*), of the Vienna Conventions, reproduced in guideline 1.1.

¹⁷¹⁴ See article 21 of the Vienna Conventions.

¹⁷¹⁵ See section 4.4 of the Guide to Practice (Effect of a reservation on rights and obligations independent of the treaty).

¹⁷¹⁶ See, for example, Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 147.

¹⁷¹⁷ See the dissenting opinion of Judge Tanaka in the *North Sea Continental Shelf* cases (footnote 1521 above), p. 182.

¹⁷¹⁸ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), vol. I, annex V, p. 120, para. 8. In its comments, France argued that “paragraph 8 of general comment No. 24 (52) is drafted in such a way as to link the two distinct legal concepts of ‘peremptory norms’ and rules of ‘customary international law’, to the point of confusing them” (see Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (footnote 1691 above), p. 104, para. 3).

¹⁷¹⁹ See the doubts expressed on this subject by the United States of America which, in its observations on general comment No. 24, transposes to provisions expressing peremptory norms the solution applicable to provisions expressing customary rules: “It is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot choose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations” (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), p. 127).

might refer marginally to a rule of *jus cogens* without the latter being its object and purpose.

(18) It has, however, been argued that “*la règle prohibant la dérogation à une norme de jus cogens vise non seulement les rapports conventionnels mais aussi tous les actes juridiques, dont les actes unilatéraux*” [the rule prohibiting derogation from a rule of *jus cogens* applies not only to treaty relations, but also to all legal acts, including unilateral acts].¹⁷²⁰ This is certainly true and in fact constitutes the most convincing argument for not transposing to reservations to provisions expressing peremptory norms the reasoning that results in not excluding, in principle, the right to formulate reservations to treaty provisions reflecting customary rules.¹⁷²¹

(19) Conversely, it should be noted that when formulating a reservation, a State may, it is true, be seeking to exempt itself from the rule to which the reservation relates, and in the case of a peremptory norm of general international law this is out of the question¹⁷²²—particularly since it is unacceptable that a persistent objector should be able to thwart such a norm. The objectives of the reserving State, however, may be different: while accepting the content of the rule, it may wish to escape the consequences arising out of it, particularly in respect of monitoring,¹⁷²³ and on this point there is no reason why the line of argument followed in respect of customary rules which are *jus dispositivum* should not be transposed to peremptory norms.

(20) It should be noted, however, that there are other ways for States to avoid the consequences of the inclusion in a treaty of a peremptory norm of general international law: they may formulate a reservation, not to the substantive provision concerned, but to “secondary” articles governing treaty relations (monitoring, dispute settlement, interpretation), even limiting their scope to a particular substantive provision.¹⁷²⁴

(21) Dissociation of this sort is illustrated by the line of argument followed by the International Court of Justice in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*:

¹⁷²⁰ Teboul, “Remarques sur les réserves ...” (footnote 1571 above), p. 707, footnote 52, referring to J.-D. Sicault, “Du caractère obligatoire des engagements unilatéraux en droit international public”, *RGDIP*, vol. 83 (1979), p. 663, and the legal literature cited therein.

¹⁷²¹ This is true *a fortiori* if we consider the reservation/acceptance “pair” as an agreement amending the treaty in the relations between the two States concerned (see Coccia, “Reservations to multilateral treaties on human rights” (footnote 196 above), pp. 30–31; see also the position of Reuter referred to in paragraph (15) above); this analysis, however, is unconvincing (see paragraph (16) above).

¹⁷²² There are, of course, few examples of reservations which are clearly contrary to a norm of *jus cogens*.

¹⁷²³ See paragraph (7) above.

¹⁷²⁴ In this regard, see, for example, the reservations of Malawi and Mexico to the International Convention against the taking of hostages of 1979, subjecting the application of article 16 (on dispute settlement and jurisdiction of the Court) to the conditions of their optional declarations pursuant to Article 36, paragraph 2, of the Statute of the International Court of Justice, *Multilateral Treaties ...* (footnote 37 above), chap. XVIII.5. There can be no doubt that such reservations are not prohibited in principle; see guideline 3.1.5.7 and commentary thereto.

In relation to the DRC's argument that the reservation in question [to article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965] is without legal effect because, on the one hand, the prohibition on racial discrimination is a peremptory norm of general international law and, on the other, such a reservation is in conflict with a peremptory norm,

the Court referred

to its reasoning when dismissing the DRC's similar argument in regard to Rwanda's reservation to Article IX of the Genocide Convention (see paragraphs 64–69 above¹⁷²⁵): the fact that a dispute concerns non-compliance with a peremptory norm of general international law cannot suffice to found the Court's jurisdiction to entertain such a dispute, and there exists no peremptory norm requiring States to consent to such jurisdiction in order to settle disputes relating to the Convention on Racial Discrimination.¹⁷²⁶

In this case, it is clear that the Court found that the peremptory nature of the prohibition on racial discrimination did not invalidate the reservations relating not to the prohibitory norm itself but to the rules surrounding it.

(22) While it is of the view that the principle stated in guideline 3.1.5.3 applies to reservations to treaty provisions reflecting a customary peremptory norm,¹⁷²⁷ the Commission considers that States and international organizations should refrain from formulating such reservations and, when they deem it indispensable, should instead formulate reservations to the provisions concerning the treaty regime governing the rules in question.

3.1.5.4 Reservations to provisions concerning rights from which no derogation is permissible under any circumstances

A State or an international organization may not formulate a reservation to a treaty provision concerning rights from which no derogation is permissible under any circumstances, unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

Commentary

(1) At first sight, the question of reservations to provisions concerning obligations from which no derogation is permissible under any circumstances¹⁷²⁸ contained in human rights treaties, as well as in certain conventions on the law of armed conflict,¹⁷²⁹ environmental

protection¹⁷³⁰ or diplomatic relations,¹⁷³¹ may appear very similar to the question of reservations to treaty provisions reflecting peremptory norms of general international law;¹⁷³² it can, however, be resolved on its own terms. States frequently justify their objections to reservations to such provisions on the grounds of the treaty-based prohibition against suspending their application whatever the circumstances.¹⁷³³

(2) Clearly, to the extent that non-derogable provisions relate to rules of *jus cogens*, the reasoning applicable to the latter applies also to the former.¹⁷³⁴ However, the two are not necessarily identical.¹⁷³⁵ According to the Human Rights Committee:

While there is no automatic correlation between reservations to non-derogable provisions and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.¹⁷³⁶

This last point is question-begging and is undoubtedly motivated by reasons of convenience but is not based on any principle of positive law and could only reflect the progressive development of international law, rather

¹⁷³⁰ Although most environmental protection conventions contain rules considered to be non-derogable (see article 11 of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal), they very often prohibit all reservations. See also article 311, paragraph 3, of the United Nations Convention on the Law of the Sea.

¹⁷³¹ See article 45 of the Vienna Convention on Diplomatic Relations of 1961. See also International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, I.C.J. Reports 1980, p. 3, at p. 40, para. 86.

¹⁷³² On this issue, see paragraphs (13)–(22) of the commentary to guideline 3.1.5. See also Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 147–159; or Pellet, “1969 Vienna Convention. Article 19: Formulation of reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 464–468, paras. 146–159.

¹⁷³³ See article 4, paragraph 2, of the International Covenant on Civil and Political Rights of 1966, article 15, paragraph 2, of the European Convention on Human Rights (see also article 3 of Protocol No. 6, concerning the abolition of the death penalty, article 4, paragraph 3, of Protocol No. 7 and article 2 of Protocol No. 13, concerning the abolition of the death penalty in all circumstances), and article 27 of the American Convention on Human Rights. Neither the International Covenant on Economic, Social and Cultural Rights nor the African Charter on Human and Peoples' Rights contain clauses of this type (see Ouguergouz, “L'absence de clauses de dérogation dans certains traités relatifs aux droits de l'homme” (footnote 392 above), pp. 289–336; in the same sense, see O. de Frouville, *L'intangibilité des droits de l'homme et droit international. Régime conventionnel des droits de l'homme et droit des traités*, Paris, Pedone, 2004, p. 302).

¹⁷³⁴ See the Human Rights Committee's general comment No. 24: “some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms [...]—the prohibition of torture and arbitrary deprivation of life are examples” (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), para. 10).

¹⁷³⁵ See the Human Rights Committee's general comment No. 29, Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40 (A/56/40)*, vol. I, annex VI, para. 11. See also Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 153–155, or K. Teraya “Emerging hierarchy in international human rights and beyond: from the perspective of non-derogable rights”, *European Journal of International Law*, vol. 12, No. 5 (2001), pp. 917–947.

¹⁷³⁶ General comment No. 24, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), para. 10.

¹⁷²⁵ On this aspect of the judgment, see paragraphs (2)–(3) of the commentary to guideline 3.1.5.7.

¹⁷²⁶ *Armed Activities on the Territory of the Congo, Jurisdiction and Admissibility, Judgment of 3 February 2006* (see footnote 1600 above), p. 35, para. 78.

¹⁷²⁷ On the effects of such reservations, see guideline 4.4.3 (Absence of effect on a peremptory norm of general international law (*jus cogens*)).

¹⁷²⁸ On this concept, see D. Prémont, C. Stenersen and I. Oseredczuk (eds.), *Droits intangibles et états d'exception*, Brussels, Bruylant, 1996, p. 644; or Ludovic Hennebel, “Les droits intangibles”, in E. Bribosia and L. Hennebel (eds.), *Classer les droits de l'homme*, Brussels, Bruylant, 2004, pp. 195–218.

¹⁷²⁹ The principles set out in common article 3, paragraph 1, of the Geneva Conventions for the protection of war victims of 1949 are non-derogable and must be respected “at any time and in any place”.

than codification *stricto sensu*. Incidentally, it follows *a contrario* from this position that, in the Committee's view, if a non-derogable right is not a matter of *jus cogens*, it can in principle be the object of a reservation.

(3) The Inter-American Court of Human Rights declared in its advisory opinion of 8 September 1983 on *Restrictions to the Death Penalty*:

Article 27 of the [American] Convention [on Human Rights] allows the States Parties to suspend, in time of war, public danger, or other emergency that threatens their independence or security, the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or derogate from certain basic or essential rights, among them the right to life guaranteed by Article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention.¹⁷³⁷

(4) In opposition to any possibility of formulating reservations to a non-derogable provision, it has been argued that, when any suspension of the obligations in question is excluded by the treaty, "with greater reason one should not admit any reservations, perpetuated in time until withdrawn by the State at issue; such reservations are ... without any *caveat*, incompatible with the object and purpose of those treaties".¹⁷³⁸ This argument is not persuasive: it is one thing to prevent derogations from a binding provision, but another thing to determine whether a State is bound by the provision at issue.¹⁷³⁹ It is this second problem that needs to be resolved.

(5) It must therefore be accepted that, while certain reservations to non-derogable provisions are certainly ruled out because they would be contrary to the object and purpose of the treaty, this is not necessarily always the case.¹⁷⁴⁰ The non-derogable nature of a right protected by

a human rights treaty reveals the importance with which it is viewed by the contracting States or contracting organizations, and it follows that any reservation aimed purely and simply at preventing its implementation is without doubt contrary to the object and purpose of the treaty.¹⁷⁴¹ It does not follow, however, that this non-derogable nature in itself prevents a reservation from being formulated to the provision setting out the right in question, provided that it applies only to certain limited aspects relating to the implementation of that right.

(6) This balanced solution is well illustrated by the objection of Denmark to the reservations of the United States to articles 6–7 of the International Covenant on Civil and Political Rights of 1966:

Denmark would like to recall article 4, paragraph 2, of the Covenant, according to which no derogations from a number of fundamental articles, *inter alia* 6 and 7, may be made by a State Party even in time of public emergency which threatens the life of the nation.

In the opinion of Denmark, reservation (2) of the United States with respect to capital punishment for crimes committed by persons below eighteen years of age as well as reservation (3) with respect to article 7 constitute general derogations from articles 6 and 7, while according to article 4, paragraph 2, of the Covenant such derogations are not permitted.

Therefore, and taking into account that articles 6 and 7 are protecting two of the most basic rights contained in the Covenant, the Government of Denmark regards the said reservations incompatible with the object and purpose of the Covenant, and consequently Denmark objects to the reservations.¹⁷⁴²

Denmark objected not only because the United States reservations related to non-derogable rights, but also because their wording was such that they left essential provisions of the treaty empty of any substance. It should be noted that in certain cases, States parties formulated no objection to reservations relating to provisions in respect of which no derogation is permitted.¹⁷⁴³

(7) Naturally, the fact that a provision may in principle be the object of derogation does not mean that all reservations relating to it will be permissible.¹⁷⁴⁴ The criterion of compatibility with the object and purpose of the treaty also applies to them. As O. de Frouville remarks, where non-derogable rights are concerned, assessing the compatibility of the reservation with the object and purpose of the treaty entails determining whether "*la réserve revient à nier l'existence d'un droit de l'Homme reconnu par la convention. ... Mais qu'entend-on par la 'négation*

¹⁷³⁷ *Restrictions to the Death Penalty*, Advisory Opinion of 8 September 1983 (see footnote 197 above), para. 61.

¹⁷³⁸ Separate opinion of Judge Antonio Augusto Cançado Trindade, appended to the decision of the Inter-American Court dated 22 January 1999 in *Blake Case, Reparations (Art. 63(1) of the American Convention on Human Rights)*, Series C, No. 48, para. 11; see the favourable comment by Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 155. In the same sense, see the objection by the Netherlands mentioning that the United States reservation to article 7 of the International Covenant on Civil and Political Rights of 1966 "has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogations, not even in times of public emergency, are permitted" (*Multilateral Treaties ...* (footnote 37 above), chap. IV.4).

¹⁷³⁹ See the observations of the United Kingdom on general comment No. 24 of the Human Rights Committee: "Derogation from a formally contracted obligation and reluctance to undertake the obligation in the first place are not the same thing" (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), p. 131, para. 6).

¹⁷⁴⁰ See the final working paper on reservations to human rights treaties prepared by Ms. Françoise Hampson in 2004 (footnote 1151 above), para. 52; see also R. Higgins, "Human rights: some questions of integrity", *Michigan Law Review*, vol. 52 (1989), p. 15; McBride "Reservations and the capacity of States ..." (footnote 1661 above), pp. 163–164; Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), p. 113; or C. J. Redgwell, "Reservations to treaties and Human Rights Committee General Comment No. 24 (52)",

International and Comparative Law Quarterly, vol. 46 (1997), p. 402; *contra*: Lijnzaad, *Reservations to UN Human Rights Treaties ...* (footnote 463 above), p. 91.

¹⁷⁴¹ See guideline 3.1.5: "A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty ...".

¹⁷⁴² *Multilateral Treaties ...* (footnote 37 above), chap. IV.4; see also, although they are less clearly based on the non-derogable nature of articles 6 and 7, the objections of Belgium, Finland, Germany, Italy, the Netherlands, as previously mentioned, and those of Norway, Portugal and Sweden (*ibid.*).

¹⁷⁴³ See the many examples given by W. A. Schabas relating to the International Covenant on Civil and Political Rights of 1966, the European Convention on Human Rights and the American Convention on Human Rights, Schabas, "Reservations to human rights treaties ..." (footnote 966 above), pp. 51–52, footnote 51.

¹⁷⁴⁴ See Redgwell, "Reservations to treaties ..." (footnote 1740 above), p. 402.

de l'existence' d'un droit? ... On retrouve la distinction classique entre l'essence et l'exercice d'un droit. Un droit peut être réglementé dans son exercice, mais cette réglementation ne doit jamais attenter à sa substance." [the reservation amounts to denying the existence of a human right recognized by the convention ... But what is meant by "denying the existence" of a right? ... Here we encounter the classic distinction between the *essence* and the *exercice* of a right. There may be regulation of the exercise of a right, but regulation must never undermine the substance of the right.]¹⁷⁴⁵

(8) This leads to several observations:

– in the first place, reservations to provisions from which a treaty allows no derogation are certainly possible provided they do not call into question the basic principle set forth in the treaty provision; in that situation, the methodological guidance contained in guideline 3.1.5.1¹⁷⁴⁶ is fully applicable;

– in the second place, however, it is necessary to proceed with the utmost caution, and this is why the Commission has drafted the first sentence of guideline 3.1.5.4 in the negative ("A State or an international organization may not formulate a reservation ..., unless"), as it has done on several occasions in the past when it wished to draw attention to the exceptional nature of certain behaviour in relation to reservations.¹⁷⁴⁷

(9) Moreover, in elaborating this guideline the Commission took care not to give the impression that it was introducing an additional criterion of permissibility with regard to reservations: the assessment of compatibility referred to in the second sentence of the provision concerns the reservation's relationship to "the essential rights and obligations arising out of that treaty", the effect on "an essential element of the treaty" being cited as one of the criteria for incompatibility with the object and purpose.¹⁷⁴⁸

3.1.5.5 Reservations relating to internal law

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific rules of the internal law of that State or of specific rules of that organization in force at the time of the formulation of the reservation may be formulated only insofar as it does not affect an essential element of the treaty nor its general tenor.

Commentary

(1) A reason frequently put forward by States in support of their formulation of a reservation relates to their desire to preserve the integrity of specific rules of their internal law.

¹⁷⁴⁵ De Frouville, *L'intangibilité des droits* ... (footnote 1733 above), p. 302.

¹⁷⁴⁶ "Determination of the object and purpose of the treaty".

¹⁷⁴⁷ See guidelines 2.3 (Late formulation of reservations), 2.4.7 (Late formulation of an interpretative declaration), 2.5.11 (Effect of a partial withdrawal of a reservation), 3.1.3 (Permissibility of reservations not prohibited by the treaty) and 3.1.4 (Permissibility of specified reservations).

¹⁷⁴⁸ See guideline 3.1.5 and, in particular, paragraph (14) (b) of the commentary thereto.

(2) Although similar in certain respects, a distinction must be drawn between the issues raised by such reservations and those arising out of vague or general reservations. The latter are often formulated by reference to internal law in general or to whole sections of such law (such as the constitution, criminal law, family law) without any further detail, thus making it impossible to assess the compatibility of the reservation in question with the object and purpose of the treaty. The question which guideline 3.1.5.5 seeks to answer is a different one, namely whether the formulation of a reservation (clearly expressed and sufficiently detailed) can be justified by considerations arising from internal law.¹⁷⁴⁹

(3) Here again, in the Commission's view, a nuanced response is essential, and it is certainly not possible to respond categorically in the negative, as certain objections to reservations of this type would seem to suggest. For instance, several States have objected to the reservation made by Canada to the Convention on environmental impact assessment in a transboundary context of 25 February 1991, on the grounds that the reservation "render[s] compliance with the provisions of the Convention dependent on certain norms of Canada's internal legislation".¹⁷⁵⁰ Similarly, Finland objected to reservations made by several States to the Convention on the rights of the child of 1989, on the "general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty".¹⁷⁵¹

(4) This ground for objection is unconvincing. True, in accordance with article 27 of the 1969 Vienna Convention,¹⁷⁵² a party may not "invoke the provisions of its internal law as justification for its failure to perform a treaty".¹⁷⁵³ The assumption, however, is that the issue is settled, that is, that the provisions in question are applicable to the reserving States; but that is precisely the question. As has been correctly pointed out, a State very often formulates a reservation *because* the treaty imposes on it obligations incompatible with its internal law, which it is not in a position to amend,¹⁷⁵⁴ at least

¹⁷⁴⁹ See paragraphs (4)–(6) of the commentary to guideline 3.1.5.2.

¹⁷⁵⁰ See the objections of Spain, France, Ireland, Luxembourg, Norway and Sweden in *Multilateral Treaties* ... (footnote 37 above), chap. XXVII.4.

¹⁷⁵¹ Objections by Finland to the reservations of Indonesia, Malaysia, Oman, Qatar and Singapore (*ibid.*, chap. IV.11). See also, for example, the objections of Denmark, Finland, Greece, Ireland, Mexico, Norway and Sweden to the second reservation of the United States to the Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, chap. IV.1); concerning the wording of the reservation, see paragraph (6) of the commentary to guideline 3.1.5.2; see also paragraph (4) of that commentary.

¹⁷⁵² Expressly invoked, for instance, by Estonia and the Netherlands to support their objections to the same reservation by the United States (*ibid.*).

¹⁷⁵³ In the words of article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46" (which has to do with "imperfect ratifications"). The rule set out in article 27 of the Convention concerns treaties in force, whereas, by definition, a reservation purports to exclude or to modify the legal effect of the provision in question in its application to the author of the reservation.

¹⁷⁵⁴ See Schabas, "Reservations to the Convention on the Rights of the Child" (footnote 1609 above), pp. 479–480 and, by the same author, "Reservations to human rights treaties ..." (footnote 966 above), p. 59.

initially.¹⁷⁵⁵ Moreover, article 57 of the European Convention on Human Rights not only authorizes a State party to formulate a reservation where its internal law is not in conformity with a provision of the Convention, but restricts that right exclusively to instances where “any law ... in force in its territory is not in conformity with the provision”.¹⁷⁵⁶ Apart from the European Convention on Human Rights, there are instances of reservations relating to the application of internal law that give rise to no objections and have in fact not met with any.¹⁷⁵⁷ On the other hand, this same provision expressly prohibits “reservations of a general character”.

(5) What matters here is that the State formulating the reservation should not use its internal law¹⁷⁵⁸ as a

¹⁷⁵⁵ Sometimes the reserving State indicates the period of time it will need to bring its domestic law into line with the treaty (as in the case of the reservation of Estonia to the application of article 6, or of that of Lithuania to article 5, paragraph 3, of the European Convention on Human Rights, which set one-year time limits (<http://conventions.coe.int/>)), or it indicates its intention to do so (as in the case of the reservations Cyprus and Malawi made upon accession to the Convention on the Elimination of All Forms of Discrimination against Women of 1979, commitments which were in fact kept—see *Multilateral Treaties ...* (footnote 37 above), chap. IV.8); see also the statement made by Indonesia upon accession to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal of 22 March 1989 (*ibid.*, chap. XXVII.3). It is also not unusual for a State to withdraw a reservation formulated without a time indication, once it has amended the provisions of its national law that had prompted the reservation (see the withdrawal by France, Ireland and the United Kingdom of several reservations to the Convention on the Elimination of All Forms of Discrimination against Women, *ibid.*, chap. IV.8); see also the successive partial withdrawals (1996, 1998, 1999, 2001) by Finland of its reservations to article 6, paragraph 1, of the European Convention on Human Rights or the full withdrawal by Serbia of its reservations to the same Convention on 10 May 2011 (<http://conventions.coe.int/>). Such practices are laudable and should definitely be encouraged (see guideline 2.5.3 of the Guide to Practice and commentary thereto); yet they cannot be used as an argument for the impermissibility in principle of “reservations relating to internal law”.

¹⁷⁵⁶ See paragraph (8) of the commentary to guideline 3.1.2.

¹⁷⁵⁷ See, for example, the reservation of Mozambique to the International Convention against the taking of hostages of 17 December 1979, *Multilateral Treaties ...* (footnote 37 above), chap. XVIII.5 (a similar reservation regarding the extradition of Mozambican nationals reappears in connection with other treaties such as, for example, the International Convention for the Suppression of the Financing of Terrorism (*ibid.*, chap. XVIII.11)); the reservations by Guatemala and the Philippines to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1962 (*ibid.*, chap. XVI.3); the reservations by Colombia (made upon signature), the Islamic Republic of Iran and the Netherlands (though very vague) to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (*ibid.*, chap. VI.19). The reservation of France to article 15, paragraph 1, of the European Convention on Human Rights has given rise to more extensive discussion: see N. Questiaux, “La Convention européenne des droits de l’homme et l’article 16 de la Constitution du 4 octobre 1958”, *Revue des droits de l’homme/Human Rights Journal*, vol. 3 (1970), pp. 651–663; A. Pellet, “La ratification par la France de la Convention européenne des droits de l’homme”, *Revue de droit public et de la science politique en France et à l’étranger*, vol. 90 (1974), pp. 1358–1365; or V. Coussirat-Coustère, “La réserve française à l’article 15 de la Convention européenne des droits de l’homme”, *Journal du droit international*, vol. 102 (1975), pp. 269–293.

¹⁷⁵⁸ Or in the case of international organizations their “rules of the organization”: the term is taken from articles 27 and 46 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. It also appears (and is defined) in article 2, subparagraph (b), of the Commission’s draft articles on the responsibility of international organizations as adopted by the Commission on second reading in 2011 (see

cover for not actually accepting any new international obligations,¹⁷⁵⁹ whereas the aim of the treaty is to change the practice of States parties to the treaty. While article 27 of the Vienna Conventions cannot rightly be said to apply to the case in point,¹⁷⁶⁰ it should nevertheless be borne in mind that national laws are “merely facts” from the standpoint of international law¹⁷⁶¹ and that the very aim of a treaty can be to lead States to modify them.

(6) The Commission preferred the expression “specific rules of the internal law” to “provisions of internal law”, which might have seemed to suggest that only the written rules of a constitutional, legislative or regulatory nature were involved, whereas guideline 3.1.5.5 applies also to customary rules or case law. Similarly, the expression “rules of the organization” refers to the “established practice of the organization” as well as the constituent instruments and “decisions, resolutions and other acts of the international organization adopted in accordance with those instruments”.¹⁷⁶²

(7) The Commission is aware that guideline 3.1.5.5 may, on first reading, seem to be merely a repetition of the principle set out in article 19, subparagraph (c), of the Vienna Conventions and reproduced in guideline 3.1. Its function is important, nonetheless: it is to establish that, contrary to an erroneous but fairly widespread perception, a reservation is not invalid solely because it aims to preserve the integrity of specific rules of internal law—on the understanding that, as is the case of any reservation, those made with such an objective must be compatible with the object and purpose of the treaty to which they relate.

paragraph 88 of the present report, *Yearbook ... 2011*, vol. II (Part Two), p. 49). However, the reference to the rules of the organization may not raise a similar problem if the reservation only applies to the relations between the organization and its members.

¹⁷⁵⁹ De Frouville calls reservations that have effect “réserves potestatives” [potestative reservations] (de Frouville, *L’intangibilité des droits de l’homme ...* (footnote 1733 above), pp. 347–349). In the same sense, Coulée points out that such reservations cast doubt on the reality of the State’s commitment (Coulée, “A propos d’une controverse ...” (footnote 1579 above), p. 503). In its concluding observations of 6 April 1995 on the initial report of the United States of America on its implementation of the International Covenant on Civil and Political Rights of 1966, the Human Rights Committee “regrets the extent of the State party’s reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant” (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), para. 279). See the analysis by Schabas, “Invalid reservations ...” (footnote 1610 above), pp. 277–325; and McBride, “Reservations and the capacity of States ...” (footnote 1661 above), p. 172.

¹⁷⁶⁰ See paragraph (4) above.

¹⁷⁶¹ *Certain German interests in Polish Upper Silesia, Judgment No. 7* of 25 May 1926 (footnote 845 above), p. 19; see also Arbitration Commission for Yugoslavia, Opinion No. 1 of 29 November 1991, reproduced in RGDIP, vol. 96 (1992), p. 264. The principle is confirmed in article 4 of the International Law Commission’s 2001 articles on responsibility of States for internationally wrongful acts, adopted by the Commission at its fifty-third session, in 2001, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42, annexed to General Assembly resolution 56/83 of 12 December 2001.

¹⁷⁶² Article 2, subparagraph (b), of the Commission’s draft articles on the responsibility of international organizations as adopted by the Commission on second reading in 2011 (see paragraph 88 of the present report, *Yearbook ... 2011*, vol. II (Part Two), p. 49).

3.1.5.6 Reservations to treaties containing numerous interdependent rights and obligations

To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenor of the treaty, and the extent of the impact that the reservation has on the treaty.

Commentary

(1) Reservations to complex treaties containing an interdependent set of rights and obligations pose particular problems, because it is especially difficult to determine at what point that interdependence, which is the *raison d'être* of the treaty, is threatened by a reservation relating to one of its elements.

(2) It is in the area of human rights that reservations to treaties of this type, whether universal (like the International Covenant on Economic, Social and Cultural Rights or the International Covenant on Civil and Political Rights of 1966) or regional (like the European Convention on Human Rights, the American Convention on Human Rights or the African Charter on Human and Peoples' Rights)¹⁷⁶³ have most often been formulated and have occasioned the liveliest debates on their permissibility.¹⁷⁶⁴ In view of the abundance of practice in that regard, the Commission initially devoted a separate draft guideline to reservations to general human rights treaties.¹⁷⁶⁵ On reflection, however, it appeared that the problem could be posed in the same terms in other areas (such as peace treaties or general conventions for the protection of the environment): what distinguishes the problems posed by reservations to such conventions is not that the conventions are intended to protect human rights¹⁷⁶⁶ but that reservations to them may undermine the interdependence which such treaties affirm and create among the different rights with which they deal. The distinctive nature of the problems in question is that they are often linked to the concept of "integral and interdependent treaties".¹⁷⁶⁷

¹⁷⁶³ These treaties are not the only ones covered by this guideline: a treaty such as the Convention on the rights of the child of 20 November 1989 also seeks to protect a very wide range of rights. See also the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990.

¹⁷⁶⁴ See Pellet and Müller, "Reservations to human rights treaties: not an absolute evil" (footnote 1619 above), pp. 533–535.

¹⁷⁶⁵ See draft guideline 3.1.12 (Reservations to general human rights treaties) provisionally adopted by the Commission at its fifty-ninth session (*Yearbook ... 2007*, vol. II (Part Two), p. 52).

¹⁷⁶⁶ Whenever it considers that human rights treaties pose particular problems with regard to reservations, the Commission has pointed this out in the commentary; with respect to the guidelines on the permissibility of reservations, see, in particular, paragraphs (8)–(9) of the commentary to guideline 3.1.5.2 (Vague or general reservations), paragraphs (17) and (19)–(20) of the commentary to guideline 3.1.5.3 (Reservations to a provision reflecting a customary rule) and the commentary to guideline 3.1.5.4 (Reservations to provisions concerning rights from which no derogation is permissible under any circumstances), *passim*.

¹⁷⁶⁷ Sir Gerald Fitzmaurice, who promoted the concept, defined such instruments as "multilateral treaties the rights and obligations of which are not of the mutually reciprocating type, but which are either

However, authors taking this approach recognize that the category is not limited to human rights treaties.¹⁷⁶⁸ Hence there is no reason to depart from one of the principles consistently followed in the elaboration of the Guide to Practice by applying different rules to reservations according to the subject matter of the treaty,¹⁷⁶⁹ even though it is in the field of reservations to general human rights treaties that practice is the most abundant and enlightening.

(a) of the interdependent type, where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non-performance generally by the other parties, and not merely a non-performance in their relations with the defaulting party; or (b) of the integral type, where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others" (third report on the law of treaties, *Yearbook ... 1958*, vol. II, document A/CN.4/115, pp. 27–28).

¹⁷⁶⁸ Thus, for Simma, it is a question of "those multilateral treaties the rights and obligations of which are integral in the sense that they constitute an indivisible whole and have to be performed by every party vis-à-vis every other party" (Simma, "From bilateralism to community interest ..." (footnote 99 above), p. 351). The author identifies two categories: "the first sub-group of such treaties, namely integral treaties embodying genuine reciprocity operative as between the parties, like treaties banning nuclear tests or the proliferation of nuclear weapons" and "integral treaties of the second variety, exemplified by human rights conventions" (*ibid.*, pp. 351–352). Coulé defines integral obligations as "*des obligations conventionnelles non réciproques visant non pas la satisfaction d'intérêts opposés, mais la protection d'un intérêt commun*" [non-reciprocal treaty obligations aiming not at the satisfaction of opposed interests but at the protection of a common interest] (Coulée, "A propos d'une controverse ..." (footnote 1579 above), p. 502). See also F. Capotorti, "Cours général de droit international public", *Collected Courses of the Hague Academy of International Law*, vol. 248 (1994-IV), p. 157; J. Pauwelyn, "A typology of multilateral treaty obligations: are WTO obligations bilateral or collective in nature?", *European Journal of International Law*, vol. 14, No. 5 (2003), pp. 907–951; or F. Coulée, *Droit des traités et non-réciprocité: recherches sur l'obligation intégrale en droit international public*, thesis, Université Paris 2, 1999. Some authors propose a civil-law analysis of the object and purpose of an integral treaty, an analysis based on the notion of "cause": "*Dans un traité réciproque, la cause de l'engagement d'une partie est l'engagement d'une autre partie. (...) Dans un traité intégral, à l'inverse, la cause de l'engagement est la même pour toutes les parties: c'est l'énoncé même. (...) Rechercher si une réserve est incompatible avec l'objet et le but du traité, dans un traité intégral, c'est donc rechercher si la réserve ne contredit pas la cause objectivement déterminée du traité, et, par conséquent, si l'Etat réservataire s'est véritablement engagé à respecter le traité. (...) Le critère de 'compatibilité avec l'objet et le but du traité' protège donc, dans un traité intégral, toutes les clauses qui participent à l'objet et au but du traité, qui comportent des obligations essentielles relativement à ceux-ci*" [In a reciprocal treaty, the cause of a commitment made by one party is the commitment made by another party (...) In an integral treaty, the cause of commitment is the same for all parties: it is precisely what is enunciated. (...) To assess whether a reservation is incompatible with the object and purpose of the treaty in the case of an integral treaty is therefore to assess whether the reservation does not contradict the objectively determined cause of the treaty and hence whether the reserving State is truly committed to respecting the treaty. (...) The criterion of "compatibility with the object and purpose of the treaty" thus, in the case of an integral treaty, protects all the clauses that have to do with the object and purpose of the treaty, which constitute the essential obligations relative to them] (de Frouville, *L'intangibilité des droits de l'homme ...* (footnote 1733 above), pp. 287–288).

¹⁷⁶⁹ Even authors who campaign for recognition of a special regime for reservations to human rights treaties explain that they would be based on a distinction that such treaties share with other normative treaties. F. Coulée, for example, puts forward the notion of their "*impermeabilité à la réciprocité*" [impermeability to reciprocity], a trait shared by "*la plupart des obligations conventionnelles en matière de protection de l'environnement, tout comme nombre d'obligations de droit humanitaire (...) qui sont des obligations intégrales*" [most treaty obligations relating to environmental protection and a number of humanitarian law obligations (...) which are integral obligations] (Coulée, "A propos d'une controverse ..." (footnote 1579 above), p. 502).

(3) In the case of the International Covenant on Civil and Political Rights, the Human Rights Committee stated in its general comment No. 24 that:

In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.¹⁷⁷⁰

Taken literally, this position would render invalid any general reservation bearing on any one of the rights protected by the International Covenant on Civil and Political Rights.¹⁷⁷¹ That is not, however, the position of States parties, which have not systematically formulated objections to reservations of this type,¹⁷⁷² and the Committee itself does not go that far since, in the paragraphs following the statement of its position of principle,¹⁷⁷³ it sets out in greater detail the criteria it uses to assess whether reservations are compatible with the object and purpose of the Covenant: it does not follow that, by its very nature, a general reservation bearing on one of the protected rights would be impermissible as such.

(4) Likewise, in the case of the Convention on the rights of the child of 1989, a great many reservations have been made to the provisions concerning adoption.¹⁷⁷⁴ As has been noted, “[i]t would be difficult to conclude that this

issue is so fundamental to the Convention as to render such reservations contrary to its object and purpose”.¹⁷⁷⁵

(5) In contrast to treaties relating to a particular human right, such as the conventions on torture or racial discrimination, the object and purpose of general human rights treaties are complex.¹⁷⁷⁶ These treaties cover a wide range of human rights and are characterized by the global nature of the rights that they are intended to protect. Nevertheless, some of the protected rights may be more essential than others or at any rate it may be that a treaty provision dealing with them has a central place in the structure of the treaty.¹⁷⁷⁷ Moreover, even in the case of essential rights, one cannot rule out that a reservation dealing with certain limited aspects of the implementation of the right in question may be permissible. In this respect, reservations to treaties relating to interdependent rights and obligations pose problems similar to those of reservations to provisions relating to non-derogable rights.¹⁷⁷⁸

(6) Guideline 3.1.5.6 attempts to strike a particularly delicate balance¹⁷⁷⁹ between these different considerations by combining three elements:

- the interdependence of the rights and obligations;
- the importance that the provision to which the reservation relates has within the general tenor of the treaty; and
- the extent of the impact that the reservation has on the treaty.

(7) The first element, the interdependence of the rights and obligations affected by the reservation, lays emphasis on the goal of achieving global realization of the object and purpose of a treaty and aims at preventing the dismantling of its obligations, that is, their disintegration into bundles of obligations, the individual, separate realization of which would not achieve the realization of the object of the treaty as a whole.

(8) The second element qualifies the previous one by recognizing—in keeping with practice—that nonetheless certain rights protected by these instruments are less essential than others—in particular, than the non-derogable ones.¹⁷⁸⁰ The importance of the provision concerned must,

¹⁷⁷⁰ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above) para. 7. See the final working paper on reservations to human rights treaties prepared by Ms. Françoise Hampson in 2004 (footnote 1151 above), para. 50; see also the commentary on article 48 of the International Covenant on Civil and Political Rights by D. Müller: “Article 48”, in E. Decaux (ed.), *Le Pacte international relatif aux droits civils et politiques. Commentaire article par article*, Paris, Economica, 2011, pp. 802–803.

¹⁷⁷¹ Some authors have maintained that the reservations regime is completely incompatible with human rights. See Imbert, who does not share this radical view (“La question des réserves et les conventions ...” (footnote 1495 above), p. 99 (also in English: “Reservations and human rights conventions” (footnote 1495 above), p. 28) or *Les réserves aux traités multilatéraux* (footnote 25 above), p. 249). See also Coccia, “Reservations to multilateral treaties ...” (footnote 196 above), p. 16, or R. P. Anand, “Reservations to multilateral conventions”, *Indian Journal of International Law*, vol. 1, No. 1 (1960), p. 88; see also the commentary on Human Rights Committee general comment No. 24 (footnote 1156 above), by E. A. Baylis, “General comment 24: confronting the problem of reservations to human rights treaties”, *Berkeley Journal of International Law*, vol. 17 (1999), pp. 277–329; Redgwell, “Reservations to treaties ...” (footnote 1740 above), pp. 390–412; R. Higgins, “Introduction”, in Gardner (ed.), *Human Rights as General Norms ...* (footnote 1527 above), pp. xvii–xxix; or K. Korkelia, “New challenges to the regime of reservations under the International Covenant on Civil and Political Rights”, *European Journal of International Law*, vol. 13 (2002), pp. 437–477.

¹⁷⁷² See, for example, the reservation of Malta to article 13 (on the conditions for the expulsion of aliens), to which no objection has been entered (*Multilateral Treaties ...* (footnote 37 above), chap. IV.4). See also the reservation by Barbados to article 14, paragraph 3, or the reservation by Belize to the same provision (*ibid.*); or the reservation by Mauritius to article 22 of the Convention on the rights of the child (*ibid.*, chap. IV.11).

¹⁷⁷³ See paragraphs 8–10 of general comment No. 24 (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above)): these criteria, beyond that of the compatibility of a reservation with the object and purpose of the Covenant, have to do with the customary, peremptory or non-derogable nature of the norm in question; see guidelines 3.1.5.3–3.1.5.4.

¹⁷⁷⁴ Articles 20–21; see *Multilateral Treaties ...* (footnote 37 above), chap. IV.11.

¹⁷⁷⁵ Schabas, “Reservations to the Convention on the Rights of the Child” (footnote 1609 above), p. 480.

¹⁷⁷⁶ See also Pellet and Müller, “Reservations to human rights treaties: not an absolute evil” (footnote 1619 above), pp. 539–541.

¹⁷⁷⁷ See paragraph (4) above.

¹⁷⁷⁸ See guideline 3.1.5.4 above, and, in particular, paragraphs (4)–(8) of the commentary thereto.

¹⁷⁷⁹ On the importance of striking that balance with respect to human rights treaties, see Pellet and Müller, “Reservations to human rights treaties: not an absolute evil” (footnote 1619 above), pp. 523–524.

¹⁷⁸⁰ See guideline 3.1.5.4 above. On the fundamental nature of a protected right, starting from the provision that guarantees it, O. de Frouville considers that a dual understanding is possible: “L’examen de la pratique des États et des organes de contrôle montre que le constat de l’incompatibilité d’une réserve avec l’objet et le but du traité fait en réalité appel à deux types de considérations: il est d’abord question du caractère ‘fondamental’ d’un droit, caractère qui interdirait d’y apporter une réserve. Cette ‘fondamentalité’ renvoie elle-même à certaines caractéristiques du droit en question. Il est ensuite

of course, be assessed in the light of the “general tenor” of the treaty, an expression taken from guideline 3.1.5.¹⁷⁸¹

(9) Lastly, the reference to “the extent of the impact that the reservation has” upon the right or the provision to which it relates allows for the inference that, even in the case of essential rights, reservations are possible if they do not preclude protection of the rights in question and do not have the effect of excessively modifying their legal regime.

3.1.5.7 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(a) the reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or

(b) the reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

Commentary

(1) In his first report on the law of treaties, Fitzmaurice categorically stated: “It is considered inadmissible that there should be parties to a treaty who are not bound by an obligation for the settlement of disputes arising under it, if this is binding on other parties.”¹⁷⁸² His position, obviously inspired by the cold war debate on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, is too sweeping; moreover, it was rejected by the International Court of Justice, which, in its orders of 2 June 1999 in response to the requests of Yugoslavia for the indication of provisional measures against Spain and against the United States in the cases concerning *Legality of Use of Force*, clearly recognized the validity of the reservations made by those two States to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, which gives the Court jurisdiction to hear all disputes relating

fait référence à l'impossibilité de 'nier' un droit ou de se soustraire totalement à l'obligation de le respecter, considération qui reflète l'idée d'intangibilité” [An analysis of the practice of States and monitoring bodies shows that assessment of the incompatibility of a reservation with the object and purpose of the treaty actually calls for two types of considerations: first of all, there is the question of the “fundamental” nature of a right, which would prohibit a reservation to it. Whether it is “fundamental” or not in turn depends on certain characteristics of the right in question. The issue then arises of the impossibility of “denying” a right or of withdrawing completely from the obligation to respect it, a consideration that reflects the idea of non-derogability] (de Frouville, *L'intangibilité des droits de l'homme ...* (footnote 1733 above), p. 294).

¹⁷⁸¹ See, in particular, paragraph (14) (b) of the commentary to guideline 3.1.5.

¹⁷⁸² *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 127, para. 96; this was the purpose of draft article 37, paragraph 4, which the Special Rapporteur was proposing (*ibid.*, p. 115).

to the Convention,¹⁷⁸³ even though some of the parties thought that such reservations were not compatible with the object and purpose of the Convention.¹⁷⁸⁴

(2) In its order on a request for the indication of provisional measures in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)*, the Court came to the same conclusion with regard to the reservation of Rwanda to that same provision, stating that “that reservation does not bear on the substance of the law, but only on the Court’s jurisdiction” and that “it therefore does not appear contrary to the object and purpose of the Convention [on the Prevention and Punishment of the Crime of Genocide]”.¹⁷⁸⁵ It upheld that position in its judgment of 3 February 2006: in response to the Democratic Republic of the Congo, which had argued that the Rwandan reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide “was invalid”, after reaffirming the position it had taken in its advisory opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,¹⁷⁸⁶ according to which a reservation to that Convention would be permitted provided it was not incompatible with the object and purpose of the Convention, the Court concluded:

Rwanda’s reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.¹⁷⁸⁷

The International Court of Justice, confirming its prior case law, thus gave effect to the reservation of Rwanda to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. This conclusion is corroborated by the very common nature of such reservations and the erratic practice followed in the objections to them.¹⁷⁸⁸

¹⁷⁸³ See the cases *Legality of Use of Force (Yugoslavia v. Spain)*, *Provisional Measures, Order of 2 June 1999*, *I.C.J. Reports 1999*, p. 761, at p. 772, paras. 29–33, and *(Yugoslavia v. United States of America)*, *ibid.*, p. 916, at pp. 923–924, paras. 21–25.

¹⁷⁸⁴ See *Multilateral Treaties ...* (footnote 37 above), chap. IV.1 (see, in particular, the clear objections to that effect of Brazil, Mexico and the Netherlands).

¹⁷⁸⁵ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Provisional Measures, Order of 10 July 2002*, *I.C.J. Reports 2002*, p. 219, at p. 246, para. 72.

¹⁷⁸⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above).

¹⁷⁸⁷ *Armed Activities on the Territory of the Congo, Jurisdiction and Admissibility, Judgment of 3 February 2006* (see footnote 1600 above), para. 67.

¹⁷⁸⁸ See, in this connection, Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 192–202. See also Pellet, “1969 Vienna Convention. Article 19: Formulation of reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 452–454, paras. 199–222. As it happens, objections to reservations to dispute settlement clauses are rare, apart from the objections raised to reservations to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide; however, see the objections formulated by several States to the reservations to article 66 of the 1969 Vienna Convention, in particular the objections of Germany, Canada, Egypt, the United States of America (which argued that the reservation of Syria “is incompatible

(3) In their joint separate opinion, however, several judges expressed the view that the principle applied by the Court in its judgment might not be absolute in scope. They stressed that there might be situations where reservations to clauses concerning dispute settlement could be contrary to the treaty's object and purpose: it depended on the particular case.¹⁷⁸⁹

(4) The Human Rights Committee, meanwhile, has considered that reservations to the International Covenant on Civil and Political Rights of 1966 relating to guarantees of its implementation and contained both in the Covenant itself and in the Optional Protocol thereto could be contrary to the object and purpose of those instruments:

These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose ... The Covenant ... envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is ... directed to securing the enjoyment of the rights, are ... incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.¹⁷⁹⁰

With respect to the Optional Protocol, the Committee adds:

A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with the obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.¹⁷⁹¹

(Footnote 1788 continued.)

with the object and purpose of the Convention and undermines the principle of impartial settlement of disputes concerning the invalidity, termination, and suspension of the operation of treaties, which was the subject of extensive negotiation at the Vienna Conference" (*Multilateral Treaties ...* (footnote 37 above), chap. XXIII.1), Japan, New Zealand, the Netherlands ("provisions regarding the settlement of disputes, as laid down in Article 66 of the Convention, are an important part of the Convention and ... cannot be separated from the substantive rules with which they are connected", *ibid.*), the United Kingdom ("These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference", *ibid.*) and Sweden (espousing essentially the same position as the United Kingdom, *ibid.*).

¹⁷⁸⁹ Joint separate opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma to the judgment of 3 February 2006, in the case *Armed Activities on the Territory of the Congo* (see footnote 1600 above), para. 21.

¹⁷⁹⁰ General comment No. 24, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), para. 11; see also the final working paper on reservations to human rights treaties prepared by Ms. Françoise Hampson in 2004 (footnote 1151 above), para. 55.

¹⁷⁹¹ General comment No. 24, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), para. 13. In the following paragraph, the Committee "considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose".

Based on this reasoning, the Committee, in the *Rawle Kennedy* case, held that a reservation made by Trinidad and Tobago excluding the Committee's competence to consider communications relating to a prisoner under sentence of death was not valid.¹⁷⁹²

(5) The European Court of Human Rights, in the *Loizidou* case, concluded from an analysis of the object and purpose of the European Convention on Human Rights "that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their 'jurisdiction' from supervision by the Convention institutions"¹⁷⁹³ and that any restriction of its competence *ratione loci* or *ratione materiae* was incompatible with the nature of the Convention.¹⁷⁹⁴

(6) This body of case law led the Commission to:

(a) recall that the formulation of reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty is not in itself precluded; this is the purpose of the "*chapeau*" of guideline 3.1.5.7;

(b) unless the regulation or monitoring in question is the purpose of the treaty instrument to which a reservation is being made; and

(c) nevertheless indicate that a State or an international organization cannot minimize its previous substantive treaty obligations by formulating a reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty at the time it accepts the provision.

(7) The Commission felt that there was no reason to draw a distinction between the two types of clauses: even if their purposes are somewhat different,¹⁷⁹⁵ the reservations that can be formulated to both types give rise to the same type of problems, and splitting them into two separate guidelines would have entailed setting out the same rules twice.

3.2 Assessment of the permissibility of reservations

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

¹⁷⁹² Communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago* (footnote 730 above), para. 6.7. To justify its reservation, Trinidad and Tobago argued that it accepted "the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, but [it] stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant" (*Multilateral Treaties ...* (footnote 37 above), chap. IV.5). Seven States reacted with objections to the reservation, before Trinidad and Tobago finally denounced the Protocol as a whole (*ibid.*).

¹⁷⁹³ Judgment of 23 March 1995, *Loizidou v. Turkey* (see footnote 304 above), Series A no. 310, p. 28, para. 77.

¹⁷⁹⁴ *Ibid.*, paras. 70–89; see, in particular, paragraph 79. See also the Decision of 4 July 2001 of the Grand Chamber on the admissibility of Application no. 48787/99 in the case of *Ilie Ilaşcu et al. v. Moldova and the Russian Federation* (available from www.echr.coe.int/ECHR/FR/hudoc), p. 20, or the Judgment of the Grand Chamber of 8 April 2004 in the case of *Assanidze v. Georgia* (Application no. 71503/01, *Reports of Judgments and Decisions* 2004-II), para. 140.

¹⁷⁹⁵ Only somewhat, because the (non-binding) settlement of disputes may be one of the functions of a treaty monitoring body and part of its overall task of monitoring.

- (a) contracting States or contracting organizations;
- (b) dispute settlement bodies;
- (c) treaty monitoring bodies.

Commentary

(1) Guideline 3.2 introduces the section of the Guide to Practice dealing with assessment of the permissibility of reservations. It is a general provision whose purpose is to recall that there are various modalities for assessing permissibility which, far from being mutually exclusive, are mutually reinforcing—including when the treaty establishes a body to monitor its implementation. This statement corresponds to the one found in a different form in paragraph 6 of the Commission's 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.¹⁷⁹⁶ Of course, these generally applicable modalities for the permissibility of reservations may be supplemented or replaced by specific modalities of assessment established by the treaty itself.

(2) It goes without saying, of course, that any treaty can include a special provision establishing particular procedures for assessing the permissibility of a reservation either by a certain percentage of the States parties or by a body with competence to do so. One of the most well-known and discussed clauses¹⁷⁹⁷ of this kind is article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965:

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. *A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it*.¹⁷⁹⁸

¹⁷⁹⁶ “The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate, by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties” (*Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157).

¹⁷⁹⁷ See, for example, A. Cassese, “A new reservations clause (Article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)”, *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva, Faculty of Law of the University of Geneva and Graduate Institute of International Studies, 1968), pp. 266–304; Redgwell, “The law of reservations ...” (footnote 1590 above), pp. 13–14; or Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 317–322.

¹⁷⁹⁸ Other examples are article 20 of the Convention concerning Customs Facilities for Touring of 4 June 1954, which authorizes reservations if they have been “accepted by a majority of the members of the Conference and recorded in the Final Act” (para. 1) or made after the signing of the Final Act without any objection having been expressed by one third of the Contracting States within 90 days from the date of circulation of the reservation of the Secretary-General (paras. 2 and 3); the similar clauses in article 14 of the Additional Protocol to the above-mentioned Convention, relating to the importation of tourist publicity documents and material, and in article 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles, or article 50, paragraph 3, of the Single Convention on Narcotic Drugs of 1961, and article 32, paragraph 3, of the Convention on psychotropic substances of 1971, which make the

(3) This reservations clause no doubt draws its inspiration from the unsuccessful attempts made to include in the Vienna Convention itself a mechanism enabling a majority to assess the permissibility of reservations:¹⁷⁹⁹

– two of the four proposals submitted as rules *de lege ferenda* in 1953 by Sir Hersch Lauterpacht made the acceptance of a reservation conditional upon the consent of two thirds of the States concerned;¹⁸⁰⁰

– Sir Gerald Fitzmaurice made no express proposal on this matter because he held to a strict interpretation of the principle of unanimity,¹⁸⁰¹ yet on several occasions he let it be known that he believed that a collective assessment of the permissibility of reservations was the “ideal” system;¹⁸⁰²

– although Sir Humphrey Waldock had also not proposed such a mechanism in his first report in 1962,¹⁸⁰³ several members of the Commission supported it;¹⁸⁰⁴

– during the United Nations Conference on the Law of Treaties, an amendment to this effect proposed by Japan, the Philippines and the Republic of Korea¹⁸⁰⁵ was

admissibility of the reservation subject to the absence of objections by one third of the contracting States.

¹⁷⁹⁹ For a summary of the discussions on the matter by the Commission and during the United Nations Conference on the Law of Treaties, see Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 314–315.

¹⁸⁰⁰ Alternative drafts A and B of draft article 9, first report on the law of treaties by Mr. H. Lauterpacht (*Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 91–92). Alternative drafts C and D, respectively, assigned the task of assessing the admissibility of reservations to a committee set up by the States parties and to a Chamber of Summary Procedure of the International Court of Justice (*ibid.*, p. 92); see also the proposals submitted during the drafting of the Covenant of Human Rights reproduced in Mr. H. Lauterpacht's second report (see *Yearbook ... 1954*, vol. II, document A/CN.4/87 [and Corr.1], pp. 123 *et seq.*, at p. 132).

¹⁸⁰¹ First report on the law of treaties by G. G. Fitzmaurice, *Yearbook ... 1956*, vol. II, document A/CN.4/101, pp. 118 *et seq.*

¹⁸⁰² See, in particular, G. G. Fitzmaurice, “Reservations to multilateral conventions” (footnote 1579 above), pp. 23–26.

¹⁸⁰³ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1.

¹⁸⁰⁴ See especially Mr. Briggs in *Yearbook ... 1962*, vol. I, 651st meeting of 25 May 1962, para. 28, and the 652nd meeting, 28 May 1962, paras. 73–74; Mr. Gros, 654th meeting, 30 May 1962, para. 43; Mr. Bartoš, 654th meeting, para. 56; *contra*: Mr. Rosenne, 651st meeting, para. 83; Mr. Tunkin, 653rd meeting, 29 May 1962, paras. 24–25 and 654th meeting, para. 31; Mr. Jiménez de Aréchaga, 653rd meeting, para. 47; and Mr. Amado, 654th meeting, para. 34. Sir Humphrey Waldock proposed alternative drafts reflecting these views (see 654th meeting, para. 16), and although they were rejected by the Commission, they appear in the commentary to draft article 18 (*Yearbook ... 1962*, vol. II, p. 179, para. (11)) and in the 1966 commentaries to draft articles 16 and 17 adopted by the Commission in 1966 (*Yearbook ... 1966*, vol. II, p. 205, para. (11)). See also Sir Humphrey Waldock's fourth report, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 49, para. 3.

¹⁸⁰⁵ The amendment to article 16, paragraph 2, stipulated that, if objections “have been raised ... by a majority of the contracting States as of the time of expiry of the twelve month period, the signature, ratification, acceptance, approval or accession accompanied by such a reservation shall be without legal effect” (A/CONF.39/C.1/L.133/Rev.1 in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (see footnote 54 above), p. 133, para. 177 (i) (a)). The original amendment (A/CONF.39/C.1/L.133) had set a time limit of 3 months instead of 12 months. See also the statement of Japan at the Conference (*Official*

rejected by a large majority¹⁸⁰⁶ despite the support of several delegations;¹⁸⁰⁷ the Expert Consultant, Sir Humphrey Waldock,¹⁸⁰⁸ and some other delegations¹⁸⁰⁹ were very doubtful about this kind of collective monitoring system.

(4) It has to be said, however, that such clauses—however attractive they may seem intellectually,¹⁸¹⁰—are, in any case, far from resolving all the problems: in practice they do not encourage States parties to maintain the special vigilance that is to be expected of them¹⁸¹¹ and they leave important questions unanswered:

– do such clauses make it impossible for States parties to avail themselves of the right to raise objections under article 20, paragraphs 4 and 5, of the Vienna Convention? Given the very broad latitude that States have in this regard, the answer must be in the negative; indeed, States

(Footnote 1805 continued.)

Records of the United Nations Conference on the Law of Treaties, First Session ... (A/CONF.39/11) (footnote 35 above), Committee of the Whole, 21st meeting, 10 April 1968, p. 110, para. 29, and 24th meeting, 16 April 1968, p. 131, paras. 62–63; and another amendment along the same lines introduced by Australia (A/CONF.39/C.1/L.166, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ... (A/CONF.39/11/Add.2)* (footnote 54 above), p. 136, para. 179 (v) (f)), which subsequently withdrew it (see *ibid.*, para. 181). Without submitting a formal proposal, the United Kingdom indicated that “There was an obvious need for some kind of machinery to ensure that the [compatibility] test was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with reservations which a large group of interested States considered to be incompatible with the object and purpose of the treaty” (*Official Records of the United Nations Conference on the Law of Treaties, First Session ... (A/CONF.39/11)* (see footnote 35 above), Committee of the Whole, 21st meeting, p. 114, para. 76).

¹⁸⁰⁶ By 48 votes to 14, with 25 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ... (A/CONF.39/11/Add.2)* (footnote 54 above), p. 136, para. 182 (c)).

¹⁸⁰⁷ See *Official Records of the United Nations Conference on the Law of Treaties, First Session ... (A/CONF.39/11)* (footnote 35 above). The Swedish representative, while supportive in principle of the idea of a monitoring mechanism, believed that the Japanese proposal was “no more than an attempt at solving the problem” (*ibid.*, Committee of the Whole, 22nd meeting, 11 April 1968, p. 117, para. 32). See also the reservations expressed by the United States of America (24th meeting, 16 April 1968, p. 130, para. 49) and by Switzerland (25th meeting, 16 April 1968, p. 133, para. 9).

¹⁸⁰⁸ With regard to the amendment proposed by Japan and other delegations (see footnote 1805 above), the view of the Expert Consultant was that “proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations” (*Official Records of the United Nations Conference on the Law of Treaties, First Session ... (A/CONF.39/11)* (see footnote 35 above), Committee of the Whole, 24th meeting, 16 April 1968, p. 126, para. 9).

¹⁸⁰⁹ Thailand (*ibid.*, 21st meeting, 10 April 1968, p. 111, para. 47), Argentina (24th meeting, 16 April 1968, p. 130, para. 45), Czechoslovakia (24th meeting, p. 132, para. 68), Ethiopia (25th meeting, 16 April 1968, p. 134, para. 17).

¹⁸¹⁰ It is possible, though, to question the value of a collegiate system when the very purpose of a reservation is precisely “to cover the position of a State, which regarded as essential a point on which a two-thirds majority had not been obtained” (*Yearbook ... 1962*, vol. I, Mr. Jiménez de Aréchaga, 654th meeting, 30 May 1962, p. 164, para. 37). See also the sharp criticisms by Cassese, “A new reservations clause ...” (footnote 1797 above), *passim* and, in particular, pp. 301–304.

¹⁸¹¹ On the question of State inertia in this regard, see the comments of the Expert Consultant at the United Nations Conference on the Law of Treaties (footnote 1808 above); see also Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 146–147, or Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 316–321.

objecting to reservations formulated under article 20 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 have maintained their objections¹⁸¹² even though their position did not receive the support of two thirds of the States parties, which is needed for an “objective” determination of incompatibility under article 20;

– on the other hand, the mechanism set up by article 20 dissuaded the Committee on the Elimination of Racial Discrimination established under the Convention from taking a position on the permissibility of reservations,¹⁸¹³ which raises the issue of whether the Committee’s attitude is the result of a discretionary judgment or whether, in the absence of specific assessment mechanisms, the monitoring bodies have to refrain from taking a position. Actually, nothing obliges them to do so; once it is recognized that such mechanisms are superimposed on the procedures provided for in the treaty for determining the permissibility of reservations, and that the human rights treaty bodies are called upon to rule on that point as part of their mandate,¹⁸¹⁴ they can do so in every instance, just as States can.¹⁸¹⁵

(5) In reality, the controversy raging on this issue among the commentators can be ascribed to the conjunction of several factors:

– the issue really arises only in connection with human rights treaties;

– this is the case because, to begin with, it is in this area and only in this area that modern treaties almost invariably create mechanisms to monitor the implementation of the rules that they enunciate; however, while it has never been contested that a judge or an arbitrator is competent to assess the permissibility of a reservation, including its compatibility with the object and purpose of the treaty to which it refers,¹⁸¹⁶ the human rights treaties endow the bodies which they establish with a variety of powers (some—at the regional level—can issue binding decisions but others, including the Human Rights Committee, can address to States only general recommendations or recommendations related to an individual complaint);

¹⁸¹² See *Multilateral Treaties ...* (footnote 37 above), chap. IV.2.

¹⁸¹³ “The Committee must take the reservations made by States parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision—even a unanimous decision—by the Committee that a reservation is unacceptable could not have any legal effect” (*Official Records of the General Assembly, Thirty-third Session, Supplement No. 18 (A/33/18)*, para. 374 (a)). On this subject, see the comments of Imbert, “Reservations and human rights conventions” (footnote 1495 above), pp. 41–42; see also D. Shelton, “State practice on reservations to human rights treaties”, *Canadian Human Rights Yearbook*, 1983, pp. 229–230. Recently, however, the Committee on the Elimination of Racial Discrimination has taken a somewhat more flexible position: for instance, in 2003, it stated with reference to a reservation made by Saudi Arabia that “the broad and imprecise nature of the State party’s general reservation raises concern as to its compatibility with the object and purpose of the Convention. The Committee encourages the State party to review the reservation with a view to formally withdrawing it” (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 18 (A/58/18)*, para. 209).

¹⁸¹⁴ See paragraph (8) below.

¹⁸¹⁵ See also Pellet and Müller, “Reservations to human rights treaties: not an absolute evil” (footnote 1619 above), pp. 536–537 and pp. 542–544.

¹⁸¹⁶ See footnote 1829 below.

– this is a relatively new phenomenon which was not taken into account by the drafters of the Vienna Convention;

– furthermore, the human rights treaty bodies have held to a particularly broad concept of their powers in this field: not only have they regarded themselves as competent to assess the compatibility of a reservation with the object and purpose of the treaty that established them, but they have also seemed to consider that they have a decision-making power to that end, even when they are not otherwise so empowered,¹⁸¹⁷ and, applying the “severability” theory, they have declared the States making the reservations they have judged to be impermissible to be bound by the treaty, including by the provision or provisions of the treaty to which the reservations related,¹⁸¹⁸

– in doing so, they have aroused the opposition of States, which do not expect to be bound by a treaty beyond the limits they have accepted; some States have denied that the bodies in question have any jurisdiction in the matter.¹⁸¹⁹

(6) In reality, the issue is unquestionably less complicated than it is generally presented—which does not mean that the situation is entirely satisfactory. In the first place, there can be no doubt that the human rights treaty bodies are competent to assess the permissibility of a reservation, including the compatibility of the reservation with the object and purpose of the treaty, when the question comes before them in the exercise of their functions.¹⁸²⁰ Indeed, it must be acknowledged that the treaty bodies could not carry out their mandated functions if they could not be sure of the exact extent of their jurisdiction *vis-à-vis* the States concerned, whether in their consideration of complaints by States or individuals or of periodic reports, or in their exercise of an advisory function; it is therefore part of their functions to assess the permissibility of reservations made by the States parties to the treaties establishing them.¹⁸²¹ Secondly, in so

doing, they have neither more nor less authority than in any other area: the Human Rights Committee and the other international human rights treaty bodies which do not have decision-making power do not acquire it in the area of reservations; the regional courts which have the authority to issue binding decisions do have that power, but within certain limits.¹⁸²² Thus, thirdly and lastly, while all the human rights treaty bodies (or dispute settlement bodies) may assess the permissibility of a contested reservation, they may not substitute their own judgment for the State’s consent to be bound by the treaty.¹⁸²³ It goes without saying that the powers of the treaty bodies do not affect the power of States or organizations to accept reservations or object to them, as established and regulated under articles 20, 21 and 23 of the Vienna Conventions.¹⁸²⁴

(7) Similarly, although guideline 3.2 does not expressly mention the possibility that national courts might have competence in such matters, neither does it exclude it: domestic courts are, from the viewpoint of international law, an integral part of the “State”, and they may, on occasion, engage its responsibility.¹⁸²⁵ Hence, nothing prevents national courts, when necessary, from assessing the permissibility of reservations made by a State on the occasion of a dispute brought before them,¹⁸²⁶ including their compatibility with the object and purpose of a treaty.

Yearbook ... 1996, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478, paras. 193–210; see also Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), pp. 90–107, and Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 345–353. With particular reference to the bodies established by the European Convention on Human Rights, see Cameron and Horn, “Reservations to the European Convention ...” (footnote 205 above), pp. 87–92.

¹⁸²² See paragraph 8 of the Commission’s preliminary conclusions on reservations to normative multilateral treaties including human rights treaties: “The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role” (*Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157).

¹⁸²³ The Commission has stated in this connection, in paragraphs 6 and 10 of its preliminary conclusions, that the competence of the monitoring bodies to assess the validity of reservations “does not exclude or otherwise affect the traditional modalities of control by the contracting parties” and “that, in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty” (*ibid.*, p. 57, para. 157).

¹⁸²⁴ See, however, Human Rights Committee general comment No. 24, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), para. 18: “it is an inappropriate task [the determination of the compatibility of a reservation with the object and purpose of the treaty] for States parties in relation to human rights treaties”. This passage contradicts the preceding paragraph in which the Committee recognizes that “an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant”.

¹⁸²⁵ See article 4 (Conduct of organs of a State) of the Commission’s articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 40 (and General Assembly resolution 56/83 of 12 December 2001, annex).

¹⁸²⁶ See the decision of the Swiss Federal Tribunal of 17 December 1992, in the case of *F. v. R. et Conseil d’État du canton de Thurgovie*, *Journal des Tribunaux*, 1995 (footnote 725 above), pp. 523–537, and the commentary by Flauss, “Le contentieux de la validité des réserves à la CEDH ...” (footnote 672 above), pp. 297–303.

¹⁸¹⁷ See, in this connection, the comments of Aust (footnote 155 above), pp. 122–123.

¹⁸¹⁸ General comment No. 24, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), para. 18; Communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago* (footnote 730 above), para. 6.7. This decision led the State party in question to denounce the Optional Protocol [to the International Covenant on Civil and Political Rights] (see *Multilateral Treaties ...* (footnote 37 above), chap. IV.5), which did not prevent the Committee from declaring, in a subsequent decision of 26 March 2002, that it considered that Trinidad and Tobago had violated several provisions of the Covenant, including the provision to which the reservation related (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 40* (A/57/40), vol. II, annex IX.T).

¹⁸¹⁹ See, in particular, the very sharp criticisms expressed by the United States of America (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), p. 127), the United Kingdom (*ibid.*, p. 132) and France (*ibid.*, *Fifty-first Session, Supplement No. 40* (footnote 1691 above), pp. 104–106).

¹⁸²⁰ See paragraph 5 of the Commission’s 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties: “where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them” (*Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157).

¹⁸²¹ For an exhaustive presentation of the position of the human rights treaty bodies, see the second report on reservations to treaties,

(8) It follows that the competence to assess the permissibility of a reservation can also belong to international courts or arbitrators. This would clearly be the case if a treaty expressly provided for the intervention of a jurisdictional body to settle a dispute regarding the permissibility of reservations, but no reservation clause of this type seems to exist, even though the question easily lends itself to a jurisdictional determination.¹⁸²⁷ Nevertheless, there is no doubt that such a dispute can be settled by any organ designated by the parties to rule on differences in interpretation or application of the treaty. It should therefore be understood that any general clause on settlement of disputes establishes the competence of the body designated by the parties in that respect.¹⁸²⁸ What is more, that was the position of the International Court of Justice in its advisory opinion of 1951 on *Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide*:

It may be ... that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention.¹⁸²⁹

(9) It must therefore be concluded that the competence to assess the permissibility of a reservation belongs, more generally, to the various entities that are called on to apply and interpret treaties: States, and, within the limits of their competence, their domestic courts, bodies for the settlement of disputes and for monitoring the implementation of the treaty; however, the positions that these bodies may adopt in such matters have no greater legal value than that accorded by their status: the verb “assess” that the Commission has chosen to use in the introductory sentence of guideline 3.2 is neutral and does

¹⁸²⁷ In this sense, see H. J. Bourguignon, “The Belilos case: new light on reservations to multilateral treaties”, *Virginia Journal of International Law*, vol. 29, No. 2 (1989), p. 359; or Bowett, “Reservations to non-restricted ...” (footnote 150 above), p. 81.

¹⁸²⁸ On the role that dispute settlement bodies can play in this area, see guideline 3.2.5 below.

¹⁸²⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 27. Likewise, in its decision of 30 June 1977, the Arbitral Tribunal constituted for the *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above) implicitly held itself competent to rule on the permissibility of the French reservations by finding “that the three reservations to Article 6 [of the Convention on the Continental Shelf of 1958] are true reservations and admissible” (p. 40, para. 56). See also the position of the International Court of Justice concerning the permissibility of “reservations” (of a specific nature, it is true, and different from those covered in the Guide to Practice—see guideline 1.5.3 (Unilateral statements made under a clause providing for options) and commentary thereto), included in optional declarations of acceptance of its obligatory jurisdiction (see, in particular, its *Judgment of 26 November 1957, Right of Passage over Indian Territory, Preliminary Objections* (footnote 944 above), pp. 141–144, and the separate opinion of Judge Hersch Lauterpacht in the case concerning *Certain Norwegian Loans (Judgment of 6 July 1957)* (footnote 1629 above), pp. 43–45) and his dissenting opinion in the *Interhandel* case (*Judgment of 21 March 1959, I.C.J. Reports 1959*, p. 6, at pp. 103–106)—see also the dissenting opinions of President Klaedstad and Judge Armand-Ugon, *ibid.*, pp. 75 and 93). See also the *Orders of 2 June 1999* in the cases concerning *Legality of Use of Force (Yugoslavia v. Spain)* (footnote 1783 above), p. 772, paras. 29–33, and *(Yugoslavia v. United States of America)* (footnote 1783 above), pp. 923–924, paras. 21–25; and the *Order of 10 July 2002* in *Armed Activities on the Territory of the Congo* (footnote 1785 above), p. 246, para. 72.

not prejudice the question of the authority underlying the assessment. Similarly, the phrase “within their respective competences” indicates that the competence of the dispute-settlement and monitoring bodies to carry out such an assessment is not unlimited but corresponds to the competences accorded to these bodies by States.

(10) On the other hand, in accordance with the widely prevailing principle of the “letter box depositary”¹⁸³⁰ endorsed by article 77 of the 1969 Vienna Convention,¹⁸³¹ in principle the depositary can only take note of reservations of which it has been notified and transmit them to the contracting States¹⁸³² without ruling on their permissibility.

(11) The present situation regarding assessment of the permissibility of reservations to treaties is therefore one in which there is concurrence, or at least coexistence of several mechanisms for assessing the permissibility of reservations.¹⁸³³

– one of these, which constitutes general law, is the purely inter-State mechanism provided for by article 20 of the Vienna Conventions and which can be adapted by special reservation clauses contained in the treaties concerned;

– where the treaty establishes a body to monitor its implementation, it is accepted that such a body can also assess the permissibility of reservations, the position taken thereby having no greater authority than that accorded by the status of the body in question;

– however, this still leaves open the possibility for the States and international organizations parties to have recourse, where appropriate, to the customary methods of peaceful settlement of disputes, including judicial or arbitral methods, in the event of a dispute arising among them concerning the permissibility of a reservation;¹⁸³⁴

¹⁸³⁰ See paragraph (10) of the commentary to guideline 2.1.7 (Functions of depositaries). See also Kohona, “Some notable developments ...” (footnote 582 above), pp. 433–450; see also J. Combacau, “Logique de la validité contre logique de l’opposabilité dans la Convention de Vienne sur le droit des traités”, in *Le droit international au service de la paix, de la justice et du développement—Mélanges Michel Virally*, Paris, Pedone, 1991, p. 199.

¹⁸³¹ Which corresponds to article 78 of the 1986 Vienna Convention.

¹⁸³² See guideline 2.1.7 (Functions of depositaries) and commentary thereto.

¹⁸³³ See the second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478, paras. 211–215, or Pellet, “1969 Vienna Convention. Article 19: Formulation of reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 469–472, paras. 160–169. For a very clear position in favour of the complementarity of systems of monitoring, see Lijnzaad, *Reservations to UN Human Rights Treaties ...* (footnote 463 above), pp. 97–98; see also Cohen-Jonathan, “Les réserves dans les traités institutionnels ...” (footnote 1691 above), p. 944.

¹⁸³⁴ Subject, however, to the possible existence of “self-contained regimes”, among which those instituted by the European Convention on Human Rights and the American Convention on Human Rights or the African Charter of Human and Peoples’ Rights should undoubtedly be included (see B. Simma, “Self-contained regimes”, *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 130 *et seq.*, or T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989, pp. 230 *et seq.*).

– it is not out of the question, moreover, that national courts, like those in Switzerland,¹⁸³⁵ may consider themselves entitled to determine the permissibility of a reservation in the light of international law—but that is not a supposition separate from the first bullet point, inasmuch as national courts are part of the State apparatus.

(12) It is clear that the multiplicity of possibilities for assessment presents certain disadvantages, not least of which is the risk of conflict between the positions different parties might take on the same reservation (or on two identical reservations of different States).¹⁸³⁶ In fact, however, this risk is inherent in any assessment system—over time, any given body may take conflicting decisions—and it is probably better to have too much assessment than none at all.

(13) A more serious danger is that constituted by the succession of assessments over time, in the absence of any limitation of the duration of the period during which the assessment may be carried out. In the case of the “Vienna regime”, article 20, paragraph 5, of the Convention, insofar as it is applicable, sets a time limit of 12 months following the date of receipt of notification of the reservation (or following the expression by the objecting State of its consent to be bound) on the period during which a State may formulate an objection.¹⁸³⁷ A real problem arises, however, in all cases of jurisdictional or quasi-jurisdictional assessments, which are unpredictable and depend on referral of the question to the monitoring or dispute settlement body. In order to overcome this problem, it has been proposed that the right of the monitoring bodies to give their opinion should also be limited to a 12-month period.¹⁸³⁸ Apart from the fact that none of the relevant treaties currently in force provides for such a limit, the limit seems scarcely compatible with the very basis of intervention by monitoring bodies, which is intended to continuously ensure compliance with the treaty by the parties, in particular the preservation of the object and purpose of the treaty. Furthermore, as has been pointed out, one of the reasons why States lodge few objections is precisely that the 12-month rule often allows them insufficient time;¹⁸³⁹ the same problem is liable to arise *a fortiori*

¹⁸³⁵ See footnote 1826 above.

¹⁸³⁶ See, in particular, P.-H. Imbert, who refers to the risks of incompatibility within the European Convention on Human Rights, in particular between the positions of the Court and the Committee of Ministers: “Reservations to the European Convention on Human Rights ...” (footnote 1527 above), pp. 617–619 (“Reservations to the European Convention on Human Rights ...” (footnote 1527 above), pp. 590–591).

¹⁸³⁷ It should be noted that the problem nevertheless arises because ratifications and accessions are spread over time.

¹⁸³⁸ See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 146, or “Reservations and human rights conventions” (footnote 1495 above), pp. 36 and 44; *contra*: H. Golsong, statement to the Rome Colloquium, 5–8 November 1975, *Proceedings of the fourth international colloquy about the European Convention on Human Rights*, Strasbourg, Council of Europe, 1976, pp. 271–272, and “Les réserves aux instruments internationaux pour la protection des droits de l’homme”, in Catholic University of Louvain, *Quatrième colloque du Département des droits de l’homme. Les clauses échappatoires en matière d’instruments internationaux relatifs aux droits de l’homme*, Brussels, Bruylant, 1982, p. 27, or Edwards, “Reservations to treaties” (footnote 59 above), pp. 387–388.

¹⁸³⁹ See Clark, “The Vienna Convention reservations regime ...” (footnote 1087 above), pp. 312–314.

for the monitoring bodies, so that the latter may find themselves paralysed.

(14) It could be concluded that the possibilities of cross-assessment in fact strengthen the opportunity for the reservations regime, and in particular the principle of compatibility with the object and purpose of the treaty, to play its real role. The problem is not to set up one possibility against another or to affirm the monopoly of one mechanism,¹⁸⁴⁰ but to combine them so as to strengthen their overall effectiveness, for while their modalities differ, their end purpose is the same: the aim in all cases is to reconcile the two conflicting but fundamental requirements of integrity of the treaty and universality of participation. It is only natural that the States that wished to conclude the treaty should be able to express their point of view; it is also natural that the monitoring bodies should play fully the role of guardians of treaties entrusted to them by the parties.

(15) This situation does not exclude—in fact it implies—a degree of complementarity among the various methods of assessment, as well as cooperation among the bodies concerned. In particular, it is essential that, in assessing the permissibility of a reservation, monitoring bodies (as well as dispute settlement bodies) should take fully into account the positions taken by the contracting States or contracting organizations through acceptances or objections. Conversely, States, which are required to abide by the decisions taken by monitoring bodies when they have given those bodies decision-making power, should pay serious attention to the well-thought-out and reasoned positions of those bodies, even when the latter cannot take legally binding decisions.¹⁸⁴¹

¹⁸⁴⁰ It is, of course, the natural tendency of competent institutions to issue rulings; see the opposing points of view between the Human Rights Committee (“it is an inappropriate task for States parties in relation to human rights treaties”—general comment No. 24, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), para. 18) and France (“it is [for States parties] and for them alone, unless the treaty states otherwise, to decide whether a reservation is incompatible with the object and purpose of the treaty”, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (footnote 1691 above), p. 106).

¹⁸⁴¹ See, however, the extremely strong reaction to general comment No. 24 found in the bill submitted to the United States Senate by Senator Helms on 9 June 1995 (*Foreign Relations Revitalization Act of 1995*, Senate of the United States, 104th Congress, 1st Session, S.908 (Report No. 104–95), title III, chap. 2, sect. 314) in terms of which “no funds authorized to be appropriated by this Act nor any other Act, or otherwise made available may be obligated or expended for the conduct of any activity which has the purpose or effect of (A) reporting to the Human Rights Committee in accordance with Article 40 of the International Covenant on Civil and Political Rights, or (B) responding to any effort by the Human Rights Committee to use the procedures of Articles 41 and 42 of the International Covenant on Civil and Political Rights to resolve claims by other parties to the Covenant that the United States is not fulfilling its obligations under the Covenant, until the President has submitted to the Congress the certification described in paragraph (2).

“(2) CERTIFICATION—The certification referred to in paragraph (1) is a certification by the President to the Congress that the Human Rights Committee established under the International Covenant on Civil and Political Rights has (A) revoked its General Comment No. 24 adopted on November 2, 1994; and (B) expressly recognized the validity as a matter of international law of the reservations, understandings, and declarations contained in the United States instrument of ratification of the International Covenant on Civil and Political Rights.”

3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations

1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

Commentary

(1) Guideline 3.2.1, like those that follow, clarifies the scope of the general guideline 3.2.

(2) Guideline 3.2 implies that the monitoring bodies established by the treaty¹⁸⁴² are competent to assess the permissibility of reservations formulated by the contracting States or contracting organizations but does not expressly state this, unlike paragraph 5 of the preliminary conclusions adopted by the Commission in 1997, whereby even if the treaty is silent on the subject, the monitoring bodies established by normative multilateral treaties “are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them”.¹⁸⁴³

(3) The meaning of this last phrase is illuminated by paragraph 8 of the preliminary conclusions:

The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role.¹⁸⁴⁴

(4) Guideline 3.2.1 combines these two principles by recalling, in the first paragraph, that the treaty monitoring bodies are necessarily competent to assess the permissibility of reservations made to the treaty whose implementation they are responsible for overseeing and, in the second paragraph, that the legal force of their findings in that regard cannot exceed that which is generally recognized for the instruments that they are competent to adopt.¹⁸⁴⁵

(5) However, guideline 3.2.1 deliberately refrains from addressing the consequences of the assessment of the permissibility of a reservation: such consequences, which cannot be determined without considering the effects of the acceptance of reservations and of the objections that might be made to them, are explained in Part 4 of the Guide to Practice, on the effects of reservations and related declarations.

¹⁸⁴² In very rare cases, a monitoring body may also be set up after the adoption of a treaty, by collective decision of the parties or of an organ of an international organization—see the Committee on Economic, Social and Cultural Rights (Economic and Social Council resolution 1985/17 of 28 May 1985, *Official Records of the Economic and Social Council, 1985, Supplement No. 1 (E/1985/85)*, p. 15).

¹⁸⁴³ *Yearbook ... 1997*, vol. II (Part Two), p. 57.

¹⁸⁴⁴ *Ibid.*, p. 57.

¹⁸⁴⁵ For more clarification on this point, see the commentary to guideline 3.2, in particular paragraphs (6) and (9).

3.2.2 Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations.

Commentary

(1) Guideline 3.2.2 reproduces and incorporates in the Guide to Practice the basic idea underlying the recommendation set out in paragraph 7 of the preliminary conclusions of 1997, which reads as follows:

The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation.¹⁸⁴⁶

(2) It would certainly not be appropriate to include a provision of this type in draft articles intended for adoption in the form of an international convention. Such is not the case, however, with the Guide to Practice, which is intended to constitute a “code of recommended practices” designed to “guide” the practice of States and international organizations with regard to reservations but without being legally binding.¹⁸⁴⁷ Moreover, the Commission decided to include in the Guide several other guidelines clearly drafted in the form of a recommendation to States and international organizations.¹⁸⁴⁸

(3) On the other hand, the Commission, being well aware of the difficulties of this sort of enterprise, decided not to recommend expressly to States and international organizations that they should include in future multilateral treaties that provide for the establishment of a monitoring body specific clauses conferring competence on that body to assess the permissibility of reservations and specifying the legal effect of such assessments, even though that would undoubtedly be desirable when feasible.

(4) The Commission wishes to point out, moreover, that it does not purport in this guideline to take a position on the appropriateness of establishing such monitoring bodies. It merely considers that *if* such a body is established, it might be helpful to specify the nature and limits of its competence to assess the permissibility of reservations in order to avoid any uncertainty and controversy in the matter.¹⁸⁴⁹ This is what is meant by the neutral wording that introduces the guideline: “When providing bodies with the competence to monitor the application of treaties”. In the same spirit, the expression “where appropriate” emphasizes the purely recommendatory nature of the guideline.

¹⁸⁴⁶ *Yearbook ... 1997*, vol. II (Part Two), p. 57.

¹⁸⁴⁷ On this subject, see paragraph (2) of the commentary to guideline 2.5.3.

¹⁸⁴⁸ See guideline 2.5.3 (Periodic review of the usefulness of reservations) and paragraph (5) of the commentary thereto; see also guidelines 2.1.2 (Statement of reasons for reservations), 2.6.9 (Statement of reasons for objections), 2.9.5 (Form of approval, opposition and recharacterization) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization).

¹⁸⁴⁹ See paragraph (1) above.

3.2.3 Consideration of the assessments of treaty monitoring bodies

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations.

Commentary

(1) Guideline 3.2.3 reflects the spirit of the recommendation formulated in paragraph 9 of the preliminary conclusions of 1997, which states:

The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future.¹⁸⁵⁰

(2) This call to States and international organizations to cooperate with monitoring bodies is carried over into guideline 3.2.3, which has nonetheless been reformulated so as to remove the ambiguity in the wording adopted in 1997: the phrase “if such bodies were to be granted competence to that effect *in the future*” seems to imply that they do not have such competence at the present time. This is not so, since there is no question but that they may assess the permissibility of reservations to treaties whose observance they are required to monitor.¹⁸⁵¹ On the other hand, they may not:

– compel reserving States and international organizations to accept their assessment, since they do not have general decision-making power;¹⁸⁵² or

– take the place of the author of the reservation, in any case, in determining the consequences to be drawn from the impermissibility of a reservation.¹⁸⁵³

(3) Although paragraph 9 of the preliminary conclusions is drafted as a recommendation (“The Commission calls upon States”), it seemed possible to adopt firmer wording in guideline 3.2.3: there is no doubt that contracting States or contracting organizations have a general duty to cooperate with the treaty monitoring bodies that they have established—which is what is evoked by the expression “shall give consideration” in the guideline. Of course, if such bodies have been vested with decision-making power, the parties must respect their decisions, but this is currently not the case in practice except for some regional human rights courts.¹⁸⁵⁴ In contrast, the other monitoring

bodies lack any juridical decision-making power, either in the area of reservations or in other areas in which they possess declaratory powers.¹⁸⁵⁵ Consequently, their conclusions are not legally binding, and States parties are obliged only to “give consideration” to their assessments in good faith.

(4) Of course, it is incumbent upon monitoring bodies to take account of the positions expressed by States and international organizations with respect to the reservation.

3.2.4 Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body

When a treaty establishes a treaty monitoring body, the competence of that body is without prejudice to the competence of the contracting States or contracting organizations to assess the permissibility of reservations to that treaty, or to that of dispute settlement bodies competent to interpret or apply the treaty.

Commentary

(1) Guideline 3.2.4 further clarifies, from a particular angle and in the form of a “without prejudice” clause, the principle established in guideline 3.2 of the plurality of bodies competent to assess the permissibility of reservations.

(2) It should also be noted that the wording of guideline 3.2 takes up only part of the substance of paragraph 6 of the preliminary conclusions of 1997:¹⁸⁵⁶ it lists the persons or institutions competent to rule on the permissibility of reservations but does not specify that such powers are cumulative and not exclusive of each other. The Commission considered it useful to spell that point out in a separate guideline.

(3) As in the case of guideline 3.2.3, the monitoring bodies in question are those established by a treaty,¹⁸⁵⁷ not dispute settlement bodies, whose competence in this area forms the subject matter of guideline 3.2.5.

3.2.5 Competence of dispute settlement bodies to assess the permissibility of reservations

When a dispute settlement body is competent to adopt decisions binding upon the parties to a dispute, and the assessment of the permissibility of a reservation is necessary for the discharge of such competence by that body, such assessment is, as an element of the decision, legally binding upon the parties.

Commentary

(1) The Commission found it necessary to draw a distinction between monitoring bodies in the strict sense, which have no decision-making power and whose competence to assess the permissibility of reservations

¹⁸⁵⁰ *Yearbook ... 1997*, vol. II (Part Two), p. 57.

¹⁸⁵¹ See paragraph (6) of the commentary to guideline 3.2 above; see also the second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478, paras. 206–209. In the same sense, see, *inter alia*, Coulée, “A propos d'une controverse ...” (footnote 1579 above), p. 504 and pp. 512–518.

¹⁸⁵² See the second paragraph of guideline 3.2.1.

¹⁸⁵³ See paragraph 10 of the preliminary conclusions (*Yearbook ... 1997*, vol. II (Part Two), p. 57) and the second report on reservations to treaties (*Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478, paras. 218–230). See also guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty) and commentary thereto.

¹⁸⁵⁴ Given their very specific nature, these bodies—like all dispute settlement bodies—are dealt with in a separate guideline; see guideline 3.2.5 below.

¹⁸⁵⁵ See paragraph 2 of guideline 3.2.1.

¹⁸⁵⁶ *Yearbook ... 1997*, vol. II (Part Two), p. 57.

¹⁸⁵⁷ See, however, footnote 1842 above.

forms the subject matter of guideline 3.2.3, and dispute settlement bodies that have been vested with decision-making power. Even though the regional human rights courts may in a broader sense be considered monitoring bodies, they are included in the second category because their decisions constitute *res judicata*. Such bodies also include those which, like the International Court of Justice, have general competence to settle disputes between States and which, in the event of a dispute involving a potentially broader subject matter, may be called upon to rule on the permissibility of a reservation.

(2) The clarification that their assessment of the permissibility of a reservation “is, as an element of the decision, legally binding upon the parties” indicates that the principle established by the guideline applies not only to cases in which the dispute has a direct bearing on this question, but also to those cases, much more frequent, in which the permissibility of the reservation constitutes a related problem that must be resolved first so that the broader dispute submitted to the competent body can be settled.

(3) It goes without saying that, in any event, the assessment of the dispute settlement body only has the authority of *res judicata*¹⁸⁵⁸ if the body in question has the power to render such a judgment.

3.3 Consequences of the non-permissibility of a reservation

3.3.1 Irrelevance of distinction among the grounds for non-permissibility

A reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

Commentary

(1) Guideline 3.3.1 establishes the unity of the rules applicable to the consequences of the non-permissibility of a reservation, whatever the reason for such non-permissibility, among those set out in guideline 3.1.¹⁸⁵⁹

(2) Just as it does not specify the consequences of the formulation of a reservation prohibited, either expressly (subparagraph (a)) or implicitly (subparagraph (b)), by the treaty to which it refers, so article 19 of the Vienna Conventions makes no reference to the effects of the formulation of a reservation prohibited by subparagraph (c),¹⁸⁶⁰ and nothing in the text of the Vienna Convention indicates how these provisions relate to those of article 20, concerning acceptance of reservations and

objections. The question has been raised as to whether this “normative gap”¹⁸⁶¹ may not have been deliberately created by the authors of the Convention.¹⁸⁶²

(3) It must in any case be acknowledged that the *travaux préparatoires* of subparagraph (c) are confused and do not offer any further indications of the consequences that the drafters of the Convention intended to draw from the incompatibility of a reservation with the object and purpose of the Convention.¹⁸⁶³

– in draft article 17 proposed by Sir Humphrey Waldock in 1962, the object and purpose of the treaty appeared only to function as guidance for the reserving State itself;¹⁸⁶⁴

– the debates on that draft were particularly confused during the Commission’s plenary meetings¹⁸⁶⁵ and, more than anything else, revealed a split between members who advocated an individual assessment by States and those who were in favour of a collegial mechanism,¹⁸⁶⁶ although the consequences of such assessment were not really discussed;

– however, after the Drafting Committee had recast the draft along lines very close to the wording of the present article 19, the overriding feeling seems to have been that the object and purpose constituted a criterion by which the permissibility of the reservation should be assessed.¹⁸⁶⁷ This is attested by the new amendment to article 18 *bis*, which entailed, on the one hand, the inclusion of the criterion of incompatibility and, on the other hand, and most importantly, the modification of the title of that provision, which became “The legal effect of reservations” instead of “The validity of reservations”,¹⁸⁶⁸ which suggests that the validity of reservations was the subject of draft article 17 (which became article 19 of the Convention);

– the deft wording of the commentary to draft articles 18 and 20 (corresponding respectively to articles 19 and 21 of the Convention) adopted in 1962 leaves the question open: it affirms both that the compatibility of the reservation with the object and purpose of the treaty

¹⁸⁶¹ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 131; see also Combacau, “Logique de la validité contre logique de l’opposabilité ...” (footnote 1830 above), p. 199.

¹⁸⁶² See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 137–140.

¹⁸⁶³ It should be recalled that this criterion was included in the draft belatedly, going back only to Sir Humphrey Waldock’s first report in 1962, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 65–66, para. 10; see also the oral presentation by the Special Rapporteur at the fourteenth session of the Commission, *ibid.*, vol. I, 651st meeting, 25 May 1962, p. 139, paras. 4–6.

¹⁸⁶⁴ *Ibid.*, vol. II, document A/CN.4/144 and Add.1 (art. 17, para. 2 (a)); see also the remarks by the Special Rapporteur at the fourteenth session of the Commission, *ibid.*, vol. I, 651st meeting, 25 May 1962, p. 145, para. 85.

¹⁸⁶⁵ *Ibid.*, pp. 139–168 and pp. 172–175.

¹⁸⁶⁶ See paragraph (3) of the commentary to guideline 3.2.

¹⁸⁶⁷ See, in particular, *Yearbook ... 1962*, vol. I, 663rd–664th meetings, 18–19 June 1962, pp. 225–234. During the discussion on new article 18 *bis*, entitled “The validity of reservations”, all the members referred to the criterion of compatibility with the object and purpose of the treaty, which was not mentioned, however, in the draft adopted by the Drafting Committee.

¹⁸⁶⁸ *Ibid.*, 667th meeting, 25 June 1962, pp. 252–253, paras. 55–70.

¹⁸⁵⁸ Or “finding”, if it is assumed that a non-judicial body may, in the exercise of its competence, be called upon to assess the permissibility of a reservation.

¹⁸⁵⁹ For a critical assessment of these guidelines in their 2010 version, see Simma and Hernández, “Legal consequences of an impermissible reservation ...” (footnote 1610 above), pp. 73–75.

¹⁸⁶⁰ See Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 83.

is the criterion governing the formulation of reservations and that, since this criterion “is to some extent a matter of subjective appreciation ... the only means of applying it in most cases will be through the individual State’s acceptance or rejection of the reservation”, but only “in the absence of a tribunal or an organ with standing competence”;¹⁸⁶⁹

– in his 1965 report, the Special Rapporteur also noted, in connection with draft article 19 relating to treaties that are silent on the question of reservations (subsequently, article 20 of the Convention), that “the Commission recognized that the ‘compatibility’ criterion is to some extent subjective and that views may differ as to the compatibility of a particular reservation with the object and purpose of a given treaty. In the absence of compulsory adjudication, on the other hand, it felt that the only means of applying the criterion is through the individual State’s acceptance or rejection of the reservation”; it also recognized that “the rules proposed by the Commission might be more readily acceptable if their interpretation and application were made subject to international adjudication”;¹⁸⁷⁰

– the Commission’s commentaries to draft articles 16 and 17 (which subsequently became articles 19 and 20, respectively) are not as clear, however, and merely state that “the admissibility or otherwise of a reservation under paragraph (c) ... is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States” and that, for that reason, draft article 16, subparagraph (c), should be understood “in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations”;¹⁸⁷¹

– at the United Nations Conference on the Law of Treaties, some delegations tried to give more content to the criterion of the object and purpose of the treaty. Accordingly, the Mexican delegation proposed that the consequences of a judicial decision recognizing the incompatibility of a reservation with the object and purpose of the treaty should be spelled out.¹⁸⁷² However, it was mainly those in favour of a system of collegial assessment who tried to draw concrete conclusions from the incompatibility of a reservation with the object and purpose of the treaty.¹⁸⁷³

(4) Moreover, nothing in the text of article 19 gives grounds for thinking that a distinction should be made

between the different cases: *ubi lex non distinguit, nec nos distinguere debemus*. In all three cases, as clearly emerges from the *chapeau* of article 19, a State is prevented from formulating a reservation and, once it is accepted that a reservation prohibited by the treaty is null and void by virtue of subparagraphs (a) and (b) of article 19, there is no reason to draw a different conclusion from subparagraph (c). Three objections, of unequal weight, have nevertheless been raised to this conclusion.

(5) First, it has been pointed out that, whereas the depositaries reject reservations prohibited by the treaty, they communicate to other contracting States the text of those that are, *prima facie*, incompatible with its object and purpose.¹⁸⁷⁴ Such is indeed the practice followed by the Secretary-General of the United Nations,¹⁸⁷⁵ but its significance is only relative. For “only if there is *prima facie no doubt** ... that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit ... In case of *doubt**, the Secretary-General shall request clarification from the State concerned ... However, the Secretary-General feels that *it is not incumbent upon him to request systematically such clarifications**; rather, it is for the States concerned to raise, if they so wish, objections to statements which they would consider to constitute unauthorized reservations”.¹⁸⁷⁶ In other words, the difference noted in the practice of the Secretary-General is not based on the distinction between the situations in article 19, subparagraphs (a) and (b), on the one hand and article 19, subparagraph (c), on the other, but on the certainty that the reservation is contrary to the treaty. When an interpretation is necessary, the Secretary-General relies on States; such is always the case when the reservation is incompatible with the object and purpose of the treaty; it may also be so when the reservations are expressly or implicitly prohibited.

(6) Secondly, it has been pointed out in the same spirit that in the situation in subparagraphs (a) and (b), the reserving State could not be unaware of the prohibition and that, for that reason, it should be assumed to have accepted the treaty as a whole, notwithstanding its reservation (doctrine of “severability”).¹⁸⁷⁷ There is no doubt that it is less easy to determine objectively that a reservation is incompatible with the object and purpose of a treaty than it is when there is a prohibition clause. The remark is certainly relevant, but not decisive. It is less easy than is sometimes thought to determine the scope of reservation clauses, especially when the prohibition is implicit, as in the situation in subparagraph (b).¹⁸⁷⁸ Furthermore, it may be difficult to determine whether or not a unilateral statement is a reservation, and the State concerned may

¹⁸⁶⁹ *Ibid.*, vol. II, document A/5209, p. 181, para. (22).

¹⁸⁷⁰ Sir Humphrey Waldock’s fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 52, para. 9.

¹⁸⁷¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 207, para. 17.

¹⁸⁷² *Official Records of the United Nations Conference on the Law of Treaties, First Session ... (A/CONF.39/11)* (see footnote 35 above), Committee of the Whole, 21st meeting, 10 April 1968, p. 113, para. 63. Mexico proposed two solutions. The first was that the State that had formulated the incompatible reservation should be obliged to withdraw it, failing which it should forfeit the right to become a party to the treaty; and the second was that the treaty in its entirety should be deemed not to be in force between the reserving State and the objecting State.

¹⁸⁷³ See, in particular, the statements of the various delegations cited above, paragraph (3) of the commentary to guideline 3.2 (footnotes 1805–1809 above).

¹⁸⁷⁴ See Gaja, “Unruly treaty reservations” (footnote 28 above), p. 317.

¹⁸⁷⁵ See *Summary of Practice of the Secretary-General ...* (footnote 75 above), paras. 191–192.

¹⁸⁷⁶ *Ibid.*, paras. 193 and 195–196. The practice followed by the Secretary General of the Council of Europe is similar, except that, in the event of difficulty, he or she may consult (and does consult) the Committee of Ministers (see Polakiewicz, *Treaty-making in the Council of Europe* (footnote 638 above), pp. 90–93).

¹⁸⁷⁷ See Fodella, “The declarations of States parties ...” (footnote 1498 above), pp. 143–147.

¹⁸⁷⁸ See, in particular, the commentary to guideline 3.1.2 (Definition of specified reservations).

have thought in good faith that it had not violated the prohibition, while considering that its consent to be bound depended on the acceptance of its interpretation of the treaty.¹⁸⁷⁹ In fact, if a State is assumed not to be ignorant of the prohibition resulting from a reservation clause, it should be equally aware that it cannot divest a treaty of its substance through a reservation that is incompatible with the treaty's object and purpose.

(7) Thirdly and most significantly, it has been argued that paragraphs 4 and 5 of article 20 mention just one limitation on the possibility of accepting a reservation: that is, when the treaty contains a contrary provision.¹⁸⁸⁰ *A contrario*, that would imply complete freedom to accept reservations, notwithstanding the provisions of article 19, subparagraph (c).¹⁸⁸¹ While it is true that, in practice, States object infrequently to reservations that are very possibly contrary to the object and purpose of the treaty to which they relate and that, in consequence, the rule contained in article 19, subparagraph (c),¹⁸⁸² is deprived of concrete effect, at least in the absence of a body competent to take decisions in that regard,¹⁸⁸³ many arguments based on the text of the Convention itself conflict with that reasoning:

- articles 19 and 20 of the Convention have distinct purposes; the rules that they establish are applicable at different “stages” of the formulation of a reservation: article 19 sets out the cases in which a reservation may not be formulated; article 20 describes what happens after one has been formulated;¹⁸⁸⁴

- the proposed interpretation would strip article 19, subparagraph (c), of any real effect: in consequence, a reservation incompatible with the object and purpose of the treaty would have exactly the same effect as a compatible reservation;

- it would also render meaningless article 21, paragraph 1, which stipulates that a reservation is “established” only “in accordance with articles 19, 20 and 23”;¹⁸⁸⁵ and

- it introduces a distinction between the scope of article 19, subparagraphs (a) and (b), on the one hand and

¹⁸⁷⁹ On the distinction between reservations, on the one hand, and interpretative declarations, whether simple or conditional, on the other, see guidelines 1.3–1.3.3 and commentaries thereto.

¹⁸⁸⁰ The wording used in both provisions is “unless the treaty otherwise provides”.

¹⁸⁸¹ See Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), pp. 83–84.

¹⁸⁸² See, in particular, D. Carreau, *Droit international*, Paris, Pedone, 2004, p. 137; Gaja, “Unruly treaty reservations” (footnote 28 above), pp. 315–318; Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), pp. 86–90; or Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 134–137.

¹⁸⁸³ See paragraphs (8)–(9) of the commentary to guideline 3.2 (Assessment of the permissibility of reservations); see also Coccia, “Reservations to multilateral treaties ...” (footnote 196 above), p. 33, or Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 301.

¹⁸⁸⁴ See Bowett, “Reservations to non-restricted ...” (footnote 150 above), p. 80; or Redgwell, “Reservations to treaties ...” (footnote 1740 above), pp. 404–406.

¹⁸⁸⁵ See paragraph (6) of the commentary to guideline 3.1 and the commentary to guideline 4.1.

article 19, subparagraph (c), on the other, which the text in no way authorizes.¹⁸⁸⁶

(8) Consequently, there is nothing in the text of article 19 of the Vienna Conventions, or in its context, or even in the practice of States or depositaries to justify drawing such a distinction between the consequences of the formulation of a reservation in spite of a treaty-based prohibition (article 19, subparagraphs (a) and (b)), on the one hand, and of its incompatibility with the object and purpose of the treaty (article 19, subparagraph (c)), on the other.

3.3.2 *Non-permissibility of reservations and international responsibility*

The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not engage the international responsibility of the State or international organization which has formulated it.

Commentary

(1) Once it has been accepted that, in accordance with guideline 3.3.1, the three subparagraphs of article 19 (reproduced in guideline 3.1) have the same function and that a reservation that is contrary to their provisions is impermissible, it still remains to be seen what happens when, in spite of these prohibitions, a State or an international organization formulates a reservation. If it does so, the reservation certainly cannot have the legal effects which, pursuant to article 21, are clearly contingent on its “establishment” “in accordance with articles 19 [in its entirety], 20 and 23”.¹⁸⁸⁷

(2) Whatever its effects,¹⁸⁸⁸ questions remain: on the one hand, should it be concluded that, by proceeding thus, the author of the reservation is committing an internationally wrongful act which engages its international responsibility? And further, are other parties prevented from accepting a reservation formulated in spite of the prohibitions contained in article 19?

(3) With regard to the first of these two questions,¹⁸⁸⁹ it has been argued that a reservation that is incompatible with the object and purpose of the treaty¹⁸⁹⁰ “amounts to a breach of [the] obligation” arising from article 19, subparagraph (c). “Therefore, it is a wrongful act, entailing such State’s international responsibility *vis-à-vis* each other party to the treaty. It does not amount to a breach of the treaty itself, but rather of the general norm embodied in the Vienna Convention forbidding ‘incompatible’ reservations.”¹⁸⁹¹ This reasoning, based expressly on the rules governing the

¹⁸⁸⁶ See paragraph (4) above.

¹⁸⁸⁷ Article 21 (Legal effects of reservations and of objections to reservations): “A reservation established with regard to another party in accordance with articles 19, 20 and 23”.

¹⁸⁸⁸ These will form the subject of Part 4 of the Guide to Practice.

¹⁸⁸⁹ See also paragraphs (2)–(7) of the general commentary to Part 3 of the Guide to Practice.

¹⁸⁹⁰ This should also hold true *a fortiori* for reservations prohibited by the treaty.

¹⁸⁹¹ Coccia, “Reservations to multilateral treaties ...” (footnote 196 above), pp. 25–26.

responsibility of States for internationally wrongful acts,¹⁸⁹² is not entirely convincing.¹⁸⁹³

(4) It is clear that “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”,¹⁸⁹⁴ and that a breach of an obligation not to act (which in this case would be the obligation not to formulate a reservation which is incompatible with the object and purpose of the treaty) is an internationally wrongful act liable to engage the international responsibility of a State in the same way as an obligation to act. However, the question would have to be posed in the sphere of the law of responsibility. As the International Court of Justice forcibly recalled in the case concerning the *Gabčíkovo-Nagymaros Project*, the law of responsibility and the law of treaties “obviously have a scope that is distinct”; while “a determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties”,¹⁸⁹⁵ it falls to this same branch of law to determine whether or not a reservation may be formulated. It follows, at the very least, that the potential responsibility of a reserving State cannot be determined under the Vienna rules and that it is not pertinent to the “law of reservations”. Furthermore, even if injury is not a requirement for engaging the responsibility of a State,¹⁸⁹⁶ it influences how that responsibility

is realized, particularly with regard to reparation;¹⁸⁹⁷ hence, for an impermissible reservation to have concrete consequences in the sphere of the law of responsibility, a State relying on it would have to be able to invoke an injury—which is highly unlikely.

(5) There is more, however. It is telling that no State has ever, when formulating an objection to a prohibited reservation, invoked the responsibility of the reserving State. The consequences of the finding that a reservation is not permissible may be varied,¹⁸⁹⁸ but they never entail an obligation to make reparation, and if an objecting State were to invite the reserving State to withdraw its reservation or to modify it within the framework of the “reservations dialogue”, it would be acting not in the sphere of the law of responsibility but in that of the law of treaties alone. There seems to be no doubt, in fact, that the formulation of a reservation excluded by any of the subparagraphs of article 19 falls within the sphere of the law of treaties and not within that of responsibility of States for internationally wrongful acts. Accordingly, it does not entail the responsibility of the reserving State.¹⁸⁹⁹ While this seems self-evident, the Commission’s intention in adopting guideline 3.3.2 was to remove any remaining ambiguity.¹⁹⁰⁰

3.3.3 *Absence of effect of individual acceptance of a reservation on the permissibility of the reservation*

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not affect the impermissibility of the reservation.

Commentary

(1) According to the first part of guideline 3.3.1 (Irrelevance of distinction among the grounds for non-permissibility), “[a] reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and purpose of the treaty is impermissible”. The provision makes it clear that the impermissibility of the reservation results *ipso facto* from one of the grounds listed in article 19 of the Vienna Conventions and reproduced in guideline 3.1. In other words, either the prohibition (explicit or implicit) of the reservation or alternatively its incompatibility with the object and purpose of the treaty constitutes the necessary and sufficient condition for its impermissibility.

¹⁸⁹² See articles 1 and 2 of the Commission’s articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 28 (and General Assembly resolution 56/83, annex).

¹⁸⁹³ They arise, *a contrario*, from article 20 and, in particular, from article 21 of the Vienna Conventions.

¹⁸⁹⁴ Much less that of States which implicitly accept a reservation that is prohibited or incompatible with the object and purpose of the treaty—see, however, Lijnzaad, *Reservations to UN Human Rights Treaties ...* (footnote 463 above), p. 56: “The responsibility for incompatible reservations is ... shared by reserving and accepting States”—but it appears from the context that the author does not consider either the incompatible reservation or its acceptance as internationally wrongful acts; rather than “responsibility” in the strictly legal sense, it is no doubt necessary to refer here to “accountability” in the sense of having to provide an explanation.

¹⁸⁹⁵ On the related terminological problems, see paragraph (6) of the general commentary to Part 3 of the Guide to Practice.

¹⁸⁹² See articles 1 and 2 of the Commission’s articles on responsibility of States for internationally wrongful acts, adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26 (and General Assembly resolution 56/83 of 12 December 2001, annex).

¹⁸⁹³ See Gaja, “Unruly treaty reservations” (footnote 28 above), p. 314, footnote 29.

¹⁸⁹⁴ Article 12 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26 (and General Assembly resolution 56/83, annex).

¹⁸⁹⁵ *Judgment of 25 September 1997, Gabčíkovo-Nagymaros Project* (see footnote 1600 above), p. 38, para. 47; see also the arbitral ruling of 30 April 1990 in the *Case concerning the difference between New Zealand and France concerning the interpretation of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, United Nations, *Reports of International Arbitral Awards*, vol. XX (Sales number: E/F.93.V.3), p. 215, at p. 251, para. 75 (RGDIP, vol. 94 (1990), pp. 838 *et seq.*, at p. 851, para. 75). On the relationships between the two branches of law, see, in particular, D. W. Bowett, “Treaties and State responsibility”, *Le droit international au service de la paix ...* (footnote 1830 above), pp. 137–145; Combacau, “Logique de la validité contre logique de l’opposabilité ...” (footnote 1830 above), pp. 195–203; P.-M. Dupuy, “Droit de traités, codification et responsabilité internationale”, *AFDI*, vol. 43 (1997), pp. 7–30; P. Weckel, “Convergence du droit des traités et du droit de la responsabilité internationale à la lumière de l’arrêt du 25 septembre 1997 de la Cour internationale de Justice relatif au projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie)”, *RGDIP*, vol. 102 (1998), pp. 647–684; P. Weil, “Droit de traités et droit de la responsabilité”, in M. Rama-Montaldo (ed.), *El derecho internacional en un mundo en transformación: liber amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga*, Montevideo, Fundación Cultura Universitaria, 1994, pp. 523–543; and A. Yahi, “La violation d’un traité: l’articulation du droit des traités et du droit de la responsabilité internationale”, *Revue belge de droit international*, vol. 26 (1993), pp. 437–469.

¹⁸⁹⁶ See, in this connection, article 1 of the Commission’s articles on the responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26 (and General Assembly resolution 56/83, annex).

(2) Consequently, it is clear that the acceptance of a reservation by a contracting State or international organization formulated notwithstanding article 19, subparagraphs (a) and (b), cannot cure this impermissibility, which is the “objective” consequence of the prohibition of the reservation or of its incompatibility with the object and purpose of the treaty.¹⁹⁰¹ That is what is explained in guideline 3.3.3.

(3) Sir Humphrey Waldock, in his capacity as Expert Consultant, clearly expressed his support for this solution at the United Nations Conference on the Law of Treaties when he stated that

a contracting State could not purport, under article 17 [current article 20], to accept a reservation prohibited under article 16 [19], paragraph (a) or paragraph (b), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance.¹⁹⁰²

(4) The logical consequence of the “impossibility” of accepting a reservation that is impermissible either under subparagraph (a) or (b) of article 19 (or of guideline 3.1), or under subparagraph (c)—which follows exactly the same logic and which there is no reason to distinguish from the other two paragraphs of the provision¹⁹⁰³—is that such an acceptance is devoid of legal effect.¹⁹⁰⁴ It cannot “permit” the reservation, nor can it cause the reservation to produce any effect whatsoever—and certainly not the effect envisaged in article 21, paragraph 1, of the Vienna Conventions, which requires that the reservation must have been established.¹⁹⁰⁵ Furthermore, if the acceptance of an impermissible reservation were considered to constitute an agreement between the author of the impermissible reservation and the State or international organization that accepted it, it would result in a modification of the treaty in the relations between the two parties, a result that would be incompatible with article 41, paragraph 1 (b) (ii), of the Vienna Conventions, which excludes any modification of the treaty if it relates “to a provision, derogation from which is incompatible with the effective execution of *the object and purpose of the treaty*” as a whole”.¹⁹⁰⁶

(5) The Commission decided that this guideline should be included in Part 3 of the Guide to Practice relating to the permissibility of reservations and not in Part 4 concerning their consequences: it is a question of identifying not the effect of acceptance of an impermissible reservation, but

¹⁹⁰¹ See in this sense Pellet and Müller, “Reservations to treaties ...” (footnote 1045 above), in particular pp. 54–56.

¹⁹⁰² *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 25th meeting, 16 April 1968, p. 133, para. 2.

¹⁹⁰³ See the last part of guideline 3.3.1 (Irrelevance of distinction among the grounds for non-permissibility): “A reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and purpose of the treaty is impermissible, *without there being any need to distinguish between the consequences of these grounds for non-permissibility*.”

¹⁹⁰⁴ See guideline 4.5.2 (Reactions to a reservation considered invalid) and commentary thereto below.

¹⁹⁰⁵ See guidelines 4.2.1–4.2.5 and commentaries thereto below.

¹⁹⁰⁶ In this sense, see Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 57; or Sucharipa-Behrmann, “The legal effects of reservations ...” (footnote 1617 above), pp. 78–79; *contra*, however, see the comments made by Mr. Jiménez de Aréchaga and Mr. Amado during the discussions on Sir Humphrey Waldock’s proposals of 1962 (*Yearbook ... 1962*, vol. I, 653rd meeting, 29 May 1962, p. 158, paras. 44–45 and p. 160, para. 63).

rather the effect of acceptance on the permissibility of the reservation itself (an issue which arises earlier in the process than the question of the effect of reservations). Permissibility logically precedes acceptance (the Vienna Conventions also follow this logic) and guideline 3.3.3 relates to the permissibility of the reservation—in other words, to the fact that acceptance cannot cure an absence of permissibility. The aim of the guideline is not to determine the effects of acceptance of a reservation by a State, but simply to establish that, if the reservation in question is impermissible, it remains impermissible despite an acceptance.

(6) Individual¹⁹⁰⁷—even express—acceptance of an impermissible reservation has no effect as such on the consequences of this impermissibility, which are outlined in Part 4 of the Guide to Practice. The question of the consequences of acceptance in terms of the effects of the reservation is not and should not be raised; the inquiry stops at the stage of permissibility, which is not and cannot be acquired as a result of the acceptance.

(7) Guideline 3.3.3 establishes that acceptance of an impermissible reservation cannot have any effect either on the permissibility of the reservation or *a fortiori* on the legal consequences that flow from the impermissible reservation. Those consequences are discussed in section 4.5 of the Guide to Practice.

(8) The question remains, however, whether collective acceptance of an otherwise impermissible reservation is possible.

(9) Draft article 17, paragraph (1) (b), proposed by Waldock in 1962 envisaged “the exceptional case of an attempt to formulate a reservation of a kind which is actually prohibited or excluded by the terms of the treaty”,¹⁹⁰⁸ he proposed that, in such case, “the prior consent of all the other interested States” is required.¹⁹⁰⁹ This provision was not retained in the Commission’s draft articles of 1962¹⁹¹⁰ or 1966 and does not appear in the Convention.¹⁹¹¹

¹⁹⁰⁷ The term “individual acceptance” is also used in guideline 2.8.10 to refer to the acceptance of a reservation to the constituent instrument of an international organization by a State or an international organization, as opposed to acceptance by the competent body of the organization in question. The problem is different when there is collective acceptance of a reservation by all contracting States and contracting international organizations; on this point, see paragraphs (8)–(13) below.

¹⁹⁰⁸ First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 65, para. (9).

¹⁹⁰⁹ See *ibid.*, p. 60, for the text of the draft article.

¹⁹¹⁰ The provision came up against opposition from Mr. Tunkin (*ibid.*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 19) and Mr. Castrén (*ibid.*, p. 143, para. 68, and 652nd meeting, 28 May 1962, p. 148, para. 30), who believed it to be superfluous, and it disappeared from the simplified draft retained by the Drafting Committee (*ibid.*, 663rd meeting, 18 June 1962, p. 221, para. 3).

¹⁹¹¹ This solution was, however, adopted in the reservation clause of the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR) of 1 July 1970, of which article 21, paragraph 2, provides as follows: “If at the time of depositing its instrument of ratification or accession a State enters a reservation other than that provided for in paragraph 1 of this article, the Secretary-General of the United Nations shall communicate the reservation to the States which have previously deposited their instruments of ratification or accession and have not since denounced this Agreement. The reservation shall be deemed to be accepted if none of the said States has, within six months after such communication,

(10) It can be argued, however, that the parties always have a right to amend the treaty by general agreement *inter se* in accordance with article 39 of the Vienna Conventions and that nothing prevents them from adopting a unanimous agreement¹⁹¹² to that end on the subject of reservations.¹⁹¹³ This possibility, which accords with the principle of consent that underpins all the law of treaties, nevertheless poses some very difficult problems. The first problem is whether the absence of objections by all the other parties within a 12-month period is equivalent to a unanimous agreement constituting an amendment to the reservation clause. At first sight, article 20, paragraph 5, of the Vienna Conventions seems to answer this in the affirmative.

(11) However, after further consideration, this is not necessarily the case: silence on the part of a State party does not necessarily mean that it is taking a position as to the permissibility of the reservation; at most, it means that the reservation may be invoked against it¹⁹¹⁴ and that the State undertakes not to object to it in the future.¹⁹¹⁵ This is shown by the fact that it cannot be argued that monitoring bodies—whether the International Court of Justice, an arbitral tribunal or a human rights treaty body—are prevented from assessing the permissibility of a reservation even if no objection has been raised to it.¹⁹¹⁶

(12) An example could be cited, however, in support of the opposite: the well-known neutrality reservation

expressed its opposition to acceptance of the reservation. Otherwise the reservation shall not be admitted, and, if the State which entered the reservation does not withdraw it the deposit of that State's instrument of ratification or accession shall be without effect." On the basis of this provision and in the absence of an objection from the other States parties to the Convention, the States members of the European Economic Community formulated a reservation, not authorized by the Agreement, excluding the application of the Agreement to certain operations. See the reservations made by the States which, at the time, were members of the Community, *Multilateral Treaties ...* (footnote 37 above), chap. XI.B.21.

¹⁹¹² But not an agreement between certain of the parties only; see article 41 of the Vienna Conventions.

¹⁹¹³ In this regard, see Greig, "Reservations: equity as a balancing factor?" (footnote 28 above), pp. 56–57; or Sucharipa-Behrmann, "The legal effects of reservations to multilateral treaties" (footnote 1617 above), p. 78. This is also the position of D. W. Bowett, but he considers that this possibility does not come under the law of reservations (Bowett, "Reservations to non-restricted ..." (footnote 150 above), p. 84); see also Redgwell, "Universality or integrity? ..." (footnote 1127 above), p. 269. Moreover, it cannot reasonably be argued that the rules established in article 19, and in particular subparagraph (c), constitute peremptory norms of general international law from which the parties may not derogate by agreement.

¹⁹¹⁴ In this regard, see Coccia, "Reservations to multilateral treaties ..." (footnote 196 above), p. 26; Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 121–131; or Zemanek, "Some unresolved questions concerning reservations ..." (footnote 1074 above), pp. 331–332; see also Gaja, "Unruly treaty reservations" (footnote 28 above), pp. 319–320. As L. Lijnzaad quite rightly points out, it is not a question of acceptance *stricto sensu*, "it is the problem of inactive States whose laxity leads to the acceptance of reservations contrary to object and purpose", Lijnzaad, *Reservations to UN Human Rights Treaties* (footnote 463 above), p. 56.

¹⁹¹⁵ See guideline 2.8.13 and commentary thereto.

¹⁹¹⁶ See Greig, "Reservations: equity as a balancing factor?" (footnote 28 above), pp. 57–58. Even during the Commission's debate in 1962, Bartoš had made the point that it was almost inconceivable that the simple operation of time limits for the making of objections could mean that a clearly inadmissible reservation "could no longer be challenged" (*Yearbook ... 1962*, vol. I, 654th meeting, 30 May 1962, p. 163, para. 29).

formulated by Switzerland upon acceding to the Covenant of the League of Nations. Even though the Covenant prohibited reservations, the reserving State was admitted into the circle of States parties.¹⁹¹⁷ This "precedent"¹⁹¹⁸ certainly does not, however, help to prove the existence of a customary norm along those lines.

(13) In the absence of a well-established rule, the Commission considered that it was better not to take a position on the question, which, in any event, has more to do with the general problem of the amendment or modification of treaties than that of reservations *stricto sensu*.¹⁹¹⁹

3.4 Permissibility of reactions to reservations

Commentary

(1) Unlike the case of reservations, the Vienna Conventions do not set forth any criteria or conditions for the permissibility of reactions to reservations, although acceptances and objections occupy a substantial place as a means for States and international organizations to give or refuse their consent to a permissible reservation. Such reactions do not, however, constitute criteria for the permissibility of a reservation that can be evaluated objectively in accordance with the conditions established in article 19 of the Vienna Conventions and independently of the acceptances or objections to which the reservation has given rise. They are a way for States and international organizations to express their point of view regarding the permissibility of a reservation, but the permissibility (or impermissibility) of a reservation must be evaluated independently of the acceptances or objections to which it gave rise. Moreover, this idea is clearly expressed in section 3.3 (Consequences of the non-permissibility of a reservation). However, acceptances and objections provide a means for States and international organizations to express their point of view regarding the permissibility of a reservation and they may accordingly be taken into account in assessing the permissibility of a reservation.¹⁹²⁰

(2) The *travaux préparatoires* of the Vienna regime in respect of objections leave no doubt as to the lack of connection between the permissibility of a reservation and the reactions thereto.¹⁹²¹ It also follows that while it may be appropriate to refer to the "permissibility" of an objection or acceptance, the term does not have the same connotation as in the case of reservations themselves. The main issue is whether the objection or acceptance can produce its full effects.

3.4.1 Permissibility of the acceptance of a reservation

Acceptance of a reservation is not subject to any condition of permissibility.

¹⁹¹⁷ See Mendelson, "Reservations to the constitutions ..." (footnote 1334 above), pp. 140–141.

¹⁹¹⁸ Not an exact precedent, since, strictly speaking, it was not a case of unanimous acceptance by the parties to the Covenant but rather acceptance by the organization itself.

¹⁹¹⁹ In this sense, see Bowett, "Reservations to non-restricted ..." (footnote 150 above), p. 84.

¹⁹²⁰ See the commentary to guideline 4.5.2 below.

¹⁹²¹ See paragraphs (4)–(6) of the commentary to guideline 2.6.2 above.

Commentary

(1) It seems self-evident that contracting States or international organizations can freely accept a reservation that is permissible and that the permissibility of such acceptances cannot be questioned.¹⁹²² It is not clear whether it is a different matter when a State or an international organization accepts a reservation that is impermissible.

(2) While acceptance cannot determine the permissibility of a reservation, some authors have argued that the converse is not true:

An acceptance of an inadmissible reservation is theoretically not possible. Directly or indirectly prohibited reservations under article 19 (1) (a) and (b) cannot be accepted by any confronted state. Such reservations and acceptances of these will not have any legal effects. (...) Similarly, an incompatible reservation under article 19 (1) (c) should be regarded as incapable of acceptance and as *eo ipso* invalid and without any legal effects.¹⁹²³

(3) The Commission, however, has not taken that view. Although this statement in the literature may not be debatable as far as it goes, there is no need to conclude that acceptance of an impermissible reservation is in turn and *ipso facto* impermissible. It would seem more accurate to say that it simply cannot produce the legal effects that its author expected to produce. The reason for the absence of effects is not the impermissibility of the acceptance but the impermissibility of the reservation. The acceptance as such cannot be said to be either permissible or impermissible.

(4) In any case, only express acceptances could conceivably have been subject to conditions of permissibility, since it is difficult to envisage a regime of impermissibility for a non-existent act, such as a tacit acceptance. Now, it is hard to imagine that there could be a regime of permissibility for express acceptances and another for tacit acceptances, since that would run counter to the 1969 and 1986 Vienna Conventions, which place them on the same plane.

(5) For these reasons, the Commission considers that acceptance is not subject to any condition of permissibility. This position is without prejudice to the absence of effect of the individual acceptance of a reservation on the latter's permissibility.¹⁹²⁴

3.4.2 Permissibility of an objection to a reservation

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

(a) the provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and

¹⁹²² See guideline 4.1 and commentary thereto below. See also the commentary to guideline 2.8.3 (Express acceptance of reservations).

¹⁹²³ See Horn, *Reservations and Interpretative Declarations* ... (footnote 25 above), p. 121.

¹⁹²⁴ See guidelines 3.3.3 (Absence of effect of individual acceptance of a reservation on the permissibility of the reservation) and 4.5.2 (Reactions to a reservation considered invalid).

(b) the objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

Commentary

(1) Guideline 3.4.2 relates solely to a very particular category of objections, frequently called those with "intermediate effect", through which a State or international organization considers that treaty relations should be excluded beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions, yet does not oppose the entry into force of the treaty between itself and the author of the reservation. The Commission has noted the existence of such objections, which might be called objections of the "third type", in the commentary to guideline 2.6.1 on the definition of objections to reservations, without taking a position on their permissibility.¹⁹²⁵

(2) While treaty practice provides relatively few specific examples of intermediate-effect or "extensive" objections, some do exist. It would seem, however, that this "*nueva generación*"¹⁹²⁶ ["new generation"] of objections developed exclusively around certain reservations to the 1969 Vienna Convention itself: some States agreed that the Convention could enter into force between themselves and the authors of the reservations, provided that not only the provisions to which the reservations in question had been made,¹⁹²⁷ but also other articles related to them were excluded.¹⁹²⁸ These objections thus had a much broader scope than that of objections with "minimum effect", yet the authors of the objections did not go so far as to state that they were not bound by the treaty *vis-à-vis* the author of the reservation. While a number of States parties to the Vienna Convention objected to such reservations but limited their objections to the "presumed" effects envisaged in article 21, paragraph 3, of the 1969 Vienna Convention,¹⁹²⁹ other States—Canada,¹⁹³⁰ Egypt,¹⁹³¹ the United States,¹⁹³² Japan,¹⁹³³ New Zealand,¹⁹³⁴

¹⁹²⁵ See paragraph (23) of the commentary to guideline 2.6.1.

¹⁹²⁶ Riquelme Cortado, *Las reservas a los tratados* ... (footnote 150 above), p. 293.

¹⁹²⁷ As a general rule, article 66 of the Convention and the annex thereto (see the reservations formulated by Algeria (*Multilateral Treaties* ... (footnote 37 above), chap. XXIII.1), Belarus (*ibid.*), Cuba (*ibid.*), Guatemala (*ibid.*), the Russian Federation (*ibid.*), the Syrian Arab Republic (*ibid.*), Tunisia (*ibid.*), Ukraine (*ibid.*) and Viet Nam (*ibid.*)). Bulgaria, the Czech Republic, Hungary and Mongolia had formulated similar reservations but withdrew them in the early 1990s (*ibid.*). The German Democratic Republic had also formulated a reservation excluding the application of article 66 (*ibid.*).

¹⁹²⁸ These are the other provisions in Part V of the Vienna Convention, in particular article 64 on *jus cogens* (arts. 53 and 64). See also paragraph (9) below.

¹⁹²⁹ That was the case with Denmark and Germany (*Multilateral Treaties* ... (footnote 37 above), chap. XXIII.1).

¹⁹³⁰ In respect of the reservation by the Syrian Arab Republic (*ibid.*).

¹⁹³¹ The objection of Egypt was directed not at one reservation in particular, but at any reservation excluding the application of article 66 (*ibid.*).

¹⁹³² The United States objections were formulated before it became a contracting party and concerned the reservations made by the Syrian Arab Republic and Tunisia (*ibid.*).

¹⁹³³ In respect of any reservation excluding the application of article 66 or the annex to the Vienna Convention (*ibid.*).

¹⁹³⁴ In respect of the reservation of Tunisia (*ibid.*).

the Netherlands,¹⁹³⁵ the United Kingdom¹⁹³⁶ and Sweden¹⁹³⁷—wanted their objections to produce more serious consequences but did not wish to exclude the entry into force of the Vienna Convention as between themselves and the reserving States.¹⁹³⁸ The latter States not only wanted to exclude the application of the obligatory dispute settlement provision or provisions “to which the reservation refers”; they also did not consider themselves bound in their bilateral relations with the reserving State by the substantive provisions to which the dispute settlement procedure or procedures applied. For example, the United States, in its objection to the reservation of Tunisia to article 66 (a) of the Vienna Convention, stated:

The United States Government intends, at such time as it becomes a party to the Convention, to reaffirm its objection ... and declare that it will not consider that Article 53 or 64 of the Convention is in force between the United States of America and Tunisia.¹⁹³⁹

(3) While the 1969 and 1986 Vienna Conventions do not expressly authorize objections with intermediate effect, nothing in the two Conventions prohibits them. On the contrary, objections with intermediate effect, as their name indicates, may be entertained in that they fall “midway” between the two extremes envisaged under the Vienna regime: they purport to prohibit the application of the treaty to an extent greater than a minimum-effect objection (article 21, paragraph 3, of the Vienna Conventions), but less than a maximum-effect objection (article 20, paragraph 4 (b), of the Vienna Conventions).¹⁹⁴⁰

(4) Although in principle, “[a] State or international organization may formulate an objection to a reservation

¹⁹³⁵ In respect of all States that had formulated reservations concerning the compulsory dispute settlement procedures. This general declaration was reiterated separately for each State that had formulated such a reservation (*ibid.*).

¹⁹³⁶ To the extent set out in its declaration of 5 June 1987, except in respect of the reservation of Viet Nam.

¹⁹³⁷ In respect of any reservation excluding application of the dispute settlement provisions, in general, and of the reservations made by Cuba, the Syrian Arab Republic and Tunisia, in particular (*ibid.*).

¹⁹³⁸ The United Kingdom made maximum-effect objections, in due and proper form, to the reservations formulated by the Syrian Arab Republic and Tunisia. The effect of these objections seems, however, to have been mitigated *a posteriori* by the declaration of the United Kingdom of 5 June 1987, which constituted in a sense the partial withdrawal of its earlier objection (see guideline 2.7.7 and commentary thereto), since the author did not oppose the entry into force of the Convention as between the United Kingdom and a State that had made a reservation to article 66 or to the annex to the Vienna Convention and excluded only the application of Part V in their treaty relations. This declaration, which the United Kingdom recalled in 1989 (with regard to the reservation of Algeria) and 1999 (with regard to the reservation of Cuba), stated that “[w]ith respect to any other reservation the intention of which is to exclude the application, in whole or in part, of the provisions of article 66, to which the United Kingdom has already objected or which is made after the reservation by [the Union of Soviet Socialist Republics], the United Kingdom will not consider its treaty relations with the State which has formulated or will formulate such a reservation as including those provisions of Part V of the Convention with regard to which the application of article 66 is rejected by the reservation” (*ibid.*). Nevertheless, in 2002, the United Kingdom again objected with maximum effect to the reservation made by Viet Nam by excluding all treaty relations with Viet Nam (*ibid.*). New Zealand also chose to give its objection to the reservation of the Syrian Arab Republic maximum effect (*ibid.*).

¹⁹³⁹ *Ibid.*

¹⁹⁴⁰ See Müller, “1969 Vienna Convention. Article 21: Legal effects of reservations and of objections to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 560–561, para. 56.

irrespective of the permissibility of the reservation”,¹⁹⁴¹ the question remains whether objections with intermediate effect must in some cases be deemed to be impermissible.

(5) Some authors propose to consider that “these extended objections are, in fact, reservations (limited *ratione personae*)”.¹⁹⁴² This analysis is to some extent supported by the fact that other States have chosen to formulate reservations in the strict sense of the word in order to achieve the same result.¹⁹⁴³ Thus, Belgium formulated a (late) reservation concerning the Vienna Convention, stating:

The Belgian State will not be bound by articles 53 and 64 of the Convention with regard to any party which, in formulating a reservation concerning article 66 (a), objects to the settlement procedure established by this article.¹⁹⁴⁴

As one author has written:

As a partial rejection modifies the content of the treaty in relation to the reserving State to an extent that exceeds the intended effect of the reservation, acceptance or acquiescence on the part of the reserving State appear to be necessary for a partial rejection to take its effect; failing this, no relations under the treaty are established between the reserving State and an objecting State which partially rejects those relations.¹⁹⁴⁵

(6) This approach has been disputed on the grounds that, by adhering to the letter of the definition of reservations,¹⁹⁴⁶ the objecting State, which typically formulates its objection only after having become a party to the treaty, would be prevented from doing so within the established time period, and would be faced with the uncertainties that characterize the regime of late reservations.¹⁹⁴⁷ As a result, unless a “reservations dialogue” were established, the reserving State would not, in principle, be in a position to respond effectively to such an objection. It has also been pointed out that it would be contradictory to make objections with intermediate effect subject to conditions of permissibility while maximum-effect objections are not subject to such conditions, and further that the determination and assessment of the necessary link between the provisions which could potentially be deprived of legal effect by the interaction between the reservation and the extended objection have really more to do with the question of whether or not the objection with intermediate effect can produce the effect intended by its author.¹⁹⁴⁸

¹⁹⁴¹ Guideline 2.6.2 (Right to formulate objections).

¹⁹⁴² See, *inter alia*, J. Sztucki, “Some questions arising from reservations to the Vienna Convention on the Law of Treaties”, *German Yearbook of International Law*, vol. 20 (1977), p. 297. The author suggests that such declarations should be viewed as “objections only to the extent of the initial reservations and own reservations of the objecting States in the remaining part” (*ibid.*, p. 291).

¹⁹⁴³ The reservation of Belgium quoted below is quite similar in spirit, purpose and technique to conditional objections (see paragraphs (29)–(34) of the commentary to guideline 2.6.1). See, in particular, the Chilean objection to the 1969 Vienna Convention, quoted in paragraph (30) of the commentary to guideline 2.6.1.

¹⁹⁴⁴ *Multilateral Treaties ...* (footnote 37 above), chap. XXIII.1.

¹⁹⁴⁵ Gaja, “Unruly treaty reservations” (footnote 28 above), p. 326. See also Baratta, *Gli effetti delle riserve ...* (footnote 698 above), p. 385.

¹⁹⁴⁶ See guideline 1.1 (and article 2, paragraph 1 (b), of the Vienna Conventions).

¹⁹⁴⁷ See guidelines 2.3–2.3.4.

¹⁹⁴⁸ According to this view, “it is one thing to say that an objection with intermediate effect is not valid and quite another to maintain that such an objection cannot produce the effect intended by its author. Thus,

(7) The Commission was not convinced by this view and considered that objections with intermediate effect, which in some ways constitute “counter-reservations” (but are certainly not reservations strictly speaking), should conform to the conditions of permissibility and formal validity of reservations and, in any event, should not deprive the treaty of its object and purpose, if only because it makes little sense to apply a treaty deprived of its object or purpose. This is what is stated in subparagraph (b) of guideline 3.4.2.

(8) That said, it would be unacceptable and entirely contrary to the principle of consent¹⁹⁴⁹ for States and international organizations to use a reservation as an excuse for attaching intermediate-effect objections of their choosing, thereby excluding any provision that they do not like. A look back at the origins of objections with intermediate effect is revealing in this regard.

(9) As was recalled above,¹⁹⁵⁰ the practice of making objections with intermediate effect has been manifest mainly, if not exclusively, in the case of reservations and objections to the provisions of Part V of the 1969 Vienna Convention, and the reasons that led the objecting States to resort to them were made very clear. Article 66 of the Vienna Convention and its annex relating to compulsory conciliation provide procedural guarantees which many States, at the time when the Convention was adopted, considered essential in order to prevent abuse of certain provisions of Part V.¹⁹⁵¹ This link was stressed by some of the States that formulated objections with intermediate effect in respect of reservations to article 66. For example:

The Kingdom of the Netherlands is of the view that the provisions regarding the settlement of disputes, as laid down in article 66 of the Convention, are an important part of the Convention and *cannot be separated** from the substantive rules with which they are connected.¹⁹⁵²

The United Kingdom stated even more explicitly:

Article 66 provides in certain circumstances for the compulsory settlement of disputes by the International Court of Justice ... or by a conciliation procedure ... These provisions are *inextricably linked** with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference.¹⁹⁵³

(10) The reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal which some States had sought to undermine through reservations and which,

(Footnote 1948 continued.)

the issue does not bear on the validity of an objection and should therefore be included not in the part of the Guide to Practice on the substantive validity of declarations in respect of treaties, but rather in the part dealing with the effects that an objection with intermediate effect can actually produce” (fourteenth report on reservations to treaties, *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 118).

¹⁹⁴⁹ See, in particular, the commentary to guideline 3.1.5.2, especially paragraph (3).

¹⁹⁵⁰ Paragraph (2) above.

¹⁹⁵¹ Sztucki, “Some questions arising from ...” (footnote 1942 above), pp. 286–287 (see also the references provided by the author).

¹⁹⁵² See footnote 1935 above.

¹⁹⁵³ United Kingdom, objection of 5 June 1987 in respect of a Soviet reservation to article 66 of the Vienna Convention. See footnote 1936 above.

save through a maximum-effect reservation,¹⁹⁵⁴ could only be restored through an objection that went beyond the “normal” effects of the reservations envisaged by the Vienna Conventions.¹⁹⁵⁵

(11) It is thus clear from the practice concerning objections with intermediate effect that there must be an intrinsic link between the provision which gave rise to the reservation and the provisions whose legal effect is affected by the objection.

(12) After asking itself how best to define this link, and having contemplated calling it “intrinsic”, “indissociable” or “inextricable”, the Commission finally settled on the word “sufficient”, which does not seem contradictory to the words just mentioned but has the merit of showing that the particular circumstances of each case have to be taken into account. Moreover, guideline 3.4.2 probably partakes more of the nature of progressive development of international law than of codification *per se*; the use of the adjective “sufficient” has the merit of leaving room for the clarification that might come from future practice.

(13) Other limitations on the permissibility of objections with intermediate effect have been suggested. It might seem logical to exclude objections aimed at articles to which reservations are not permitted under article 19, subparagraphs (a) and (b), of the Vienna Conventions.¹⁹⁵⁶ The Commission does not disagree, but such situations are so hypothetical and marginal that it seems unnecessary to address them expressly in guideline 3.4.2.

(14) One might also think that since, according to guideline 4.4.3, paragraph 2, “[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law”, the same principle should apply to objections with intermediate effect. However, the Commission did not adopt that point of view, considering that objections, even those with intermediate effect, are not reservations and have the main purpose of countering a reservation, and that the “proximity” to the reservation of the provisions excluded by the objection¹⁹⁵⁷ suffices to avert any risk of lack of conformity with *jus cogens*.

(15) Consequently, the Commission deliberately rejected the idea of referring to the impermissibility of an objection owing to its being contrary to a rule of *jus cogens*: it considers that, in reality, such a hypothesis could not arise.

(16) It is quite clear that if the effect of an objection is to modify the bilateral treaty relations between its author and the author of the reservation in a manner that proves to be contrary to a peremptory norm of international law (*jus cogens*), this result would be unacceptable. Such an eventuality would, however, seem to be impossible: an

¹⁹⁵⁴ See article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions.

¹⁹⁵⁵ See Müller, “1969 Vienna Convention. Article 21: Legal effects of reservations and of objections to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 561, para. 57.

¹⁹⁵⁶ The text of which is incorporated in guideline 3.1 of the Guide to Practice.

¹⁹⁵⁷ See subparagraph (a) of guideline 3.4.2.

objection purports only to, and can only, exclude the application of one or more treaty provisions. Such an exclusion cannot “produce” a rule that is incompatible with a *jus cogens* norm. The effect is simply “deregulatory”, thus leading to the application of customary law. Ultimately, therefore, the rules applicable as between the author of the reservation and the author of the objection are never different from those that predated the treaty and, unless application of the treaty as a whole is excluded, from treaty-based provisions not affected by the reservation. It is impossible under these circumstances to imagine an “objection” that could violate a peremptory norm.

(17) Furthermore, when the definition of “objection” was adopted, the Commission refused to take a position on the question of the permissibility of objections that purport to produce a “super-maximum” effect.¹⁹⁵⁸ These are objections in which the authors deem not only that the reservation is not valid but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States. The permissibility of objections with super-maximum effect has frequently been questioned,¹⁹⁵⁹ primarily because

the effect of such a statement is not to bar the application of the treaty as a whole or of the provisions to which the reservation refers in the relations between the two parties but to render the reservation null and void without the consent of its author. This greatly exceeds the consequences of the objections to reservations provided for in article 21, paragraph 3, and article 20, paragraph 4 (b), of the [Vienna] Conventions. Whereas “unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State”, in this case it is the rule itself advocated by the reserving State which is challenged, and this is contrary to the very essence of an objection.¹⁹⁶⁰

(18) It is not, however, the permissibility of the objection as such that is called into question; the issue raised by this practice is whether the objection is capable of producing the effect intended by its author;¹⁹⁶¹ this is far from certain and depends, among other things, on the permissibility of the reservation itself.¹⁹⁶² A State (or an international organization) may well make an objection and wish to give it super-maximum effect, but this does not mean that the objection is capable of producing such an effect, which is not envisaged by the Vienna regime. However, as the Commission acknowledges in its commentary to guideline 2.6.1, where the definition of the term “objection” unquestionably includes objections with super-maximum effect:

[T]he Commission has endeavoured to take a completely neutral position with regard to the validity of the effects [and not of the objection] that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections.¹⁹⁶³

¹⁹⁵⁸ See paragraphs (24)–(25) of the commentary to guideline 2.6.1 (Definition of objections to reservations).

¹⁹⁵⁹ See the eighth report on reservations to treaties, *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 48, paras. 97–98 and footnote 160. See also the commentary to guideline 2.6.1, in particular paragraphs (24)–(25).

¹⁹⁶⁰ Eighth report on reservations to treaties, *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, para. 97.

¹⁹⁶¹ *Ibid.*, para. 95. See also paragraphs (24)–(25) of the commentary to guideline 2.6.1.

¹⁹⁶² See guidelines 4.3.4 and 4.5.3.

¹⁹⁶³ Paragraph (25) of the commentary to guideline 2.6.1 (Definition of objections to reservations).

(19) Furthermore, it should be stressed once again that an objection may not validly be formulated if its author has previously accepted the reservation in question. While this condition could be understood as a condition of permissibility of an objection, it may also be viewed as a question of form or of formulation. Thus, guideline 2.8.13 (Final nature of acceptance of a reservation) states that “acceptance of a reservation cannot be withdrawn or amended”. There seems to be no need to revisit the issue in the present guideline.

3.5 Permissibility of an interpretative declaration

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty.

Commentary

(1) The Vienna Conventions contain no rule on interpretative declarations as such, or, of course, on the conditions for the permissibility of such unilateral declarations. In that regard, and in many others as well, they differ from reservations and cannot simply be equated with them. Guideline 3.5 and those that follow are intended to fill that gap in respect of the permissibility of these instruments—it being understood in this connection that “simple” interpretative declarations (guideline 3.5) must be distinguished from conditional interpretative declarations, which in this respect follow the legal regime of reservations.¹⁹⁶⁴

(2) The definition of interpretative declarations provided in guideline 1.2 (Definition of interpretative declarations) is limited to identifying the practice in positive terms:

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.

(3) However, this definition, as noted in the commentary, “in no way prejudices the validity or the effect of such declarations and ... the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them”.¹⁹⁶⁵

(4) There is, however, still some question as to whether an interpretative declaration can be permissible, a question that is clearly different from that of whether a unilateral statement constitutes an interpretative declaration or a reservation. Indeed, it is one thing to determine whether a unilateral statement “purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions”—which corresponds to the definition of interpretative declaration—and another to determine whether the interpretation thus proposed is valid, or, in other words, whether the meaning or scope attributed by the declarant to a treaty or to certain of its provisions is valid.

¹⁹⁶⁴ For the definition of conditional interpretative declarations, see guideline 1.4, which states that “[c]onditional interpretative declarations are subject to the rules applicable to reservations”.

¹⁹⁶⁵ Paragraph (33) of the commentary to guideline 1.2.

(5) The issue of the permissibility of interpretative declarations can, of course, be addressed in the treaty itself;¹⁹⁶⁶ although quite uncommon in practice, this is still a possibility. Thus, a treaty's prohibition of any interpretative declaration would render impermissible any declaration that purported to "specify or clarify the meaning or scope" of the treaty or certain of its provisions. Article XV.3 of the Free Trade Agreement between the Government of Canada and the Government of Costa Rica of 2001¹⁹⁶⁷ is an example of such a provision. Other examples exist outside the realm of bilateral treaties.¹⁹⁶⁸

(6) It is also conceivable that a treaty might merely prohibit the formulation of certain interpretative declarations to certain of its provisions. To the Special Rapporteur's knowledge, no multilateral treaty contains such a prohibition in this form. But treaty practice includes more general prohibitions which, without expressly prohibiting a particular declaration, limit the parties' capacity to interpret the treaty in one way or another. It follows that if the treaty is not to be interpreted in a certain manner, interpretative declarations proposing the prohibited interpretation are impermissible. The European Charter for Regional or Minority Languages of 5 November 1992 includes examples of such prohibition clauses; article 4, paragraph 1, states:

Nothing in this Charter *shall be construed as* limiting or derogating from any of the rights guaranteed by the European Convention on Human Rights.

And article 5 states:

Nothing in this Charter *may be interpreted as* implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States.

(7) Similarly, articles 21–22 of the Framework Convention for the protection of national minorities of 1 February 1995 also limit the potential to interpret the Convention:

Article 21

Nothing in the present framework Convention *shall be interpreted as* implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.

Article 22

Nothing in the present framework Convention *shall be construed as* limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.

¹⁹⁶⁶ Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), p. 114.

¹⁹⁶⁷ Article XV.3 (Reservations): "This Agreement shall not be subject to unilateral reservations or unilateral interpretative declarations" (available from <http://www.sice.oas.org/Trade/cancr/English/cancrinPDF.asp>).

¹⁹⁶⁸ See the website of the Free Trade Area of the Americas, available from http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp; the square brackets are original to the text. The third draft agreement for the Free Trade Area of the Americas of November 2003, though still in the drafting stage, stated in Chapter XXIV, draft article 4: "This Agreement shall not be subject to reservations [or unilateral interpretative declarations] at the moment of its ratification."

(8) These examples show that the prohibition against interpretative declarations in guideline 3.5 may be express as well as implicit.

(9) This is why the Commission did not consider it necessary to provide in guideline 3.5 for a situation where an "interpretative declaration" was incompatible with the object and purpose of the treaty: that would be possible only if the declaration was considered a reservation, since by definition such declarations do not purport to modify the legal effects of a treaty, but only to specify or clarify them.¹⁹⁶⁹ This situation is covered in guideline 3.5.1.

(10) Similarly, but for different reasons, the Commission declined to consider that an "objectively wrong" interpretation—for example, one contrary to the interpretation given by an international court adjudicating the matter—should be declared impermissible.

(11) It goes without saying that an interpretation may be held to be with or without merit although, in absolute terms, it is impossible to determine whether the author is right or wrong until a competent body rules on the interpretation of the treaty. Interpretation remains an eminently subjective process and it is rare that a legal provision, or a treaty as a whole, can be interpreted in only one way. "The interpretation of documents is to some extent an art, not an exact science."¹⁹⁷⁰

(12) As Kelsen has noted:

If "interpretation" is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value.¹⁹⁷¹

As has also been pointed out:

Le processus interprétatif [en droit international n'est en effet qu'exceptionnellement centralisé, soit par un organe juridictionnel, soit de toute autre manière. La compétence d'interprétation appartient à l'ensemble des sujets, et, individuellement, à chacun d'eux. L'éclatement des modes d'interprétation qui en résulte n'est qu'imparfaitement compensé par leur hiérarchie. Les interprétations unilatérales sont en principe d'égale valeur; et les modes concertés sont facultatifs et par là même aléatoires. Il ne faut cependant pas surestimer les difficultés pratiques. Il ne s'agit pas tant d'une imperfection essentielle du droit international que d'une composante de sa nature, qui l'oriente tout entier vers une négociation permanente que les règles en vigueur permettent de rationaliser et de canaliser.

[The process of interpretation [in international law] is, in fact, only occasionally centralized, either through a judicial body or in some other

¹⁹⁶⁹ See paragraph (16) of the commentary to guideline 1.2. See also the famous dictum of the International Court of Justice in its advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (footnote 157 above), p. 229; see also *Rights of Nationals of the United States of America in Morocco, Judgment of 27 August 1952, ibid.*, p. 196.

¹⁹⁷⁰ See the Commission's draft articles on the law of treaties, paragraph (4) of the commentary to draft articles 27 and 28, in the report of the International Law Commission on the work of its eighteenth session, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 218. See also Aust, *Modern Treaty Law and Practice* (footnote 155 above), p. 230.

¹⁹⁷¹ H. Kelsen, *Pure Theory of Law*, tr. M. Knight, Berkeley and Los Angeles, University of California Press, 1967, p. 351.

way. Competence to interpret lies with all subjects and, individually, with each one of them. The resulting proliferation of forms of interpretation is only partially compensated for by their hierarchy. Unilateral interpretations are, in principle, of equal value, and the agreed forms are optional and consequently unpredictable. However, the practical difficulties must not be overestimated. It is not so much a question of an essential flaw in international law as an aspect of its nature, which guides it in its entirety towards an ongoing negotiation that can be rationalized and channelled using the rules currently in force.¹⁹⁷²

(13) Thus, “[e]n vertu de sa souveraineté, chaque État a le droit d’indiquer le sens qu’il donne aux traités auxquels il est partie, en ce qui le concerne” [on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party].¹⁹⁷³

If States have the right to interpret treaties unilaterally, they must also have the right to let their point of view be known as regards the interpretation of a treaty or of certain of its provisions.

(14) International law does not, however, provide any criterion allowing for a definitive determination of whether a given interpretation has merit. There are, of course, methods of interpretation (see, to begin with, articles 31 to 33 of the Vienna Conventions), but they are only guidelines as to the ways of finding the “right” interpretation; they do not offer a final “objective” (or “mathematical”) test of whether the interpretation has merit. Thus, article 31, paragraph 1, of the Vienna Conventions specifies that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*”^{*}. This clarification in no way constitutes a criterion for assessing the correctness, and still less a condition of the permissibility, of the interpretations given to the treaty, but a means of deriving one interpretation. That is all.

(15) International law in general and treaty law in particular do not impose conditions for the permissibility of interpretation in general and of interpretative declarations in particular. It has only the notion of the opposability of an interpretation or an interpretative declaration, and that comes into play in the context of determining the effects of an interpretative declaration.¹⁹⁷⁴ In the absence of any condition of permissibility, “[e]infache Interpretationserklärungen sind damit grundsätzlich zulässig” [“simple interpretative declarations are therefore, in principle, admissible”],¹⁹⁷⁵ although this does not mean that it is appropriate to speak of permissibility or non-permissibility unless the treaty itself sets the criterion.¹⁹⁷⁶

(16) In addition, it seemed to the Commission that, in the course of assessing the permissibility of interpretative declarations, one must not slip into the domain of responsibility—which, for reservations, is excluded by guideline 3.3.2. This would be the case for interpretative declarations if one were to consider that a “wrong”

interpretation constituted an internationally wrongful act that “violated” articles 31 and 32 of the Vienna Conventions.

3.5.1 *Permissibility of an interpretative declaration which is in fact a reservation*

If a unilateral statement which appears to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.5.7.

Commentary

(1) Section 1.3 of the Guide to Practice envisages a situation in which an “interpretative declaration” purports, in fact, to exclude or to modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.¹⁹⁷⁷ In such a situation, it is not an interpretative declaration but a reservation, which should be treated as such and must therefore meet the conditions for the permissibility and formal validity of reservations.

(2) The Court of Arbitration that settled the dispute between France and the United Kingdom concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* confirmed this approach. In that case, the United Kingdom maintained that the third reservation of France to article 6 of the Convention on the Continental Shelf was merely an interpretative declaration and hence opposed that interpretation on the grounds that it could not be invoked against the United Kingdom. The Court rejected this line of argument and considered that the declaration of France was not simply an interpretation; it had the effect of modifying the scope of application of article 6 and was therefore a reservation, as France had maintained:

This condition, according to its terms, appears to go beyond mere interpretation; for it makes the application of that régime dependent on acceptance by the other State of the French Republic’s designation of the named areas as involving “special circumstances” regardless of the validity or otherwise of that designation under Article 6. Article 2 (1) (d) of the Vienna Convention on the Law of Treaties, which both Parties accept as correctly defining a “reservation”, provides that it means “a unilateral statement, however phrased or named, made by a State ... whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in its application to that State”. This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State. This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this “reservation” is to be considered a “reservation” rather than an “interpretative declaration”.¹⁹⁷⁸

(3) While States often maintain or imply that an interpretation proposed by another State is incompatible with

¹⁹⁷² Combacau and Sur, *Droit international public* (footnote 166 above), p. 171.

¹⁹⁷³ Daillier, Forteau and Pellet, *Droit international public* (footnote 254 above), p. 277, para. 164. See also Rousseau, *Droit international public* (footnote 351 above), p. 250.

¹⁹⁷⁴ See guidelines 4.7.1–4.7.3.

¹⁹⁷⁵ Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), p. 113.

¹⁹⁷⁶ See paragraphs (5) and (8) above.

¹⁹⁷⁷ Guideline 1.3.3 (Formulation of a unilateral statement when a reservation is prohibited). It goes without saying that it is not enough for another State or another international organization to “recharacterize” an interpretative declaration as a reservation for the nature of the declaration in question to be modified (see guideline 2.9.3 (Recharacterization of an interpretative declaration) and commentary thereto, in particular paragraphs (3)–(6)).

¹⁹⁷⁸ Arbitral award of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), p. 40, para. 55.

the object and purpose of the treaty concerned,¹⁹⁷⁹ an interpretative declaration, by definition, cannot be contrary to the treaty or to its object and purpose. If it is otherwise, the statement is, in fact, a reservation, as noted in many States' reactions to "interpretative declarations".¹⁹⁸⁰ The reaction of Spain to the "declaration" formulated by Pakistan in signing the International Covenant on Economic, Social and Cultural Rights of 1966 also demonstrates the different stages of thought in cases where the proposed "interpretation" is really a modification of the treaty that is contrary to its object and purpose. The "declaration" must first be characterized; only then will it be possible to apply to it the conditions of permissibility (of reservations):

The Government of the Kingdom of Spain has examined the Declaration made by the Government of the Islamic Republic of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966.

The Government of the Kingdom of Spain points out that regardless of what it may be called, a unilateral declaration made by a State for the purpose of excluding or changing the legal effects of certain provisions of a treaty as it applies to that State constitutes a reservation.

The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan, which seeks to subject the application of the provisions of the Covenant to the provisions of the constitution of the Islamic Republic of Pakistan is a reservation which seeks to limit the legal effects of the Covenant as it applies to the Islamic Republic of Pakistan. A reservation that includes a general reference to national law without specifying its contents does not make it possible to determine clearly the extent to which the Islamic Republic of Pakistan has accepted the obligations of the Covenant and, consequently, creates doubts as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.

The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan to the effect that it subjects its obligations under the International Covenant on Economic, Social and Cultural Rights to the provisions of its constitution is a reservation and that that reservation is incompatible with the object and purpose of the Covenant.

According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a treaty are not permissible.

Consequently, the Government of the Kingdom of Spain objects to the reservation made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.

¹⁹⁷⁹ See, for example, the reaction of Germany to the interpretative declaration of Poland to the European Convention on Extradition of 13 December 1957 (United Nations, *Treaty Series*, vol. 1862, pp. 469–470) and to the declaration of India interpreting article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (*Multilateral Treaties ...* (footnote 37 above), chap. IV.3 and 4).

¹⁹⁸⁰ In addition to the aforementioned example of the reservation of Spain, see the objection of Austria to the "interpretative declaration" formulated by Pakistan in respect of the International Convention for the Suppression of Terrorist Bombings of 1997, and the comparable reactions of Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America (*Multilateral Treaties ...* (footnote 37 above), chap. XVIII.9). See also the reactions of Germany and the Netherlands to the unilateral statement of Malaysia (*ibid.*) and the reactions of Finland, Germany, the Netherlands and Sweden to the "interpretative declaration" formulated by Uruguay in respect of the Rome Statute of the International Criminal Court (*ibid.*, chap. XVIII.10). For other examples of recharacterization, see the commentary to guideline 1.2, footnote 149 above.

This objection shall not preclude the entry into force of the Covenant between the Kingdom of Spain and the Islamic Republic of Pakistan.¹⁹⁸¹

(4) Therefore, the issue is not the "permissibility" of interpretative declarations. Such unilateral statements are, in reality, reservations and accordingly must be treated as such, including with respect to their permissibility and formal validity. The European Court of Human Rights followed that reasoning in its judgment in the case of *Belilos v. Switzerland*. Having recharacterized the declaration of Switzerland as a reservation, it applied the conditions for the permissibility of reservations to the European Convention on Human Rights:

In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content. In the present case, it appears that Switzerland meant to remove certain categories of proceedings from the ambit of Article 6 § 1 [art. 6-1] and to secure itself against an interpretation of that article [art. 6-1] which it considered to be too broad. However, the Court must see to it that the obligations arising under the Convention are not subject to restrictions which would not satisfy the requirements of Article 64 [art. 64] as regards reservations. Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision.¹⁹⁸²

3.6 Permissibility of reactions to interpretative declarations

An approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

Commentary

(1) The question of the permissibility of reactions to interpretative declarations—approval, opposition or recharacterization¹⁹⁸³—must be considered in light of the study of the permissibility of interpretative declarations themselves. Since any State, on the basis of its sovereign right to interpret the treaties to which it is a party, has the right to make interpretative declarations, there seems little doubt that the other contracting States or contracting organizations also have the right to react to these interpretative declarations and that, where appropriate, these reactions are subject to the same conditions for permissibility as those for the declaration to which they are a reaction.

(2) As a general rule, like interpretative declarations themselves, the approval or opposition they arouse may prove to be correct or erroneous, but that does not imply that they are permissible or impermissible.

(3) The question of the permissibility of recharacterizations of interpretative declarations should be approached slightly differently. In a recharacterization, the author does not call into question¹⁹⁸⁴ the content of the

¹⁹⁸¹ *Multilateral Treaties ...* (footnote 37 above), chap. IV.3.

¹⁹⁸² Judgment of 29 April 1988, *Belilos v. Switzerland* (see footnote 192 above), p. 24, para. 49.

¹⁹⁸³ See guidelines 2.9.1–2.9.3.

¹⁹⁸⁴ It may *simultaneously* call into question and object to the content of the recharacterized declaration by making an objection to it; in such cases, however, the recharacterization and the objection remain conceptually different from one another. In practice, States almost always combine the recharacterization with an objection to the reservation. It should be borne in mind, however, that recharacterizing an interpretative declaration as a reservation is one thing and objecting to

initial declaration, but rather its legal nature and the regime applicable to it.¹⁹⁸⁵

(4) The characterization of a reservation or as interpretative declaration must be determined objectively, taking into account the criteria that the Commission set forth in guidelines 1.3 and 1.3.1–1.3.3. Guideline 1.3 states:

The character of a unilateral statement as a reservation or as an interpretative declaration is determined by the legal effect that its author purports to produce.

(5) This “objective” test takes into account only the declaration’s potential effects on the treaty *as intended by its author*. In other words,

only an objective analysis of the potential effects of the statement can determine the purpose sought. In determining the legal nature of a statement formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement has (or would have). If it results (or would result) in modifying or excluding the legal effect of the treaty or certain of its provisions, it is a reservation “however phrased or named”; if the statement simply clarifies the meaning or scope that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration.¹⁹⁸⁶

(6) Without prejudging the effects of such unilateral statements,¹⁹⁸⁷ it is clear that they are an important factor in determining the legal nature of the initially formulated act: in order to determine whether the act constitutes an interpretative declaration or reservations, these statements must be taken into account as expressing the position of parties to a treaty as to the nature of the “interpretative declaration” or “reservation”, with all the consequences that this entails. Nevertheless, the author of a recharacterization is simply expressing its opinion on the matter. That opinion may prove to be justified or unjustified when the test of guideline 1.3 is applied, but that in no way implies that the recharacterization is permissible or impermissible; they are two different questions.

(7) Recharacterizations, whether justified or unjustified, are not subject to criteria of permissibility. Abundant State practice¹⁹⁸⁸ shows that contracting States or contracting organizations consider themselves entitled to make such declarations, often in order to ensure the integrity of the treaty or to ensure respect for treaty-based prohibitions of reservations.¹⁹⁸⁹

the reservation thus “recharacterized” is another. Nonetheless, it should be noted that even in the case of a reservation that is “disguised” (as an interpretative declaration)—which, from a legal standpoint, has always been a reservation—the rules of procedure and formulation as set out in the present Guide to Practice remain fully applicable. This clearly means that a State wishing to formulate a recharacterization and an objection must abide by the procedural rules and time periods applicable to objections. This is why it is specified, in the second paragraph of guideline 2.9.3, that that State should accordingly treat the recharacterized declaration as a reservation.

¹⁹⁸⁵ See paragraph (5) of the commentary to guideline 2.9.3.

¹⁹⁸⁶ See paragraph (3) of the commentary to guideline 1.3.1 (Method of determining the distinction between reservations and interpretative declarations).

¹⁹⁸⁷ See guidelines 4.7.1–4.7.3 and commentaries thereto.

¹⁹⁸⁸ See, in particular, paragraph (4) of the commentary to guideline 2.9.3.

¹⁹⁸⁹ For a particularly telling example, see the reactions of several States to the “interpretative declaration” of the Philippines to the United Nations Convention on the Law of the Sea of 1982 (*Multilateral Treaties ...* (footnote 37 above), chap. XXI.6).

4. Legal effects of reservations and interpretative declarations

Commentary

(1) Part 4 of the Guide to Practice covers the effects of reservations, acceptances and objections and, in addition, the effects of interpretative declarations and reactions to them (approval, opposition, recharacterization or silence). Part 4 follows the logic of the Guide to Practice, in which an attempt is made to present, as systematically as possible, all the legal issues concerning reservations and related unilateral declarations, as well as interpretative declarations: after defining the concepts (in Part 1 of the Guide) and establishing the rules for assessing the formal validity (Part 2 of the Guide) and permissibility (Part 3 of the Guide) of these various declarations, Part 4 is concerned with determining the legal effects they produce.¹⁹⁹⁰

(2) First of all, it is worth recalling a point that is crucial to understanding the legal effects of a reservation or interpretative declaration. Both of these instruments are defined in relation to the legal effects that their authors intend them to have on the treaty. Accordingly, guideline 1.1 (Definition of reservations) provides as follows:

1. “Reservation” means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty* in their application to that State or to that international organization.

2. Paragraph 1 is to be interpreted as including reservations which purport to exclude or to modify the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects*, in their application to the State or to the international organization which formulates the reservation.

(3) In the same spirit, guideline 1.2 (Definition of interpretative declarations) states:

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions*.

(4) Although the potential legal effects of a reservation or interpretative declaration are thus a “substantive element”¹⁹⁹¹ of its definition,¹⁹⁹² this does not at all mean that a reservation or interpretative declaration actually produces those effects. Part 4 of the Guide is not intended to determine the effects that the author of a reservation or the author of an interpretative declaration intended it to

¹⁹⁹⁰ The final part of the Guide to Practice, Part 5, addresses reservations (and, to a lesser degree, interpretative declarations) in cases of succession of States.

¹⁹⁹¹ *Yearbook ... 1998*, vol. II (Part Two) p. 94, para. 500. It is generally recognized that the function of reservations is to purport to produce legal effects. Horn maintains that the fact that reservations purport to produce certain specific legal effects is the main criterion of this type of unilateral act (see Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 41. See also the statements of Mr. Ruda and Mr. Rosenne, who emphasized the close link between the definition of the reservation and the legal effects that it may produce (*Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 167, para. 46, and 800th meeting, 11 June 1965, p. 171, para. 8).

¹⁹⁹² For a definition of reservations in general, see guideline 1.1 and commentary thereto.

have—that issue was dealt with in Part 1 on the definition and identification of reservations and interpretative declarations. Instead, Part 4 deals with determining the legal effects that reservations and interpretative declarations actually produce, possibly in relation to reactions from other contracting States or contracting organizations. The purported effects and the actual effects are not necessarily identical and depend, on the one hand, on the formal validity and permissibility of the reservations and interpretative declarations and, on the other hand, on the reactions of other interested States or international organizations.

(5) Despite the relevant provisions of the Vienna Conventions, the effects of a reservation or of an acceptance of or objection to a reservation remain one of the most controversial issues of treaty law. Article 21 of the two Conventions refers exclusively to the “legal effects of reservations and of objections to reservations”. The drafting of this provision was relatively straightforward compared to that of the other provisions on reservations. Neither the International Law Commission nor the United Nations Conference on the Law of Treaties, held at Vienna in 1968 and 1969, seems to have had any particular difficulty in formulating the rules presented in the first two paragraphs of article 21 concerning the effects of reservations (while paragraph 3 deals with the effects of objections).

(6) The Commission’s first Special Rapporteur on the law of treaties, Mr. Brierly, had already suggested in his draft article 10, paragraph 1, that a reservation should be considered as

limiting or varying the effect of [a] treaty in so far as concerns the relation of [the] State or organization [author of the reservation] with one or more of the existing or future parties to the treaty.¹⁹⁹³

(7) Sir Gerald Fitzmaurice made the first proposal for a separate provision on the legal effects of a reservation, which largely prefigured the first two paragraphs of the current article 21.¹⁹⁹⁴ It is interesting that these draft provisions seemed to state the obvious to the Special Rapporteur: he did not make any comment on the draft and noted only that “[i]t is considered useful to state these consequences, but they require no explanation”.¹⁹⁹⁵

(8) At the outset, Sir Humphrey Waldock suggested a provision on the effects of a reservation deemed “admissible”,¹⁹⁹⁶ and from that time on his proposal underwent only minor drafting changes.¹⁹⁹⁷ Neither

¹⁹⁹³ [First] report on the law of treaties by J. L. Brierly, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 238.

¹⁹⁹⁴ First report on the law of treaties by G. G. Fitzmaurice, *Yearbook ... 1956*, vol. II, document A/CN.4/101, pp. 115–116.

¹⁹⁹⁵ *Ibid.*, p. 127, para. 101.

¹⁹⁹⁶ This is the term that was used in draft article 18, paragraph 5, as presented in Sir Humphrey Waldock’s first report, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 61.

¹⁹⁹⁷ The text proposed by Sir Humphrey Waldock for article 18, paragraph 5, became article 18 *ter*, devoted entirely to the legal effect of reservations, with a few editorial changes from the Drafting Committee (*ibid.*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 63). Subsequently, the Drafting Committee made other changes to the draft (*ibid.*, 667th meeting, 25 June 1962, p. 253, para. 71). It ultimately became article 21, as adopted by the Commission on first reading in 1962 (*ibid.*, vol. II, document A/5209, p. 181). The text underwent changes made necessary by the rephrasing of other provisions on reservations.

Sir Humphrey Waldock¹⁹⁹⁸ nor the Commission considered it necessary to comment at length on that rule, the Commission merely stating that

[t]hese rules, which appear not to be questioned, follow directly from the consensual basis of the relations between parties to a treaty.¹⁹⁹⁹

(9) Nor did the issue give rise to observations or criticisms from States between the two readings by the Commission or at the United Nations Conference on the Law of Treaties.

(10) The drafting of the current article 21, paragraph 3, posed greater difficulties. This provision, logically absent from Sir Humphrey Waldock’s first proposals (which precluded any treaty relations between a reserving State and an objecting State)²⁰⁰⁰ had to be included in the article on the effects of reservations and objections when the Commission accepted that a State objecting to a reservation could nevertheless establish treaty relations with the author of the reservation.²⁰⁰¹ A proposal by the United States of America to that effect convinced Sir Humphrey Waldock of the logical need for such a provision,²⁰⁰² but its drafting by the Commission was nevertheless time-consuming.²⁰⁰³ The Conference made only a relatively minor change in

The changes were purely editorial, except for the change to subparagraph 1 (b) (on this point, see paragraph (34) of the commentary to guideline 4.2.4).

¹⁹⁹⁸ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 68, para. 21.

¹⁹⁹⁹ *Ibid.*, document A/5209, p. 181 (commentary to article 21). See also paragraph 1 of the commentary to draft article 19 adopted on second reading in 1965, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 209.

²⁰⁰⁰ See the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 56, para. 3.

²⁰⁰¹ See Müller, “1969 Vienna Convention. Article 21: Legal effects of reservations and of objections to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 540–541, paras. 7–8.

²⁰⁰² See the fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 47–48 and 55. See also the comments of the Government of Denmark (*ibid.*, p. 46).

²⁰⁰³ Although Sir Humphrey Waldock considered that the case of a reservation to which a simple objection had been made was “not altogether easy to express” (*ibid.*, vol. I, 813th meeting, 29 June 1965, p. 270, para. 96), most of the members (see Mr. Ruda (*ibid.*, 800th meeting, 11 June 1965, p. 712, para. 13); Mr. Ago (*ibid.*, 814th meeting, 29 June 1965, pp. 271–272, paras. 7 and 11); Mr. Tunkin (*ibid.*, p. 271, para. 8); and Mr. Briggs (*ibid.*, p. 272, para. 14)) were convinced that it was necessary, and even “indispensable” (Mr. Ago, *ibid.*, p. 271, para. 7) to introduce a provision on that subject “in order to forestall ambiguous situations” (*ibid.*). However, members had different opinions as to the basis of the paragraph proposed by the United States and the Special Rapporteur: whereas Sir Humphrey Waldock’s proposal emphasized the consensual basis of the treaty relationship established despite the objection, the paragraph proposed by the United States seemed to suggest that the intended effect originated only from the unilateral act of the objecting State, that is, from the objection, without the reserving State having a real choice. The two positions had their supporters within the Commission (see the positions of Mr. Yasseen (*ibid.*, 800th meeting, 11 June 1965, p. 171, para. 7 and pp. 172–173, paras. 21–23 and 26), Mr. Tunkin (*ibid.*, p. 172, para. 18) and Mr. Pal (*ibid.*, p. 172, para. 24) and those of Sir Humphrey Waldock (*ibid.*, p. 173, para. 31), Mr. Rosenne (*ibid.*, p. 172, para. 10) and Mr. Ruda (*ibid.*, p. 172, para. 13)). The text that the Commission finally adopted on a unanimous basis (*ibid.*, 816th meeting, 2 July 1965, p. 284), however, is very neutral and clearly shows that the issue was left open by the Commission (see also the Special Rapporteur’s summing-up, *ibid.*, 800th meeting, 11 June 1965, p. 173, para. 31).

order to harmonize paragraph 3 with the reversal of the presumption of article 20, paragraph 4 (b).²⁰⁰⁴

(11) The resumed consideration of article 21 during the drafting of the 1986 Vienna Convention did not pose any significant difficulties. During the very brief discussion of draft article 21, two members of the Commission emphasized that the provision in question “followed logically” from draft articles 19 and 20.²⁰⁰⁵ Even more clearly, Mr. Calle y Calle stated that

if reservations were admitted, their legal effect was obviously to modify the relations between the reserving party and the party with regard to which the reservation was established.²⁰⁰⁶

(12) The Commission, and then several years later the United Nations Conference on the Law of Treaties, adopted article 21 with only the drafting changes required by the broader scope of the 1986 Vienna Convention.

(13) One might think that the widespread acceptance of article 21 during the adoption of the draft articles on the law of treaties between States and international organizations or between international organizations showed that the provision was already accepted by that time as reflecting international custom on the subject. The arbitral award in the *Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* corroborates this analysis. The Court of Arbitration recognized that

the law governing reservations to multilateral treaties was then undergoing an evolution which crystallized only in 1969 in Articles 19 to 23 of the Vienna Convention on the Law of Treaties.²⁰⁰⁷

(14) Nevertheless, the effects of a reservation and acceptance of it or objection to it are by no means fully addressed by article 21 of the 1969 and 1986 Vienna Conventions. The provision concerns only the effect of those instruments on the content of the treaty relationship between the reserving party and the other contracting States and contracting organizations.²⁰⁰⁸ A separate issue, not that of the effect of the reservation itself, but that of the effects of acceptance or objection on the consent of the reserving party to be bound by the treaty, is governed not by article 21 of the two Vienna Conventions, but by article 20, entitled “Acceptance of and objection to reservations”.

(15) This provision, which is the result of draft article 20 adopted by the Commission on first reading in 1962, entitled “The effects of reservations”,²⁰⁰⁹ was nevertheless

incorporated in 1965 in the new draft article 19, entitled “Acceptance of and objection to reservations”²⁰¹⁰ (which later became article 20 of the 1969 Vienna Convention), after significant reworking out of concern for clarity and simplicity.²⁰¹¹ In the context of that reworking, the Commission also decided to abandon the link between objections and the conditions for permissibility of a reservation, including its compatibility with the object and purpose of the treaty.

(16) At the United Nations Conference on the Law of Treaties, the first paragraph of this provision underwent major changes,²⁰¹² and paragraph 4 (b) was then altered by a Soviet amendment.²⁰¹³ The amendment was far-reaching, as it reversed the presumption of paragraph 4 (b): any objection would in the future be considered a simple objection unless its author had clearly expressed an intention to the contrary. Furthermore, despite the inappropriate title of article 20, it is clear from the origin of this provision that it was intended to cover, *inter alia*, the effects of a reservation, of the acceptance thereof and of any objections to that reservation.

(17) Nevertheless, articles 20 and 21 of the Vienna Conventions have some unclear elements and some gaps. In State practice, the case contemplated in article 21, paragraph 3, namely objections with minimum effect, is

“2. Except in cases falling under paragraphs 3 and 4 below and unless the treaty otherwise provides:

“(a) Acceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State, as soon as the treaty is in force;

“(b) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.

“3. Except in a case falling under paragraph 4 below, the effect of a reservation to a treaty which has been concluded between a small group of States shall be conditional upon its acceptance by all the States concerned unless:

“(a) The treaty otherwise provides; or

“(b) The States are members of an international organization which applies a different rule to treaties concluded under its auspices.

“4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides.” (*Yearbook ... 1962*, vol. II, document A/5209, p. 176.)

²⁰¹⁰ *Yearbook ... 1965*, vol. II, document A/6009, p. 162.

²⁰¹¹ See the fourth report on the law of treaties by Sir Humphrey Waldock, *ibid.*, document A/CN.4/177 and Add.1–2, p. 50, paras. 4–5.

²⁰¹² See the amendments by Switzerland (A/CONF.39/C.1/L.97), France and Tunisia (A/CONF.39/C.1/L.113) and Thailand (A/CONF.39/C.1/L.150). These amendments were adopted by a large majority (*Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (footnote 35 above), 25th meeting, 16 April 1968, p. 135, para. 30).

²⁰¹³ A/CONF.39/L.3, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), pp. 265–266. This amendment was adopted by 49 votes to 21, with 30 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (footnote 332 above), 10th plenary meeting, 29 April 1969, p. 35, para. 79). See also Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 494–495, para. 14.

²⁰⁰⁴ *Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (footnote 332 above), 33rd plenary meeting, 21 May 1969, p. 181.

²⁰⁰⁵ See Mr. Tabibi, *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 98, para. 7; see also Mr. Dadzie, *ibid.*, p. 99, para. 18.

²⁰⁰⁶ *Ibid.*, p. 98, para. 8.

²⁰⁰⁷ *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (footnote 24 above), p. 32, para. 38.

²⁰⁰⁸ See guideline 4.2.4 and commentary thereto.

²⁰⁰⁹ The draft article read as follows:

“[1.] (a) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.

“(b) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 below shall apply.

no longer viewed as “unusual”,²⁰¹⁴ as the Commission had initially envisaged; on the contrary, owing to the presumption of article 20, paragraph 4 (b), it has become the most frequent type of objection.

(18) However, the practice of States is not limited to recourse to the effects set out in paragraph 3. They are increasingly trying to have their objections produce different effects. The absence of a firm position on the part of the Commission, which intentionally opted for a neutral solution that was acceptable to everyone, far from resolving the problem, created others that the Guide to Practice attempts to resolve.

(19) Nor do articles 20 and 21 answer the question of what effects are produced by a reservation that does not meet the conditions of permissibility set out in article 19 or of formal validity (contained in article 23 and elsewhere). In other words, neither article 20 nor article 21 set out the consequences of the invalidity of a reservation, at least not expressly. It is also of particular concern that the application of paragraph 3 on the combined effects of a reservation and an objection is not limited to cases of permissible reservations—that is, reservations established in accordance with article 19, unlike the case set out in paragraph 1. The very least that can be said is that “[a]rticle 21 is somewhat obscure”.²⁰¹⁵

(20) In these circumstances, the Commission considered it necessary to draw a distinction between the rules applying to the legal effects of a valid reservation,²⁰¹⁶ which are set out—at least partially—in the two Vienna Conventions, and those concerning the legal effects of an invalid reservation.²⁰¹⁷

(21) The silence of the Vienna Conventions on the matter of interpretative declarations²⁰¹⁸ extends, obviously, to the effects of such declarations, which are covered in section 4.7 of Part 4 of the Guide to Practice.

4.1 *Establishment of a reservation with regard to another State or international organization*

A reservation formulated by a State or an international organization is established with regard to a contracting State or a contracting organization if it is permissible and was formulated in accordance with the required form and procedures, and if that contracting State or contracting organization has accepted it.

Commentary

(1) The legal effects of a valid reservation depend to a large extent on the reactions that it has received. A valid and accepted reservation produces legal effects different from those of a valid reservation to which objections have

been made. Article 21 of the Vienna Conventions establishes this distinction clearly. In its 1986 version, which is fuller in that it includes the effects of reservations and reactions of international organizations, it states:

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

(2) While paragraph 1 of this provision concerns the legal effects of an “established” reservation, a concept that should be clarified, paragraph 3 covers the legal effects of a reservation to which an objection has been made. A distinction should therefore be drawn between the case of a valid and accepted reservation—that is, an “established” reservation—and that of a valid reservation²⁰¹⁹ to which an objection has been made.

(3) While the Commission was aware that there might be some hesitation regarding that terminology, which was not defined in the Vienna Conventions and could give the impression of artificially creating a new category of reservations, it considered that that concept, found in article 21, paragraph 1, of the Vienna Conventions, while not creating a specific category of reservation, was of great significance for defining the effects of reservations. It would therefore be useful, at least, to endeavour to clarify the meaning of the term in the part of the Guide to Practice covering the effects of reservations.

(4) According to the *chapeau* of article 21, paragraph 1, only a reservation that has been “established”—in accordance with the provisions of articles 19, 20 and 23—has the legal effects set out in subparagraphs (a) and (b) of that paragraph. As for the scope of application of article 21, paragraph 1, the Vienna Conventions merely make a rather awkward reference to provisions concerning the permissibility of a reservation (art. 19), consent to a reservation (art. 20) and the form of a reservation (art. 23), without explaining the relationship between those provisions in greater detail. It therefore seems appropriate to define what is meant by an “established” reservation within the meaning of article 21, paragraph 1, before considering the legal effects it produces.

(5) Under the terms of the *chapeau* of article 21, paragraph 1, of the Vienna Conventions, a reservation is established “with regard to another party in accordance with

²⁰¹⁴ See the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 55.

²⁰¹⁵ Gaja, “Unruly treaty reservations” (footnote 28 above), p. 330.

²⁰¹⁶ See sections 4.1–4.4 of the Guide to Practice.

²⁰¹⁷ See section 4.5.

²⁰¹⁸ See paragraph (1) of the commentary to guideline 1.2 (Definition of interpretative declarations).

²⁰¹⁹ It should be noted that paragraph 3 of article 21 does not refer to the validity of the reservation which has been the subject of an objection. It cannot therefore be excluded, *a priori*, that this provision also applies to an objection to an invalid reservation; on this point, see paragraphs (9)–(12) of the commentary to guideline 4.5.2.

articles 19, 20 and 23". The phrase, which at first appears clear and is often understood as referring to valid reservations accepted by a contracting State or contracting organization, contains many uncertainties and imprecisions, which are the result of a significant recasting undertaken by the Commission during the second reading of the draft articles on the law of treaties in 1965 and of the changes made to article 20, paragraph 4 (b), of the Convention during the 1969 United Nations Conference on the Law of Treaties.

(6) First of all, the reference to article 23 as a whole poses a problem, since the provisions of article 23, paragraphs 3 and 4, have no effect on the establishment of a reservation. They concern only its withdrawal and the fact that, in certain cases, the formulation of an acceptance or an objection does not require confirmation.

(7) Secondly, it is difficult, if not impossible, to determine what connection might exist between the establishment of a reservation and the effect on the entry into force of the treaty of an objection provided for in article 20, paragraph 4 (b). The objection cannot be considered as consent to the reservation since it in fact aims to "preclude the reservation from having its intended effects or otherwise [oppose] the reservation".²⁰²⁰ Accordingly, a reservation to which an objection has been made is obviously not established within the meaning of article 21, paragraph 1.

(8) Consultation of the *travaux préparatoires* provides an explanation for this "contradiction". In the draft articles adopted by the Commission, which contained in article 19 (later article 21) the same reference, the presumption of article 17 (future article 20), paragraph 4 (b), established the principle that a treaty did not enter into force between a reserving State and a State which had made an objection. Since the treaty was not in force, there was no reason to determine the legal effects of the reservation on the content of treaty relations. Moreover, the comments of the Commission specified: "Paragraphs 1 and 2 of this article set out the rules concerning the legal effects of a reservation which has been established under the provisions of articles 16, 17 and 18, assuming that the treaty is in force*."²⁰²¹ The "contradiction" was introduced only during the Conference as a result of the reversal of the presumption of article 20, paragraph 4 (b), following the adoption of the Soviet amendment.²⁰²² Because of that new presumption, a treaty remains in force for the reserving State even if a simple objection is formulated. However, this does not mean that the reservation is established under article 21.

(9) In his first report on the law of treaties, Sir Humphrey Waldock did take into account the requirement of consent to a reservation for it to be able to produce its effects. The draft article 18 that he proposed to devote to "Consent to reservations and its effects" specified as follows:

A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is

presumed to have given, its consent thereto in accordance with the provisions of the following paragraphs of this article.²⁰²³

(10) In its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice also highlighted this basic principle of the law of reservations, and of treaty law in general:

It is well established that in its treaty relations a State cannot be bound without its consent and that consequently no reservation can be effective against any State without its agreement thereto.²⁰²⁴

It is this idea to which paragraph 1 of article 21 of the Vienna Conventions refers, and this is the meaning that must be given to the reference to article 20.

(11) Consent to the reservation is therefore a *sine qua non* for the reservation to be considered established and to produce its effects. Yet contrary to what has been maintained by certain partisans of the "opposability" school,²⁰²⁵ consent is not the only condition. The *chapeau* of article 21, paragraph 1, cumulatively refers to consent to the reservation (the reference to article 20), permissibility (art. 19) and formal validity (art. 23). Consent alone is thus not sufficient for the reservation to produce its "normal" effects. Moreover, the reservation must be permissible in the sense of article 19 and have been so formulated that it complies with the rules of procedure and form set forth in article 23. Only this combination can "establish" the reservation. That was the position taken by the Inter-American Court of Human Rights in its advisory opinion of 24 September 1982 concerning *The effect of reservations on the entry into force of the American Convention on Human Rights*, which concluded from its examination of the Vienna system (to which article 75 of the Pact of San José, Costa Rica, directly refers) that "States ratifying or adhering to the Convention may do so with any reservations that are not incompatible with its object and purpose*";²⁰²⁶ the Court also held that the

²⁰²³ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 61.

²⁰²⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), p. 17. See also Müller, "1969 Vienna Convention. Article 20: Acceptance of and objection to reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 496–498, paras. 18–22.

²⁰²⁵ In contrast to the "permissibility" school. On these two schools, see the general commentary to Part 3 of the Guide to Practice (Permissibility of reservations and interpretative declarations), in particular paragraph (4). See also the first report on the law and practice relating to reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 142–143, paras. 101–105; see also Koh, "Reservations to multilateral treaties ..." (footnote 1443 above), pp. 71–116; Redgwell, "The law of reservations ..." (footnote 1590 above), pp. 263–269; Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 73–82; Sinclair, *The Vienna Convention on the Law of Treaties* (footnote 129 above), p. 81, footnote 78; and Pellet, "1969 Vienna Convention. Article 19: Formulation of reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 425–426, paras. 49–53.

²⁰²⁶ Inter-American Court of Human Rights, *The effect of reservations on the entry into force of the American Convention on Human Rights* (arts. 74 and 75), advisory opinion OC-2/82 of 24 September 1982, *Series A: Judgments and Opinions*, No. 2, para. 26. The Court, referring to the specific nature of the Convention, nevertheless held that reservations to the Convention "do not require acceptance by the States Parties" (*ibid.*, para. 37); however, as the Court subsequently noted, that assertion was valid solely in the context of entry into force of the Convention (para. 38; on this point, see the commentaries to guidelines 4.2.2 and 4.2.5 below).

²⁰²⁰ See guideline 2.6.1 (Definition of objections to reservations).

²⁰²¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 209, paragraph (1) of the commentary to article 19.

²⁰²² See paragraph (16) above of the introduction to Part 4 of the Guide to Practice and, in particular, footnote 2013 above.

Convention implied the acceptance of all the reservations that were not incompatible with its object and purpose.

(12) This necessary combination of validity and consent results also from the phrase in article 21, paragraph 1, which states that a reservation is established “with regard to another party”. Logically, a reservation cannot be valid only with regard to another party. Either it is valid or it is not. This is a question that is not in principle subject to the will of the other contracting States or contracting organizations,²⁰²⁷ subject to the remaining uncertainty as to the possibility that they might decide by common agreement to “permit” the reservation.²⁰²⁸ On the other hand, a reservation that is valid is opposable only to the States or organizations that have, in one way or another, consented to it. It is a bilateral link which is created, following acceptance, between the author of the reservation and the contracting State or organization that has consented to it. The reservation is established only in regard to that party, and it is only in relations with that party that it produces its effects.

(13) As a consequence, it seems necessary to emphasize once again in the Guide to Practice that the establishment of a reservation results from the combination of its validity and of consent expressed by another contracting State or contracting international organization. However, the Commission did not consider it appropriate simply to reproduce the *chapeau* of article 21, paragraph 1, which explains the meaning of the term “established reservation” by referring to other provisions of the Vienna Conventions from which it derives. Guideline 4.1 in fact has the same meaning; however, instead of referring to other provisions, it sets out their content: “if it is permissible” corresponds to the reference to article 19;²⁰²⁹ “[if it] was formulated in accordance with the required form and procedures” corresponds to the reference in article 21, paragraph 1, to article 23;²⁰³⁰ and “if that contracting State or contracting organization has accepted it” corresponds to the reference to article 20.

(14) The formulation of guideline 4.1 differs from the *chapeau* of the first paragraph of article 21 of the Vienna Conventions in another regard: instead of referring to “another party”,²⁰³¹ guideline 4.1 covers cases in which “a reservation ... is established with regard to a contracting State or a contracting organization”. The reason for this is that, while article 21 applies to the “actual” effects of a reservation and presupposes that the treaty to which the reservation applies has already entered into force, guideline 4.1 merely specifies the conditions under which the reservation will be legally *capable* of producing the effects intended by its author, if and when the treaty enters into force.

(15) Guideline 4.1 merely sets out the general rule and does not fully answer the question of whether a

reservation is established. Article 20 of the Vienna Conventions, paragraph 4 of which specifies the implications, under general law, of consent to a reservation and hence constitutes the cornerstone of the flexible Vienna system,²⁰³² does in fact contain exceptions with regard to the expression of consent to the reservation by the other contracting States and contracting organizations. Moreover, paragraph 4 clearly specifies that it applies only in “cases not falling under the preceding paragraphs and unless the treaty otherwise provides”. The establishment of the reservation, and particularly the requirement of consent, may thus be modified depending on the nature of the reservation or of the treaty, but also by any provision incorporated in the treaty to that effect. These specific cases in which the consent of the other contracting States and contracting organizations is no longer required, or must be expressed unanimously or collectively, are covered in guidelines 4.1.1, 4.1.2 and 4.1.3.

(16) The words “with regard to” a State or an international organization, which appear in both the body and title of guideline 4.1, aim to make it clear that this provision refers to the usual situation in which the establishment of the reservation produces only relative effects, between the author of a reservation and a State or international organization that has accepted the reservation, in contrast to the special situations in which acceptance by another contracting State or another contracting international organization is not required in order for the reservation to produce its effects (see guidelines 4.1.1 and 4.1.3) or in which unanimous acceptance of the reservation by all the contracting States and contracting organizations is required for that purpose (see guideline 4.1.2).

(17) Article 21, paragraph 2, of the Vienna Conventions does not, strictly speaking, concern the legal effects of a reservation, but rather deals with the absence of any legal effect of a reservation on the legal relations between contracting States and contracting organizations other than the author of the reservation, regardless of whether the reservation is established or valid. This matter is dealt with in section 4.6 of the Guide to Practice.

4.1.1 *Establishment of a reservation expressly authorized by a treaty*

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and contracting organizations, unless the treaty so provides.

2. A reservation expressly authorized by a treaty is established with regard to the other contracting States and contracting organizations if it was formulated in accordance with the required form and procedures.

Commentary

(1) Guideline 4.1.1 presents the exception to the general rule concerning the establishment of reservations

²⁰²⁷ See guideline 3.3.3.

²⁰²⁸ See paragraphs (8)–(13) of the commentary to guideline 3.3.3.

²⁰²⁹ See guideline 3.1 (Permissible reservations).

²⁰³⁰ See guidelines 2.1.1 (Form of reservations), 2.1.5 (Communication of reservations) and 2.2.1 (Formal confirmation of reservations formulated when signing a treaty). Generally speaking, this reference to “required procedures” refers to the procedural requirements set out in the Vienna Conventions, the Guide to Practice and, in some cases, the treaty to which the reservation applies.

²⁰³¹ “A reservation established with regard to another party* in accordance with articles 19, 20 and 23”.

²⁰³² See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 207, paragraph (21) of the commentary to article 17. See also Bowett, “Reservations to non-restricted ...” (footnote 150 above), p. 84 and Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 490, para. 1.

contained in article 20, paragraph 1, of the Vienna Conventions, while establishing a link to the term “established reservation”. Since a reservation expressly authorized by the treaty is, by definition, permissible and accepted by the contracting States and contracting organizations, making it in a way that respects the rules applicable to the formulation and communication of reservations is all that is required to establish it. It thus becomes opposable to all the contracting States and contracting organizations.

(2) According to article 20, paragraph 1, of the Vienna Conventions, expressly authorized reservations do not require “subsequent” acceptance by the other contracting States and contracting organizations. However, paragraph 1 does not imply that the reservation is exempt from the requirement of the contracting States’ and contracting organizations’ assent; it simply expresses the idea that, since they have given their assent even before the formulation of the reservation, and have done so in the text of the treaty itself, any subsequent acceptance is superfluous. Moreover, the expression “unless the treaty so provides” which appears in the text of this provision²⁰³³ clearly calls for such an interpretation. Only reservations that are actually covered by such prior agreement are exempt from the need for subsequent acceptance, and are thus, logically, established from the moment they are validly made.²⁰³⁴

(3) The draft articles adopted by the Commission on second reading in 1966 did not restrict the possibility of acceptance solely to reservations “expressly” authorized by the treaty, but also included reservations “impliedly” authorized, but the work of the Commission sheds no light on the meaning to be attributed to this concept.²⁰³⁵ At the United Nations Conference on the Law of Treaties, a number of delegations expressed doubts regarding the soundness of this solution²⁰³⁶ and proposed amendments aimed at deleting the words “or impliedly”,²⁰³⁷ and the change was accepted.²⁰³⁸ Waldock, Expert Consultant at

²⁰³³ The words “unless the treaty so provides” were added by the Special Rapporteur, Sir Humphrey Waldock, in order to take account of “the possibility ... that a treaty may specifically authorize reservations but on condition of their acceptance by a specified number or fraction of the parties” (fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 50). This wording was slightly modified by the Drafting Committee (*ibid.*, vol. I, 813th meeting, 29 June 1965, p. 265, para. 30). In 1966, the wording was once again slightly modified, but the summary records of the meetings shed no light on the reasons for this change.

²⁰³⁴ “Made”, not “formulated”, because they produce their effects without any additional formality being required. See paragraph (6) of the commentary to guideline 3.1 (Permissible reservations).

²⁰³⁵ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 202; see also paragraph (18) of the commentary to article 17, which is quite brief and not particularly illuminating on this point, *ibid.*, p. 207.

²⁰³⁶ See the statements by the representatives of India (*Official Records of the United Nations Conference on the Law of Treaties, First Session ... (A/CONF.39/11)* (footnote 35 above), 24th meeting, p. 128, para. 30), the United States (*ibid.*, p. 130, para. 53) and Ethiopia (*ibid.*, 25th meeting, 16 April 1968, p. 134, para. 15).

²⁰³⁷ See the amendments by France and Tunisia (A/CONF.39/C.1/L.113), Switzerland (A/CONF.39/C.1/L.97) and Thailand (A/CONF.39/C.1/L.150) (*Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ... (A/CONF.39/11/Add.2)* (footnote 54 above), p. 135).

²⁰³⁸ The three amendments aimed at deleting “or impliedly” (see previous footnote) were adopted by 55 votes to 18, with 12 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, First Session ... (A/CONF.39/11)* (footnote 35 above), 25th meeting, 16 April 1968, p. 135, para. 30).

the Conference, himself recognized that “the words ‘or impliedly’ in article 17, paragraph 1, seemed to have been retained in the draft articles as a relic from earlier and more detailed drafts which dealt with implied prohibition and implied authorization of reservations”.²⁰³⁹ It is thus with good reason that reservations implicitly authorized by the treaty are not mentioned in article 20, paragraph 1.

(4) Had it been concluded, as was suggested,²⁰⁴⁰ that where a treaty prohibits certain reservations or certain categories of reservations, it *ipso facto* authorizes all others, which would amount to a reversal of the presumption of article 19, subparagraph (b), this interpretation would clearly place article 20, paragraph 1, in direct contradiction to article 19. On such an assumption, the inclusion in the treaty of a clause prohibiting reservations to a specific provision would suffice to institute total freedom to make any reservation whatsoever other than those that were expressly prohibited; the criterion of the object and purpose of the treaty would then be deprived of any effect.²⁰⁴¹ The Commission has already ruled out this interpretation in guideline 3.1.3 (Permissibility of reservations not prohibited by the treaty), which makes it clear that reservations not prohibited by the treaty are not *ipso facto* permissible and hence can certainly not be regarded as established and accepted by the terms of the treaty itself.

(5) By the same token, and despite the lack of precision in the Vienna Conventions on this point, a general authorization of reservations in a treaty cannot constitute *a priori* acceptance of any and all reservations on the part of the contracting States and contracting organizations. To say that all the parties have the right to formulate reservations to the treaty cannot imply that that right is unlimited, still less that all reservations so formulated are, by virtue of the simple general clause included in the treaty, “established” within the meaning of the *chapeau* to article 21, paragraph 1. To accept an unlimited right to formulate reservations under such circumstances would render the Vienna regime utterly meaningless. Such general authorizations do no more than refer to the general regime, of which the Vienna Conventions constitute the expression, and which is based on the fundamental principle that the parties to a treaty have the right to formulate reservations.

(6) Nor is the notion of an expressly authorized reservation identical or equivalent²⁰⁴² to the concept of a specified reservation. This was very clearly established by the arbitral tribunal in the case concerning *Delimitation of the*

²⁰³⁹ *Ibid.*, 24th meeting, 16 April 1968, pp. 126–127, para. 14.

²⁰⁴⁰ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 132.

²⁰⁴¹ See, in particular, the criticisms by Tomuschat, “Admissibility and legal effects of reservations ...” (footnote 1080 above), p. 475.

²⁰⁴² Imbert nevertheless maintains that specified reservations are included within the term “expressly authorized reservation”. In support of this interpretation he suggests that article 20, paragraph 1, in no way limits the right of contracting States to object to an expressly authorized reservation, but expresses only the idea that the reserving State becomes a contracting party upon the deposit of its instrument of ratification or accession (see Imbert, “La question des réserves dans la décision arbitrale du 30 juin 1977 ...” (footnote 1016 above), pp. 52–57). He does not deny that this solution openly contradicts the provisions of article 20, but justifies his approach by referring to the work of the United Nations Conference on the Law of Treaties. See also paragraph (11) of the commentary to guideline 3.1.2.

Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic in relation to the interpretation of article 12 of the Convention on the Continental Shelf of 1958, paragraph 1 of which provides as follows:

At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive.

There can be no doubt that, pursuant to this provision, any State may make its consent to be bound by the Convention on the Continental Shelf subject to the formulation of a reservation so “specified”, that is to say any reservation relating to articles 4–15, in accordance with article 19, subparagraph (b), of the Vienna Conventions. This “authorization” does not however imply that any reservation so formulated is necessarily permissible,²⁰⁴³ nor, *a fortiori*, that the other parties have consented, under article 12, paragraph 1, to any and every reservation to articles 4–15. The Court of Arbitration considered that this provision

cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 and 3 ... Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty.²⁰⁴⁴

(7) State practice supports the solution adopted by the Court of Arbitration. The fact that 11 States objected to reservations made to the Convention on the Continental Shelf,²⁰⁴⁵ even though those reservations only concerned articles other than articles 1–3, the only ones mentioned in article 12, paragraph 1, of the Convention, is furthermore revealing as regards the interpretation to be followed.

(8) The term “reservations expressly authorized” by the treaty must be interpreted restrictively in order to meet the objective of article 20, paragraph 1. In the case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, the Court of Arbitration rightly considered that

[o]nly if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance.²⁰⁴⁶

In order to determine which “expressly authorized” reservations do not require subsequent unilateral acceptance, it is thus appropriate to determine which reservations the parties have already consented to in the treaty. In this connection, it has been noted that “where the contents of authorized reservations are fixed beforehand, acceptance can reasonably be construed as having been given in advance, at the moment of consenting to the treaty”.²⁰⁴⁷

(9) In line with that opinion, article 20, paragraph 1, covers two types of prior authorizations by which parties

²⁰⁴³ See, on this question, guideline 3.1.4 (Permissibility of specified reservations) and commentary thereto.

²⁰⁴⁴ Decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), p. 32, para. 39.

²⁰⁴⁵ *Multilateral Treaties ...* (footnote 37 above), chap. XXI.4.

²⁰⁴⁶ Decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), p. 32, para. 39.

²⁰⁴⁷ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 133.

do not simply accept the abstract possibility of formulating reservations but determine in advance exactly which reservations may be made. On the one hand, a reservation made pursuant to a reservations clause that authorizes the parties simply to exclude the application of a provision²⁰⁴⁸ or an entire part of the treaty²⁰⁴⁹ must be deemed to be an “expressly authorized reservation”. In this case, the other contracting States and contracting organizations can see exactly, at the time the treaty is concluded, what contractual relations they will have with the parties that exercise the option of making reservations pursuant to the exclusion clause. On the other hand, “negotiated”²⁰⁵⁰ reservations can also be regarded as specified reservations. Indeed, certain international conventions do not merely authorize States parties to make reservations to one provision or another but contain an exhaustive list of reservations from among which States must make their choice.²⁰⁵¹ This procedure also allows contracting States and contracting organizations to gauge precisely and *a priori* the impact and effect of a reservation on treaty relations. By expressing its consent to be bound by the treaty, a State or an international organization consents to any reservations permitted by the “list”.

(10) In these two cases, the content of the reservation is sufficiently predetermined by the treaty for these reservations to be able to be considered “expressly authorized” within the meaning of article 20, paragraph 1, of the Vienna Conventions. The contracting States and contracting organizations are aware in advance of the treaty relations that result from the formulation of such a reservation and have agreed to it in the actual text of the treaty. There is no surprise, and the principle of consent is not undermined.

(11) The Commission has, moreover, developed a criterion for distinguishing among the different categories of specified reservations in defining the notion of expressly authorized reservations in its guideline 3.1.4 (Permissibility of specified reservations). Pursuant to this provision:

²⁰⁴⁸ See, for example, article 20, paragraph 1, of the Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930: “Any High Contracting Party may, when signing or ratifying the present Convention or acceding thereto, append an express reservation excluding any one or more of the provisions of Articles 1 to 17 and 21.” Treaties often authorize a reservation excluding the application of a provision concerning the settlement of disputes (see Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 169 (footnote 27) and Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 135–136).

²⁰⁴⁹ See article 38 of the Revised General Act for the Pacific Settlement of International Disputes of 1949, or article 34 of the European Convention for the peaceful settlement of disputes of 1957. The Social Security (Minimum Standards) Convention, 1952 (No. 102) combines, moreover, this possibility of rejecting the application of entire chapters with a minimum number of chapters that must actually be applied (art. 2) (see also article 2 of the Invalidity, Old-Age and Survivors’ Benefits Convention, 1967 (No. 128), article 20 of the European Social Charter of 1961, or article 2 of the European Code of Social Security of 1964). See also Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 134.

²⁰⁵⁰ Regarding this notion, see also paragraph (10) of the commentary to guideline 1.1.6. See also Gormley, “The modification of multilateral conventions ...” (footnote 115 above), pp. 75–76; and Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 196–199.

²⁰⁵¹ For Council of Europe practice, see Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 130–131.

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

A contrario, a specified reservation whose content is fixed in the treaty is considered *ipso facto* permissible and, given the provision expressly authorizing them, established.

(12) Paragraph 1 of guideline 4.1.1 reproduces the text of article 20, paragraph 1, of the 1986 Vienna Convention. While this reminder may not be strictly necessary, especially since the principle laid out follows from a close reading of guideline 4.1 and paragraph 2 of guideline 4.1.1, it is in line with the Commission's established and consistent practice of incorporating the provisions of the Convention in the Guide to Practice, to the extent possible. This is also why the Commission has not changed the wording despite the fact that the phrase "unless the treaty so provides" seems self-evident.²⁰⁵²

(13) Paragraph 2 of guideline 4.1.1 sets forth the specific rule that applies to the establishment of reservations expressly authorized by the treaty as an exception to the general rule established in guideline 4.1, laying down the single condition to be met for an expressly authorized reservation to be established: it must be formulated in accordance with the required form and procedures.²⁰⁵³

(14) In both paragraphs, as indeed in all the provisions that use the term, "contracting States and contracting organizations" covers three possible scenarios: one in which only States are involved; more exceptionally, one in which international organizations alone are contracting; and the intermediate hypothesis, in which contracting States and contracting organizations are both involved.

(15) It should also be emphasized that, once it has been clearly established that a particular reservation falls under article 20, paragraph 1, not only is its acceptance by the other parties unnecessary, but the parties are deemed to have effectively and definitively accepted it, with all the consequences that follow therefrom. One of the consequences of this particular regime is that the other parties cannot object to such a reservation.²⁰⁵⁴ Accepting this type of reservation in advance in the text of the treaty itself effectively prevents the contracting States and contracting organizations from subsequently making an objection, as "[t]he Parties have already agreed that the reservation is permissible and, having made its permissibility the object of an express agreement, the Parties have abandoned any right thereafter to object to such a reservation".²⁰⁵⁵ An amendment²⁰⁵⁶ proposed by France at the United Nations

²⁰⁵² However, see the explanation given by Sir Humphrey Waldock (footnote 2033 above); see also D Müller, "1969 Vienna Convention. Article 21: Legal effects of reservations and of objections to reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 540–541, para. 7.

²⁰⁵³ For the exact meaning of the required "procedures", see footnote 2030 above.

²⁰⁵⁴ Bowett, "Reservations to non-restricted ..." (footnote 150 above), p. 84, or Coccia, "Reservations to multilateral treaties ..." (footnote 196 above), p. 9.

²⁰⁵⁵ Bowett, "Reservations to non-restricted ..." (footnote 150 above), pp. 84–85.

²⁰⁵⁶ A/CONF.39/C.1/L.169. Paragraph 2 of the single article that, according to the French proposal, was to replace articles 16 and 17 of

Conference on the Law of Treaties expressed exactly the same idea, but was not adopted by the Drafting Committee. Guideline 2.8.13 (Final nature of acceptance of a reservation) is therefore applicable *a fortiori* to expressly authorized reservations. They are deemed to have been accepted, and consequently there can be no objection to them.

4.1.2 *Establishment of a reservation to a treaty which has to be applied in its entirety*

When it appears, from the limited number of negotiating States and organizations and the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation to this treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if all the contracting States and contracting organizations have accepted it.

Commentary

(1) A special case provided for in article 20, paragraph 2, of the Vienna Conventions is that of treaties which must be applied in their entirety. Paragraph 2 provides that the flexible system shall not apply to any treaty whose application in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty. In such cases, a reservation requires acceptance by all the parties.

(2) Sir Gerald Fitzmaurice made a distinction between plurilateral treaties, which were in his view closer to bilateral treaties, and multilateral treaties;²⁰⁵⁷ however, it was only in Sir Humphrey Waldock's first report that the usefulness of such a distinction became clearly apparent. What is now article 20, paragraph 2, resulted from a compromise between the members of the Commission who remained deeply convinced of the virtues of the traditional system of unanimity and the proponents of Sir Humphrey Waldock's flexible system.²⁰⁵⁸ At the time, the paragraph represented the last bastion which the proponents of unanimity refused to give up. The principle behind article 20, paragraph 2, no longer gave rise to debate either in the Commission during the second reading of the Waldock draft or at the United Nations Conference on the Law of Treaties.

(3) However, the main issue is not the principle of unanimity. Rather, the question is how to determine which

the International Law Commission draft provided that "[a] reservation expressly authorized by the treaty cannot be the subject of an objection by other contracting States unless the treaty so provides" (*Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 133).

²⁰⁵⁷ See the first report on the law of treaties by G. G. Fitzmaurice, *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 127, para. 97.

²⁰⁵⁸ The Special Rapporteur stressed that "paragraph [4] and paragraph 2 represented the balance on which the whole article was based" (*Yearbook ... 1962*, vol. I, 664th meeting, 19 June 1962, p. 230, para. 17). See also the statements made by Mr. Gros (*ibid.*, 663rd meeting, 18 June 1962, pp. 228 and 229, para. 97) and Mr. Ago (*ibid.*, p. 228, para. 87).

treaties are subject to the safeguard clause and are therefore excluded from the flexible system. Until 1965, the (limited) number of parties was the only criterion referred to by the special rapporteurs and the Commission.²⁰⁵⁹ Sir Humphrey Waldock's fourth report took into account the criticisms levelled against that criterion and recognized that "to find a completely precise definition of the category of treaties in issue is not within the bounds of possibility".²⁰⁶⁰ At the same time, he proposed a reference to the intention of the parties: "the application of its provisions between all the parties is to be considered an essential condition of [the validity of] the treaty".²⁰⁶¹ The parties' intention to preserve the integrity of the treaty was therefore the criterion for ruling out the flexible system and retaining the traditional unanimity system. The Commission adopted that idea, making minor drafting changes to what would become the present paragraph 2.²⁰⁶²

(4) It is worth noting, however, that the new provision addresses a completely different category of treaty than had been envisaged before 1962. The reference to intention has two advantages. First, it allows the flexible system to extend to treaties which, although concluded by only a small number of States, are otherwise more akin to general multilateral treaties. Secondly, it excludes treaties that have been concluded by a more significant number of States, but whose very nature requires that the integrity of the treaty be preserved. The concept of the "plurilateral" treaty has therefore shifted towards that of a treaty whose integrity must be ensured.²⁰⁶³

(5) The criterion of number was never completely discarded, and is still contained in article 20, paragraph 2. However, its function has changed: whereas prior to 1965 it was the sole factor in determining whether or not a given treaty was subject to the flexible system, its purpose is now to shed light on the intention of the parties. As a result, it now carries less weight in determining the nature of a treaty, having become an auxiliary criterion in this respect while unfortunately remaining somewhat imprecise and difficult to apply.²⁰⁶⁴

(6) Sir Humphrey Waldock proposed other "auxiliary" criteria that could assist in the intrinsically problematic

²⁰⁵⁹ This is true of G. G. Fitzmaurice (draft article 38 in the first report on the law of treaties, *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115) and of Sir Humphrey Waldock (draft article 1, subparagraph (d), first report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 31). Draft article 20, paragraph 3, which was adopted by the Commission on first reading in 1962, refers to treaties concluded "between a small group of States" (*ibid.*, document A/5209, p. 176).

²⁰⁶⁰ See *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1-2, p. 51, para. 7.

²⁰⁶¹ *Ibid.*, p. 50 (draft article 19, paragraph 2).

²⁰⁶² *Ibid.*, vol. I, 813th meeting, 29 June 1965, pp. 258-260, paras. 36-53, and *ibid.*, 816th meeting, 2 July 1965, pp. 283-284, paras. 43-49.

²⁰⁶³ See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 115.

²⁰⁶⁴ See, in particular, the criticisms made by Imbert, *ibid.*, pp. 112-113. See also the United States proposal at the United Nations Conference on the Law of Treaties to delete any reference to criteria other than intention, owing to those difficulties, *Official Records of the United Nations Conference on the Law of Treaties, First Session ... (A/CONF.39/11)* (footnote 35 above), 21st meeting, 10 April 1968, p. 108, para. 9.

task of establishing the parties' intentions. In his fourth report, he also mentioned the nature of the treaty and the circumstances of its conclusion.²⁰⁶⁵ The change was never explained, and despite the proposals of the United States, which pressed for the definition to refer to the nature of the treaty,²⁰⁶⁶ the object and purpose of the treaty was the only other "auxiliary" criterion adopted by the Commission and subsequently at the United Nations Conference on the Law of Treaties. The criterion of the object and purpose of the treaty,²⁰⁶⁷ like the criterion of number, is far from clear-cut, and it has even been suggested that, rather than clarifying the interpretation of paragraph 2, it renders it even more vague and subjective.²⁰⁶⁸

(7) Furthermore, paragraph 2 of article 20 is unclear, or at any rate difficult to interpret, not only in respect of its scope, but also in respect of the applicable legal regime. Under paragraph 2, reservations require acceptance by all parties. Only two things can be deduced for certain. First, such reservations are not subject to the flexible system set forth in paragraph 4; indeed, paragraph 4 confirms that view, in that it applies only to "cases not falling under the preceding paragraphs". Secondly, the reservations are indeed subject to unanimous acceptance: they must be accepted "by all the parties".

(8) However, paragraph 2 of article 20 does not clearly state who must actually accept the reservation. The text does refer to "the parties", but this is hardly satisfactory. It is questionable whether the acceptance of a reservation by all "parties" only should be a condition, a "party" being defined under article 2, paragraph 1 (g), as "a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force". That would contradict the underlying idea, which is that the treaty should be implemented in its entirety by all current and future parties. To argue otherwise would, in no small measure, deprive unanimous consent of its meaning.

(9) Moreover, although article 20, paragraph 5, connects the principle of tacit or implied consent to paragraph 2, it remains a mystery how implied acceptance could apply to the treaties referred to in the latter provision. It follows from article 20, paragraph 5, that a contracting State or contracting organization may make an objection only on becoming a party to the treaty. A signatory State or signatory organization could thus block unanimous acceptance even without formulating a formal objection

²⁰⁶⁵ *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1-2, p. 51, para. 7.

²⁰⁶⁶ See amendment A/CONF.39/C.1/L.127, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ... (A/CONF.39/11/Add.2)* (footnote 54 above), p. 135.

²⁰⁶⁷ See guidelines 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty) and 3.1.5.1 (Determination of the object and purpose of the treaty). In its advisory opinion of 24 September 1982, the Inter-American Commission on Human Rights found that "Paragraph 2 of Article 20 is inapplicable, *inter alia*, because the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of States, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality" (*The effect of reservations on the entry into force of the American Convention on Human Rights (arts. 74 and 75)*) (see footnote 2026 above), para. 27).

²⁰⁶⁸ See Tomuschat, "Admissibility and legal effects of reservations ..." (footnote 1080 above), p. 479, and Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 114-115.

to the reservation, because it would be impossible to presume that State's assent before the 12-month deadline elapsed. The presumption in article 20, paragraph 5, would therefore have the exact opposite of the desired effect, namely the rapid stabilization of treaty relations and of the status of the reserving State *vis-à-vis* the treaty.²⁰⁶⁹ For precisely that reason, the Special Rapporteur argued in 1962 that where States not yet parties to a treaty are concerned,

[t]his qualification of the rule is not possible in the case of plurilateral treaties because there the delay of taking a decision does place in suspense the status of the reserving State *vis-à-vis* all the States participating in the treaty.²⁰⁷⁰

(10) Such lacunae and inconsistencies are particularly surprising given that draft article 18 as proposed by Waldock in 1962 made a clear distinction between the tacit or implied acceptance of "plurilateral treaties" on the one hand and of multilateral treaties on the other hand.²⁰⁷¹ While these clarifications specified the legal regime for the treaties referred to in article 20, paragraph 2, perfectly well, they were nevertheless sacrificed in order to make the provisions on reservations less complex and more succinct.

(11) In an attempt to remove such uncertainties, guideline 4.1.2 clearly specifies that, where this type of treaty is concerned, a reservation is established only "if all the contracting States and contracting organizations have accepted it", by which is meant all the States and international organizations that have already ratified the treaty or do so within the 12-month period following the formulation of the reservation.

(12) The relatively complex wording that the Commission adopted for guideline 4.1.2 is the result of its desire to follow the wording of article 20, paragraph 2, as closely as possible, while also giving a complete list of the conditions that must be met for reservations to the treaties in question to be established, following the pattern of guideline 4.1.

(13) The two criteria adopted for establishing that a treaty is of the type that "has to be applied in its entirety" (a limited number of negotiating States and organizations, and the object and purpose of the treaty) are indicative but not necessarily cumulative or exhaustive.

4.1.3 *Establishment of a reservation to a constituent instrument of an international organization*

When a treaty is a constituent instrument of an international organization, a reservation to this treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if it has been accepted in conformity with guidelines 2.8.8 to 2.8.11.

²⁰⁶⁹ See Müller, "1969 Vienna Convention. Article 20: Acceptance of and objection to reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 502–503, paras. 41–42.

²⁰⁷⁰ First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 67, para. (16).

²⁰⁷¹ *Ibid.*, pp. 61–62.

Commentary

(1) The third—and final—exception to the flexible regime set out in article 20, paragraph 4, of the Vienna Conventions is provided for by paragraph 3 of that article and relates to constituent instruments of international organizations. Under the terms of the provision:

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

(2) A simple perusal of this provision shows that, in order to be established, a reservation to the constituent instrument of an international organization calls for the acceptance of the competent organ of the organization. The modalities for formulating such acceptance are the subject of guidelines 2.8.8–2.8.11, the commentaries to which explain the meaning and describe the *travaux préparatoires* for this provision.

(3) It does not appear necessary to recall once again the reasons that led the Commission and the Conference to adopt the provisions contained in article 20, paragraph 3, of the Vienna Conventions. Although guideline 2.8.8 is sufficient to express the need for the acceptance of the competent organ of the organization, the Commission considered that it was worth recalling this particular requirement in the section dealing with the effects of reservations, given that the acceptance of the competent organ is the *sine qua non* for the establishment of a reservation to the constituent instrument of an international organization. Only this collective acceptance can enable the reservation to produce all its effects. The individual acceptance of the other members of the organization, while clearly not prohibited, has no effect on the establishment of the reservation.²⁰⁷²

4.2 *Effects of an established reservation*

Commentary

(1) A reservation "established" within the meaning of section 4.1 produces all the effects intended by its author, that is to say, to echo the wording of guideline 1.1, it excludes or modifies "the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects". At that point, the object of the reservation as desired or "purported" by its author is achieved.

(2) However, modifying or excluding the legal effect of one or more provisions of the treaty is not the only result of the establishment of the reservation; it also constitutes the author of the reservation a contracting State or a contracting organization to the treaty. Following the establishment of the reservation, the treaty relationship is established between the author of the reservation and the contracting States or contracting organizations with regard to which the reservation is established. This has

²⁰⁷² See guideline 2.8.12 (Reaction by a member of an international organization to a reservation to its constituent instrument). Guideline 2.8.10 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

consequences in terms of the status of the contracting State or contracting organization (guideline 4.2.1), the entry into force of a treaty (guideline 4.2.2), the existence of a treaty relationship between the author of the reservation and the parties with regard to which the reservation is established (guideline 4.2.3) and the resultant treaty relations (guidelines 4.2.4 and 4.2.5).

4.2.1 Status of the author of an established reservation

As soon as a reservation is established in accordance with guidelines 4.1 to 4.1.3, its author becomes a contracting State or contracting organization to the treaty.

Commentary

(1) The establishment of the reservation has a number of consequences for its author relating to the very existence of the treaty relationship and the author's status in relation to the other contracting States or contracting organizations. It may even result in the entry into force of the treaty for all of the contracting States or contracting international organizations. These consequences follow directly from article 20, paragraph 4 (a) and (c), of the Vienna Conventions: the first of these provisions relates to the establishment of treaty relations between the author of the reservation and the contracting State or contracting organization which has accepted it (hence, the contracting State or contracting organization with regard to which or by which the reservation is established); the second relates to whether the consent of the reserving State or reserving international organization takes effect, or in other words whether the author of the reservation becomes a contracting State or contracting organization to the treaty. In the 1986 Vienna Convention these provisions read as follows:

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving State and for the accepting State or organization;

(b) ...

(c) an act expressing the consent of a State or of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one contracting State or one contracting organization has accepted the reservation.

(2) The Commission's commentary to draft article 17 (which became article 20) clearly explains the intent of these provisions:

Paragraph 4 contains the three basic rules of the "flexible system" which are to govern the position of the contracting States in regard to reservations to any multilateral treaties not covered by the preceding paragraphs. Sub-paragraph (a) provides that acceptance of a reservation by another contracting State constitutes the reserving State a party to the treaty *in relation to that State* if or when the treaty is in force ...²⁰⁷³

²⁰⁷³ Subparagraph (b) primarily concerns the effects of an objection to a valid reservation. In this connection, see section 4.3 of the Guide to Practice below and, in particular, guidelines 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the

Sub-paragraph (c) then provides that an act expressing the consent of a State to be bound and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation. This provision is important since it determines the moment at which a reserving State may be considered as a State which has ratified, accepted or otherwise become bound by the treaty.²⁰⁷⁴

(3) Article 20, paragraph 4 (a), of the 1969 Vienna Convention (the gist of which is reproduced in guideline 4.2.3) does not resolve the issue of the date on which the author of the reservation may be considered to have joined the group of contracting States or contracting international organizations. Paragraph 4 (c) was inserted into the Convention by the Commission in order to fill that gap. As Sir Humphrey Waldock explained in his fourth report:

The point is not purely one of drafting, since it touches the question of the conditions under which a reserving State is to be considered a "party" to a multilateral treaty under the "flexible" system. Indeed, not only the Australian but also the Danish Government urges the Commission to deal explicitly with that question, since it may affect the determination of the date on which the treaty comes into force and may otherwise be of concern to a depositary. The Special Rapporteur understands the position under the "flexible" system to be that a reserving State is to be considered as a "party" if and at the moment when another State which has established its consent to be bound by the treaty accepts the reservation either expressly or tacitly under paragraph 3 of the existing article 19 (paragraph 4 of the new article 20 as given below).²⁰⁷⁵

(4) What can be determined with certainty is whether and when the author becomes a contracting State or contracting organization, in other words, if it has "consented to be bound by the treaty, whether or not the treaty has entered into force" (art. 2, para. 1 (f)). That is precisely the subject of article 20, paragraph 4 (c), which merely states that the "act expressing [the author of the reservation's] consent to be bound by the treaty and containing a reservation *is effective** when at least one other contracting State has accepted the reservation".

(5) Although the general rule seems to be clearly established by article 20, paragraph 4 (c), of the Vienna Conventions—the author of a reservation becomes a contracting State or contracting organization as soon as its valid reservation has been accepted by at least one contracting State or one contracting organization—its practical application is far from being consistent, let alone uniform. The main actors involved in applying this rule, that is, depositaries, have almost always applied it in a very approximate manner.

(6) The Secretary-General of the United Nations, in his capacity as depositary of multilateral treaties, for example, agrees that any instrument expressing consent to be bound by a treaty which is accompanied by a reservation may be deposited and, refusing to adopt a position on the issue of the validity or effects of the reservation, "indicates the date on which, in accordance with the treaty provisions, the instrument would normally produce its effect, leaving it to each party to draw the legal

objection and the author of a reservation) and 4.3.5 (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect).

²⁰⁷⁴ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 207, paragraph (21) of the commentary to article 17.

²⁰⁷⁵ *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 52–53, para. 11.

consequences of the reservations that it deems fit²⁰⁷⁶. In other words, the Secretary-General does not wait for at least one acceptance to be received before accepting the definitive deposit of an instrument of ratification or accession accompanied by a reservation, but treats such instruments in the same way as any other ratification or accession that is not accompanied by a reservation:

Since he is not to pass judgment, the Secretary-General is not therefore in a position to ascertain the effects, if any, of the instrument containing reservations thereto and, *inter alia*, whether the treaty enters into force as between the reserving State and any other State, *a fortiori* between a reserving State and an objecting State if there have been objections. As a consequence, if the final clauses of the treaty in question stipulate that the treaty shall enter into force after the deposit of a certain number of instruments of ratification, approval, acceptance or accession, the Secretary-General as depositary will, subject to the considerations in the following paragraph, include in the number of instruments required for entry into force all those that have been accepted for deposit, whether or not they are accompanied by reservations and whether or not those reservations have met with objections.²⁰⁷⁷

(7) This position has been criticized²⁰⁷⁸ in view of the content of article 20, paragraph 4 (c), of the Vienna Conventions (read in conjunction with article 20, paragraph 5). It has been justified by the Secretary-General by the fact that

no objection had ever in fact been received from any State concerning an entry into force that included States making reservations. Finally, for a State's instrument not to be counted, it might conceivably be required that all other contracting States, without exception, would have not only objected to the participation of the reserving State, but that those objecting States would all have definitely expressed their intention that their objection would preclude the entry into force of the treaty as between them and the [reserving] State.²⁰⁷⁹

(8) To give a recent example, Pakistan acceded to the International Convention for the Suppression of the Financing of Terrorism through a notification dated 17 June 2009. That instrument was accompanied by reservations to articles 11, 14 and 24 of the Convention.²⁰⁸⁰ Despite these reservations, the Secretary-General noted in his depositary notification of 19 June 2009:

The Convention will enter into force for Pakistan on 17 July 2009 in accordance with its article 26 (2) which reads as follows:

“For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.”²⁰⁸¹

The instrument of Pakistan is therefore considered by the depositary as taking immediate effect, notwithstanding

²⁰⁷⁶ *Summary of Practice of the Secretary-General ...* (see footnote 75 above), para. 187.

²⁰⁷⁷ *Ibid.*, para. 184.

²⁰⁷⁸ See Imbert, “À l’occasion de l’entrée en vigueur de la Convention de Vienne ...” (footnote 601 above), pp. 524–541; Gaja, “Unruly treaty reservations” (footnote 28 above), pp. 323–324; Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 245–250; or Müller, “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 503–504, para. 43.

²⁰⁷⁹ *Summary of Practice of the Secretary-General ...* (footnote 75 above), para. 186.

²⁰⁸⁰ *Multilateral Treaties ...* (footnote 37 above), chap. XVIII.11.

²⁰⁸¹ Depositary notification No. C.N.371.2009.TREATIES-1, available from <http://treaties.un.org> (*Depositary notifications*).

article 20, paragraph 4 (c), of the 1969 Vienna Convention. For the depositary, Pakistan is one of the contracting States, indeed one of the parties, to the International Convention for the Suppression of the Financing of Terrorism, independently of whether its reservations have been accepted by at least one other contracting State.²⁰⁸²

(9) This practice, which seems to have been followed for many years and which existed well before the adoption of the 1969 Vienna Convention, has also been followed by other depositary institutions or States. Thus, depositaries as diverse as the Dominican Republic and the Council of Europe replied in 1965 to the Secretary-General's questionnaire with respect to depositary practice in relation to reservations²⁰⁸³ that a reserving State was “immediately counted among the number of countries necessary for bringing the convention into force”²⁰⁸⁴—in other words, as soon as it had expressed its consent to be bound, even when accompanying it with a reservation. Other depositaries, including the United States of America, the OAS and the FAO, reported a more nuanced practice, in principle not counting reserving States as contracting States.²⁰⁸⁵

(10) Without intending to take a position on the merits of this practice,²⁰⁸⁶ the Commission is of the view that, although application of article 20, paragraph 4 (c), of the Vienna Conventions is inconsistent, to say the least, the rule expressed in this provision has not lost its authority. It is certainly part of the reservations regime established by the 1969 and 1986 Vienna Conventions, which the Commission decided, as a matter of principle, to complement rather than contradict.²⁰⁸⁷ According to the terms of article 20, paragraph 4 (c), of the Vienna Conventions, the author of a reservation does not become a contracting State or organization until at least one other contracting State or one other contracting organization accepts the reservation, either expressly—which seldom occurs—or tacitly on expiration of the time period set by article 20,

²⁰⁸² See also, for example, the reservation of El Salvador accompanying its ratification, on 27 May 2008, to the Stockholm Convention on Persistent Organic Pollutants. The depositary notification of the Secretary-General of 11 June 2008 states that El Salvador will be considered to be a State party on “the ninetieth day after the date of deposit by such State or regional economic integration organization of its instrument of ratification, acceptance, approval or accession”, in accordance with article 26 of the Convention (C.N.436.2008.TREATIES-5) *ibid.*; see also the declaration of the Islamic Republic of Iran accompanying its act of accession to the Convention on the Rights of Persons with Disabilities and the depositary notification relating thereto (C.N.792.2009.TREATIES-37) *ibid.*; the reservations of Pakistan to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment accompanying its instrument of accession (deposited on 23 June 2010; depositary notification C.N.406.2010.TREATIES-1), *ibid.*; and the reservation of Uzbekistan to the Agreement establishing the International Fund for Agricultural Development accompanying the act of accession of 19 February 2011 (depositary notification C.N.78.2011.TREATIES-1), *ibid.*

²⁰⁸³ Depositary practice in relation to reservations: Report by the Secretary-General submitted in accordance with General Assembly resolution 1452 B (XIV), *Yearbook ... 1965*, vol. II, document A/5687, p. 98.

²⁰⁸⁴ *Ibid.*

²⁰⁸⁵ *Ibid.*

²⁰⁸⁶ See guideline 4.2.2 and paragraph (4) of the commentary thereto below.

²⁰⁸⁷ *Yearbook ... 1995*, vol. II (Part Two), pp. 107–108, para. 481; see also paragraph (6) of the introduction to this Guide to Practice.

paragraph 5, and referred to in guidelines 2.6.12 (Time period for formulating objections) and 2.8.2 (Tacit acceptance of reservations). In the worst case, the consequence of strict application of this provision is a delay of 12 months in the entry into force of the treaty for the author of the reservation. This delay may certainly be considered undesirable; nevertheless, it is caused by the author of the reservation, and it can be reduced by express acceptance of the reservation on the part of a single other contracting State or a single other contracting international organization.

(11) This is the general case. However, the wording of guideline 4.2.1 covers both the general case and the special situations covered by article 20, paragraphs 1, 2 and 3, of the Vienna Conventions. That is why guideline 4.2.1 does not simply echo the sole condition of acceptance by another contracting State or contracting organization, but speaks of the establishment of a reservation.²⁰⁸⁸ That wording makes it possible, for example, to cover, in the same guideline, reservations whose establishment does not require acceptance by another party because express provision is made for them in the treaty.²⁰⁸⁹ A reservation thus established will constitute the author of the reservation a contracting State or contracting organization.

(12) This was the reasoning followed, for example, by the Inter-American Court of Human Rights in its advisory opinion of 1982, in which it concluded that a reserving State became a contracting State or a contracting organization as from the date of ratification. Admittedly the reasoning rests on a fairly broad interpretation of the notion of “reservation expressly authorized” (art. 20, para. 1).²⁰⁹⁰ The conclusion reached regarding the effects of a reservation thus established is, however, uncontroversial:

Accordingly, for the purpose of the present analysis, the reference in Article 75 to the Vienna Convention makes sense only if it is understood as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty. As such, they can be said to be governed by Article 20 (1) of the Vienna Convention and, consequently, do not require acceptance by any other State Party.²⁰⁹¹

(13) In the light of these considerations, the Commission has decided to include in the Guide to Practice guideline 4.2.1, which expresses the idea of article 20, paragraph 4 (c), rather than reproducing it word for word. As soon as a reservation is established within the meaning of guidelines 4.1–4.1.3, the instrument of ratification or accession of the author of the reservation takes effect and constitutes the author a contracting State or a contracting organization. This has the result that the author of the reservation becomes a contracting State or contracting organization, with the ensuing consequences, if the treaty is not yet in force,²⁰⁹² or a party to the treaty if it has already

entered into force or comes into force by virtue of its instrument expressing consent to be bound.²⁰⁹³

4.2.2 *Effect of the establishment of a reservation on the entry into force of a treaty*

1. When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation is established.

2. The author of the reservation may, however, be included at a date prior to the establishment of the reservation in the number of contracting States and contracting organizations required for the treaty to enter into force, if no contracting State or contracting organization is opposed.

Commentary

(1) When applying the general rule set forth in guideline 4.2.1, a distinction must be drawn according to whether the treaty is not in force—a situation which may give rise to some fairly complex issues, which are dealt with in guideline 4.2.2—or is in force—a much easier situation, which is addressed in guideline 4.2.3.

(2) Indeed, if the treaty has not yet entered into force, the establishment of the reservation and the validity of the instrument through which the author of the reservation has expressed consent to be bound by the treaty may have the consequence that the treaty enters into force for all contracting States and organizations, including the author of the reservation. That is the case if, following the establishment of the reservation, the addition of the author to the number of contracting parties has the result that the conditions for the entry into force of the treaty are fulfilled. This result depends heavily on the circumstances of the case, and in particular on the conditions for the entry into force of the treaty as established by its final clauses, the number of contracting States and contracting organizations, etc. It is thus scarcely possible to derive a general rule in this respect except that the author of the established reservation should be included in the number of contracting States or organizations that determines the entry into force of the treaty. This is the principle established by guideline 4.2.2, paragraph 1.

(3) The purpose of paragraph 2, on the other hand, is to take into account—without passing judgment on its merits—what is probably the predominant practice of depositaries (and is, in any case, the practice of the Secretary-General of the United Nations, described above),²⁰⁹⁴ which is to consider the author of the reservation to be a contracting State or contracting organization as soon as the instrument expressing its consent to be bound has been deposited and without taking into account the validity or the invalidity of the reservation.

(4) The drafting of this second paragraph was prompted by a desire to take into consideration a practice which, up

²⁰⁸⁸ See also paragraphs (2)–(3) of the commentary to guideline 4.2.3.

²⁰⁸⁹ See guideline 4.1.1 and paragraphs (1) and (15) of the commentary thereto.

²⁰⁹⁰ Inter-American Court of Human Rights, Advisory Opinion OC-228 of 24 September 1982, *The effect of reservations on the entry into force of the American Convention on Human Rights (arts. 74 and 75)* (see footnote 2026 above) para. 36.

²⁰⁹¹ *Ibid.*, para. 35.

²⁰⁹² See guideline 4.2.2.

²⁰⁹³ See guideline 4.2.3.

²⁰⁹⁴ Paragraphs (6)–(10) of the commentary to guideline 4.2.1.

until now, does not seem to have caused any particular difficulties, while not calling into question the very clear rule, scarcely open to divergent interpretations, which is laid down in article 20, paragraph 4 (c), of the Vienna Conventions. A mere reference to the possibility of parties reaching an agreement contrary to this rule would not have been sufficient to reconcile these two concerns: quite apart from the fact that all the guidelines in the Guide to Practice are only indicative and parties remain free to depart from them by (valid) agreement *inter se*, it is extremely doubtful whether an agreement could be said to have come about merely because the other parties all remain silent. In this spirit, the International Court of Justice, in its advisory opinion of 1951, refused to consider that the mere fact of using an institutional depositary meant agreement with all the depositary's rules and practices:

It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom.²⁰⁹⁵

The Commission likewise did not consider it wise to refer to the depositary's habitual practice without further clarification,²⁰⁹⁶ for that might entrench and encourage the use of such practices, which contradicted the letter and spirit of article 20, paragraph 4 (c), of the Vienna Conventions.

(5) The formula chosen, which is reflected in the addition of a second paragraph, merely describes the practice of certain depositaries as an alternative to the rule. The expression "may, however, be included" reflects the optional nature of this divergent practice, whereas the final qualification "if no contracting State or contracting organization is opposed" safeguards the application of the principle set out in paragraph 1 should any one contracting State or contracting organization be opposed to that inclusion.

(6) The phrase "at a date prior" seeks to preserve broad flexibility for practice in the future and, for example, the possibility, not of eliminating any time lag whatsoever between the expression of the consent of the author of the reservation to be bound by the treaty and the acquisition of the status of contracting State or contracting organization, but of reducing it to less than one year. But in such case, the practice would remain subject to the principle of non-objection.

4.2.3 *Effect of the establishment of a reservation on the status of the author as a party to the treaty*

The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States and contracting organizations in respect of which the reservation is established if or when the treaty is in force.

²⁰⁹⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), p. 25.

²⁰⁹⁶ Moreover, it provided this clarification; see guideline 2.3.1 (Acceptance of the late formulation of a reservation): "Unless the treaty otherwise provides or the well-established practice followed by the depositary differs*, the late formulation of a reservation shall only be deemed to have been accepted if no contracting State or contracting organization has opposed such formulation after the expiry of the twelve-month period following the date on which notification was received."

Commentary

(1) The rule that the acceptance of a valid reservation establishes a treaty relationship between the author of the reservation and the State or international organization that has accepted it makes good sense. It appears in various forms in the drafts of all the special rapporteurs on the law of treaties. The only difference between Sir Humphrey Waldock's approach and that of his predecessors lies in the number of acceptances needed in order to produce this effect. The first three special rapporteurs, staunch advocates of the traditional regime of unanimity, did not consider a treaty relationship established until all the other contracting States and contracting organizations had accepted the reservation. In Sir Humphrey Waldock's flexible approach, each State (or international organization) not only decides for itself whether a reservation is opposable to it or not; that individual acceptance also produces its effects independently of the reactions of the other States or international organizations, although, logically, only in the bilateral relations between the author of the reservation and the author of the acceptance. The Commission explained in its commentary to draft article 20 as adopted on first reading that the application of this flexible system could

certainly have the result that a reserving State may be a party to the treaty with regard to State X, but not with regard to State Y, although States X and Y are mutually bound by the treaty. But in the case of a general multilateral treaty or of a treaty concluded between a considerable number of States, this result appears to the Commission not to be as unsatisfactory as allowing State Y, by its objection, to prevent the treaty from coming into force between the reserving State and State X, which has accepted the reservation.²⁰⁹⁷

(2) This system of "relative" participation in the treaty²⁰⁹⁸ is applicable, however, only in the "normal" instance of establishment of the reservation. Clearly, it cannot be applied in cases where unanimous acceptance is required in order to establish a reservation. For such a reservation to be able to produce its effects, including the entry into force of the treaty for the author of the reservation, all of the contracting States and contracting organizations must have consented to the reservation.²⁰⁹⁹ Consequently, the treaty necessarily enters into force in the same way for all of the contracting States and contracting organizations, on the one hand, and the author of the reservation, on the other hand. A comparable solution is necessary in the case of a reservation to the constituent instrument of an international organization; only the acceptance of the competent organ can establish the reservation and constitute its author one of the circle of contracting States and contracting organizations.²¹⁰⁰ Once this acceptance is obtained, the author of the reservation establishes treaty relations with all the other contracting States and contracting organizations without their individual consent being required.

(3) In the light of these comments it should, however, be noted that once the reservation is established, in conformity

²⁰⁹⁷ *Yearbook ... 1962*, vol. II, document A/5209, p. 181, paragraph (23) of the commentary. See also *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 207–208, paragraph (22) of the commentary to draft article 17.

²⁰⁹⁸ *Ibid.*

²⁰⁹⁹ See guideline 4.1.2 above.

²¹⁰⁰ See guideline 4.1.3 above.

with the rules set out in guidelines 4.1–4.1.3, depending on the nature of the reservation and the characteristics of the treaty, a treaty relationship is formed between the author of the reservation and the contracting State or States (or contracting organization or organizations) in respect of which the reservation is established: the contracting State or contracting organization which has accepted the reservation (in the “normal” case), and all the contracting States and contracting organizations (in the other cases). It thus suffices to recall this rule, which constitutes the core of the Vienna regime, without any need to distinguish again between the general rule and the exceptions to it, as the wording of guidelines 4.1–4.1.3 makes it possible to determine in respect of whom the reservation is established and with whom the treaty relationship is constituted.

(4) Guideline 4.2.3 draws the consequences of this principle—which is enunciated in guideline 4.2.1—if the treaty is in force (or enters into force pursuant to guideline 4.2.2 or for another reason). In that case, it goes without saying that the author of an established reservation thereby becomes a party to the treaty within the meaning of article 2, paragraph 1 (g), of the 1986 Vienna Convention and not just a contracting State or contracting organization as defined in paragraph 1 (f) of the same article.

4.2.4 *Effect of an established reservation on treaty relations*

1. A reservation established with regard to another party excludes or modifies for the reserving State or international organization in its relations with that other party the legal effect of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation.

2. To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.

3. To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation.

Commentary

(1) The three paragraphs of guideline 4.2.4 are structured as follows:

– the first paragraph sets out the principle contained in article 21, paragraph 1 (a), of the Vienna Conventions, with the requisite adjustments for the purposes of the Guide to Practice;

– the second paragraph explains the consequences of this principle specifically when an established reservation excludes the legal effect of certain provisions of a treaty; and

– the third does the same when the reservation modifies this legal effect.

(2) In all three cases (and in the title of the guideline) the Commission has used the singular to designate the set of consequences attendant upon the establishment of a reservation, although in reality they are diverse, out of a concern to align the wording of the guideline with that of article 2, paragraph 1 (d), of the Vienna Conventions (reproduced in guideline 1.1), which employs the singular. That provision also establishes the distinction between reservations which purport to “exclude” and those which purport to “modify the legal effect of certain provisions of the treaty in their application” to the author of the reservation, whereas article 21, paragraph 1, states that an established reservation “modifies ... the provisions of the treaty to which the reservation relates”, without contemplating an exclusionary effect. Reservations that modify should not, however, be treated as having precisely the same effect as reservations that exclude.

(3) In order to clarify further the content of the obligations and rights of the author of the reservation and of the State or international organization with regard to which the reservation is established, it is helpful to draw a distinction between, as Horn terms them, “modifying reservations” and “excluding reservations”.²¹⁰¹ The distinction is not always easy to make and it can happen that one and the same reservation has both an excluding and a modifying effect. Thus, a reservation by which its author purports to limit the scope of application of a treaty obligation only to a certain category of persons may be understood equally well as a modifying reservation (it modifies the legal effect of the initial obligation by limiting the circle of persons concerned) and as an excluding reservation (it purports to exclude the application of the treaty obligation for all persons not forming part of the specified category).²¹⁰² It can also happen that an excluding reservation indirectly has modifying effects. In order to take account of such uncertainty, paragraphs 2 and 3 both begin with the phrase “To the extent that”. The distinction does, however, permit a better insight into the two most common situations. The great majority of reservations may be classified in one or other of these categories, or at least understood by means of this distinction.

(4) Article 21, paragraph 1 (a), of the Vienna Conventions broadly determines the effect that the established reservation produces on the content of its author’s treaty relations. In the 1986 Vienna Convention, this provision reads:

A reservation established with regard to another party in accordance with articles 19, 20 and 23:

²¹⁰¹ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 80–87.

²¹⁰² See, for example, the reservation of Egypt to the Vienna Convention on Consular Relations: “Article 49 concerning exemption from taxation shall apply only to consular officers, their spouses and minor children. This exemption cannot be extended to consular employees and to members of the service staff” (*Multilateral Treaties ...* (footnote 37 above), chap. III.6).

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation;

(5) Apart from the lack of any reference to excluding reservations, although they are included in the definition of a reservation, another more serious inconsistency may be signalled between the definition of the term “reservation” in the Vienna Conventions and the effects contemplated in article 21, paragraph 1: whereas, according to article 21, a reservation modifies “the provisions of the treaty”, the purpose of a reservation according to article 2, paragraph 1 (d), is to modify or exclude “the legal effect of certain provisions of the treaty”. This problem did not go unnoticed during the debate in the Commission: while some members stressed that the reservation could not change the provisions of the treaty and that it would be preferable to replace “provisions” by “application”,²¹⁰³ other members paid little attention to the matter,²¹⁰⁴ or expressed their satisfaction with the text proposed by the Drafting Committee.²¹⁰⁵

(6) In the literature, the question of whether it is the “provisions of the treaty” or their “legal effects” that are modified has been raised more forcefully. Imbert is of the view that:

[C]’est précisément le lien établi par les rédacteurs de la Convention de Vienne entre la réserve et les dispositions d’une convention qui nous semble le plus critiquable. En effet, une réserve ne tend à éliminer une disposition mais une obligation.

[It is precisely the link which the drafters of the Vienna Convention established between reservations and the provisions of a convention that seems to be most open to criticism, in that a reservation is aimed at eliminating not a *provision* but an *obligation*.]²¹⁰⁶

However, this view considers the effect of the reservation only from the standpoint of its author, and appears to overlook the fact that, in modifying the author’s obligation the reservation also affects the correlative rights of the States or international organizations in respect of which the reservation is established. It is thus more convincing to conclude that, with regard to this question, article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions is better drafted than article 21, paragraph 1. It is unclear how a reservation, which is an instrument *external* to the treaty, could modify *a provision of that treaty*. It may exclude or modify its application, that is, its effect, but not the text itself, that is, the provisions.²¹⁰⁷

(7) Moreover, the text of article 2, paragraph 1 (d), also does not appear to correspond fully to State practice with respect to reservations, in that it specifies that a reservation can purport to exclude or modify only “the

legal effect of certain provisions of the treaty”.²¹⁰⁸ It is in fact not uncommon for States to formulate reservations in order to modify the application of a treaty as a whole, or at least of a substantial part of it. In certain cases, such reservations can certainly not be regarded as permissible, in that they deprive the treaty of its object and purpose, so that they cannot be deemed “established reservations”.²¹⁰⁹ However, that is not always the case, and there are in practice many examples of such across-the-board reservations which were not the subject of objections or challenges by the other contracting States.²¹¹⁰ Article 21, paragraph 1 (a), is more open in this respect, in that it simply provides that the reservation modifies [or excludes] “the provisions of the treaty to which the reservation relates to the extent of the reservation”. If a reservation can thus permissibly purport to modify the legal effects of all of the provisions of a treaty with respect to certain specific aspects, as the Commission clearly acknowledged in the second paragraph of guideline 1.1 (Definition of reservations), it will have the effect, once established, of modifying the application of all those provisions, or indeed, as the case may be, of all of the provisions of the treaty, in accordance with article 21, paragraph 1.²¹¹¹

(8) It follows that a validly established reservation affects the treaty relations of the author of the reservation in that it excludes or modifies the legal effect of one or more provisions of the treaty, or even of the treaty as a whole, with respect to a specific aspect, and on a reciprocal basis.²¹¹²

(9) In accordance with the Commission’s well-established practice in the context of the Guide to Practice, paragraph 1 of guideline 4.2.4 largely reproduces article 21, paragraph 1 (a), of the 1986 Vienna Convention while making the modifications justified by the above-mentioned arguments:

- the inclusion of “excluding” reservations;
- the point that the reservation does not modify “the provisions of the treaty” but their legal effect; and

²¹⁰⁸ See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 14–15; and Szafarz, “Reservations to multilateral treaties” (footnote 27 above), p. 296. See, however, D. N. Hyllton, who maintains that “[r]eservations modify a treaty only in regard to specific provisions” (“Default breakdown: the Vienna Convention on the Law of Treaties’ inadequate framework on reservations”, *Vanderbilt Journal of International Law*, vol. 27, No. 2 (1994), p. 422).

²¹⁰⁹ See guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty) and commentary thereto and paragraphs (19)–(20) of the commentary to guideline 1.1.

²¹¹⁰ Paragraph (18) of the commentary to guideline 1.1.

²¹¹¹ “*Mediante le riserve, gli Stati possono produrre l’effetto di restringere il campo d’applicazione materiale o soggettivo della convenzione, fino all’esclusione di una o più disposizioni dell’accordo o alla non applicazione per determinati soggetti, oppure manifestare la volontà di accettare le disposizioni con modalità restrittive o con limiti di ordine temporale o territoriale*” [By means of reservations, States can reduce the material or subjective scope of application of a treaty to the point of exclusion of one or more provisions of the treaty or its non-application to specific subjects, or again they can demonstrate willingness to accept the provisions of the treaty in accordance with restrictive modalities or by attaching to the limitations of a temporal or territorial nature] (P. de Cesari, “Riserve, dichiarazioni e facoltà nelle Convenzioni dell’Aja di diritto internazionale privato”, *Comunicazioni e Studi*, vol. 22 (2002), p. 167, para. 8).

²¹¹² On the matter of reciprocity, see guideline 4.2.5 and commentary thereto below.

²¹⁰³ Mr. Rosenne (*Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 172, para. 9, and 814th meeting, 29 June 1965, p. 271, para. 2) and Mr. Tsuruoka (*ibid.*, p. 272, para. 16).

²¹⁰⁴ Mr. Tunkin “considered it of no great importance whether the wording used was ‘modifies the provisions of the treaty’ or ‘modifies the application of the provisions of the treaty’” (*ibid.*, p. 271, para. 9). For a similar view, see Mr. Briggs (*ibid.*, p. 272, para. 13).

²¹⁰⁵ See Mr. Briggs (*ibid.*, 800th meeting, 11 June 1965, p. 173, para. 28).

²¹⁰⁶ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 15.

²¹⁰⁷ See paragraph (16) of the commentary to guideline 1.1.

– the point that it may have an effect not only on specific provisions but on the “treaty as a whole with respect to certain specific aspects”.

(10) The two following paragraphs, which provide a more detailed description of, respectively, the modifying and excluding effects of established reservations, are constructed along the same lines. In each, the first sentence concerns the rights and obligations (or the lack thereof) of the author of the reservation. The second sentence deals with the rights and obligations of the other parties to the treaty with regard to which the reservation is established and in doing so it echoes the principle established in article 21, paragraph 1 (b), of the Vienna Conventions and sets out the principle of reciprocity in the application of the reservation.

(11) Paragraph 2 of guideline 4.2.4 explains the consequences of an established reservation when the latter excludes the legal effect of one or more provisions of the treaty.

(12) There are many examples of such reservations.²¹¹³ Excluding reservations are often used, in particular to exclude compulsory dispute settlement procedures. Pakistan, for instance, notified the Secretary-General of the United Nations of the following reservation when it acceded to the International Convention for the Suppression of the Financing of Terrorism, on 17 June 2009:

The Government of the Islamic Republic of Pakistan does not consider itself bound by article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism. The Government of the Islamic Republic of Pakistan hereby declares that, for a dispute to be referred to the International Court of Justice, the agreement of all parties shall in every case be required.²¹¹⁴

(13) A considerable number of reservations also purport to exclude the application of substantive provisions of the treaty. Egypt, for example, formulated a reservation to the Vienna Convention on Diplomatic Relations purporting to exclude the legal effect of article 37, paragraph 2:

Paragraph 2 of article 37 shall not apply.²¹¹⁵

Cuba also made a reservation purporting to exclude the application of article 25, paragraph 1, of the Convention on special missions:

The Revolutionary Government of the Republic of Cuba enters an express reservation with regard to the third sentence of paragraph 1 of article 25 of the Convention, and consequently does not accept the assumption of consent to enter the premises of the special mission for any of the reasons mentioned in that paragraph or for any other reasons.²¹¹⁶

As another example, the Government of Rwanda formulated a reservation to the International Convention on

²¹¹³ See also guideline 1.1.6 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty) and commentary thereto.

²¹¹⁴ *Multilateral Treaties ...* (footnote 37 above), chap. XVIII.11. See also the similar reservations of Algeria, Andorra, Bahrain, Bangladesh, China, Colombia, Cuba, Egypt, El Salvador, Saudi Arabia, the United Arab Emirates, the United States of America, etc. (*ibid.*). See also the many reservations excluding the application of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, chap. IV.1).

²¹¹⁵ *Ibid.*, chap. III.3. See also the reservation formulated by Morocco (*ibid.*).

²¹¹⁶ *Ibid.*, chap. III.9.

the Elimination of All Forms of Racial Discrimination worded as follows:

The Rwandese Republic does not consider itself as bound by article 22 of the Convention.²¹¹⁷

(14) Applying article 21, paragraph 1 (a), of the Vienna Conventions to reservations of this kind is relatively easy. An established reservation modifies the legal effect of the treaty provision to which the reservation relates “to the extent of the reservation”, that is to say by simply excluding any legal effect of that treaty provision. Once the reservation is established, everything in the treaty relations between the author of the reservation and the parties with regard to which the reservation is established takes place as if the treaty did not include the provision referred to in the reservation. Excluding reservations thus have a “contraregulatory effect”.²¹¹⁸ The author of the reservation is no longer bound by the obligation stemming from the treaty provision in question, but is in no way prevented from complying with it (and being held to it if it should be the case that the treaty rule enunciates a customary obligation). It follows logically that the other States or international organizations with regard to which the reservation is established have waived their right to demand performance of the obligation stemming from the treaty provision in question in the context of their treaty relationship with the author of the reservation.

(15) Paragraph 2 of guideline 4.2.4 expresses this effect of excluding reservations in simple terms intended to leave no doubt that the author of the reservation is not bound by any obligation stemming from the treaty provision to which the excluding reservation relates and cannot claim any right stemming from it. And, as the word “likewise” in the second sentence indicates, the same is true conversely for the other parties with regard to which the reservation is established.

(16) It should be noted, moreover, that the exclusion by means of a reservation of an obligation stemming from a provision of the treaty does not automatically mean that the author of the reservation refuses to fulfil the obligation. The author of the reservation may simply wish to exclude the application of the treaty obligation within the legal framework established by the treaty. A State or an international organization may be in full agreement with a rule enunciated in a treaty provision, but nevertheless reject the competence of a treaty body or a judicial authority to rule on a dispute concerning the application and interpretation of that rule. While remaining entirely free to comply with the obligation established within the treaty framework, the author nevertheless excludes the applicability to itself of the control mechanisms established by the treaty.²¹¹⁹

(17) The concrete effect of a modifying reservation—the situation contemplated in paragraph 3 of guideline 4.2.4—is significantly different and more difficult to grasp.

²¹¹⁷ *Ibid.*, chap. IV.2; see also the case concerning *Armed Activities on the Territory of the Congo, Judgment of 3 February 2006* (footnote 1600 above), p. 26, paras. 42–44.

²¹¹⁸ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 84.

²¹¹⁹ See also guideline 3.1.5.3 (Reservations to a provision reflecting a customary rule) and commentary thereto, in particular paragraph (7).

Unlike the author of an excluding reservation, the author of a modifying reservation is not seeking to be released from its obligations stemming from one or more treaty provisions in order to regain freedom of action within the treaty's legal framework. Rather, it is seeking to replace the obligation stemming from the treaty provision with a different one.

(18) By such a modifying reservation, the author, once the reservation is established, does not simply purport to be released from all treaty obligations stemming from the provisions to which the reservation relates. The effect of the reservation is to replace the obligation initially provided for in the treaty by another one which is provided for in the reservation. In other words, the obligation stemming from the treaty provision referred to in the reservation is replaced or modified by the one set forth in the reservation in the treaty relations between its author and the State or international organization with regard to which the reservation is established. Or, to be more precise, the established reservation leads to the replacement of the obligation and the correlative right stemming from the treaty provision in question with the obligation and the correlative right provided for in the reservation or stemming from the treaty provision as modified by the reservation.

(19) However, the substitution of obligations has effect only with respect to the author of the reservation and has implications only for the other parties with regard to which the reservation is established. The phrase "as modified by the reservation", which is repeated twice in paragraph 3 and refers both to the rights and obligations of the author of the reservation and to those of the other parties with regard to which the reservation is established, is intended to draw attention to the diversity of these effects.

(20) An example of the first type of modifying reservation—those that modify only the rights and obligations of the author of the reservation *vis-à-vis* the other parties without affecting the content of the rights and obligations of the latter—is the reservation of the Federal Republic of Germany to the Convention on psychotropic substances:

In the Federal Republic of Germany, manufacturers, wholesale distributors, importers and exporters are not required to keep records of the type described [in paragraph 2 of article 11 of the Convention] but instead to mark specifically those items in their invoices which contain substances and preparations in Schedule III. Invoices and packaging slips showing such items are to be preserved by these persons for a minimum period of five years.²¹²⁰

By means of this reservation, Germany thus purports not simply to exclude the application of article 11, paragraph 2, of the Convention on psychotropic substances, but rather to replace the obligation stemming from that provision with another, different one that applies only to the author of the reservation.

(21) The Finnish reservation to article 18 of the Convention on road signs and signals of 1968 is another example that clearly shows that the author of the reservation is not simply releasing itself from its obligation under the treaty, but is replacing it, at least in part, with another obligation that in no way modifies the rights and obligations of the other parties:

²¹²⁰ *Multilateral Treaties ...* (footnote 37 above), chap. VI.6.

Finland reserves the right not to use signs E,9a or E,9b to indicate the beginning of a built-up area or signs E,9c or E,9d to indicate the end of such an area. Instead of them symbols are used. A sign corresponding to sign E,9b is used to indicate the name of a place, but it does not signify the same as sign E,9b.²¹²¹

(22) On the other hand, the reservation that Israel formulated to the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, the Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea and the Geneva Convention relative to the protection of civilian persons in time of war in relation to the articles on a distinctive sign for medical personnel,²¹²² while not appearing to modify directly the content of the relevant provisions, except with respect to Israel itself, does impose corresponding obligations on the other parties with regard to which it is established. The reservation to the first Geneva Convention reads as follows:

Subject to the reservation that, while respecting the inviolability of the distinctive signs and emblems of the Convention, Israel will use the Red Shield of David as the emblem and distinctive sign of the medical services of her armed forces.²¹²³

Israel thereby imposes on the other parties with regard to which its reservation is established the obligation, not originally provided for, to respect a new emblem in their relations with Israel.

(23) Similarly, the reservations of the Union of Soviet Socialist Republics to article 9 of the Convention on the High Seas²¹²⁴ of 1958, and to article 20 of the Convention on the Territorial Sea and the Contiguous Zone²¹²⁵ are clearly intended to establish a treaty regime that would impose on other parties to those conventions obligations which they did not undertake when ratifying or acceding to them. The same could be said about the reservations of Denmark, Ireland, Spain, Sweden and the United Kingdom to the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations,²¹²⁶ since they modify, *ratione*

²¹²¹ *Ibid.*, chap. XI.B.20.

²¹²² This reservation was formulated following the rejection of an amendment proposed by Israel at the 1949 Diplomatic Conference to include the Red Shield of David among the distinctive signs for medical personnel. Israel thereupon formulated three similar reservations upon signing the Geneva Conventions (on 8 December 1949), which it confirmed upon ratification (6 July 1951).

²¹²³ United Nations, *Treaty Series*, vol. 75, p. 436.

²¹²⁴ "The Government of the Union of Soviet Socialist Republics considers that the principle of international law according to which a ship on the high seas is not subject to any jurisdiction except that of the flag State applies without restriction to all government ships" (*Multilateral Treaties ...* (footnote 37 above), chap. XXI.2).

²¹²⁵ "The Government of the Union of Soviet Socialist Republics considers that government ships in foreign territorial waters have immunity and that the measures mentioned in this article may therefore be applied to them only with the consent of the flag State" (*ibid.*, chap. XXI.1).

²¹²⁶ These reservations all seek to preserve the delegation of certain areas of responsibility to the European Union. They are drafted in nearly identical terms, despite some slight variations in wording. The reservation of Ireland, for example, reads: "Whereas to the extent to which certain provisions of the Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations ('the Convention') fall within the responsibility of the European Community, the full implementation of the Convention by Ireland has to be done in accordance with the procedures of this international organisation" (*ibid.*, chap. XXV.4).

personae, the treaty regime by calling for the shifting of the obligation from one entity to another.

(24) While it is not mechanical, excluding reservations lend themselves better to reciprocity than do modifying reservations (especially those in the first category, which modify only the content of the rights and obligations of their author). The Commission has nevertheless thought it necessary to refer, in the second sentence of both paragraphs 2 and 3 of guideline 4.2.4, to the general principle of reciprocal application of reservations set out in article 21, paragraph 1 (b), of the Vienna Conventions. These references should be understood as being without prejudice to the exceptions in guideline 4.2.5.

(25) The principle of reciprocal application of reservations means that, as soon as a reservation has been established, it can be invoked not only by its author but also by any other party with regard to which it has acquired this status, as shown by the second sentence in paragraphs 2 and 3 of guideline 4.2.4. The reservation creates between its author and the parties with regard to which it is established a special regulatory system which is applied on a reciprocal basis. In this regard, Sir Humphrey Waldock has explained that “reservations always work both ways”.²¹²⁷ This idea is also to be found in article 21, paragraph 1 (b), of the Vienna Conventions, which, in its 1986 version, reads as follows:

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) ...

(b) modifies those provisions [of the treaty to which they relate] to the same extent for that other party in its relations with the reserving State or international organization.

(26) It follows that the author of the reservation is not only released from compliance with the treaty obligations which are the subject of the reservation but also loses the right to require the State or international organization with regard to which the reservation is established to fulfil the treaty obligations that are the subject of the reservation. In addition, the State or the international organization with regard to which the reservation is established is released from compliance with the obligation which is the subject of the reservation with respect to the reserving State or organization.

(27) This principle of reciprocal application is based on common sense.²¹²⁸ The system of rules governing treaty relations between the two States concerned reflects the common denominator of their respective commitments resulting from the overlap—albeit partial—of their

²¹²⁷ H. Waldock, “General course on public international law”, *Collected Courses of the Hague Academy of International Law*, vol. 106 (1962), p. 87.

²¹²⁸ Dionisio Anzilotti believed that “*l’effetto della riserva è che lo Stato riservante non è vincolato dalle disposizioni riservate: naturalmente, le altre parti non sono vincolate verso di lui, di guisa che, nei rapporti tra lo Stato riservante e gli altri, le disposizioni riservate sono come se non facessero parte del trattato*” [the effect of the reservation is that the reserving State is not bound by the provisions which are the subject of the reservation; naturally, the other parties are not bound in respect to it; thus, in relations between the reserving State and the others, it is as if the provisions which are the subject of the reservation are not part of the treaty], Anzilotti, *Corso di diritto internazionale* (footnote 26 above), pp. 334–335.

wills.²¹²⁹ It follows “directly from the consensual basis of treaty regulations”,²¹³⁰ which has a significant influence on the general regime of reservations of the Vienna Convention, as Waldock explains in his first report on treaty law:

A reservation operates reciprocally between the reserving State and any other party to the treaty, so that both are exempted from the reserved provisions in their mutual relations.²¹³¹

(28) The International Court of Justice presented the problem of the reciprocal application of the optional declarations of acceptance of compulsory jurisdiction provided for in Article 36, paragraph 2, of the Statute of the Court in a comparable, although slightly different, way. In its judgment in the *Norwegian Loans* case, it stated that

since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the two Declarations coincide in conferring it. A comparison between the two Declarations shows that the French Declaration accepts the Court’s jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court’s jurisdictions, exists within these narrower limits indicated by the French reservation.²¹³²

(29) The reciprocity of the effects of the reservation also rebalances the inequalities created by the reservation in the bilateral relations between the author of the reservation and the other States or international organizations with regard to which the reservation is established. These latter cannot, through the reservations mechanism, be bound by more obligations towards the author of the reservation than the latter itself is ready to assume.²¹³³ Professor Simma believed in this regard:

Wer sich bestimmten Vertragspflichten durch einen Vorbehalt entzogen hat, kann selbst auch nicht verlangen, im Einklang mit den vom Vorbehalt erfassten Vertragsbestimmungen behandelt zu werden [Whoever has withdrawn from certain treaty obligations by a

²¹²⁹ Baratta, *Gli effetti delle riserve ...* (footnote 698 above), p. 291: “*Si è poi visto che l’orientamento che emerge della pratica internazionale appare in sintonia con il principio consensualistico posto a fondamento del diritto dei trattati: la norma riservata è priva di giuridicità non essendosi formato l’accordo fra tali soggetti a causa dell’apposizione della riserva stessa.*” [We have seen, moreover, that the trend resulting from international practice seems to be linked with the consensual principle, a basic element of treaty law: the rule which is the subject of the reservation loses its juridical status, absent an agreement between subjects of law due to the fact of the formulation of the reservation itself.]

²¹³⁰ First report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 68, paragraph (21) (commentary to article 18). The Commission endorsed this explanation in the commentary to draft article 19 (which became article 21 of the 1969 Vienna Convention) adopted on second reading (*Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 209, paragraph (1) of the commentary).

²¹³¹ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 68, paragraph (21) of the commentary to article 18.

²¹³² *Judgment of 6 July 1957, Case of Certain Norwegian Loans (France v. Norway)* (see footnote 1629 above), p. 23.

²¹³³ See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 206, paragraph (13) of the commentary to draft articles 16 and 17. Roberto Baratta has rightly maintained that the reciprocity of the effects of a reservation has proven to be a “*strumento di compensazione nelle mutue relazioni pattizie tra parti contraenti; strumento che è servito a ristabilire la parità nel quantum degli obblighi convenzionali vicendevolmente assunti, parità unilateralmente alterata da una certa riserva*” [compensatory mechanism in the mutual relations between contracting parties which has served to restore the balance in the quantum of reciprocally assumed treaty obligations that was unilaterally altered by a given reservation], Baratta, *Gli effetti delle riserve ...* (footnote 698 above), p. 292.

reservation cannot claim treatment in accordance with the treaty provisions which are the subject of the reservation].²¹³⁴

(30) The reciprocal application of a reservation follows directly from the idea of the reciprocity of international commitments and of give-and-take between the parties and conforms to the maxim *do ut des*.

(31) Furthermore, the reciprocity of the effects of the reservation plays a non-negligible regulatory, even deterrent, role in the exercise of the widely recognized right to formulate a reservation: the author of the reservation must bear in mind that the effects of the reservation are not only to its own benefit; the author also runs the risk of the reservation being invoked against it. On this subject, Sir Humphrey Waldock has written:

There is of course another check upon undue exercise of the freedom to make reservations in the fundamental rule that a reservation always works both ways, so that any other State may invoke it against the reserving State in their mutual relations.²¹³⁵

(32) Reciprocal application thus cuts both ways and “contributes significantly to resolving the inherent tension between treaty flexibility and integrity”.²¹³⁶ In a way, this principle appears to be a complement to, and is often far more of a deterrent than, the requirement of permissibility of the reservation, owing to the uncertain determination of permissibility in a good number of cases.

(33) A number of reservation clauses thus make express reference to the principle of reciprocal application of reservations,²¹³⁷ whereas other treaties recall the principle of reciprocal application in more general terms.²¹³⁸ However,

²¹³⁴ B. Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge*, Berlin, Duncker & Humblot, 1972, p. 60.

²¹³⁵ Sir Humphrey Waldock, “General course on public international law” (footnote 2127 above). See also F. Parisi and C. Ševčenko, “Treaty reservations and the economics of article 21 (1) of the Vienna Convention”, *Berkeley Journal of International Law*, vol. 21, No. 1 (2003), pp. 1–26.

²¹³⁶ F. Parisi and C. Ševčenko, “Treaty reservations and the economics of article 21 (1) of the Vienna Convention”, *George Mason School of Law’s series of Working Papers in Law & Economics*, No. 02-07, p. 16. See also Baratta, *Gli effetti delle riserve ...* (footnote 698 above), pp. 295–296.

²¹³⁷ This was already the case in article 20, paragraph 2, of the Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 (“The provisions thus excluded cannot be applied against the Contracting Party who has made the reservation nor relied on by that Party against any other Contracting Party”). Other examples are found in The Hague Conventions on International Private Law (for these reservation clauses, see Majoros (footnote 388 above), pp. 90 *et seq.*), in a number of conventions concluded within the United Nations Economic Commission for Europe (see Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 188–191 and p. 251) and in some conventions drawn up and concluded within the Council of Europe. For example, the Model Final Clauses for Conventions and Agreements Concluded within the Council of Europe adopted by the Committee of Ministers in 1980 propose the following provision relating to reciprocity of the effects of reservation: “A Party which has made a reservation in respect of a provision of [the Agreement concerned] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision insofar as it has itself accepted it” (article e, paragraph 3; available from <http://www.coe.int/en/web/conventions>). See also Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 146–147.

²¹³⁸ See, for example, article 18 of the Convention on the Recovery Abroad of Maintenance (“A Contracting Party shall not be entitled to avail itself of this Convention against other Contracting Parties except to the extent that it is itself bound by the Convention”) or article XIV

such express clauses are superfluous.²¹³⁹ The principle of reciprocity is recognized not only as a general principle,²¹⁴⁰ but also as a principle that applies automatically, requiring neither a specific clause in the treaty nor a unilateral declaration by the States or international organizations that have accepted the reservation to that effect.²¹⁴¹

(34) Draft article 21 adopted on first reading by the Commission in 1962 was, however, not very clear as regards the question of the automatic nature of the reciprocity principle, in that it provided that the reservation would operate “[r]eciprocally to entitle any other State Party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving State”.²¹⁴² This formulation of the rule implied that the other contracting States must invoke the reservation in order to benefit from the effects of reciprocity. Following the comments of Japan and the United States,²¹⁴³ the text was recast so as to establish that the reservation produces *ipso jure* the same effect for the reserving State and the State accepting it.²¹⁴⁴ Although it still underwent a number of drafting changes,²¹⁴⁵ the text finally adopted by the Commission in 1965 thus clearly expresses the idea of automaticity.

4.2.5 *Non-reciprocal application of obligations to which a reservation relates*

Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.

of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound by the Convention”).

²¹³⁹ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 252; Majoros, “Le régime de réciprocité ...” (footnote 388 above), pp. 83 and 109. Majoros criticizes the introduction of clauses reiterating the reciprocity principle into treaties “for reasons of clarity and legal stability” (*ibid.*, p. 81).

²¹⁴⁰ *Ibid.*, pp. 83 and 109; Baratta, *Gli effetti delle riserve ...* (footnote 698 above), pp. 243 *et seq.*; Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 148; see also Simma, *Das Reziprozitätselement ...* (footnote 2134 above), pp. 60–61.

²¹⁴¹ Baratta, *Gli effetti delle riserve ...* (footnote 698 above), pp. 227 *et seq.*, and p. 291; Majoros, “Le régime de réciprocité ...” (footnote 388 above), pp. 83 and 109; and Parisi and Ševčenko, “Treaty reservations ...” (footnote 2135 above), p. 20. There have, however, been cases where, simply as a precaution, States have made their acceptance conditional upon the reciprocal application of the reservation. It is in this sense that we must understand the United States declarations in response to the reservation by Romania and the Union of Soviet Socialist Republics to the Convention on road traffic of 1949, whereby the Government of the United States specified that it “has no objection to [these] reservation[s] but considers that it may and hereby states that it will apply [these] reservation[s] reciprocally with respect to [their respective author States]”, *Multilateral Treaties ...* (footnote 37 above), chap. XI.B.1.

²¹⁴² *Yearbook ... 1962*, vol. II, document A/5209, p. 181.

²¹⁴³ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 303 and 351. See also the comments by Austria (*ibid.*, p. 282).

²¹⁴⁴ See the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 55.

²¹⁴⁵ For the final text of draft article 19, see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 208–209.

Commentary

(1) As its title indicates, guideline 4.2.5 deals with exceptions to the general principle of reciprocal application of a reservation as between its author and the other parties to the treaty with regard to which the reservation is established.

(2) Although the second sentences of paragraphs 2 and 3 of guideline 4.2.4 reflect the principle of reciprocal application of reservations, each in its own way taking up the idea embodied in article 21, paragraph 1 (b), of the Vienna Conventions, guideline 4.2.5 emphasizes that this principle is not absolute.²¹⁴⁶ It cannot, in particular, find application in cases where a rebalancing between the obligations of the author of the reservation and the State or international organization with regard to which the reservation is established is unnecessary or proves impossible. This is the case essentially because of the nature of the obligation to which the reservation relates, the object and purpose of the treaty or the content of the reservation itself.

(3) The first sentence of guideline 4.2.5 covers the first of these hypotheses: the case in which the reciprocal application of the reservation is excluded because of the nature of the obligation to which the reservation relates or the object and purpose of the treaty—these two subcategories being difficult to distinguish. If the treaty itself is not based on reciprocity of rights and obligations between the parties, a reservation can produce no such reciprocal effect.

(4) A typical example is afforded by human rights treaties.²¹⁴⁷ The fact that a State formulates a reservation excluding the application of one of the obligations contained in such a treaty does not release a State which accepts the reservation from respecting that obligation, despite the existence of the reservation, to the extent that the obligation concerned is not reciprocal, in other words, to the extent that such obligations apply not in an inter-State relationship between the reserving State and the State which has accepted the reservation, but rather in a State–person relationship. The Human Rights Committee considered in this respect in its general comment No. 24 that

[a]lthough treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.²¹⁴⁸

²¹⁴⁶ See Simma, *Das Reziprozitätselement ...* (footnote 2134 above), p. 61; Baratta, *Gli effetti delle riserve ...* (footnote 698 above), p. 292; Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 139; Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 148 *et seq.*; R. Pinto, “L’application du principe de réciprocité et des réserves dans les conventions interétatiques concernant les droits de l’homme”, in: *Mélanges offerts à Georges Levasseur. Droit pénal. Droit européen*, Paris, Litec, 1992, pp. 83–88; or Pellet and Müller, “Reservations to human rights treaties: not an absolute evil” (footnote 1619 above), pp. 533–535.

²¹⁴⁷ See the first report on the law and practice relating to reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 148, para. 138. See also the second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 65, paras. 148–154.

²¹⁴⁸ Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see

For this reason, the Committee continues, the human rights treaties, “and the Covenant [on Civil and Political Rights] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place”.²¹⁴⁹

(5) Moderating this formulation, which appears too absolute, the phrase “insofar as” with which guideline 4.2.5 begins aims to show that, even if the nature of the obligation or the object and purpose of the treaty as a whole exclude the reciprocity of reservations, elements of reciprocity may nevertheless remain in the relations between the author of the reservation and the other parties to the treaty. Thus, for example, it is clear that a State or international organization that has made a reservation cannot invoke the obligation excluded or modified by that reservation and require the other parties to fulfil it—even though the other parties remain bound by the obligation in question. This also means that guideline 4.2.5 is without effect on the normal operation of the reservation in the relations among the other parties (whose obligations it does not modify);²¹⁵⁰ this is the meaning of the phrase “the content of the obligations of the parties other than the author of the reservation remains unaffected” at the end of the first sentence of guideline 4.2.5.

(6) Moreover, human rights treaties are not the only treaties that do not lend themselves to reciprocity. The effect of reciprocity is also absent from treaties establishing obligations owed to the community of contracting States. Examples can be found in treaties on commodities,²¹⁵¹ in environmental protection treaties, in some demilitarization or disarmament treaties²¹⁵² and also in international private law treaties providing for uniform law.²¹⁵³

(7) In all these situations, a reservation cannot produce a reciprocal effect in the bilateral relations between its author and a State or international organization with regard to which the reservation is established. A party owes it to all the other parties to the treaty to respect the obligation. Thus the reverse effect of the reservation has “nothing on which it can ‘bite’ or operate”.²¹⁵⁴

footnote 1156 above), para. 8. See also Coccia, “Reservations to multilateral treaties on human rights” (footnote 196 above), p. 37; Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 153; or M. Virally, “Le principe de réciprocité dans le droit international contemporain”, *Collected Courses of the Hague Academy of International Law, 1967-III*, vol. 122, pp. 26–27.

²¹⁴⁹ Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), para. 17.

²¹⁵⁰ See guideline 4.6.

²¹⁵¹ See H. G. Schermers, “The suitability of reservations to multilateral treaties”, *Nederlands Tijdschrift voor Internationaal Recht*, vol. VI, No. 4 (1959), p. 356. See also Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 140.

²¹⁵² See Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 164–165.

²¹⁵³ On the conventions of The Hague Conference on International Private Law, see de Cesari (footnote 2111 above), pp. 149–174, and Majoros, “Le régime de réciprocité ...” (footnote 388 above), pp. 73–109.

²¹⁵⁴ G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. 1, Cambridge, Grotius Publications, 1986, p. 412.

(8) As Roberto Baratta has pointed out:

[A]nche in ipotesi di riserve a norme poste dai menzionati accordi l'effetto di reciprocità si produce, in quanto né la prassi, né i principi applicabili in materia inducono a pensare che lo Stato riservante abbia un titolo giuridico per pretendere l'applicazione della disposizione da esso riservata rispetto al soggetto non autore della riserva. Resta nondimeno, in capo a tutti i soggetti che non abbiano apposto la stessa riserva, l'obbligo di applicare in ogni caso la norma riservata a causa del regime solidaristico creato dall'accordo.²¹⁵⁵

[Even on the assumption of reservations to the rules enunciated in the above-mentioned agreements, the effect of reciprocity is produced, as neither practice nor the principles applicable suggest that the reserving State would have a legal right to call for the application of the provision to which the reservation relates by a subject which is not the author of the reservation. There nonetheless remains the obligation for all subjects which have not formulated the reservation to apply in all cases the rule to which the reservation relates, by virtue of the regime of solidarity established by the agreement.]

(9) This, moreover, was the thinking underlying the model clause on reciprocity adopted by the Committee of Ministers of the Council of Europe in 1980:

A Party which has made a reservation in respect of a provision of [the Agreement concerned] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision insofar as it has itself accepted it.²¹⁵⁶

(10) The second sentence of guideline 4.2.5 concerns the second exception to the general principle of the reciprocal application of reservations: a situation when “reciprocal application is not possible because of the content of the reservation”.

(11) This situation arises, for example, in the case of reservations purporting to limit the territorial application of a treaty. Reciprocal application of such a reservation is quite simply not possible in practice.²¹⁵⁷ Similarly, reciprocal application of the effects of the reservation is also excluded if it was motivated by situations obtaining specifically in the reserving State.²¹⁵⁸ Thus, the reservation formulated by Canada to the Convention on psychotropic substances of 1971, purporting to exclude peyote²¹⁵⁹ from the application of the Convention, formulated solely because of the presence in Canadian territory of groups which use in their magical or religious rites certain psychotropic substances that would normally fall under the Convention regime,²¹⁶⁰ could not be invoked in its own favour by another party to the Convention unless it was confronted with the same situation.

²¹⁵⁵ Baratta, *Gli effetti delle riserve ...* (footnote 698 above), p. 294; see also Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 140.

²¹⁵⁶ Model Final Clauses for Conventions and Agreements concluded within the Council of Europe (article e, paragraph 3) (see footnote 2137 above). On this subject, see Majoros, “Le régime de réciprocité ...” (footnote 388 above), p. 90, and Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 146–147.

²¹⁵⁷ See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 258, and Simma, *Das Reziprozitätselement ...* (footnote 2134 above), p. 61.

²¹⁵⁸ See Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 165–166; Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 258–260. See, however, the more cautious ideas relating to such situations formulated by Majoros, “Le régime de réciprocité ...” (footnote 388 above), pp. 83–84.

²¹⁵⁹ Peyote is a species of small cactus which has hallucinogenic psychotropic effects.

²¹⁶⁰ *Multilateral Treaties ...* (footnote 37 above), chap. VI.16.

(12) The principle of reciprocal application of reservations may also be limited by reservation clauses contained in the treaty itself. An example is the Convention concerning Customs Facilities for Touring and its Additional Protocol of 1954. Article 20, paragraph 7, of the Convention provides:

No Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies. Any State availing itself of this right shall notify the Secretary-General accordingly and the latter shall communicate this decision to all signatory and Contracting States.

Even though this particular clause does not in itself exclude the application of the principle of reciprocity, it deprives it of automaticity by making it subject to notification by the accepting State. Such notifications have been made by the United States of America in relation to the reservations formulated by Bulgaria, Romania and the Union of Soviet Socialist Republics to the dispute settlement mechanism provided for in article 21 of that Convention.²¹⁶¹

4.2.6 Interpretation of reservations

A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.

Commentary

(1) It is often difficult to specify to what extent treaty relations are modified by the establishment of a reservation²¹⁶² or to what extent the effect of the principle of reciprocal application is excluded or limited,²¹⁶³ or even to determine whether a unilateral declaration presented as a reservation meets the definition of a reservation.

(2) Since reservations are unilateral acts, the Commission based itself on the guidelines for interpreting such acts contained in the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, which it adopted in 2006.²¹⁶⁴ It should not be forgotten, however, that reservations are acts attached to a treaty, the legal effect of which they purport to modify or exclude. Consequently, the treaty is the context that should be taken into account for the purposes of interpreting the reservation. Guideline 4.2.6 combines these two ideas.

(3) With regard to unilateral acts, the warning by the International Court of Justice against mechanical transposition of the rules for the interpretation of treaties to unilateral acts should be borne in mind:

The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction.²¹⁶⁵

²¹⁶¹ *Ibid.*, chap. XI.A.6 and A.7. See Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), p. 212 (footnote 44).

²¹⁶² See guideline 4.2.4 (Effect of an established reservation on treaty relations) and commentary thereto.

²¹⁶³ See guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates), in particular paragraph (11) of the commentary thereto.

²¹⁶⁴ See footnote 249 above.

²¹⁶⁵ *Judgment of 4 December 1998, Fisheries Jurisdiction (Spain v. Canada)* (see footnote 199 above), p. 453, para. 46.

(4) It was in this spirit that the Commission elaborated principle No. 7 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations:

7. A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.²¹⁶⁶

(5) This general approach is also found, *mutatis mutandis*, in guideline 4.2.6, which, in line with the case law of the International Court of Justice, places emphasis on the intention of the author as one of the main elements on which interpretation of the reservation should be based:

At the same time, since a declaration under Article 36, paragraph 2, of the Statute, is a unilaterally drafted instrument, the Court has not hesitated to place a certain emphasis on the intention of the depositing State. Indeed, in the case concerning *Anglo-Iranian Oil Co.*, the Court found that the limiting words chosen in Iran's declaration were "a decisive confirmation of the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court". (*Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I. C. J. Reports 1952*, p. 107).

The Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.²¹⁶⁷

(6) It is very clear from these paragraphs that the interpretation of a unilateral act aims to establish the intention of the author of the act. The text of the reservation is the primary indicator of intention.²¹⁶⁸ This approach is especially relevant in the case of reservations, since they are defined by the objective their author purports to attain.²¹⁶⁹

(7) The intention of the reserving State or international organization can be derived in the first instance from the actual text of the reservation. The predominance of the text is confirmed in case law. Thus, in the case of *Boyce et al. v. Barbados*, the Inter-American Court of Human Rights was called upon to give its view on the effects of the reservation to the American Convention on Human Rights made by the defending State.²¹⁷⁰ The reservation reads as follows:

In respect of [Article] 4(4) [of the Convention,] the criminal code of Barbados provides for death by hanging as a penalty for murder and

²¹⁶⁶ *Yearbook ... 2006*, vol. II (Part Two), p. 161; see also the commentary to this principle, *ibid.*, pp. 164–165.

²¹⁶⁷ *Judgment of 4 December 1998, Fisheries Jurisdiction* (see footnote 199 above), p. 454, paras. 48–49.

²¹⁶⁸ See principle No. 7 of the the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (footnote 249 above).

²¹⁶⁹ See guideline 1.1.

²¹⁷⁰ *Boyce et al. v. Barbados*, judgment of 20 November 2007, *Preliminary Objection, Merits, Reparations and Costs*, Series C, No. 169, paras. 13–17.

treason. The Government is at present reviewing the whole matter of the death penalty[,] which is only rarely inflicted[,] but wishes to enter a reservation on this point inasmuch as treason in certain circumstances might be regarded as a political offence and falling within the terms of section 4(4).

In respect of [Article] 4(5)[,] while the youth or old age of an offender may be matters which the Privy Council, the [then] highest Court of Appeal, might take into account in considering whether the sentence of death should be carried out, persons of 16 years and over or over 70 years of age may be executed under Barbadian law.²¹⁷¹

(8) Barbados maintained, *inter alia*, that its reservation to the Convention prevented the Court from ruling on issues of capital punishment, or on how such punishment was implemented. Invoking its advisory opinions of 1982 and 1983,²¹⁷² the Court recalled:

Firstly, in interpreting reservations the Court must first and foremost rely on a strictly textual analysis.²¹⁷³

Having examined the reservation by Barbados in this light, the Court arrived at the conclusion that

the text of the reservation does not explicitly state whether a sentence of death is mandatory for the crime of murder, nor does it address whether other possible methods of execution or sentences are available under Barbadian law for such a crime. Accordingly, the Court finds that a textual interpretation of the reservation entered by Barbados at the time of ratification of the American Convention clearly indicates that this reservation was not intended to exclude from the jurisdiction of this Court neither the mandatory nature of the death penalty nor the particular form of execution by hanging. Thus the State may not avail itself of this reservation to that effect.²¹⁷⁴

The Court also pointed out that it

has previously considered that "a State reserves no more than what is contained in the text of the reservation itself".²¹⁷⁵

(9) Other elements should be taken into consideration for the purposes of determining the intention of the author of the reservation, including in particular the texts accompanying the formulation of the reservation, especially those explaining the reasons for the reservation,²¹⁷⁶ and possibly circumstances of its formulation (or, in the words of the International Court of Justice, "circumstances of its preparation")²¹⁷⁷ that may clarify the meaning of the reservation. Thus, in the case concerning the *Aegean Sea Continental Shelf (Greece v. Turkey)*, the Court based itself on:

– "the explanation of reservation (b) given in the *exposé des motifs*";²¹⁷⁸

²¹⁷¹ United Nations, *Treaty Series*, vol. 1298, p. 441.

²¹⁷² Advisory Opinion OC-2/82, 24 September 1982, *The effect of reservations on the entry into force of the American Convention on Human Rights (arts. 74 and 75)* (see footnote 2026 above), para. 35; Advisory Opinion OC-3/83, *Restrictions to the Death Penalty* (see footnote 197 above), paras. 60–66.

²¹⁷³ *Boyce et al. v. Barbados* (see footnote 2170 above), para. 15.

²¹⁷⁴ *Ibid.*, para. 17.

²¹⁷⁵ *Ibid.* See also Advisory Opinion OC-3/83, *Restrictions to the Death Penalty* (footnote 197 above), para. 69.

²¹⁷⁶ See guideline 2.1.2 (Statement of reasons for reservations) and commentary thereto, in particular paragraphs (4)–(5).

²¹⁷⁷ See paragraph 49 *in fine* of the judgment in *Fisheries Jurisdiction* (footnote 199 above), referred to in paragraph (5) above.

²¹⁷⁸ *Aegean Sea Continental Shelf* (see footnote 210 above), p. 28, para. 68.

– “a document referred to by [the Greek] counsel as ‘the *travaux préparatoires* of the reservation’”²¹⁷⁹ (actually a letter explaining the circumstances of the formulation of the Greek reservation);²¹⁸⁰

– and “certain internal documents relating to the preparation of Greece’s instrument of accession to the General Act”;²¹⁸¹

– in the same spirit, the Court took into account “the general historical context in which reservations of questions relating to territorial status had come into use in the League of Nations period”²¹⁸² which corresponds to the circumstances, in the broad sense of the term, in which the reservation was made.

All these exogenous elements were considered together by the Court in determining “the intention of the Greek Government at the time when it deposited its instrument of accession to the General Act”.²¹⁸³

(10) As indicated in guideline 4.2.6, the exogenous elements to consider in the interpretation of the reservation should include the object and purpose of the treaty, since the reservation is a non-autonomous unilateral act, which only produces an effect within the framework of the treaty. It is also important to recall that this is one of the criteria for the permissibility of the reservation: it is because a reservation has passed the test of permissibility that it is “established”, and thus capable of producing the effects intended by its author. The reservation can only produce these effects precisely to the extent that it is compatible with the object and purpose of the treaty.

(11) The question is particularly significant in the case of reservations the compatibility of which with the object and purpose of the treaty is questionable and may depend on the precise meaning attributed to the reservation. If the permissibility of the reservation is to be preserved, and thereby the intention of the author, whose good faith must be presumed, it can only be preserved at the cost of heightened attention to the preservation of the object and purpose of the treaty. This interdependence was highlighted by the Court in its advisory opinion of 1951:

The disadvantages which result from this possible divergence of views [as to the validity of the reservation] ... are real; they are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.²¹⁸⁴

(12) The criterion of the object and purpose of the treaty is the parameter for assessing the permissibility of the reservations, whether by a body established by the treaty itself, a dispute settlement body, or other States or contracting organizations.

²¹⁷⁹ *Ibid.*, p. 26, para. 63.

²¹⁸⁰ *Ibid.*, pp. 26–27, paras. 63–64.

²¹⁸¹ *Ibid.*, p. 27, para. 65.

²¹⁸² *Ibid.*, p. 29, para. 70.

²¹⁸³ *Ibid.*, p. 29, para. 69.

²¹⁸⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), pp. 26–27.

(13) However, this does not mean that, as a general rule, reservations should be interpreted restrictively.²¹⁸⁵ The International Court of Justice has not generally referred to a restrictive interpretation in its interpretation of reservations.²¹⁸⁶

(14) The position of human rights treaty monitoring bodies is, however, the opposite. Thus, the Inter-American Court of Human Rights, in the case of *Boyce et al. v. Barbados* referred to above, held that the realization of the object and purpose of the treaty required the Court to consider in a restrictive manner any limitation on those rights:

Secondly, due consideration must also be assigned to the object and purpose of the relevant treaty which, in the case of the American Convention, involves the “protection of the basic rights of individual human beings”. In addition, the reservation must be interpreted in accordance with Article 29 of the Convention, which implies that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognized in the Convention to a greater extent than is provided for in the reservation itself.²¹⁸⁷

The question therefore arises of whether, by their nature, human rights treaties require the application of specific principles of interpretation. It goes without saying that the answer to this question far exceeds the scope of the present Guide to Practice.

(15) One last indication demonstrates the substantive interdependence between the reservation and the treaty to which it relates: the International Court of Justice has, on occasion, applied the principle of dynamic interpretation to the terms of the reservation, on the same grounds as to the terms of the treaty itself. It follows that if the meaning of the latter evolves over time, that evolution also affects the identical terms appearing in the reservation, provided that the change does not turn out to be contrary to the intention of the author of the reservation, as manifested at the time the reservation was formulated:

Once it is established that the expression “the territorial status of Greece” was used in Greece’s instrument of accession [to the 1928 General Act] as a generic term denoting any matters comprised within the concept of *territorial status** under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like “domestic jurisdiction” and “territorial status” were intended to have a fixed content regardless of the subsequent evolution of international law.²¹⁸⁸

²¹⁸⁵ See the case concerning *Fisheries Jurisdiction* (footnote 199 above), p. 453, para. 45.

²¹⁸⁶ The Court explicitly rejected the principle of restrictive interpretation of reservations accompanying optional declarations to Article 36 of the Statute: “There is thus no reason to interpret them restrictively” (International Court of Justice, *Fisheries Jurisdiction* (footnote 199 above), p. 453, para. 44); see also *Aegean Sea Continental Shelf* case (footnote 210 above), p. 31, para. 74.

²¹⁸⁷ *Boyce et al. v. Barbados* (see footnote 2170 above), para. 15 (footnotes omitted). See also Inter-American Court of Human Rights, Judgment, 1 September 2001, *Benjamin et al. v. Trinidad and Tobago, Preliminary Objections*, Series C, No. 81, para. 70.

²¹⁸⁸ *Aegean Sea Continental Shelf* (footnote 210 above), p. 32, para. 77. See also the *Judgment of 13 July 2009, Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (footnote 1600 above), para. 65.

4.3 *Effect of an objection to a valid reservation*

Unless the reservation has been established with regard to an objecting State or international organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or international organization.

Commentary

(1) Unlike acceptance of a valid reservation, an objection to a reservation may produce a variety of effects as between the author of the reservation and the author of the objection. The choice is left to a great extent (but not entirely) to the latter, which can vary the potential legal effects of the reservation-objection pair. For example, it may choose, in accordance with article 20, paragraph 4 (b), of the Vienna Conventions, to preclude the treaty from entering into force as between itself and the reserving State by “definitely” expressing that intention. But the author of the objection may also elect not to oppose the entry into force of the treaty as between itself and the author of the reservation or, to put it more precisely, may refrain from expressing a contrary intention. In that case, if the treaty does actually enter into force for the two parties,²¹⁸⁹ the treaty relations between the author of the reservation and the author of the objection are modified in accordance with article 21, paragraph 3, of the Vienna Conventions. Thus, objections to a valid reservation may have a number of effects on the very existence of treaty relations or on their content, and those effects may vary with respect to the same treaty and the same reservation.

(2) The primary function and the basic effect of every objection are, however, very simple. Unlike acceptance, an objection constitutes its author’s rejection of the reservation. As the International Court of Justice clearly stated in its 1951 advisory opinion, “no State can be bound by a reservation to which it has not consented”.²¹⁹⁰ This is the fundamental effect of the same principle of mutual consent that underlies all treaty law and, in particular, the regime of reservations: the treaty is a consensual instrument par excellence, drawing its strength from the *will* of States. Reservations are substantially linked to the State’s consent to be bound by the treaty.²¹⁹¹

(3) Thus, an objection may be viewed first and foremost as the objecting State’s refusal to consent to the reservation and, as such, it prevents the establishment of the reservation with respect to the objecting State or international organization within the meaning of article 21, paragraph 1, of the Vienna Conventions and of guideline 4.1. As the Commission points out in its commentary to guideline 2.6.1 (Definition of objections to reservations):

²¹⁸⁹ On the question of when the treaty enters into force for the author of the reservation, see guidelines 4.2.1 and 4.2.3, 4.3.1 and 4.3.4 and commentaries thereto.

²¹⁹⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 26.

²¹⁹¹ See, for example, *Yearbook ... 1997*, vol. II (Part Two), p. 49, para. 83.

The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning.²¹⁹²

(4) Unlike an acceptance, an objection makes the reservation non-opposable to the author of the objection. Clearly, this effect can be produced only where the reservation has not already been accepted (expressly or tacitly) by the author of the objection. Acceptance and objection are mutually exclusive, and definitively so, at least insofar as the effects of acceptance are concerned. In this regard, guideline 2.8.13 states:

[A]cceptance of a reservation cannot be withdrawn or amended.

The phrase introducing guideline 4.3 refers implicitly to this principle, even if the Commission chose not to overload the guideline—it serves to introduce section 4.3 as a whole—with a specific reference.

(5) In order to highlight the fundamental function of objections, guideline 4.3, which begins the section of the Guide to Practice on the effect of an objection to a valid reservation, sets out the principle whereby an objection prevents the reservation from producing the effects intended by its author.²¹⁹³ This constitutes an initial clarification of the meaning of the phrase “the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation”, which appears at the end of article 21, paragraph 3, of the Vienna Conventions and the meaning of which is clarified further in guideline 4.3.6.

(6) The neutralization of a reservation’s effect as it applies to the State or international organization that is the author of the objection is, however, far from answering all the questions concerning the effects of an objection. The objection may in fact have several different effects, both on the entry into force of the treaty (as described in guidelines 4.3.1–4.3.5) and, once the treaty has entered into force, if it does, for the author of the reservation and the author of the objection, on the content of the treaty relations thus established (dealt with in guidelines 4.3.6–4.3.8).

(7) There is, however, a situation in which an objection does not produce the normal effects described in guideline 4.3. It is the case in which a State or organization member of an international organization formulates an objection to a reservation formulated by another State or another international organization to the constituent instrument of the organization. Such an objection, regardless of its content, would be devoid of legal effects, in line with guideline 2.8.12 (Reaction by a member of an international organization to a reservation to its constituent instrument), according to which

Guideline 2.8.10 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.²¹⁹⁴

²¹⁹² Paragraph (13) of the commentary to guideline 2.6.1.

²¹⁹³ It will be recalled that guidelines 1.1 and 1.1.1 define reservations in terms of the intended object of the State or international organization formulating them.

²¹⁹⁴ Guideline 2.8.8 (Acceptance of a reservation to the constituent instrument of an international organization) reads: “When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.”

4.3.1 *Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation*

An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, except in the case mentioned in guideline 4.3.5.

Commentary

(1) As the Commission indicated in its commentary to guideline 2.6.7, the Vienna Conventions do not give any indication of the time at which the intention to oppose the entry into force of the treaty must be expressed by the author of the objection.²¹⁹⁵ The Commission did, however, conclude that, in accordance with the presumption established in article 20, paragraph 4 (b), of the Vienna Conventions, an objection not accompanied by a clear expression of such an intention does not preclude the entry into force of the treaty as between the author of the objection and the author of the reservation or, in certain cases, the entry into force of the treaty itself. This legal effect cannot be called into question by the subsequent expression of a contrary intention. This idea has already been expressed in guideline 2.6.7, which provides that the intention to oppose the entry into force of the treaty must have been expressed “before the treaty would otherwise enter into force between [the author of the objection and the author of the reservation]”.²¹⁹⁶ However, that guideline concerns the *procedure for formulating* the required intention and not its effects; it therefore seemed useful to reiterate the principle in the Part of the Guide to Practice dealing with the legal effect of objections. Nevertheless, guideline 4.3.1 uses the expression “does not preclude the entry into force of the treaty”, which implies that the treaty was not in force as between the author of the reservation and the author of the objection when the reservation was made.

(2) Concretely, the consequence of the non-entry into force of the treaty as between the author of the reservation and the author of the objection is that no treaty relationship exists between them—even if, as is often the case, both can be considered parties to the treaty within the meaning of the Vienna Conventions. The mere fact that one party rejects the reservation and does not wish to be bound by the provisions of the treaty in its relations with the author of the reservation does not necessarily mean that the latter cannot become a contracting State or contracting organization in accordance with guideline 4.2.1. It is sufficient, under the general regime, for another State or another international organization to accept the reservation expressly or tacitly for the author of the reservation to be considered a contracting State or contracting organization to the treaty. The absence of a treaty relationship between the author of a maximum-effect objection and the author of the reservation does not *a priori* have any effect except between them.²¹⁹⁷

²¹⁹⁵ Paragraph (4) of the commentary to guideline 2.6.7 (Expression of intention to preclude the entry into force of the treaty).

²¹⁹⁶ See also paragraph (5) of the commentary to guideline 2.6.7.

²¹⁹⁷ The International Court of Justice recognized in 1951 that “such a decision will only affect the relationship between the State making

(3) In the absence of a definite expression of the contrary intention, an objection—which can be termed “simple”—to a valid reservation does not *ipso facto* result in the entry into force of the treaty as between the author of the reservation and the author of the objection, as would be the case for an acceptance. This, in fact, is one of the fundamental differences between a simple objection and acceptance, one which, along with other considerations, means that such an objection is not “tantamount to acceptance”,²¹⁹⁸ contrary to what has often been asserted.²¹⁹⁹ Pursuant to article 20, paragraph 4 (b), of the Vienna Conventions, reproduced in guideline 4.3.5, such an objection “*does not preclude** the entry into force of the treaty as between the objecting State or international organization and the reserving State or international organization”. Yet while such an objection does not preclude the entry into force of the treaty, it remains neutral on the question as to whether or not the reserving State or organization becomes a contracting State or contracting organization to the treaty, and does not necessarily result in the entry into force of the treaty as between the author of the objection and the author of the reservation.

(4) This effect—or rather lack of effect—of a simple objection on the establishment or existence of a treaty relationship between the author of the objection and the author of the reservation derives directly from the wording of article 20, paragraph 4 (b), of the Vienna Conventions, as States sometimes point out when formulating an objection. The objection by the Netherlands to the reservation formulated by the United States of America to the International Covenant on Civil and Political Rights is a particularly eloquent example:

Subject to the proviso of article 21, paragraph 3 of the Vienna Convention of the Law of Treaties, these objections *do not constitute an obstacle to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States**.²²⁰⁰

The Netherlands deemed it useful to reiterate that its objection did not constitute an “obstacle” to the entry into force of the treaty with the United States, and that if the treaty came into force, their treaty relationship would have to be determined in accordance with article 21, paragraph 3, of the Vienna Convention.

the reservation and the objecting State” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 26). See, however, paragraph (1) of the commentary to guideline 4.3.4 below.

²¹⁹⁸ See Pellet and Müller, “Reservations to treaties ...” (footnote 1045 above), pp. 37–59, *passim*.

²¹⁹⁹ See comments by Mr. Yasseen (*Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 271, para. 5) and the doubts expressed by Mr. Tsuruoka (*ibid.*, 800th meeting, 11 June 1965, p. 174, para. 40); See also Koh, “Reservations to multilateral treaties ...” (footnote 1443 above), p. 102; Coccia “Reservations to multilateral treaties ...” (footnote 196 above), p. 35; Gaja, “Unruly treaty reservations” (footnote 28 above), pp. 326–329; J. Klabbbers, “Accepting the unacceptable? A new Nordic approach to reservations to multilateral treaties”, *Nordic Journal of International Law*, vol. 69 (2000), p. 181; Ruda, “Reservations to treaties” (footnote 56 above), pp. 198–199; Sucharipa-Behrmann, “The legal effects of reservations ...” (footnote 1617 above), p. 74; and Zemanek, “Some unresolved questions concerning reservations ...” (footnote 1074 above), pp. 332–333. See also the first report on the law and practice relating to reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 121.

²²⁰⁰ *Multilateral Treaties ...* (footnote 37 above), chap. IV.4.

(5) This effect—or lack of effect—of a simple objection on the entry into force of the treaty is spelled out in guideline 4.3.1, which, apart from a few minor changes, faithfully reproduces the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention.

4.3.2 *Effect of an objection to a reservation that is formulated late*

If a contracting State or a contracting organization to a treaty objects to a reservation whose late formulation has been unanimously accepted in accordance with guideline 2.3.1, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

Commentary

(1) Guideline 4.3.2 draws the consequences, in terms of the effects of an objection, of the rules set out in guidelines 2.3.1 (Acceptance of the late formulation of a reservation) and 2.3.2 (Time period for formulating an objection to a reservation that is formulated late).

(2) It is clear from guideline 2.3.1 that acceptance of the late formulation of a reservation is, in principle, impossible, and that even one objection to such late formulation is sufficient to prevent it from having any effect whatsoever. This is necessarily the meaning of the phrase: “if no contracting State or contracting organization has opposed such formulation”.

(3) However, such “opposition” should not be confused with objections to the content of the reservation in the sense of articles 20–23 of the Vienna Conventions. The Conventions preclude a valid reservation from producing all its effects in the relations between its author and an objecting State or international organization, whereas opposition to the late formulation of a reservation “voids” the reservation as such. Moreover, it was to avoid this confusion that the Commission, in guidelines 2.3.1–2.3.3, used different terminology to distinguish between these two categories of reactions to a reservation that is formulated late.²²⁰¹

(4) In the case of (unanimous) absence of opposition to the late formulation of the reservation, contracting States and organizations may still make an objection within 12 months, as provided for under guideline 2.3.2. Guideline 4.3.2 deals with cases in which such an objection is formulated.

(5) The legal effects of such an objection are no different, in principle, from those of an objection made to a reservation made in good time. The objection prevents the establishment of a valid reservation—or a reservation that has become formally valid as a result of the unanimous acceptance of the late formulation—in that it rejects acceptance of its content and the effects it purports to produce. The rules and guidelines concerning the legal effects of an objection are therefore, in principle, applicable.

(6) Nevertheless, guideline 4.3.2 limits the effects of an objection made to a reservation that was formulated late. It must be remembered that, hypothetically, the author of the reservation that was formulated late has already become a contracting State or contracting organization through its consent to be bound which, initially, was not accompanied by a reservation. The status of the State or international organization cannot be called into question, *a posteriori* without overly threatening the security of treaty relations. An objection can therefore not have the effect of precluding the establishment of treaty relations between the author of the reservation formulated late and the author of the objection—relations which, hypothetically, have already been established. Guideline 4.3.2 repeats this requirement by specifying that the treaty enters into or remains in force between the author of the reservation and the author of the objection. This does not mean, however, that the objection produces no effects: it precludes the establishment of the reservation with regard to the author of the objection, and the effects of the objection on the content of the treaty relations established between the author of the reservation and the author of the objection are determined in accordance with the generally applicable rules.

(7) This does not mean, however, that a State or international organization that becomes a contracting State or contracting organization after expiry of the time limit specified in guideline 2.3.1 cannot make an objection with maximum effect. Since no treaty relations have yet existed between this State or international organization and the author of the reservation, the reasoning behind the rule set out in guideline 4.3.2 does not apply.

4.3.3 *Entry into force of the treaty between the author of a reservation and the author of an objection*

The treaty enters into force between the author of a valid reservation and the objecting contracting State or contracting organization as soon as the author of the reservation has become a contracting State or a contracting organization in accordance with guideline 4.2.1 and the treaty has entered into force.

Commentary

(1) Guideline 4.3.3 defines the moment at which the treaty enters into force as between the author of an objection and the author of the reservation.

(2) For this to happen, it is both necessary and sufficient for the treaty to enter into force and for both the author of the reservation and the author of the objection to be contracting States or contracting international organizations to the treaty. In other words, the reservation must have been established by the acceptance of another State or international organization, in the sense of guideline 4.2.1. Hence, apart from the scenario envisaged in guideline 4.3.4, the entry into force of the treaty as between the author of the objection and the author of the reservation is in no way dependent on the objection itself, but rather on the establishment of the reservation; the objection plays no role in the establishment of the reservation.

(3) In concrete terms, a treaty that is subject to the general regime of consent to reservations as established by

²²⁰¹ See paragraph (1) of the commentary to guideline 2.3.2.

article 20, paragraph 4, of the Vienna Conventions enters into force for the reserving State or international organization only if the reservation has been accepted by at least one other contracting State or one other contracting organization (in accordance with article 20, paragraph 4 (c)). Only if the reservation is thus established may treaty relations be instituted between the author of the reservation and the author of a simple objection. Their treaty relations are, however, subject to the restrictions set out in article 21, paragraph 3, of the Vienna Conventions.²²⁰²

4.3.4 *Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required*

If the establishment of a reservation requires the acceptance of the reservation by all the contracting States and contracting organizations, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.

Commentary

(1) The principle set out in guideline 4.3.3 is not applicable in cases in which, for one reason or another, unanimous acceptance by the contracting States and contracting organizations is required in order to “establish” the reservation, as in the case of a treaty that must be applied in its entirety,²²⁰³ for example. In such cases, any objection—simple or qualified—has a much more significant effect with regard to the entry into force of the treaty as between all the contracting States and contracting organizations, on the one hand, and the author of the reservation, on the other. The objection, in fact, prevents the reservation from being established as such. Even if article 20, paragraph 4 (b), of the Vienna Conventions were to apply to this situation—which is far from certain, in view of the *chapeau* of the paragraph²²⁰⁴—the reservation could not be established and, consequently, the author of the reservation could never become a contracting State or contracting organization. Here an objection—whether simple or qualified—constitutes an insurmountable obstacle both for the author of the reservation and for all the other contracting States or contracting organizations in relation to the establishment of treaty relations with the author of the reservation. Only the withdrawal of the reservation or of the objection would resolve the situation.

(2) Although such a solution could already be deduced by looking at guideline 4.1.2 in conjunction with guideline 4.2.1, it is worth recalling this significant effect of an objection to a reservation that requires unanimous acceptance.

4.3.5 *Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect*

An objection by a contracting State or a contracting organization to a valid reservation precludes the entry

²²⁰² See guideline 4.3.4.

²²⁰³ See guideline 4.1.2 above and, in particular, paragraphs (9)–(11) of the commentary thereto.

²²⁰⁴ “In cases not falling under the preceding paragraphs and unless the treaty otherwise provides”.

into force of the treaty as between the objecting State or organization and the reserving State or organization, if the objecting State or organization has definitely expressed an intention to that effect in accordance with guideline 2.6.7.

Commentary

(1) Article 20, paragraph 4 (b), of the Vienna Conventions leaves no doubt as to the effect of an objection accompanied by the definitely expressed intention not to apply the treaty as between the author of the objection and the author of the reservation, in line with guideline 2.6.7 (Expression of intention to preclude the entry into force of the treaty). In this case, the objection produces what is often referred to as “maximum effect”.

(2) This rule is the subject of guideline 4.3.5, which basically echoes the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention.

(3) It is clear from that provision—which, apart from the reference to an international organization, is identical to the corresponding provision of the 1969 Vienna Convention—that, in principle, an objection to a reservation does not constitute an obstacle to the entry into force of the treaty as between the objecting State and the reserving State:

[A]n objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization ...

(4) While such a “simple” or “minimum-effect” objection²²⁰⁵ does not have as its immediate effect the entry into force of the treaty in relations between the two States (or organizations), as is the case with an acceptance,²²⁰⁶ it does not preclude it.

(5) This is, however, a presumption that can be reversed by the author of the objection. Article 20, paragraph 4 (b), of the 1986 Vienna Convention continues: “unless a contrary intention is definitely expressed by the objecting State or organization”. Thus, the author of the objection may also elect to have no treaty relations with the author of the reservation, provided that it does so “definitely”. These are often referred to as objections “with maximum effect”.

(6) The system established by the Vienna Conventions in that regard corresponds to the approach taken by the International Court of Justice since 1951, according to which: “each State objecting to it will or will not ... consider the reserving State to be a party to the Convention”.²²⁰⁷

²²⁰⁵ See, for example, Riquelme Cortado, *Las reservas a los tratados ...* (footnote 150 above), pp. 279–280; and Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 170–172.

²²⁰⁶ Provided that the treaty itself is in force or becomes so as a result of accession by the accepting State or international organization (see guidelines 4.2.1–4.2.3 and commentaries thereto, in particular paragraphs (4)–(6) of the commentary to guideline 4.2.1, paragraph (2) of the commentary to guideline 4.2.2 and paragraph (4) of the commentary to guideline 4.2.3).

²²⁰⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 26.

(7) The direction of the presumption may be surprising. Traditionally, in keeping with the strict principle of consent, the immediate effect of an objection was that the reserving State could not claim to be a State party to the treaty,²²⁰⁸ the “maximum” effect of an objection was thus the rule. This outcome was necessary under the system of unanimity, in which a single objection compromised the unanimous consent of the other contracting States; no derogation was possible. The reserving State was required either to withdraw or to modify its reservation in order to become a party to the treaty. This rule was considered so self-evident that the Commission’s first special rapporteurs, who held to the system of unanimity, did not even formulate it in any of their reports.

(8) The revolution introduced by the flexible system to which Sir Humphrey Waldock was won over²²⁰⁹ did not, however, lead him to reject the traditional principle whereby “the objections shall preclude the entry into force of the treaty”.²²¹⁰ The Special Rapporteur did, however, allow for one major difference as compared with the traditional system, in that he considered that objections had only a relative effect: rather than preventing the reserving State from becoming a party to the treaty, an objection came into play only in the relations between the reserving State and the objecting State.²²¹¹

(9) However, in order to align the draft with the solution proposed in the 1951 advisory opinion of the International Court of Justice,²²¹² and in response to the criticisms and misgivings expressed by many Commission members,²²¹³ the radical solution proposed by Sir Humphrey Waldock was abandoned in favour of a simple presumption of maximum effect, leaving minimum effect available as an option. Draft article 20, paragraph 2 (b), as adopted on first reading, provided:

An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.²²¹⁴

²²⁰⁸ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 155 and 260.

²²⁰⁹ Pellet, “1969 Vienna Convention. Article 19: Formulation of reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 414–415, paras. 15–20.

²²¹⁰ Draft article 19, paragraph 4 (c), presented by Sir Humphrey Waldock in 1962 (first report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62). This solution is, moreover, frequently offered as the only one that makes sense. See, for example, Reuter, *Introduction au droit des traités* (footnote 28 above), p. 75, para. 134.

²²¹¹ On this point, see also the Commission’s commentary to draft article 20, paragraph 2 (b) (*Yearbook ... 1962*, vol. II, document A/5209, p. 181, para. (23)).

²²¹² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 26.

²²¹³ See, for example, Mr. Tunkin (*Yearbook ... 1962*, vol. I, 653rd meeting, 29 May 1962, p. 156, para. 26, and 654th meeting, 30 May 1962, p. 161, para. 11), Mr. Rosenne (*ibid.*, 653rd meeting, 29 May 1962, p. 156, para. 30), Mr. Jiménez de Aréchaga (*ibid.*, p. 158, para. 48), Mr. de Luna (*ibid.*, p. 160, para. 66) and Mr. Yasseen (*ibid.*, 654th meeting, 30 May 1962, p. 161, para. 6). The Special Rapporteur was also in favour of introducing the presumption (*ibid.*, p. 162, paras. 17 and 20).

²²¹⁴ *ibid.*, vol. II, document A/5209, p. 176; see also p. 181, para. (23).

(10) During the debate on the Commission’s draft in the Sixth Committee of the General Assembly, however, the Czechoslovak and Romanian delegations argued that the presumption should be reversed, so that the rule would “be more likely to broaden treaty relations among States and to prevent the formation of an undesirable vacuum in the legal ties between States”.²²¹⁵ Nonetheless, despite the favourable comments of some Commission members during the second reading of the draft,²²¹⁶ this position was not retained in the Commission’s final draft.

(11) The issue arose again, however, during the United Nations Conference on the Law of Treaties. The proposals of Czechoslovakia,²²¹⁷ Syria²²¹⁸ and the Union of Soviet Socialist Republics²²¹⁹ were aimed at reversing the presumption adopted by the Commission. Although it was characterized by some delegations²²²⁰ as innocuous, the reversal of the presumption constituted a major shift in the logic of the mechanism of acceptances and objections.²²²¹ That was why the notion of reversing the presumption was rejected in 1968.²²²² During the second session of the Conference, however, the Union of Soviet Socialist Republics once again submitted a similar amendment,²²²³ which was debated at length, insisting on the sovereign right of each State to formulate a reservation and relying on the Court’s 1951 advisory opinion.²²²⁴ That amendment was finally adopted²²²⁵ and the presumption of article 20, paragraph 4 (b), of the Convention, as proposed by the Commission, was reversed.

²²¹⁵ See the summary of the Czechoslovak and Romanian observations in the fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 48–49.

²²¹⁶ See comments by Mr. Tunkin (*Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 167, para. 39) and Mr. Lachs (*ibid.*, 813th meeting, 29 June 1965, p. 268, para. 62).

²²¹⁷ A/CONF.39/C.1/L.85, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), p. 135.

²²¹⁸ A/CONF.39/C.1/L.94, *ibid.*

²²¹⁹ A/CONF.39/C.1/L.115, *ibid.*, p. 133.

²²²⁰ The United Arab Republic considered, for example, that those amendments were purely drafting changes (*Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (see footnote 35 above), 24th meeting, 16 April 1968, p. 127, para. 24).

²²²¹ See the statement by the representative of Sweden on this subject, who noted that “the International Law Commission’s formula might have the advantage of dissuading States from formulating reservations” (*ibid.*, 22nd meeting, 11 April 1968, p. 117, para. 35). The representative of Poland supported the amendments precisely because they favoured the formulation of reservations and the establishment of a treaty relationship (*ibid.*, p. 118, para. 40), which for Argentina “would be going too far in applying the principle of flexibility” (*ibid.*, 24th meeting, 16 April 1968, p. 129, para. 43).

²²²² *ibid.*, 25th meeting, 16 April 1968, p. 135, paras. 35 *et seq.*

²²²³ A/CONF.39/L.3, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (footnote 54 above), pp. 265–266.

²²²⁴ Notably the answer to the second question, in which the Court held that a State that has formulated an objection “can in fact consider that the reserving State is not party to the Convention” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*) (see footnote 604 above), p. 29.

²²²⁵ By 49 votes to 21, with 30 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (footnote 332 above), 10th plenary meeting, 29 April 1969, p. 35, para. 79).

(12) The difficulties that the Conference encountered in adopting the Soviet amendment show clearly that reversal of the presumption was not as innocuous as Sir Humphrey Waldock, then Expert Consultant to the Conference, had indicated. The problem is not merely that of “formulating a rule one way or the other”;²²²⁶ this new formula, in particular, is at the origin of the doubts often expressed about the function of an objection and the real differences that exist between acceptance and objection.²²²⁷

(13) Still, the presumption has never been called into question since the adoption of the 1969 Vienna Convention. During the drafting of the 1986 Vienna Convention it was simply transposed by the Commission. It therefore seems neither possible nor truly necessary to undo the last-minute compromise that was struck at the 1969 United Nations Conference on the Law of Treaties. According to the presumption that is now part of positive international law, the general rule remains that an objection does not preclude the entry into force of a treaty—a principle recalled in guideline 4.3.1, the exception being the absence of treaty relations between the author of the objection and the author of the reservation, an exception dealt with in guideline 4.3.5.

4.3.6 *Effect of an objection on treaty relations*

1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

2. To the extent that a valid reservation purports to exclude the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates.

3. To the extent that a valid reservation purports to modify the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions of the treaty as intended to be modified by the reservation.

4. All the provisions of the treaty other than those to which the reservation relates shall remain applicable as between the reserving State or organization and the objecting State or organization.

²²²⁶ *Ibid.*, p. 34, para. 74. See also Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 156–157.

²²²⁷ See Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 172–173. See also Pellet and Müller, “Reservations to treaties ...” (footnote 1045 above), pp. 37–59.

Commentary

(1) The range of potential effects of an objection is quite broad.²²²⁸ The outright non-application of the treaty between the author of the reservation and the author of the objection is the most straightforward situation (objections with maximum effect, dealt with in guideline 4.3.5), but it is now infrequent, owing in particular to the reversal of the presumption in article 20, paragraph 4 (b), of the Vienna Conventions.²²²⁹ The vast majority of objections are now intended to produce a very different effect: rather than opposing the entry into force of the treaty *vis-à-vis* the author of the reservation, the objecting State seeks to modify the treaty relations by adapting them to its own position. Under article 21, paragraph 3, of the Vienna Conventions, bilateral relations in such cases result in principle in the partial non-application of the treaty (objections with minimum effect, the consequences of which are complex and can vary depending on the content of the reservation, are described in guideline 4.3.6). State practice, however, has developed other types of objections with effects other than those envisaged by article 21, paragraph 3, of the Vienna Conventions, either by excluding the application of certain provisions of the treaty that are not (specifically) addressed by the reservation (objections with intermediate effect, whose legal regime is set out in guideline 4.3.7) or by claiming that the treaty applies without any modification (objections with “super-maximum” effect, covered in guideline 4.3.8).

(2) Guideline 4.3.6, which describes the effects of a “simple” objection between the author of a reservation and the objecting State or international organization, consists of four paragraphs:

- the first paragraph, which is of a general introductory nature, reproduces the text of article 21, paragraph 3, of the 1986 Vienna Convention while specifying that it concerns only objections to a valid reservation;

- the second and third paragraphs provide details regarding the effect of an objection on treaty relations, depending on whether the objection seeks to exclude or to modify the provision or provisions at which the reservation is directed;

- lastly, the fourth paragraph states that, in principle, the objection has no effect on the other provisions of the treaty.

(3) Under the traditional system of unanimity, it was unimaginable that an objection could produce an effect other than non-participation by the author of the reservation to the treaty.²²³⁰ the objection undermined unanimity and prevented the reserving State from becoming a party to the treaty. Since at the time that notion seemed self-evident, neither Mr. Brierly nor Sir Gerald Fitzmaurice discussed the effects of objections to reservations, while

²²²⁸ See paragraph (4) of the introductory commentary to Part 4 of the Guide to Practice.

²²²⁹ See paragraphs (1)–(5) of the commentary to guideline 4.3.5.

²²³⁰ See Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 146.

Sir Hersch Lauterpacht touched on them only briefly in his proposals *de lege ferenda*.²²³¹

(4) Nor did Sir Humphrey Waldock find it necessary in his first report to take up the question of the effects of an objection to a reservation. This is explained by the fact that, according to his draft article 19, paragraph 4 (c), the objection precluded the entry into force of the treaty in the bilateral relations between the reserving State and the objecting State.²²³² Despite the shift away from this categorical approach in favour of simply a presumption, the draft articles adopted on first reading said nothing about the concrete effect of an objection that did not preclude the entry into force of the treaty as between the author of the objection and the reserving State. Few States, however, expressed concern at that omission.²²³³

(5) Nevertheless, a comment by the United States of America²²³⁴ drew the problem to the attention of the Special Rapporteur and the Commission. Although a situation where treaty relations were established despite an objection was deemed “unusual”,²²³⁵ which was certainly true at the time, the United States still considered it necessary to provide for such a situation and suggested the addition of a new paragraph, as follows:

Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States.²²³⁶

(6) The arguments put forward by the United States convinced Sir Humphrey Waldock of the “logical” need to include this hypothesis in draft article 21. He proposed a new paragraph, the wording of which differed significantly from the United States proposal:

Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States.²²³⁷

(7) The International Court of Justice had expressed a similar view in its 1951 advisory opinion:

Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.²²³⁸

(8) The Commission engaged in a very lively debate on the text of paragraph 3 proposed by Sir Humphrey Waldock.

²²³¹ Alternative drafts C and D of draft article 9, in the first report on the law of treaties by Hersch Lauterpacht, *Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 91 *et seq.*, at p. 92.

²²³² See paragraph (8) of the commentary to guideline 4.3.5 above.

²²³³ Only two States explicitly raised the issue. See the comments of the Danish Government (fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 46) and the comments of the United States (*ibid.*, pp. 47 and 55).

²²³⁴ *Ibid.*, p. 55.

²²³⁵ *Ibid.*

²²³⁶ *Ibid.*

²²³⁷ *Ibid.*, p. 55, para. 3 (Observations and proposals of the Special Rapporteur on article 21).

²²³⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 27.

Mr. Castrén, who considered that the case of a reservation in respect of which a simple objection had been raised was already covered by draft article 21, paragraph 1 (b),²²³⁹ was alone in his view. Most members²²⁴⁰ considered it necessary, if not “indispensable”,²²⁴¹ to introduce a provision “in order to forestall ambiguous situations”.²²⁴² However, the members of the Commission were divided on how to explain the intended effect of the new paragraph proposed by the United States and the Special Rapporteur. Whereas Sir Humphrey Waldock’s proposal emphasized the consensual basis of the treaty relations established despite the objection, the provision proposed by the United States seemed to imply that the intended effect originated only from the unilateral act of the objecting State, that is, from the objection, without the reserving State having a real choice. The two positions had their supporters within the Commission.²²⁴³

(9) The text that the Commission finally adopted on a unanimous basis,²²⁴⁴ however, was very neutral and clearly showed that the issue had been left open by the Commission. The Special Rapporteur in fact stated that he was able to “agree with both currents of opinion about the additional paragraph” since “the practical effect of either of the two versions would be much the same and in that particular situation both States would probably be ready to regard the treaty as being in force between them without the reserved provisions”.²²⁴⁵

(10) During the debate at the United Nations Conference on the Law of Treaties on what would become article 21, paragraph 3, almost no problems were raised apart from a few unfortunate changes which the Conference fairly quickly reconsidered.

(11) An episode that occurred on that occasion is relevant, however, for understanding article 21, paragraph 3. The Conference Drafting Committee, chaired by Mr. Yasseen—who, within the Commission, had expressed doubts regarding the difference between the respective effects of acceptance and objection on treaty relations,²²⁴⁶—proposed an amended version of the text that subsequently became article 21, paragraph 3, in order to take account of the new presumption in favour of the minimum effect of an objection, which had been adopted following the Soviet amendment.²²⁴⁷ The amended text stated:

²²³⁹ *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 172, para. 15.

²²⁴⁰ Mr. Ruda (*ibid.*, para. 13), Mr. Ago (*ibid.*, 814th meeting, 29 June 1965, pp. 271–272, paras. 7 and 11), Mr. Tunkin (*ibid.*, p. 271, para. 8) and Mr. Briggs (*ibid.*, p. 272, para. 14).

²²⁴¹ See the statement made by Mr. Ago (*ibid.*, p. 271, para. 7).

²²⁴² *Ibid.*

²²⁴³ Mr. Yasseen (*ibid.*, 800th meeting, 11 June 1965, p. 171, para. 7, p. 172, paras. 21–23 and p. 173, para. 26), Mr. Tunkin (*ibid.*, p. 172, para. 18) and Mr. Pal (*ibid.*, pp. 172–173, para. 24) expressed the same doubts as the Special Rapporteur (*ibid.*, p. 173, para. 31); in contrast, Mr. Rosenne, supported by Mr. Ruda (*ibid.*, p. 172, para. 13) considered that “[t]he United States unilateral approach to the situation it had mentioned in its observations concerning paragraph 2 was more in line with the general structure of the Commission’s provisions on reservations and preferable to the Special Rapporteur’s reciprocal approach” (*ibid.*, p. 172, para. 10).

²²⁴⁴ *Ibid.*, 816th meeting, 2 July 1965, p. 284.

²²⁴⁵ *Ibid.*, 800th meeting, 11 June 1965, p. 173, para. 31.

²²⁴⁶ *Ibid.*, 814th meeting, 29 June 1965, p. 271, para. 5.

²²⁴⁷ See paragraph (4) above.

When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, *the reservation has the effects provided for in paragraphs 1 and 2*.²²⁴⁸

(12) It would thus have been very clear that a simple objection was assumed to produce the same effect as an acceptance. Although the provision was adopted at one point by the Conference,²²⁴⁹ a joint amendment was submitted by India, Japan, the Netherlands and the Union of Soviet Socialist Republics²²⁵⁰ a few days before the end of the Conference with a view to replacing the last part of the sentence with the words originally proposed by the Commission, thereby restoring the distinction between the effects of an objection and those of an acceptance.

(13) The joint amendment was incorporated in the text by the Drafting Committee and adopted by the Conference.²²⁵¹ Mr. Yasseen explained that it was “necessary to distinguish between cases where a State objected to a reservation but agreed that the treaty should nevertheless come into force, and cases in which the reservation was accepted”.²²⁵²

(14) The reinstatement of the text initially proposed by the Commission restores the true meaning and effects of objections and silences the doctrinal voices that question the distinctive nature of the institution of objections as opposed to acceptances.²²⁵³

(15) Paragraph 3 of article 21 of the 1969 Vienna Convention was not, however, an exercise in codification *stricto sensu* at the time of its adoption by the Commission and subsequently by the Conference. It had been included by the Commission “for the sake of completeness”,²²⁵⁴ but not as a rule of customary law.²²⁵⁵ Although the Commission had drafted paragraph 3 in something of a hurry and the paragraph had led to debate and proposed amendments right up to the final days of the 1969 United Nations Conference on the Law of Treaties, during the *travaux préparatoires* of the draft that became the 1986 Vienna Convention some members of the Commission nevertheless found the provision to be clear²²⁵⁶ and acceptable.²²⁵⁷ That seems to have been the position of the Commission as a whole, since the paragraph was adopted on first reading in 1977, with only the necessary editorial changes. That endorsement demonstrated the customary nature acquired by paragraph 3 of article 21,²²⁵⁸

²²⁴⁸ *Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (see footnote 332 above), 11th plenary meeting, 30 April 1969, p. 36.

²²⁴⁹ *Ibid.*, para. 10 (94 votes to none).

²²⁵⁰ A/CONF.39/L.49, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (see footnote 54 above), p. 273.

²²⁵¹ *Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (see footnote 332 above), 33rd plenary meeting, 21 May 1969, p. 181, para. 12.

²²⁵² *Ibid.*, p. 181, para. 2.

²²⁵³ See the references to the literature cited in footnote 2199 above.

²²⁵⁴ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 209, paragraph (2) of the commentary to draft article 19.

²²⁵⁵ Edwards, “Reservations to treaties” (footnote 59 above), p. 398.

²²⁵⁶ Mr. Calle y Calle, *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 98, para. 8.

²²⁵⁷ Mr. Tabibi, *ibid.*, para. 7.

²²⁵⁸ Edwards, “Reservations to treaties” (footnote 59 above), p. 398; Gaja, “Unruly treaty reservations” (footnote 28 above), p. 308.

which was confirmed by the decision of the Court of Arbitration responsible for settling the dispute concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, which was rendered a few days later.²²⁵⁹ The provision is an important element of the flexible system of reservations to treaties.

(16) What has come to be considered the “normal” effect of an objection to a valid reservation is thus set forth in article 21, paragraph 3, of the Vienna Conventions. This provision, in its fuller 1986 version, provides:

When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

(17) Despite the apparent complexity of the wording, the sense of the provision is clear: as soon as the treaty has entered into force in the bilateral relations between the author of the reservation and the author of the objection—an element that article 21, paragraph 3, does not specify but which is self-evident—the provision or provisions to which the reservation relates shall be excised from their treaty relations to the extent of the reservation. Article 21, paragraph 3, however, calls for three remarks.

(18) First, the intended effect of an objection is diametrically opposed to that of an acceptance. Acceptance has the effect of modifying the legal effect of the provisions to which the reservation relates to the extent of the reservation, whereas an objection excludes the application of those provisions to the same extent.²²⁶⁰ Even though in certain specific cases the actual effect on the treaty relations established despite the objection may be identical to that of an acceptance,²²⁶¹ the legal regimes of the reservation/acceptance pair and the reservation/objection pair are nevertheless clearly different in law.

(19) Secondly, it is surprising—and regrettable—that paragraph 3 does not expressly limit its scope of application to reservations that are “valid” in the sense of articles 19 and 23 of the Vienna Conventions, as is the case in paragraph 1.²²⁶² It is nevertheless the case that an objection to an invalid reservation cannot produce the effect specified in paragraph 3,²²⁶³ even though State practice would appear to allow this in certain respects. States often object to reservations that they consider to be impermissible as being incompatible with the object and purpose of a treaty without opposing the entry into force of the treaty, or indeed expressly state that their objection does not preclude the entry into force of the treaty in their relations with the reserving State.

²²⁵⁹ Decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), p. 3.

²²⁶⁰ See Pellet and Müller, “Reservations to treaties ...” (footnote 1045 above), in particular pp. 46–54.

²²⁶¹ On this question, see paragraph (39) below.

²²⁶² “1. A reservation established with regard to another party in accordance with articles 19, 20 and 23”; see guideline 4.1 (Establishment of a reservation with regard to another State or international organization) and commentary thereto.

²²⁶³ See guideline 4.5.1 (Nullity of an invalid reservation) and commentary thereto.

(20) A telling example is that of the objection of the Federal Republic of Germany to the reservation formulated by Myanmar to the Convention on the rights of the child:

The Federal Republic of Germany considers that the reservations made by the Union of Myanmar regarding articles 15 and 37 of the Convention on the Rights of the Child are incompatible with the object and purpose of the Convention (article 51, paragraph 2) and therefore objects to them.

This objection shall not preclude the entry into force of the Convention as between the Union of Myanmar and the Federal Republic of Germany.²²⁶⁴

(21) This example is far from isolated. There are numerous objections in which, despite the conviction expressed by their authors as to the impermissibility of the reservation, the authors do not oppose the entry into force of the treaty and say so clearly,²²⁶⁵ while also expressly indicating, at times, that only the provisions to which the reservation relates shall not apply in the relations between the two States.²²⁶⁶ Simple objections (or objections having “minimum effect”) to reservations considered to be invalid are thus far from being a matter of mere speculation.²²⁶⁷

(22) The Vienna Conventions do not resolve this thorny issue and seem to treat the effects of objections on the

²²⁶⁴ *Multilateral Treaties ...* (footnote 37 above), chap. IV.II.

²²⁶⁵ See also, among many examples, the objections of Belgium to the reservations of Egypt and Cambodia to the Vienna Convention on Diplomatic Relations (*ibid.*, chap. III.3) or the objections of Germany to several reservations to the same Convention (*ibid.*). It is, however, interesting to note with regard to the German objection, which considers certain reservations to be “incompatible with the letter and spirit of the Convention”, that the Government of Germany has stated only for certain objections that they do not preclude the entry into force of the treaty between Germany and the respective States, without expressly taking a position in the other cases where it objected to a reservation for the same reasons. Numerous examples can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights: in particular the objections raised to the reservation of the United States of America to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (*ibid.*, chap. IV.4). All those States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose the entry into force of the Covenant in their relations with the United States, unlike Germany, which did not stay silent on that point even though its objection was also motivated by the incompatibility of the United States reservation “with the text as well as the object and purpose of article 6” (*ibid.*). The same remarks apply to the objection of Poland to the reservations formulated by Pakistan at the time of its accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*ibid.*, chap. IV.9). Nor is the phenomenon limited to human rights treaties: see also the objections of Austria, France, Germany and Italy to the reservation of Viet Nam to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (*ibid.*, chap. VI.19).

²²⁶⁶ See, for example, the objection by Belgium to the reservations of several States to the Vienna Convention on Diplomatic Relations: “The Government of the Kingdom of Belgium objects to the reservations made with respect to article 27, paragraph 3, by Bahrain and with respect to article 37, paragraph 2, by the United Arab Republic [now the Arab Republic of Egypt], Cambodia [now the Khmer Republic] and Morocco. The Government nevertheless considers that the Convention remains in force as between it and the aforementioned States, respectively, except in respect of the provisions which in each case are the subject of the said reservations” (*ibid.*, chap. III.3); see also the objection of the Netherlands to the reservation formulated by the United States to the International Covenant on Civil and Political Rights, cited in paragraph (4) of the commentary to guideline 4.3.1 (footnote 2200 above).

²²⁶⁷ See Zemanek, “Some unresolved questions concerning reservations ...” (footnote 1074 above), p. 331.

content of treaty relations independently from the issue of the validity of reservations. On this point, one might consider that the Conventions have gone further than necessary in delinking the criteria for the validity of reservations and the effects of objections. It is one thing to allow States and international organizations to object to any reservation,²²⁶⁸ whether valid or invalid, and another to assign identical effects to all these objections. Moreover, as guidelines 4.5.1 and 4.5.3 indicate, article 21, paragraph 3, of the Vienna Conventions does not apply to objections to reservations that do not meet the conditions for validity set out in article 19 (or guideline 3.1) and article 23 (or guidelines 2.1.1–2.1.7 and 2.2.1).²²⁶⁹ For this reason, each of the first three paragraphs of guideline 4.3.6 specify that they apply only to objections to valid reservations.

(23) Thirdly, although it is clear from article 21, paragraph 3, of the Vienna Conventions that the provisions to which the reservation relates²²⁷⁰ do not apply *vis-à-vis* the author of the objection, the phrase “to the extent of the reservation” leaves one “rather puzzled”²²⁷¹ and requires further clarification.

(24) The decision of the Court of Arbitration in the *Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*²²⁷² clarifies the meaning to be given to this phrase. France had, at the time of ratification, formulated a reservation to article 6 of the Convention on the Continental Shelf of 1958, the relevant portion of which reads as follows:

[T]he Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:

- if such boundary is calculated from baselines established after 29 April 1958;
- if it extends beyond the 200-metre isobath;
- if it lies in areas where, in the Government’s opinion, there are “special circumstances” within the meaning of article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.²²⁷³

The Government of the United Kingdom objected to this part of the French reservation, stating only that

²²⁶⁸ See paragraphs (1)–(9) of the commentary to guideline 2.6.2.

²²⁶⁹ See, in particular, G. Gaja, “Il regime della Convenzione di Vienna concernente le riserve inammissibili”, in *Studi in onore di Vincenzo Starace*, Naples, Scientifica, 2008, vol. I, pp. 349–361.

²²⁷⁰ The term “provisions” should not be interpreted too narrowly here. It may refer to an article or several articles of the treaty, or simply to a paragraph, a sentence or a phrase, or even to the treaty as a whole with respect to certain specific aspects. See also Bowett, “Reservations to non-restricted ...” (footnote 150 above), p. 86 (cited in paragraph (29) below).

²²⁷¹ As the representative of the United States of America expressed it at the United Nations Conference on the Law of Treaties, *Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (footnote 332 above), 33rd plenary meeting, 21 May 1969, p. 181, para. 9.

²²⁷² *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above).

²²⁷³ *Multilateral Treaties ...* (footnote 37 above), chap. XXI.4.

[t]he Government of the United Kingdom are unable to accept the reservations made by the Government of the French Republic.²²⁷⁴

(25) Before the Court of Arbitration, France maintained that, on account of the combined effect of its reservation and the objection by the United Kingdom, and in accordance with the principle of mutuality of consent, article 6 as a whole was not applicable in relations between the two parties.²²⁷⁵ The United Kingdom took the view that, in accordance with article 21, paragraph 3, of the Vienna Convention—which had at the time not entered into force and had not even been signed by France—“the French reservations cannot render Article 6 inapplicable *in toto*, but at the most ‘to the extent of the reservation’”.²²⁷⁶

(26) The Court found that

the answer to the question of the legal effect of the French reservations lies partly in the contentions of the French Republic and partly in those of the United Kingdom. Clearly, the French Republic is correct in stating that the establishment of treaty relations between itself and the United Kingdom under the Convention depended on the consent of each State to be mutually bound by its provisions; and that when it formulated its reservations to Article 6 it made its consent to be bound by the provisions of that Article subject to the conditions embodied in the reservations. There is, on the other hand, much force in the United Kingdom’s observation that its rejection was directed to the reservations alone and not to Article 6 as a whole. In short, the disagreement between the two countries was not one regarding the recognition of Article 6 as applicable in their mutual relations but one regarding the matters reserved by the French Republic from the application of Article 6. The effect of the United Kingdom’s rejection of the reservations is thus limited to the reservations themselves.²²⁷⁷

The Court went on to say:

[H]owever, the effect of the rejection may properly, in the view of the Court, be said to render the reservations non-opposable to the United Kingdom. Just as the effect of the French reservations is to prevent the United Kingdom from invoking the provisions of Article 6 except on the basis of the conditions stated in the reservations, so the effect of their rejection is to prevent the French Republic from imposing the reservations on the United Kingdom for the purpose of invoking against it as binding a delimitation made on the basis of the conditions contained in the reservations. Thus, the combined effect of the French reservations and their rejection by the United Kingdom is neither to render Article 6 inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto*, as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and this is precisely the effect envisaged in such cases by Article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent.²²⁷⁸

(27) The 1977 decision not only confirms the customary nature of article 21, paragraph 3,²²⁷⁹ but also shows that the objective of this provision—which derives from the same principle of mutuality of consent—is to safeguard as much as possible the agreement between the parties. One should not exclude the application of the entirety of the provision or provisions to which a reservation relates, but only of the parts of those provisions concerning which the parties have expressed disagreement.

²²⁷⁴ *Ibid.*

²²⁷⁵ *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), pp. 40–41, para. 57.

²²⁷⁶ *Ibid.*, p. 41, para. 58.

²²⁷⁷ *Ibid.*, para. 59.

²²⁷⁸ *Ibid.*, p. 42, para. 61.

²²⁷⁹ See paragraph (16) above.

(28) In the case of France and the United Kingdom, that meant accepting that article 6 remained applicable as between the parties apart from the matters covered by the French reservation. This is what should be understood by “to the extent of the reservation”. The effect sought by paragraph 3 is to preserve the agreement between the parties to the extent possible by reducing the application of the treaty to the provisions on which there is agreement and excluding the others, or, as Jean Kyongun Koh explains:

Here the Vienna Convention seems to be overtly seeking to preserve as much of the treaty as possible even when parties disagree about a reservation ... The Vienna Convention tries to salvage as much as is uncontroversial about the relations between reserving and opposing States.²²⁸⁰

(29) Although the principle of article 21, paragraph 3, is clearer than is sometimes suggested, it is still difficult to apply, as noted by D. W. Bowett:

The practical difficulty may be that of determining precisely which part of the treaty is affected by the reservation and must therefore be omitted from the agreement between the two Parties. It may be a whole article, or a sub-paragraph of an article, or merely a phrase or word within the sub-paragraph. There can be no rule to determine this, other than the rule that by normal methods of interpretation and construction one must determine which are the “provisions”, the words, to which the reservation relates.²²⁸¹

(30) Moreover, as Frank Horn rightfully notes:

A reservation does not only affect the provision to which it directly refers but may have repercussions on other provisions. An “exclusion” of a provision, that is the introduction of an opposite norm, changes the context that is relevant for interpreting other norms. A norm seldom exists in isolation but forms an integrated part in a system of norms. The extent of a reservation does not necessarily comprise only the provision directly affected but also those provisions the application of which is influenced by the “exclusion” or the “modification”.²²⁸²

(31) Only the wording of the reservation, suitably interpreted, makes it possible to determine the provisions of the treaty or the specific aspects of the treaty the legal effect of which the reserving State or international organization purports to exclude or modify. Those provisions or aspects of the treaty are, by virtue of an objection, not applicable in treaty relations between the author of the objection and the author of the reservation. By contrast, all the provisions or parts of provisions not affected by the reservation remain applicable as between the parties, as paragraph 4 of guideline 4.3.6 states.

(32) In principle, what should be excluded from relations between the two parties can be determined by asking what the reservation actually modifies in the treaty relations of its author *vis-à-vis* a contracting State or contracting organization that has accepted it.

(33) However, paragraph 1 of guideline 4.3.6 requires further clarification, depending on whether the reservation that is the subject of the objection purports to exclude or to modify the legal effect of certain provisions of the treaty. It is precisely this clarification that is provided in paragraphs 2 and 3 of the guideline.

²²⁸⁰ Koh, “Reservations to multilateral treaties ...” (footnote 1443 above), p. 102.

²²⁸¹ Bowett, “Reservations to non-restricted ...” (footnote 150 above), p. 86.

²²⁸² Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 178.

(34) In order to clarify the content of the treaty relations between the author of the reservation and the objecting State or international organization, it is useful to recall the distinction between “modifying reservations” and “excluding reservations” employed in guideline 4.2.4—the pattern of which guideline 4.3.6 generally follows—in order to determine the effects of an established reservation.

(35) Like paragraphs 2 and 3 of guideline 4.2.4, paragraphs 2 and 3 of guideline 4.3.6 begin with the phrase “To the extent that”, to reflect the fact that a single reservation can have both excluding and modifying effects.²²⁸³ The expressions “purports to exclude” or “purports to modify”, which are the very expressions used in article 2, paragraph 1 (d), of the Vienna Conventions and are reproduced in guideline 1.1 of the Guide to Practice in the definition of reservations, are in contrast to the verbs “exclude” and “modify”, which appear in the corresponding provisions of guideline 4.2.4 in order to indicate that the reservations referred to in guideline 4.3.6 cannot be considered to be “established” in respect of the author of the objection since, *ex hypothesi*, the latter has not accepted them but has, on the contrary, objected to them.

(36) The case of excluding reservations is more straightforward. The Egyptian reservation to the Vienna Convention on Diplomatic Relations of 1961 is a case in point. That reservation reads: “Paragraph 2 of article 37 shall not apply”.²²⁸⁴ In treaty relations between the author of the reservation and the author of a simple objection, therefore, the Vienna Convention on Diplomatic Relations will apply without paragraph 2 of article 37. This provision does not apply, to the extent provided by the reservation: in other words, it does not apply at all. Its application is entirely excluded.

(37) Cuba made a reservation purporting to exclude the application of article 25, paragraph 1, of the Convention on special missions:

The Revolutionary Government of the Republic of Cuba enters an express reservation with regard to the third sentence of paragraph 1 of article 25 of the Convention, and consequently does not accept the assumption of consent to enter the premises of the special mission for any of the reasons mentioned in that paragraph or for any other reasons.²²⁸⁵

In this case, too, a (simple) objection results in the exclusion of the application of the third sentence of paragraph 1 of article 25 of the Convention. On the other hand, the rest of the provision remains in force between the two parties.

(38) Some types of excluding reservations are more complex, however. This is the case, for instance, with across-the-board reservations, that is, reservations that purport to exclude the legal effect of the treaty as a whole with respect to certain specific aspects.²²⁸⁶ The reservation of Guatemala to the Customs Convention on the Temporary Importation of Private Road Vehicles of 1954 thus states:

The Government of Guatemala reserves its right:

(1) To consider that the provisions of the Convention shall apply solely to natural persons and not to legal persons and bodies corporate as provided in chapter 1, article 1.²²⁸⁷

A purely mechanical application of article 21, paragraph 3, of the Vienna Conventions might suggest that the treaty relation established between the author of this reservation and an objecting State excludes the application of article 1—the provision to which the reservation refers. But the fact that only article 1 is expressly referred to does not mean that the reservation applies only to that provision. In the specific example of the reservation of Guatemala, it would be equally absurd to exclude only the application of article 1 of the Convention or to conclude that, because the reservation concerns all the provisions of the Convention (by excluding part of its scope of application *ratione personae*), a simple objection excludes all the provisions of the Convention. Only that which is effectively modified or excluded as a result of the reservation remains inapplicable in the treaty relations between the author of the reservation and the author of the simple objection: the application of the Convention as a whole to the extent that such application concerns legal persons.

(39) In these cases, but only in these cases,²²⁸⁸ an objection produces in concrete terms the same effects as an acceptance: the exclusion of the legal effect, or application, of the provision to which the reservation relates “to the extent of the reservation”; an acceptance and a simple objection therefore result in the same treaty relations between the author of the reservation, on the one hand, and the author of the acceptance or of the simple objection, on the other. The literature agrees on this point.²²⁸⁹ The similarity in the effects of an acceptance and a minimum-effect objection does not mean, however, that the two reactions are identical and that the author of the reservation “would get what it desired”.²²⁹⁰ Moreover, while an acceptance is tantamount to agreement, or at least to the absence of opposition to a reservation, an objection cannot be considered mere “wishful thinking”,²²⁹¹ it expresses disagreement and purports to protect the rights of its author much as a unilateral declaration (protest) does.²²⁹²

²²⁸⁷ *Multilateral Treaties ...* (footnote 37 above), chap. XI.A.8.

²²⁸⁸ The same does not hold true for objections to modifying reservations; see guideline 4.3.6, paragraph 3, and paragraph (41) below.

²²⁸⁹ See, for example, Clark, “The Vienna Convention reservations ...” (footnote 1087 above), p. 308; Coccia, “Reservations to multilateral treaties ...” (footnote 196 above), p. 36; Gaja, “Unruly treaty reservations” (footnote 28 above), p. 327; Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 157; Ruda, “Reservations to treaties” (footnote 56 above), p. 199; and Sinclair, *The Vienna Convention on the Law of Treaties* (footnote 129 above), p. 76. See also the explanations of the representative of the Netherlands in respect of the four-State amendment (cited in footnote 2250 above), *Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (footnote 332 above), 32nd plenary meeting, 20 May 1969, p. 179, para. 55. See also Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 173 and Klabbbers, “Accepting the unacceptable? ...” (footnote 2199 above), pp. 186–187.

²²⁹⁰ Klabbbers, “Accepting the unacceptable? ...” (footnote 2199 above), p. 179.

²²⁹¹ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 157, quoting J. Dehaussy.

²²⁹² Zemanek, “Some unresolved questions concerning reservations ...” (footnote 1074 above), p. 332. See also Pellet and Müller, “Reservations to treaties ...” (footnote 1045 above), p. 53.

²²⁸³ See paragraph (3) of the commentary to guideline 4.2.4.

²²⁸⁴ *Multilateral Treaties ...* (footnote 37 above), chap. III.3.

²²⁸⁵ *Ibid.*, chap. III.9.

²²⁸⁶ See paragraph 2 of guideline 1.1 (Definition of reservations) and paragraphs (16)–(22) of the commentary thereto.

(40) In the light of these observations, paragraph 2 of guideline 4.3.6 clarifies the concrete effect of an objection to an excluding reservation by recognizing the similarity between the treaty relations established in the two cases.

(41) In contrast, in the case of modifying reservations, which are the subject of paragraph 3 of guideline 4.3.6, the difference between an objection and an acceptance is very clear. Whereas the establishment of such a reservation modifies the legal obligations between the author of the reservation and the contracting States or contracting organizations in respect of which the reservation is established, article 21, paragraph 3, excludes the application of all the provisions that potentially would be modified by the reservation, to the extent provided by the reservation. If a State makes a reservation that purports to replace one treaty obligation with another, article 21, paragraph 3, requires that the obligation potentially replaced by the reservation shall be excised from the treaty relations between the author of the reservation and the author of the simple objection. Neither the initial obligation, nor the modified obligation proposed by the reservation, applies: the former because the author of the reservation has not agreed to it and the latter because the author of the objection has in turn opposed it.²²⁹³

(42) Paragraph 3 of guideline 4.3.6 highlights this difference between a reservation with a modifying effect that has been accepted and one that is the subject of a simple objection. As is the case with paragraph 2, paragraph 3 must be read in conjunction with paragraph 1 of the guideline, which it is designed to clarify.

(43) Paragraph 4, the final paragraph of the guideline, sets out a common-sense rule that can be deduced *a contrario* from the three preceding paragraphs, namely that the interaction of a reservation and an objection leaves intact all the rights and obligations arising under the provisions of the treaty, apart from those that are the subject of the reservation. Yet this principle must be understood as being subject to the special case of what are sometimes called objections “with intermediate effect”, which are dealt with in guideline 4.3.7.

4.3.7 Effect of an objection on provisions other than those to which the reservation relates

1. A provision of the treaty to which the reservation does not relate, but which has a sufficient link with the provisions to which the reservation does relate, is not applicable in the treaty relations between the author of the reservation and the author of an objection formulated in accordance with guideline 3.4.2.

2. The reserving State or international organization may, within a period of twelve months following the notification of an objection which has the effect referred to in paragraph 1, oppose the entry into force of the treaty between itself and the objecting State or organization. In the absence of such opposition, the treaty shall apply between the author of the reservation and the author of the objection to the extent provided by the reservation and the objection.

²²⁹³ Examples of modifying reservations can be found in paragraphs (22)–(23) of the commentary to guideline 4.2.4.

Commentary

(1) According to guideline 3.4.2 (Permissibility of an objection to a reservation):

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

(a) the provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and

(b) the objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

(2) Such objections, while they do not go so far as to preclude the entry into force of the treaty as a whole as between the author of the objection and the author of the reservation (objections with maximum effect),²²⁹⁴ are nevertheless intended to produce effects that go further than those provided for in article 21, paragraph 3, of the Vienna Conventions, which is reproduced and amplified in guideline 4.3.6; such objections are often referred to as objections “with intermediate effect”.²²⁹⁵

(3) The purpose of guideline 4.3.7 is not to set out the conditions for the permissibility of such reservations—that is the purpose of guideline 3.4.2—but to determine what effects they may produce. To what extent can the author of an objection have that objection produce an effect that is intermediate between a “simple” effect (article 21, paragraph 3, of the Vienna Conventions) and a “qualified” or “maximum” effect, which excludes the entry into force of the treaty as a whole in the relations between the author of the reservation and the author of the objection (article 20, paragraph 4 (b), of the Vienna Conventions)?

(4) Clearly, the choice cannot be left entirely to the discretion of the author of the objection.²²⁹⁶ As the International Court of Justice emphasized in its 1951 opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:

It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.²²⁹⁷

(5) Thus, an objection cannot under any circumstances exclude from the treaty relations between the objecting State or international organization and the author of the reservation provisions of the treaty that are essential for the realization of its object and purpose. This clearly constitutes a limit not to be exceeded, and guideline 3.4.2 makes it a criterion for the assessment of permissibility.²²⁹⁸

(6) On the other hand, it is important not to lose sight of the principle of mutuality of consent, which is the basis for the law of treaties as a whole and which, as the Court

²²⁹⁴ See guideline 4.3.5.

²²⁹⁵ See paragraph (1) of the commentary to guideline 3.4.2.

²²⁹⁶ See paragraph (8) of the commentary to guideline 3.4.2.

²²⁹⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), p. 27.

²²⁹⁸ See paragraph (1) above.

of Arbitration rightly stressed in the *Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, is essential for determining the effects of an objection and of a reservation.²²⁹⁹ As is recalled many times in the commentaries to various guidelines in the Guide to Practice: “No State can be bound by contractual obligations it does not consider suitable”.²³⁰⁰ This is true for both the reserving State (or international organization) and the objecting State (or international organization). However, in some situations, the effects attributed to objections by article 21, paragraph 3, of the Vienna Conventions may prove unsuited for the re-establishment of mutual consent between the author of the reservation and the author of the objection, even when the object and purpose of the treaty are not threatened by the reservation.

(7) This is the case, for example, when the reservation purports to exclude or modify a provision of the treaty which, according to the intention of the parties, is necessary to safeguard the balance between the rights and obligations resulting from their consent to the entry into force of the treaty. This happens when the reservation not only challenges the consent of the parties to the provision to which the reservation directly refers, but also upsets the balance achieved during negotiations on a set of connected provisions. A contracting State or contracting organization may in this case legitimately consider that being bound by one of the provisions in question without being able to benefit from one or more of the others constitutes “a contractual obligation it does not consider suitable”.

(8) These are the types of situations that objections with intermediate effect are meant to address. The practice has been resorted to mainly, if not exclusively, in the case of reservations and objections to the provisions of Part V of the 1969 Vienna Convention, and the example makes it clear why authors of objections seek to expand the effects they intend their objections to produce.

(9) Article 66 of the Vienna Convention and the annex thereto relating to compulsory conciliation provide procedural guarantees which many States, at the time the Convention was adopted, considered essential in order to prevent abuse of certain provisions of Part V.²³⁰¹ The reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal, which some States had sought to undermine through reservations and which could only be restored through an objection that went beyond the “normal” effects of the reservations envisaged by the Vienna Conventions.²³⁰²

²²⁹⁹ Decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom ...* (see footnote 24 above), p. 42, para. 61.

²³⁰⁰ Tomuschat, “Admissibility and legal effects of reservations ...” (footnote 1080 above), p. 466; see also the second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 57, paras. 97 and 99; see also Müller “1969 Vienna Convention. Article 20: Acceptance of and objection to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 496–498, paras. 18–22.

²³⁰¹ See paragraphs (9)–(10) of the commentary to guideline 3.4.2.

²³⁰² See Müller, “1969 Vienna Convention. Article 21: Legal effects of reservations and of objections to reservations”, in Corten and Klein

(10) Hence, in order to restore what could be referred to as the “consensual balance” between the author of the reservation and the author of the objection, the effect of the objection on treaty relations between the two parties should be allowed to extend to provisions of the treaty that have a sufficient link with the provisions to which the reservation refers.

(11) It was in the light of these remarks that the Commission included in the Guide to Practice paragraph 1 of guideline 4.3.7, specifying that an objection may exclude the application of provisions to which the reservation does not relate under the conditions set out in guideline 3.4.2. The latter is mentioned expressly so that there can be no doubt whatsoever that this effect can only be produced if the conditions for the permissibility of objections with intermediate effect set out in that guideline are met. To the extent possible, the wording of paragraph 1 of guideline 4.3.7 has been aligned with that of guideline 3.4.2.

(12) While conceding that objections with intermediate effect may produce the effects intended by their authors under the strict conditions set out in guideline 3.4.2, the Commission is aware of the risks they could pose for the overall treaty balance, and it believes that they should continue to constitute exceptions.

(13) Paragraph 2 of guideline 4.3.7 partially addresses this concern and seeks to maintain the principle of mutual consent to the greatest extent possible. The paragraph proceeds from the principle that objections with intermediate effect constitute in some respects “counter-reservations”,²³⁰³ and it provides the author of the reservation with an opportunity to prevent such an effect from being produced by opposing the entry into force of the treaty between itself and the author of the objection.

(14) It seemed reasonable, in the form of progressive development, to set a time period of 12 months for such a reaction, by analogy with the time period available to contracting States and contracting organizations for the expression of their intention not to be bound by the treaty in respect of the author of the reservation.²³⁰⁴

(15) The second sentence of paragraph 2 of guideline 4.3.7 draws the consequence of the absence of such opposition within the stipulated time period by transposing the rule applicable to objections with “minimum” effect established in article 21, paragraph 3, of the Vienna Conventions and reproduced in guideline 4.3. The phrase “to the extent provided by the reservation and the objection” is a succinct way of saying that, if all these conditions are met, the treaty shall apply as between the author of the reservation and the author of the objection with the exception of those provisions excluded or modified by the reservation and those additional provisions excluded by the objection.

(eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 561, para. 57.

²³⁰³ See paragraph (7) of the commentary to guideline 3.4.2.

²³⁰⁴ See article 20, paragraph 5, of the Vienna Conventions and also guideline 2.6.12 (Time period for formulating objections).

4.3.8 *Right of the author of a valid reservation not to comply with the treaty without the benefit of its reservation*

The author of a valid reservation is not required to comply with the provisions of the treaty without the benefit of its reservation.

Commentary

(1) The question of objections with “super-maximum” effect whereby the author of the objection affirms that the treaty enters into force in its relations with the author of the reservation without the latter being able to benefit from its reservation,²³⁰⁵ which is much more controversial than that of reservations with intermediate effect, can also be resolved logically by applying the principle of mutual consent.²³⁰⁶

(2) It should be noted, however, that the practice of objections with super-maximum effect has developed not within the context of objections to valid reservations, but in reaction to reservations that are held to be incompatible with the object and purpose of a treaty. A recent example is afforded by the Swedish objection to the reservation formulated by El Salvador to the Convention on the Rights of Persons with Disabilities of 2006:

[T]he Government of Sweden has examined the reservation made by the Government of the Republic of El Salvador upon ratifying the Convention on the Rights of Persons with Disabilities.

According to international customary law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of all States that treaties to which they have chosen to become parties, are respected as to their object and purpose by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden notes that El Salvador in its reservation gives precedence to its Constitution over the Convention. The Government of Sweden is of the view that such a reservation, which does not clearly specify the extent of the derogation, raises serious doubt as to the commitment of El Salvador to the object and purpose of the Convention.

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation.²³⁰⁷

(3) Regardless of the consequences of such an objection with a purported super-maximum effect in the case of an invalid reservation,²³⁰⁸ it is clear that such an effect of an objection is not only not provided for in the Vienna Conventions—which is also true of an objection with intermediate effect—but is also clearly incompatible with the principle of mutual consent. Accordingly, “super-maximum” effect is excluded in the case of a valid reservation: the author of an objection cannot force the author of the reservation to be bound by more than what it is

prepared to accept. The objecting State or international organization cannot impose on a reserving State or international organization that has validly exercised its right to formulate a reservation any obligations which the latter has not expressly agreed to assume. This idea is expressed in guideline 4.3.8.

(4) The author of a reservation that meets the criteria for permissibility and has been formulated in accordance with the prescribed form and procedure cannot be required to comply with the provisions of the treaty without the benefit of its reservation.

(5) This does not mean, however, that an objection with super-maximum effect has no effect on the content of treaty relations between its author and the author of the reservation. As is the case with reservations with intermediate effect that go beyond admissible effects, such unilateral declarations are objections through which the author expresses its disagreement with the reservation. The application of the rules set out in guideline 4.3.6 (Effect of an objection on treaty relations) is not limited to simple objections. Those rules apply to all objections to a valid reservation, including objections with super-maximum effect.

4.4 *Effect of a reservation on rights and obligations independent of the treaty*

4.4.1 *Absence of effect on rights and obligations under other treaties*

A reservation, acceptance of a reservation or objection to a reservation neither modifies nor excludes any rights and obligations of their authors under other treaties to which they are parties.

Commentary

(1) The definition of a reservation contained in article 2, paragraph 1 (*d*), of the Vienna Conventions and reproduced in guideline 1.1 clearly establishes that a reservation “purports to exclude or to modify the legal effect of certain provisions of the treaty, or of the treaty as a whole with respect to certain specific aspects*²³⁰⁹”. Likewise, article 21, paragraph 1, provides that an established reservation can only modify (or exclude) the “provisions of the treaty* to which the reservation relates”.²³⁰⁹ Although article 21, paragraph 3, and guideline 4.2.4 are not as precise on this point, they refer to the “provisions to which the reservation relates”, which, based on the definition of a reservation, can only mean “certain provisions of the treaty*²³⁰⁹”.

(2) The text of the Vienna Conventions therefore leaves no room for doubt: a reservation can only modify or exclude the legal effects of the treaty or some of its provisions. A reservation remains a unilateral statement linked to a treaty, the legal effects of which it purports

²³⁰⁵ See paragraph (17) of the commentary to guideline 3.4.2.

²³⁰⁶ See paragraph (5) of the commentary to guideline 4.3.7.

²³⁰⁷ *Multilateral Treaties ...* (footnote 37 above), chap. IV.15.

²³⁰⁸ See guidelines 4.5.2–4.5.3.

²³⁰⁹ On the differences between article 2, paragraph 1 (*d*), and article 21, paragraph 1, of the Vienna Conventions, see Müller, “1969 Vienna Convention. Article 21: Legal effects of reservations and of objections to reservations”, in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), p. 546, paras. 25–26.

to modify. It does not constitute an independent unilateral act capable of modifying the obligations, or even the rights, of its author. Furthermore, the combined effect of a reservation and an objection cannot exclude the application of rules external to the treaty.

(3) Although technically they do not apply to a reservation to a treaty, the arguments put forward by the French Republic with regard to its reservation to its declaration of acceptance of the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court during the *Nuclear Tests* cases are quite instructive in this regard.²³¹⁰ In order to establish that the Court had no jurisdiction in those cases, France contended that the reservation generally limited its consent to the jurisdiction of the Court, particularly the consent given in the General Act of Arbitration of 1928. In their joint dissenting opinion, several judges of the Court rejected the French thesis:

Thus, in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon, or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations.²³¹¹

(4) This opinion is expressed in sufficiently broad terms not to be applicable solely to the specific situation of reservations to declarations of acceptance of the compulsory jurisdiction of the Court under the optional clause but, more generally, to any reservation to an international treaty. This approach was later endorsed by the Court itself in the *Border and Transborder Armed Actions (Nicaragua v. Honduras)* case, in which Honduras sought to have its reservation to its declaration of acceptance of the compulsory jurisdiction of the Court under the optional clause take precedence over its obligations by virtue of article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá). The Court, however, held that such a reservation could not in any event restrict the commitment which Honduras had undertaken by virtue of article XXXI. The Honduran argument as to the effect of the reservation to its 1986 declaration on its commitment under article XXXI of the Pact could not therefore be accepted.²³¹²

(5) This relative effect of the reservation and of reactions to the reservation, in the sense that they can modify or exclude only the legal effects of the treaty in regard to which they were formulated and made, results from the principle *pacta sunt servanda*. A State or international organization cannot release itself through a reservation, acceptance of a reservation or objection to a reservation from obligations it has elsewhere.

²³¹⁰ *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 101–102, para. 18; *Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 137–138, para. 16.

²³¹¹ *Nuclear Tests (Australia v. France), Judgment of 20 December 1974* (see footnote 24 above), p. 350, para. 83 (joint dissenting opinion of Justices Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock).

²³¹² *Border and Transborder Armed Actions (Nicaragua v. Honduras)* (see footnote 670 above), p. 88, para. 41.

(6) Guideline 4.4.1 highlights the absence of effect of a reservation, or acceptance of or objection to it, on treaty obligations under another treaty. Only the legal effects of treaty provisions to which the reservation relates can be modified or excluded.

(7) The strong wording employed in this guideline does not exclude the possibility that a reservation to a particular treaty as well as the reactions to it may come to play a certain role in the interpretation of other treaties by analogy or by means of a *contrario* reasoning. However, such considerations lie outside the scope of guideline 4.4.1, which merely recalls that such instruments can neither *modify* nor *exclude* the rights and obligations emanating from another treaty: even if the reservations, acceptances or objections of which they are the object can play a role in interpretation, they cannot have modifying or excluding effects.

4.4.2 Absence of effect on rights and obligations under customary international law

A reservation to a treaty provision which reflects a rule of customary international law does not of itself affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule.

Commentary

(1) Just as a reservation cannot influence the pre-existing treaty relations of its author, it cannot have an impact on other obligations, of any nature, binding on the author of the reservation apart from the treaty. This is especially clear with regard to a reservation to a provision reflecting²³¹³ a rule of customary international law.

(2) Adopted within the framework of Part 3 of the Guide to Practice on the permissibility of reservations, guideline 3.1.5.3 addresses the issue as follows:

3.1.5.3 Reservations to a provision reflecting a customary rule

The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision.

(3) It follows that the customary nature of the rule reflected in a treaty provision does not in itself constitute an obstacle to the formulation of a reservation,²³¹⁴ but that such a reservation can in no way call into question the binding nature of the rule concerned in relations between the reserving State or international organization and other States or international organizations, whether or not they are parties to the treaty.

(4) Nevertheless, the customary nature of a provision which is the object of a reservation has important consequences with respect to the effects produced by the reservation; once the reservation is established, it prevents application of the treaty rule which is the object of the

²³¹³ On the use of the word “reflect”, see paragraph (1) of the commentary to guideline 3.1.5.3.

²³¹⁴ See guideline 3.1.5.3 and commentary thereto.

reservation in the reserving State's relations with the other parties to the treaty, but it does not eliminate that State's obligation to respect the customary rule (the content of which may be identical).²³¹⁵

(5) Certainly, as between the author of the reservation and the contracting States or contracting organizations with regard to which the reservation is established, the reservation has the "normal" effect provided for in article 21, paragraph 1, creating between those parties a specific regulatory system which may derogate from the customary rule concerned in the *context of the treaty*²³¹⁶—for example, by imposing less stringent obligations with regard to notification or dispute settlement. Nevertheless, the reservation in itself in no way affects the obligatory nature of the customary rule as such. It cannot release its author from compliance with the customary rule, if it is in force with regard to the author, independently of the treaty.²³¹⁷ The International Court of Justice has clearly stressed in this regard that

[n]o reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention [on the Continental Shelf].²³¹⁸

The reason for this is simple:

The fact that the above-mentioned principles [of customary and general international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.²³¹⁹

(6) In his dissenting opinion appended to the 1969 judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, *ad hoc* Judge Sørensen

²³¹⁵ In support of this position, see *Oppenheim's International Law* (footnote 210 above), pp. 1243–1244; Teboul, "Remarques sur les réserves ..." (footnote 1571 above), p. 711; and P. Weil, "Vers une normativité relative en droit international?", *RGDIP*, vol. 86 (1982), pp. 43–44. See also the authors cited in footnote 1687 above, or Schabas, "Reservations to human rights treaties ..." (footnote 966 above), p. 56. P. Reuter takes the opposing view: "... entre l'État qui formule la réserve et les parties qui s'abstiennent de présenter une objection, la règle coutumière cesse de s'appliquer puisque par un mécanisme conventionnel postérieur à l'établissement de la règle coutumière son application a été suspendue" [the customary rule no longer applies between the State that formulates a reservation and the parties that refrain from objecting to it since, through a treaty mechanism subsequent to the establishment of the customary rule, its application has been suspended] (Reuter, "Solidarité et divisibilité ..." (footnote 405 above), p. 631, reproduced in Reuter, *Le développement ...* (footnote 405 above), p. 370); for a similar argument, see Teboul, "Remarques sur les réserves ..." (footnote 1571 above), pp. 690–708.

²³¹⁶ *Ibid.*, p. 708, para. 32.

²³¹⁷ P. Weil has stated that "[p]eu importe désormais la volonté manifestée par un État vis-à-vis d'une convention donnée: (...) qu'il fasse des réserves à certaines de ses clauses ou non (...), il sera de toute manière lié par celles des dispositions de cette convention auxquelles aura été reconnu le caractère de règles de droit international coutumier ou général" [the will demonstrated by a State in regard to a particular convention is now of little significance ... whether or not it makes reservations to some of its clauses ... it will in any case be bound by those provisions of the convention which have been recognized as having the character of rules of customary or general international law] (Weil, "Vers une normativité relative en droit international?" (footnote 2315 above), pp. 43–44).

²³¹⁸ *North Sea Continental Shelf* (see footnote 1521 above), p. 40, para. 65.

²³¹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 424, para. 73.

summarized the rules applicable to reservations to a provision declaratory of customary law as follows:

[T]he faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law. To substantiate this opinion it may be sufficient to point out that a number of reservations have been made to provisions of the Convention on the High Seas, although this Convention, according to its preamble, is "generally declaratory of established principles of international law". Some of these reservations have been objected to by other contracting States, while other reservations have been tacitly accepted. The acceptance, whether tacit or express, of a reservation made by a contracting party does not have the effect of depriving the Convention as a whole, or the relevant article in particular, of its declaratory character. It only has the effect of establishing a special contractual relationship between the parties concerned within the general framework of the customary law embodied in the Convention. Provided the customary rule does not belong to the category of *jus cogens*, a special contractual relationship of this nature is not invalid as such. Consequently, there is no incompatibility between the faculty of making reservations to certain articles of the Convention on the Continental Shelf and the recognition of that Convention or the particular articles as an expression of generally accepted rules of international law.²³²⁰

(7) Concretely, the effect of the reservation (and of the reactions to it—acceptance or objection) is to exclude application of the *treaty* rule that reflects a customary rule, which means that the author of the reservation is not bound *vis-à-vis* the other contracting States or contracting organizations to comply with the (treaty) rule within the framework of the treaty. For example, it is not required to have recourse to arbitration or an international court for any matter of interpretation or application of the rule, notwithstanding a dispute settlement clause contained in the treaty. Nevertheless, since the customary rule retains its full legal force, the reservation does not exempt its author from the obligation to respect the customary rule (by definition identical). Compliance or the consequences of non-compliance with the customary rule are not part of the legal regime created by the treaty but are covered by general international law and evolve along with it.

(8) This view of the matter, moreover, is shared by States, which do not hesitate to draw the attention of the author of a reservation concerning a treaty provision reflecting a customary rule to the fact that the rule remains in force in their mutual relations their objection notwithstanding. See, for example, the objection of the Netherlands to several reservations to article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations:

The Kingdom of the Netherlands does not accept the declarations by the People's Republic of Bulgaria, the German Democratic Republic, the Mongolian People's Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the People's Democratic Republic of Yemen concerning article 11, paragraph 1, of the Convention. The Kingdom of the Netherlands takes the view that this provision remains in force in relations between it and the said States in accordance with international customary law.²³²¹

(9) Thus, the United States of America rightly considered, in its objection to the reservation of the Syrian Arab Republic to the 1969 Vienna Convention, that

²³²⁰ *North Sea Continental Shelf* (see footnote 1521 above), p. 248.

²³²¹ *Multilateral Treaties ...* (footnote 37 above), chap. III.3. In essence, the validity of the remark by the Netherlands is not in doubt; however, the way it is framed is highly debatable: it is not the treaty provision that remains in force between the reserving States and the Netherlands, but the customary rule that the provision reflects.

the absence of treaty relations between the United States of America and the Syrian Arab Republic with regard to certain provisions in Part V will not in any way impair the duty of the latter to fulfil any obligation embodied in those provisions to which it is subject under international law independently of the Vienna Convention on the Law of Treaties.²³²²

4.4.3 *Absence of effect on a peremptory norm of general international law (jus cogens)*

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

Commentary

(1) The consequence of guidelines 4.4.1 and 4.4.2 is that a reservation and the reactions that it elicits neither modify nor exclude the application of other treaty or customary rules that bind the parties. This principle applies *a fortiori*, of course, when the treaty rule reflects a peremptory norm of general international law (*jus cogens*).

(2) As indicated in the commentary to guideline 3.1.5.3 (Reservations to a provision reflecting a customary rule), the reasoning developed with regard to reservations to provisions reflecting customary rules is applicable *mutatis mutandis* to reservations to provisions reflecting peremptory norms.²³²³ The purpose of guideline 4.4.3 is to make it clear that a reservation which has just been formulated to a treaty provision reflecting a peremptory norm of general international law shall not have any effect on the application of that norm.

(3) Given the similarity of the problems applicable to reservations to a provision reflecting a “simple” customary rule, on the one hand, and to a provision reflecting a peremptory norm, on the other hand, guideline 4.4.3 is worded similarly to guideline 4.4.2. However, in order not to give the impression that some States might not be bound by the peremptory norm of international law in question, which *ex hypothesi* is applicable to all States and international organizations,²³²⁴ the phrase “which are bound by that rule”, which appears at the end of guideline 4.4.2, was omitted. In addition, the Commission saw no reason to include the words “of itself”²³²⁵ in guideline 4.4.3: doubtless the rules of *jus cogens* will continue to evolve,²³²⁶ but it seems unlikely that a reservation can contribute to destabilizing a norm presenting such a degree of binding force.

²³²² *Multilateral Treaties ...* (footnote 37 above), chap. XXIII.1; see also the objections of the Netherlands, cited in paragraph (8) above.

²³²³ See paragraphs (16)–(22) of the commentary to guideline 3.1.5.3.

²³²⁴ Subject to the possible existence of regional peremptory norms, which the Commission did not address.

²³²⁵ See paragraph (8) of the commentary to the 2010 version of guideline 4.4.2 (*Yearbook ... 2010*, vol. II (Part Two), p. 102).

²³²⁶ See article 64 of the Vienna Conventions (Emergence of a new peremptory norm of general international law (*jus cogens*)).

(4) Paragraph 2 of guideline 4.4.3, which borrows wording from the definition of reservations, expresses the idea that a reservation cannot in any way exclude or modify the legal effect of a treaty in a manner contrary to *jus cogens*. For the sake of conciseness, it did not seem necessary to reproduce the text of guideline 1.1 in full, but the phrase “exclude or modify the legal effect of a treaty” must be understood as meaning to exclude or modify both the “legal effect of certain provisions of the treaty” and “the legal effect ... of the treaty as a whole with respect to certain specific aspects” in their application to the State or to the international organization which formulates the reservation.

(5) Guideline 4.4.3 also covers the case in which, although no rule of *jus cogens* is reflected in the treaty, a reservation would entail the treaty being applied in a manner conflicting with *jus cogens*. It is conceivable, for instance, that a reservation could be intended to exclude a category of persons from benefiting from certain rights granted under a treaty, on the basis of a form of discrimination that would be contrary to *jus cogens*; the reservation in question could produce such an effect.

4.5 *Consequences of an invalid reservation*

Commentary

(1) Neither the 1969 nor the 1986 Vienna Convention deals explicitly with the question of the legal effects of a reservation that does not meet the conditions of permissibility and formal validity established in articles 19 and 23, which, taken together, allow the reservation to be considered established in respect of another contracting State or another contracting organization as soon as that State or organization has accepted it in accordance with the provisions of article 20.²³²⁷ The *travaux préparatoires* on the provisions of these two Conventions that concern reservations are equally unrevealing as to the effects—or absence of effects—that result from the invalidity of a reservation.

(2) The effects attributed to a non-established reservation by the Commission’s early special rapporteurs arose implicitly from their adherence to the traditional system of unanimity: the author of such a reservation could not claim to have become a party to the treaty. Moreover, it was not a question of determining the effects of a reservation that did not fulfil certain conditions of validity, since such conditions were of little relevance under the wholly intersubjective system,²³²⁸ but rather of determining the effects of a reservation which had not been accepted by all the other contracting States and which, for that reason, did not become “part of the bargain between the parties”.²³²⁹

(3) From this perspective, Mr. Brierly wrote in 1950 that “[t]he acceptance of a treaty subject to a

²³²⁷ See guideline 4.1 (Establishment of a reservation with regard to another State or international organization).

²³²⁸ See, however, paragraph (4) below.

²³²⁹ [First] report on the law of treaties by J. L. Brierly, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 241, para. 96. See also *Yearbook ... 1950*, vol. I, 53rd meeting, 23 June 1950, p. 90, para. 3 (J. L. Brierly).

reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation has consented thereto".²³³⁰ H. Lauterpacht expressed the same idea: "A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty."²³³¹ Thus, unless a reservation is established in this manner, it produces no effect and nullifies the consent to be bound by the treaty. The League of Nations Committee of Experts for the Progressive Codification of International Law had already stressed that a "null and void" reservation had no effect:

In order that any reservation whatever may be validly made in regard to a clause of the treaty[,] it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void.²³³²

Under this system, the issue is the ineffectiveness, rather than the invalidity, of a reservation; consent alone establishes its acceptability or unacceptability to all the other contracting States and contracting organizations.

(4) However, even Mr. Brierly, though a strong advocate of the system of unanimity, was aware that there might be reservations which, by their very nature or as a result of the treaty to which they referred, might *ipso jure* have no potential effect. In the light of treaty practice, he considered that some treaty provisions "allow only certain reservations specified in the text, and prohibit all others; these do not bear on the position of a depositary or the question of States being consulted in regard to reservations, for *such questions cannot arise as no reservations at that stage are permissible*".²³³³ It followed that States were not free to "agree upon any terms in the treaty",²³³⁴ as he had maintained the previous year; there were indeed reservations that could not be accepted because they were prohibited by the treaty itself. Sir Gerald Fitzmaurice endorsed this idea in his draft article 37, paragraph 3, which stated:

In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and *cannot be accepted*.²³³⁵

(5) The situation changed with Sir Humphrey Waldock's first report. The fourth Special Rapporteur on the law of treaties, a convert to the flexible system, expressly made the sovereign right of States to formulate reservations subject to certain conditions of permissibility. Despite some

uncertainty concerning his position on the permissibility of reservations incompatible with the object and purpose of the treaty,²³³⁶ draft article 17, paragraph 1, as proposed in his first report, "accepts the view that, *unless the treaty itself, either expressly or by clear implication, forbids or restricts the making of reservations*, a State is free, in virtue of its sovereignty, to formulate such reservations as it thinks fit".²³³⁷ However, Sir Humphrey Waldock did not deem it appropriate to specify the effects arising from the formulation of a prohibited reservation; in other words, he set the criteria for the permissibility of reservations without establishing the regime governing reservations which did not meet them.²³³⁸

(6) Sir Humphrey Waldock's first report does, however, contain several clues as to the effects of a reservation that is prohibited by the treaty:

[W]hen a reservation is formulated which is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself.²³³⁹

While this explanation does not directly address the question of the effect of prohibited reservations, it has the merit of suggesting that they are excluded from the scope of the provisions concerning the consent of the contracting States and, subsequently, of all the provisions concerning the effects of reservations with the exception of the potential validation of an otherwise inadmissible reservation through the unanimous consent of all the contracting States.²³⁴⁰

(7) For a long time, the Commission gave separate—and rather confusing—treatment to the question of

²³³⁶ See the first report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 65–66, paragraph (10) of the commentary to draft article 17. See also paragraphs (2)–(3) of the commentary to guideline 3.1 (Permissible reservations).

²³³⁷ First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 65, paragraph (9) of the commentary to draft article 17. See also *ibid.*, p. 67, paragraph (15) of the commentary to draft article 18. See also the Commission's debate, *ibid.*, vol. I, 651st meeting, 25 May 1962, p. 143, para. 64 (Mr. Yasseen) and the summing up of the Special Rapporteur, Sir Humphrey Waldock, *ibid.*, 653rd meeting, 29 May 1962, p. 159, para. 57.

²³³⁸ During the debate, Mr. Verdross expressed the view that the case of a "treaty which specifically prohibited reservations ... did not present any difficulties" (*ibid.*, 652nd meeting, 28 May 1962, p. 148, para. 33), without, however, taking a clear position regarding the effects of the violation of such a specific prohibition. The members of the Commission were, however, aware that the problem could arise, as seen from the debate on draft article 27 on the functions of a depositary (*ibid.*, 658th meeting, 6 June 1962, p. 191, para. 59 (Sir Humphrey Waldock); and *ibid.*, 664th meeting, 19 June 1962, p. 236, paras. 82–95).

²³³⁹ *Ibid.*, vol. II, document A/CN.4/144 and Add.1, p. 65, paragraph (9) of the commentary to draft article 17. In that connection, see the report on the law of treaties by J. L. Brierly, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 239, para. 88.

²³⁴⁰ Draft article 17, paragraph 1 (b), first report on the law of treaties by Sir Humphrey Waldock: "The formulation of a reservation, the making of which is expressly prohibited or impliedly excluded under any of the provisions of sub-paragraph (a), is inadmissible unless the prior consent of all the other interested States has been first obtained." (*Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 60). See also draft article 18 as proposed by Sir Humphrey Waldock in his fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 50. On the question of the unanimous consent of the contracting States and contracting organizations, see guideline 3.3.3 above and commentary thereto, in particular paragraph (9).

²³³⁰ [First] report on the law of treaties by J. L. Brierly, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 224 (draft article 10, paragraph 3).

²³³¹ First report on the law of treaties by Hersch Lauterpacht, *Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 91 (draft article 9).

²³³² League of Nations, *Official Journal*, eighth year, No. 7, p. 881.

²³³³ Report on reservations to multilateral conventions by J. L. Brierly, *Yearbook ... 1951*, vol. II, document A/CN.4/41, p. 3, para. 11. In annex C to his report, the Special Rapporteur provided examples from the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes of 1930, the Convention providing a Uniform Law for Cheques of 1931, and the 1948 Protocol amending the International Convention relating to Economic Statistics of 1928.

²³³⁴ [First] report on the law of treaties by J. L. Brierly, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 239, para. 88.

²³³⁵ First report on the law of treaties by Gerald G. Fitzmaurice, *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115.

reservations incompatible with the object and purpose of the treaty and that of prohibited reservations. Thus, paragraph 2 (b) of draft article 20 (The effect of reservations), adopted by the Commission on first reading, envisaged the legal effect of a reservation only in the context of an objection to it made on the grounds of its incompatibility with the object and purpose of the treaty:

An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.²³⁴¹

(8) It is also clear from this formula that an objection—which was (at that time) also subject to the requirement that it must be compatible with the object and purpose of the treaty, in accordance with the advisory opinion of the International Court of Justice²³⁴²—was envisaged only in the case of reservations incompatible (or deemed incompatible) with the object and purpose of the treaty. In 1965, however, in response to several States' criticism of this restriction of the right to make objections to reservations, the Special Rapporteur proposed new wording²³⁴³ in order to make clearer the dissociation of objections from the permissibility of reservations. However, as a result, the question of impermissible reservations was set aside in the work of the Commission and the Conference. The Vienna Convention does not mention this question.

(9) The absence of rules on invalid reservations in the 1969 Vienna Convention is, moreover, a consequence of the wording of article 21, paragraph 1, on the effect of acceptance of a reservation: only reservations that are permissible under the conditions established in article 19, formulated in accordance with the provisions of article 23 and accepted by another contracting State or contracting organization in accordance with article 20²³⁴⁴ can be considered established under the terms of this provision. Clearly, a reservation that is not valid does not meet these cumulative conditions, even if it has been accepted by one or more contracting States or organizations.

²³⁴¹ *Yearbook ... 1962*, vol. II, document A/5209, p. 176.

²³⁴² In 1951, the Court stated: "it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 24). For a thorough analysis of the differences between the legal system adopted by the Commission and the Court's 1951 advisory opinion, see Koh, "Reservations to multilateral treaties ..." (footnote 1443 above), pp. 88–95.

²³⁴³ Fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 52, paragraph (9) (Observations and proposals of the Special Rapporteur with regard to article 19). Draft article 19, paragraph 4, as proposed by Waldock, states:

"4. In other cases, unless the State [*sic*—read 'the treaty'?] concerned otherwise specifies:

"(a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;

"(b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State" (*ibid.*, p. 50).

²³⁴⁴ See guideline 4.1 above (Establishment of a reservation with regard to another State or international organization) and commentary thereto.

(10) This clarification is not, however, repeated in article 21, paragraph 3, on objections to reservations. But it does not follow that the Convention determines the legal effects of an invalid reservation to which an objection has been made: under article 20, paragraph 4 (c), in order for such an objection to produce the effect envisaged in article 21, paragraph 3, at least one acceptance is required;²³⁴⁵ however, the effects of acceptance of an invalid reservation are not governed by the Convention.

(11) The *travaux* of the United Nations Conference on the Law of Treaties clearly confirm that the 1969 Vienna Convention says nothing about the consequences of invalid reservations, still less their effects. In 1968, during the first session of the Conference, the United States of America proposed adding, in the *chapeau* of future article 20, paragraph 4, after "[i]n cases not falling under the preceding paragraphs", the following specification: "and unless the reservation is prohibited by virtue of article 16 [future article 19]".²³⁴⁶ According to the explanation given by Mr. Briggs, the United States representative, in support of the amendment:

The purpose of the United States amendment to paragraph 4 was to extend the applicability of the prohibited categories of reservations set out in article 16 to the decisions made by States under paragraph 4 of article 17 in accepting or objecting to a proposed reservation. In particular, the proposal would preclude acceptance by another contracting State of a reservation prohibited by the treaty, and the test of incompatibility with the object or purpose of the treaty set out in sub-paragraph (c) of article 16 would then be applicable to such acceptance or objection. It was a shortcoming of sub-paragraph (c) that it laid down a criterion of incompatibility for a prohibited reservation, but failed to make it explicitly applicable to the acceptance or objection to a reservation.²³⁴⁷

(12) Although it is unclear from Mr. Briggs' explanations, which focused primarily on extending the criteria for the permissibility of a reservation to include acceptances and objections, the effect of the United States amendment would unquestionably have been that the system of acceptances of and objections to reservations established in article 20, paragraph 4, would apply only to reservations that met the criteria for permissibility under article 19. Acceptance of and objection to an impermissible reservation are clearly excluded from the scope of this amendment²³⁴⁸ even though no new rule concerning such reservations was proposed. The representative of Canada, Mr. Wershof, then asked: "Was paragraph C of the United States amendment (A/CONF.39/C.1/L.127) consistent with the intention of the International Law Commission regarding incompatible reservations?"²³⁴⁹ Sir Humphrey Waldock, in his capacity as Expert Consultant, replied:

²³⁴⁵ See paragraphs (2)–(3) of the commentary to guideline 4.3.3.

²³⁴⁶ A/CONF.39/C.1/L.127, reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (see footnote 54 above), p. 136, para. 179 (v) (d).

²³⁴⁷ *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (see footnote 35 above), 21st meeting of the Committee of the Whole, 10 April 1968, p. 108, para. 11.

²³⁴⁸ It is, however, not entirely clear why the same restriction should not apply to the cases covered by paragraph 2 (treaties that must be applied in their entirety) and paragraph 3 (constituent instruments of international organizations).

²³⁴⁹ *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (see footnote 35 above), 24th meeting, 16 April 1968, pp. 132–133, para. 77.

“The answer was ... Yes, since it would in effect restate the rule already laid down in article 16.”²³⁵⁰

(13) The “drafting” amendment proposed by the United States was sent to the Drafting Committee.²³⁵¹ However, neither the text that was provisionally adopted by the Committee and submitted to the Committee of the Whole on 15 May 1968,²³⁵² nor the text ultimately adopted by the Committee of the Whole and referred to the plenary Conference,²³⁵³ contained the wording proposed by the United States, although the failure to incorporate it is not explained in the published materials of the Conference. It seems, however, clear that the Commission and the Conference considered that the case of impermissible reservations was not the subject of the rules adopted at the conclusion of their work and that the provisions of articles 20 and 21 of the Vienna Convention did not apply to that situation.

(14) During the Commission’s work on the question of treaties concluded between States and international organizations or between two or more international organizations and the *travaux* of the 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, the question of the potential effects of a reservation formulated despite the conditions for permissibility in article 19 was not addressed. Nevertheless, Mr. Reuter, Special Rapporteur of the Commission on the topic, recognized that “[e]ven in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention have not eliminated all these difficulties”.²³⁵⁴ Nonetheless, the Special Rapporteur “thought it wise not to depart from [the 1969 Vienna Convention] where the concept of reservations was concerned”.²³⁵⁵

(15) In its observations on the Human Rights Committee’s general comment No. 24, the United Kingdom also recognized, at least in principle,²³⁵⁶ that the 1969 Vienna Convention did not cover the question of impermissible reservations:

²³⁵⁰ *Ibid.*, 25th meeting, 16 April 1968, p. 133, para. 4. Draft article 16 became article 19 of the Convention.

²³⁵¹ *Ibid.*, pp. 135–136, para. 38.

²³⁵² A/CONF.39/C.1/L.344, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (see footnote 54 above), p. 137, para. 185.

²³⁵³ That text was approved by 60 votes to 15, with 13 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (see footnote 332 above), 85th meeting of the Committee of the Whole, 10 April 1969, p. 221, paras. 33–34).

²³⁵⁴ Tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Paul Reuter, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, p. 56, para. 53. The Special Rapporteur referred to Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above); and, by the same author, “La question des réserves dans la décision arbitrale du 30 juin 1977 ...” (footnote 1016 above), pp. 29–58.

²³⁵⁵ *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 98, para. 4 (P. Reuter).

²³⁵⁶ See footnote 2394 below. While the United Kingdom considered that inadmissible reservations were not covered by the Vienna Conventions, the solution that it proposed was, ultimately, simply to apply the rule laid down in article 21, paragraph 3, of the Conventions to them.

The Committee correctly identifies articles 20 and 21 of the Vienna Convention on the Law of Treaties as containing the rules which, taken together, regulate the legal effect of reservations to multilateral treaties. The United Kingdom wonders however whether the Committee is right to assume their applicability to incompatible reservations. The rules cited clearly do apply to reservations which are fully compatible with the object and purpose but remain open for acceptance or objection (...). It is questionable however whether they were intended also to cover reservations which are inadmissible *in limine*.²³⁵⁷

(16) Admittedly, neither the 1969 nor the 1986 Vienna Convention—which are largely similar, in this respect as well—contains clear and precise rules concerning the effects of an invalid reservation.²³⁵⁸ That is, without a doubt, one of the most serious lacunae in the matter of reservations in the Vienna Conventions. It has been referred to as a “normative gap”, and the gap is all the more troubling in that the *travaux préparatoires* do not offer any clear indications as to the intentions of the authors of the 1969 Vienna Convention, but instead give the impression that they deliberately left the question open. However, what was acceptable in a general treaty on the law of treaties, in view of the disputes raised by the question, is not acceptable when the aim is precisely to fill the gaps left by the Vienna Conventions in the matter of reservations.

(17) In this regard, it is particularly striking that “the 1969 Vienna Convention has not frozen the law. Regardless of the fact that it leaves behind many ambiguities, that it contains gaps on sometimes highly important points and that it could not foresee rules applicable to problems that did not arise, or hardly arose, at the time of its preparation ..., the Convention served as a point of departure for new practices that are not, or not fully, followed with any consistency at the present time”.²³⁵⁹ In accordance with the method of work that has been followed by the Commission in the preparation of the Guide to Practice,²³⁶⁰ it has assumed that the treaty rules—which are silent on the question of the effects of invalid reservations—are established, but

²³⁵⁷ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), annex VI, p. 133, para. 13.

²³⁵⁸ In that regard, see Gaja, “Il regime della Convenzione di Vienna ...” (footnote 2269 above); Simma, “Reservations to human rights treaties ...” (footnote 1042 above), p. 663; C. Tomuschat, “International law: ensuring the survival of mankind on the eve of a new century”, *Collected Courses of the Hague Academy of International Law*, vol. 281 (1999), p. 321; and Pellet and Müller, “Reservations to human rights treaties: not an absolute evil” (footnote 1619 above), pp. 544–547.

²³⁵⁹ First report on the law and practice relating to reservations to treaties by Alain Pellet, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 152, para. 161.

²³⁶⁰ In 2006, during the Commission’s consideration of the tenth report on reservations to treaties (*Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2), “[i]t was even questioned whether the Commission should take up the matter of the consequences of the invalidity of reservations, which, perhaps wisely, had not been addressed in the 1969 and 1986 Vienna Conventions. Perhaps that gap should not be filled; the regime that allowed States to decide on the validity of reservations and to draw the consequences already existed, and there was no reason to change it” (*Yearbook ... 2006*, vol. II (Part Two), p. 137, para. 142). In the Sixth Committee, however, this was said to be a key issue for the study (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee, 17th meeting* (A/C.6/61/SR.17), para. 5 (France)). Several delegations supported the idea that impermissible reservations were null and void (*ibid.*, 16th meeting (A/C.6/61/SR.16), para. 43 (Sweden) and para. 51 (Austria); *ibid.*, 17th meeting (A/C.6/61/SR.17), para. 7 (France)), and it was hoped that the specific consequences arising from that nullity would be spelled out in the Guide to Practice (*ibid.*, 16th meeting (A/C.6/61/SR.16), para. 59 (Canada)).

has endeavoured to “simply try to fill the gaps and, where possible and desirable, to remove their ambiguities while retaining their versatility and flexibility”.²³⁶¹

(18) In so doing, the Commission did not intend to legislate and to establish *ex nihilo* rules concerning the effects of a reservation that does not meet the criteria for validity. State practice, international jurisprudence and doctrine have already developed approaches and solutions on this matter which the Commission considers perfectly suitable for guiding its work. It is a question not of creating but of systematizing the applicable principles and rules in a reasonable manner, while introducing elements of progressive development, and of preserving the general spirit of the Vienna system.

(19) The title of section 4.5 of the Guide to Practice “Consequences of an invalid reservation” was preferred over the one that was initially proposed, “Effects of an invalid reservation”²³⁶² because the main consequence of these instruments is, precisely, that they are devoid of legal effects.

(20) Furthermore, it should be noted that invalid reservations, the consequences of which are specified in this section of the Guide to Practice, are invalid either because they do not meet the formal and procedural requirements prescribed in Part 2 or because they are deemed impermissible according to the provisions of Part 3. The use of the words “validity/invalidity” and “valid/invalid” is consistent with the broad definition of the expression “validity of reservations” adopted by the Commission in 2006 in order “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”.²³⁶³

4.5.1 Nullity of an invalid reservation

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 any legal effect.

Commentary

(1) By clearly indicating 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 by formally stating the consequence that it is devoid of effect, guideline 4.5.1 aims to fill one of the major gaps in the Vienna Conventions, which, no doubt deliberately, left this question unanswered,²³⁶⁴ despite its very great practical importance.

²³⁶¹ First report on the law and practice relating to reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 152, para. 163.

²³⁶² Fifteenth report on reservations to treaties, *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/624 and Add.1–2, para. 129.

²³⁶³ See paragraph (2) of the general commentary to Part 3 of the Guide to Practice.

²³⁶⁴ See paragraph (16) of the introductory commentary to section 4.5 of the Guide to Practice above.

(2) This guideline, which is probably one of the most important provisions in the Guide to Practice, does not duplicate guideline 3.3.1 (Irrelevance of distinction among the grounds for non-permissibility). First of all, it deals with both the formal invalidity and the impermissibility of reservations,²³⁶⁵ whereas Part 3, in particular the first three sections thereof, concerns only the permissibility of reservations. There is no reason to exclude from the conditions for the validity of a reservation—which, if not met, render the reservation null and void—those which concern form. A reservation which was not formulated in writing,²³⁶⁶ was not communicated to the other concerned parties²³⁶⁷ or was formulated late²³⁶⁸ is also, in principle, unable to produce legal effects; it is null and void.²³⁶⁹ Secondly, guideline 4.5.1 is “downstream” from guidelines 3.1 and 3.3.3, of which it draws the consequences: the latter establish the conditions under which a reservation is impermissible, whereas guideline 4.5.1 infers from such impermissibility that the reservation is null and void and produces no legal effects.

(3) The purpose of the phrase “null and void” is to recall that this nullity is not dependent on the reactions of the other contracting States or contracting organizations, something that guidelines 3.3.3 and 4.5.2 state even more clearly.

(4) While the nullity of a reservation and the consequences or effects of that nullity are certainly interdependent, they are nonetheless different issues. It is not possible first to consider the effects of an impermissible reservation and then to deduce its nullity: the fact that a legal act produces no effect does not necessarily mean that it is null and void. It is the characteristics of the act that influence its effects, not the reverse. In that regard, the nullity of an act is merely one of its characteristics, which, in turn, influences the capacity of the act to produce (or not to produce) or to modify (or not to modify) a legal situation.

(5) With regard to acts which are null and void under civil law, the great French jurist Marcel Planiol has explained:

Un acte juridique est nul lorsqu'il se trouve privé d'effets par la loi, bien qu'il ait été réellement accompli, et qu'aucun obstacle ne le rende inutile. La nullité suppose que l'acte pourrait produire tous ses effets, si la loi le permettait [A legal act is null and void when it is deprived of

²³⁶⁵ See paragraph (20) of the introductory commentary to section 4.5 of the Guide to Practice above. This broad scope explains why guideline 4.5.1 is in Part 4 and not Part 3 of the Guide to Practice (see *a contrario* the reasons for the inclusion of guideline 3.3.3 in Part 3, in paragraphs (5)–(7) of the commentary thereto.

²³⁶⁶ Article 23, paragraph 1, of the Vienna Conventions. See also guideline 2.1.1 (Form of reservations) and commentary thereto.

²³⁶⁷ Article 23, paragraph 1, of the Vienna Conventions. See also guideline 2.1.5 (Communication of reservations) and commentary thereto.

²³⁶⁸ See guidelines 2.3 (Late formulation of reservations) to 2.3.4 (Widening of the scope of a reservation) and commentaries thereto.

²³⁶⁹ In addition, section 4.5 is the counterpart for invalid reservations to guideline 4.1 for valid reservations (established reservations): these guidelines both relate to the two types of conditions (permissibility or formal validity) that allow a reservation to be considered “established”, in the first case (provided that it was also accepted by at least one other contracting State or contracting organization), or “invalid”, in the second case.

effect by law, even if it was in fact carried out and no obstacle renders it useless. Nullity presupposes that the act could produce all of its effects if the law allowed it to do so.²³⁷⁰

The *Dictionnaire de droit international public* defines “nullity” as follows:

Caractéristique d'un acte juridique, ou d'une disposition d'un acte, dépourvu de valeur juridique, en raison de l'absence des conditions de forme ou de fond nécessaires pour sa validité [Characteristic of a legal act or of a provision of an act, lacking legal effect due to the absence of formal or substantive conditions necessary for its validity].²³⁷¹

This is precisely the situation in the case of a reservation which does not meet the criteria for permissibility under article 19 of the Vienna Conventions: it does not meet the requirements for permissibility and, for this reason, has no legal effect. Had the reservation met the requirements for permissibility, it could have produced legal effects.

(6) Leaving it to the contracting States and contracting organizations to assess the permissibility of a reservation ultimately amounts to depriving article 19 of the Vienna Conventions (the 1986 text of which is reproduced in guideline 3.1) of any real impact, even though it is central to the Vienna regime and formulates (*a contrario*, at least) the conditions for the permissibility of reservations not as a set of factors which States and international organizations should take into account, but in prescriptive language.²³⁷² The opposite position would imply that States could validate a reservation that does not meet the conditions for permissibility established in the 1969 and 1986 Vienna Conventions by accepting it; this would contradict guideline 3.3.3 (Absence of effect of individual acceptance of a reservation on the permissibility of the reservation) and would deprive article 19 of any substance.

(7) It is therefore reasonable and in keeping with the logic of the Vienna regime to adopt this solution on which those who espouse permissibility and those who espouse opposability²³⁷³ agree, and which also accords with the positions taken by the human rights treaty bodies,²³⁷⁴ namely that failure to respect the conditions for the permissibility of reservations laid down in article 19 of the Vienna Conventions and reproduced in guideline 3.1 (Permissible reservations) nullifies the reservation.

²³⁷⁰ Cited by P. Guggenheim, “La validité et la nullité des actes juridiques internationaux”, *Collected Courses of the Hague Academy of International Law, 1949-I*, vol. 74, p. 208.

²³⁷¹ J. Salmon (ed.), *Dictionnaire de droit international public* (footnote 1013 above), p. 760 (“Nullité”).

²³⁷² “A State may ... formulate a reservation, unless” which clearly means *a contrario* “a State may not formulate a reservation if”.

²³⁷³ Even though they do not draw all the consequences. On the opposition between these two “schools”, see paragraph (4) of the introductory commentary to Part 3 of the Guide to Practice (Permissibility of reservations and interpretative declarations); see also the preliminary report on reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 142–143, paras. 101–105.

²³⁷⁴ See paragraph (15) of the commentary to guideline 3.2 (Assessment of the permissibility of reservations), as well as the commentary to guidelines 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations) and 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations).

(8) The nullity of an impermissible reservation is in no way a matter of *lex ferenda*; it is solidly established in State practice. It is not unusual for States to formulate objections to reservations incompatible with the object and purpose of the treaty while at the same time noting that they consider the reservation to be “null and void”.

(9) As early as in 1955 and 1957, upon ratifying the Geneva Conventions for the protection of war victims of 1949, the United Kingdom and the United States of America made objections to reservations formulated by several Eastern European States, stating that, since the reservations in question were null and void, the Conventions in their entirety applied to the reserving States. Thus, the United Kingdom declared that

whilst they regard all the above-mentioned States as being parties to the above-mentioned Conventions, they do not regard the above-mentioned reservations thereto made by those States as valid, and will therefore regard any application of any of those reservations as constituting a breach of the Convention to which the reservation relates.²³⁷⁵

For its part, in 1982,

[t]he Government of the Union of Soviet Socialist Republics [did] not recognize the validity of the reservation made by the Government of the Kingdom of Saudi Arabia on its accession to the 1961 Vienna Convention on Diplomatic Relations, since that reservation [was] contrary to one of the most important provisions of the Convention, namely, that the diplomatic bag shall not be opened or detained.²³⁷⁶

Similarly, Italy formulated an objection to the reservation to the International Covenant on Civil and Political Rights formulated by the United States:

In the opinion of Italy reservations to the provisions contained in art. 6 are not permitted, as specified in art. 4, paragraph 2, of the Covenant.

Therefore this reservation is null and void since it is incompatible with the object and the purpose of art. 6 of the Covenant.²³⁷⁷

In 1995, Finland, the Netherlands and Sweden made comparable objections to the declarations formulated by Egypt upon acceding to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal. In its objection, the Netherlands stated:

The Kingdom of the Netherlands considers the declaration on the requirement of prior permission for passage through the territorial sea made by Egypt a reservation which is null and void.²³⁷⁸

The Governments of Finland and Sweden also stated in their objections that they considered the declarations to be “devoid of legal effect” or “null and void”.²³⁷⁹

²³⁷⁵ United Nations, *Treaty Series*, vol. 278, p. 268. See also the identical objections in connection with the four Geneva Conventions made by the United States of America. The objection in connection with the Geneva Convention relative to the Treatment of Prisoners of War reads: “Rejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except as to the changes proposed by such reservations” (*ibid.*, vol. 213, p. 384).

²³⁷⁶ *Multilateral Treaties ...* (footnote 37 above), chap. III.3.

²³⁷⁷ *Ibid.*, chap. IV.4.

²³⁷⁸ *Ibid.*, chap. XXVII.3. Article 26, paragraph 1, of the Basel Convention stipulates that: “No reservation or exception may be made to this Convention”.

²³⁷⁹ *Ibid.*, chap. XXVII.3.

The reactions of Sweden to reservations judged invalid frequently contain this statement, regardless of whether the reservation is prohibited by the treaty,²³⁸⁰ was formulated late²³⁸¹ or is incompatible with the object and purpose of the treaty.²³⁸² In the latter category, the reaction of Sweden to the declaration in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment formulated by the German Democratic Republic²³⁸³ is particularly explicit:

The Government of Sweden has come to the conclusion that the declaration made by the German Democratic Republic is incompatible with the object and purpose of the Convention and therefore is invalid according to article 19 (c) of the Vienna Convention on the Law of Treaties.²³⁸⁴

(10) The Government of Sweden makes it clear that the nullity of the reservation is a consequence not of the objection made by the Government of Sweden, but of the fact that the declaration made by the German Democratic Republic does not satisfy the conditions for the permissibility of a reservation. This is an objective matter which does not depend on the reactions of the other contracting States or contracting organizations, even though they may help to assess the compatibility of the reservation with the requirements of article 19 of the Vienna Conventions as reflected in guideline 3.1 (Permissible reservations).²³⁸⁵

(11) Individually, the contracting States and contracting organizations are not competent to determine the nullity of an invalid reservation.²³⁸⁶ Moreover, that is not the purpose of such objections, and they should not be understood in that manner.

(12) However, and this is particularly important in a system that lacks a control and annulment mechanism,

²³⁸⁰ *Ibid.*

²³⁸¹ The objection of Sweden to the late declaration of Egypt to the Basel Convention was, however, justified by both the Convention's prohibition of reservations and the fact that "these declarations were made almost two years after the accession by Egypt contrary to the rule laid down in article 26, paragraph 2 of the Basel Convention" (*ibid.*). Finland, however, justified its objection based solely on the fact that the declarations were, in any event, late (*ibid.*). Italy also considered that the declarations formulated by Egypt were late and that "for these reasons, the deposit of the aforementioned declarations cannot be allowed, regardless of their content" (*ibid.*).

²³⁸² See the objections of Sweden to the reservations to the International Covenant on Civil and Political Rights formulated by Mauritania and Maldives (*ibid.*, chap. IV.4); its objections to the reservations to the Convention on the Elimination of All Forms of Discrimination against Women formulated by the Democratic People's Republic of Korea, Bahrain, the Federated States of Micronesia, the United Arab Emirates, Oman and Brunei Darussalam (*ibid.*, chap. IV.8); and its objections to the reservation and interpretive declaration to the Convention on the Rights of Persons with Disabilities formulated by El Salvador and Thailand, respectively (*ibid.*, chap. IV.15).

²³⁸³ The German Democratic Republic had declared upon signing and ratifying the Convention that it "will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee [against Torture] as recognized by the German Democratic Republic" (*ibid.*, chap. IV.9). See also the third report on reservations to treaties, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 259, para. 217.

²³⁸⁴ *Multilateral Treaties ...* (footnote 37 above), chap. IV.9.

²³⁸⁵ See also paragraphs (1)–(3) of the commentary to guideline 3.3.3.

²³⁸⁶ See also Klabbbers, "Accepting the unacceptable? ..." (footnote 2199 above), p. 184.

such objections express the views of their authors on the question of the validity and effects of an invalid reservation²³⁸⁷ and are of particular importance in the context of the reservations dialogue. As the representative of Sweden pointed out in 2005 in the Sixth Committee:

Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection per se; consequently, the time limit of twelve months specified in article 20, paragraph 5, of the Convention, should not apply. However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such "objections" still served an important purpose.²³⁸⁸

(13) It is also highly significant that, in formulating objections to reservations that they consider invalid, States often pay very little attention to the conditions governing the efficacy of their objections. With regard to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, nine States²³⁸⁹ formulated objections against four reservations; of the 18 objections, 12 were late, which tends to show that their authors were convinced that the nullity of the reservations in question did not depend on their negative reactions but existed *ipso facto* independently of them. In other words, these objections *recognize* a pre-existing nullity based on objective criteria.

(14) Simply to state that a reservation is null and void, as in the first part of guideline 4.5.1, does not resolve the question of the effects—or lack thereof—of this nullity on the treaty and on potential treaty relations between the author of the reservation and the other contracting States or contracting organizations; the Vienna Conventions are silent on this matter.²³⁹⁰ It is therefore necessary to refer to the basic principles underlying all the law of treaties (beginning with the rules applicable to reservations), above all, the principle of consent.

(15) Many objections are formulated in respect of reservations that are considered impermissible, either because they are prohibited by the treaty or because they are incompatible with its object and purpose, without precluding the entry into force of the treaty. This practice is fully consistent with the principle set out in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, although it might seem surprising that it was primarily (but not exclusively) the Western States which, at the United Nations Conference on the Law of Treaties, expressed serious misgivings regarding the reversal of presumption that was strongly supported by the Eastern countries.²³⁹¹ However, the fact that

²³⁸⁷ See also guideline 3.2 (Assessment of the permissibility of reservations).

²³⁸⁸ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 14th meeting*, A/C.6/60/SR.14, para. 22.

²³⁸⁹ Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Norway, Spain and Sweden (*Multilateral Treaties ...* (footnote 37 above), chap. IV.9).

²³⁹⁰ See paragraphs (1)–(13) of the introductory commentary to section 4.5 above.

²³⁹¹ See paragraphs (7)–(13) of the commentary to guideline 4.3.5 above (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect). See also paragraph (1) of the commentary to guideline 2.6.7 (Expression of intention to preclude the entry into force of the treaty).

the treaty remains in force between the author of the reservation and the author of the objection does not answer the question of the status of *the reservation*.

(16) The objection of Belgium to the reservations of the United Arab Republic and the Kingdom of Cambodia to the Vienna Convention on Diplomatic Relations illustrates the problem. Upon ratifying the Convention in 1968, the Belgian Government stated that it considered

the reservation made by the United Arab Republic and the Kingdom of Cambodia to paragraph 2 of article 37 to be incompatible with the letter and spirit of the Convention,²³⁹²

without drawing any particular consequences. However, in 1975, in reaction to the confirmation of these reservations and to a comparable reservation by Morocco, Belgium explained:

The Government of the Kingdom of Belgium objects to the reservations made with respect to article 27, paragraph 3, by Bahrain and with respect to article 37, paragraph 2, by the United Arab Republic (now the Arab Republic of Egypt), Cambodia (now the Khmer Republic) and Morocco. The Government nevertheless considers that the Convention remains in force as between it and the aforementioned States, respectively, *except in respect of the provisions which in each case are the subject of the said reservations**.²³⁹³

In other words, according to Belgium, despite the reservations' incompatibility with "the letter and spirit" of the Convention, the latter would enter into force between Belgium and the authors of the impermissible reservations. However, the provisions to which the reservations referred would not apply as between the authors of those reservations and Belgium; this amounts to giving impermissible reservations the same effect as permissible reservations.

(17) The approach taken in the objection of Belgium appears to correspond to the one envisaged in article 21, paragraph 3, of the Vienna Conventions in the case of a simple objection.²³⁹⁴

²³⁹² *Multilateral Treaties ...* (footnote 37 above), chap. III.3.

²³⁹³ *Ibid.*

²³⁹⁴ See the commentary to guideline 4.3.6 (Effect of an objection on treaty relations). See also the objection of the Netherlands to the reservation to the International Covenant on Civil and Political Rights formulated by the United States of America:

"The Government of the Kingdom of the Netherlands objects to the reservations with respect to capital punishment for crimes committed by persons below eighteen years of age, since it follows from the text and history of the Covenant that the said reservation is incompatible with the text, the object and purpose of article 6 of the Covenant, which according to article 4 lays down the minimum standard for the protection of the right to life.

"The Government of the Kingdom of the Netherlands objects to the reservation with respect to article 7 of the Covenant, since it follows from the text and the interpretation of this article that the said reservation is incompatible with the object and purpose of the Covenant.

"In the opinion of the Government of the Kingdom of the Netherlands this reservation has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogations, not even in times of public emergency, are permitted.

"It is the understanding of the Government of the Kingdom of the Netherlands that the understandings and declarations of the United States do not exclude or modify the legal effect of provisions of the Covenant in their application to the United States, and do not in any way limit the competence of the Human Rights Committee to interpret these provisions in their application to the United States.

(18) It is, however, highly debatable; it draws no real consequences from the nullity of the reservation but treats it in the same way as a valid reservation by letting in "through the back door" what was excluded by the authors of the 1969 and 1986 Vienna Conventions.²³⁹⁵ Unquestionably, nothing in the wording of article 21, paragraph 3, of the Vienna Conventions expressly suggests that it does not apply to the case of invalid reservations, but it seems clear from the *travaux préparatoires* that this question was no longer considered relevant to the draft article that was the basis for this provision.²³⁹⁶

"Subject to the proviso of article 21, paragraph 3 of the Vienna Convention on the Law of Treaties*, these objections do not constitute an obstacle to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States" (*ibid.*, chap. IV.4).

See also the objection of the United States of America to the reservations formulated to the same Covenant by Pakistan:

"The Government of the United States of America objects to Pakistan's reservations to the ICCPR. Pakistan has reserved to Articles 3, 6, 7, 12, 13, 18, 19, and 25 of the Covenant, which address the equal right of men and women to the full enjoyment of civil and political rights, the right to life, protections from torture and other cruel inhuman or degrading treatment or punishment, freedom of movement, expulsion of aliens, the freedoms of thought, [conscience] and religion, the freedom of expression, and the right to take part in political affairs. Pakistan has also reserved to Article 40, which provides for a process whereby States Parties submit periodic reports on their implementation of the Covenant when so requested by the Human Rights Committee (HRC). These reservations raise serious concerns because they both obscure the extent to which Pakistan intends to modify its substantive obligations under the Covenant and also foreclose the ability of other Parties to evaluate Pakistan's implementation through periodic reporting. *As a result, the United States considers the totality of Pakistan's reservations to be incompatible with the object and purpose of the Covenant. This objection does not constitute an obstacle to the entry into force of the Covenant between the United States and Pakistan, and the aforementioned articles shall apply between our two States, except to the extent of Pakistan's reservations**" (*ibid.*).

In its observations on general comment No. 24 of the Human Rights Committee, the United Kingdom also gave some weight to the exclusion of the parties to the treaty to which a reservation relates: "[t]he United Kingdom is absolutely clear that severability would entail excising both the reservation and the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in Article 38 (1) of the Statute of the International Court of Justice, that international conventions establish rules 'expressly recognized by' the Contracting States. The United Kingdom regards it as hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not 'expressly recognized' but rather has indicated its express unwillingness to accept" (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), annex VI, p. 133, para. 14).

In its report to the 18th meeting of chairpersons of the human rights treaty bodies, the working group on reservations also did not completely rule out such an approach. In its recommendations, it suggested that "the only foreseeable consequences of invalidity are that the State could be considered as not being a party to the treaty, or as a party to the treaty but the provision to which the reservation has been made would not apply*, or as a party to the treaty without the benefit of the reservation" (HRI/MC/2006/5/Rev.1, para. 16, recommendation No. 7). This position was, however, subsequently modified (see footnote 2397 below).

²³⁹⁵ See the observations of the United Kingdom on general comment No. 24 of the Human Rights Committee (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), annex VI, p. 133, para. 13). See also the expanded working paper on the question of reservations to human rights treaties, prepared by Ms. Françoise Hampson in accordance with decision 2001/17 of the Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/2003/WP.2), para. 16.

²³⁹⁶ See paragraphs (5)–(13) of the introductory commentary to section 4.5 above.

(19) As the representative of Sweden, speaking on behalf of the Nordic countries, rightly explained during the Sixth Committee's debate on the report of the Commission on the work of its fifty-seventh session:

A reservation incompatible with the object and purpose of a treaty was not formulated in accordance with article 19, so that the legal effects listed in article 21 did not apply. When article 21, paragraph 3, stated that the provisions to which the reservation related did not apply as between the objecting State and the reserving State to the extent of the reservation, it was referring to reservations permitted under article 19. It would be unreasonable to apply the same rule to reservations incompatible with the object and purpose of a treaty. Instead, such a reservation should be considered invalid and without legal effect.²³⁹⁷

(20) Moreover, that the Vienna rules do not pertain to the effects of invalid reservations is clearly confirmed by the great majority of States' reactions to reservations that they consider invalid. Whether or not they state explicitly that their objection will not preclude the entry into force of the treaty with the author of the reservation, they nevertheless state unambiguously that an impermissible reservation is devoid of any legal effect.

(21) The objections made many years ago by the United States of America and the United Kingdom to some of the reservations formulated by Eastern European States to the Geneva Conventions for the protection of war victims are significant examples.²³⁹⁸

(22) Belarus, Bulgaria, Russia and Czechoslovakia also made objections to the "interpretative declaration" of the Philippines, which they considered a reservation, to the United Nations Convention on the Law of the Sea, stating that this reservation was devoid of legal force or effect.²³⁹⁹ Norway and Finland made objections to a declaration by the German Democratic Republic in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;²⁴⁰⁰ the declaration was also criticized by several other States, which considered that "any such declaration is without legal effect, and cannot in any manner diminish the obligation of a government to contribute to the costs of the Committee in conformity with the provisions of the Convention".²⁴⁰¹ Moreover, Portugal, in its objection to the reservation of Maldives to the Convention on the Elimination of All Forms of Discrimination against Women, stated that

these reservations cannot alter or modify in any respect the obligations arising from the Convention for any State party thereto.²⁴⁰²

(23) State practice is extensive—and essentially homogeneous—and is not limited to a few specific States.

²³⁹⁷ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 14th meeting, A/C.6/60/SR.14*, para. 22. See also Malaysia (A/C.6/60/SR.18, para. 86) and Greece (A/C.6/60/SR.19, para. 39), as well as the report of the meeting of the working group on reservations to the 19th meeting of chairpersons of the human rights treaty bodies and the sixth inter-committee meeting of the human rights treaty bodies: "It cannot be envisaged that the reserving State remains a party to the treaty with the provision to which the reservation has been made not applying" (HRI/MC/2007/5, para. 18).

²³⁹⁸ See paragraphs (9)–(10) of the commentary to the present guideline.

²³⁹⁹ *Multilateral Treaties ...* (footnote 37 above), chap. XXI.6.

²⁴⁰⁰ See footnote 2383 above.

²⁴⁰¹ *Multilateral Treaties ...* (footnote 37 above), chap. IV.9.

²⁴⁰² *Ibid.*, chap. IV.8.

Recent objections by Finland,²⁴⁰³ Sweden,²⁴⁰⁴ other States, such as Belgium,²⁴⁰⁵ Spain,²⁴⁰⁶ the Netherlands,²⁴⁰⁷ the Czech Republic²⁴⁰⁸ and Slovakia,²⁴⁰⁹ and also the European Union²⁴¹⁰ quite often include a statement that the

²⁴⁰³ See the objections of Finland to the reservation of Yemen to the International Convention on the Elimination of All Forms of Racial Discrimination (*ibid.*, chap. IV.2); to the reservations to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Kuwait, Malaysia, Lesotho, Singapore and Pakistan (*ibid.*, chap. IV.8); to the reservations to the Convention on the rights of the child formulated by Malaysia, Qatar, Singapore and Oman (*ibid.*, chap. IV.11); and to the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (*ibid.*, chap. XXVI.2).

²⁴⁰⁴ See the objection of Sweden to the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (*ibid.*, chap. XXVI.2). Sweden specified, however, that "[t]his objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefiting from its reservation".

²⁴⁰⁵ See the objection of Belgium to the reservation of Singapore to the Convention on the rights of the child: "The Government considers that paragraph 2 of the declarations, concerning articles 19 and 37 of the Convention and paragraph 3 of the reservations, concerning the constitutional limits upon the acceptance of the obligations contained in the Convention, are contrary to the purposes of the Convention and are consequently without effect under international law" (*ibid.*, chap. IV.11).

²⁴⁰⁶ See the objection of Spain to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Qatar: "The Government of the Kingdom of Spain believes that the aforementioned declarations ... have no legal force and in no way exclude or modify the obligations assumed by Qatar under the Convention" (*ibid.*, chap. IV.8).

²⁴⁰⁷ See the objection of the Netherlands to the reservation to the Convention on the Rights of Persons with Disabilities formulated by El Salvador: "It is the understanding of the Government of the Kingdom of the Netherlands that the reservation of the Government of the Republic of El Salvador does not exclude or modify the legal effect of the provisions of the Convention in their application to the Republic of El Salvador" (*ibid.*, chap. IV.15).

²⁴⁰⁸ See the objection of the Czech Republic to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Qatar: "[T]he Czech Republic, therefore, objects to the aforesaid reservations made by the State of Qatar to the Convention. This objection shall not preclude the entry into force of the Convention between the Czech Republic and the State of Qatar. The Convention enters into force in its entirety between the Czech Republic and the State of Qatar, without the State of Qatar benefiting from its reservation" (*ibid.*, chap. IV.8).

²⁴⁰⁹ See the Slovak objection to the reservation to the International Covenant on Economic, Social and Cultural Rights formulated by Pakistan: "The International Covenant on Economic, Social and Cultural Rights enters into force in its entirety between the Slovak Republic and the Islamic Republic of Pakistan, without ... Pakistan benefiting from its reservation" (*ibid.*, chap. IV.3); and to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Qatar: "This objection shall not preclude the entry into force of the Convention on the Elimination of All Forms of Discrimination against Women between the Slovak Republic and the State of Qatar. The Convention ... enters into force in its entirety between the Slovak Republic and the State of Qatar, without the State of Qatar benefiting from its reservations and declarations" (*ibid.*, chap. IV.8).

²⁴¹⁰ See the objections made jointly by the European Community and its members (Belgium, Denmark, the Federal Republic of Germany, France, Ireland, Italy, Luxembourg, the Netherlands and the United Kingdom) to the declarations to the Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) formulated by Bulgaria and the German Democratic Republic. In the two identical objections, the authors noted: "The statement made ...

invalid reservation is devoid of legal effect. It is highly revealing that, in principle, this practice of making objections with “super-maximum” effect²⁴¹¹ elicits no opposition of principle from other contracting States or contracting organizations—including the authors of the reservations in question.

(24) The absence of any legal effect as a direct consequence of the nullity of an impermissible reservation—which, moreover, arises directly from the very concept of nullity²⁴¹²—was also affirmed by the Human Rights Committee in its general comment No. 24 on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant. The Committee considered that one aspect of the “normal consequence” of the impermissibility of a reservation was that its author did not have the benefit of the reservation.²⁴¹³ It is significant that, despite the active response to general comment No. 24 by the United States of America, France and the United Kingdom, none of the three States challenged this position.²⁴¹⁴

(25) The Committee subsequently confirmed and applied this conclusion in its general comment No. 24 during its consideration of the *Rawle Kennedy v. Trinidad and Tobago* communication. In its decision on the admissibility of the communication,²⁴¹⁵ the Committee ruled on the permissibility of the reservation formulated by the State party on 26 May 1998 upon acceding again to the first Optional Protocol to the International Covenant on Civil and Political Rights, after having denounced the Optional Protocol on the same day. Through its reservation, Trinidad and Tobago sought to exclude the Committee’s jurisdiction in cases involving prisoners

concerning article 52 (3) has the appearance of a reservation to that provision, although such reservation is expressly prohibited by the Convention. The Community and the Member States therefore consider that under no circumstances can this statement be invoked against them and they regard it as entirely void” (*ibid.*, chap. XI.A.16).

²⁴¹¹ See paragraphs (1)–(4) of the commentary to guideline 4.3.8. See also the eighth report on reservations to treaties, *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, para. 96. See also Simma, “Reservations to human rights treaties ...” (footnote 1042 above), pp. 667–668.

²⁴¹² See paragraph (5) above.

²⁴¹³ Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), annex V, p. 124, para. 18. See also Françoise Hampson’s final working paper on reservations to human rights treaties of 2004 (footnote 1151 above), paragraph 57 (“It would be surprising if a human rights body were expected to give effect to a reservation which it had found to be incompatible with the object and purpose of the treaty”) and paragraph 59 of her expanded working paper on the same topic (see footnote 2395 above): “A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty.” The Human Rights Committee combined in a single statement the idea that an incompatible reservation cannot produce effects (which is not contested) and the question of the effect of that incompatibility on the author’s status as a party (which has been widely debated; see the commentary to guideline 4.5.3 below).

²⁴¹⁴ See the observations of the United States of America (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 1156 above), annex VI, pp. 126–130, the United Kingdom (*ibid.*, pp. 130–134) and France (*ibid.*, *Fifty-first Session, Supplement No. 40*) (footnote 1691 above), vol. I, annex VI, pp. 104–106).

²⁴¹⁵ Communication No. 845/1999, decision of 2 November 1999 (see footnote 730 above).

under sentence of death.²⁴¹⁶ On the basis of the discriminatory nature of the reservation, the Committee considered that the reservation “cannot be deemed compatible with the object and purpose of the Optional Protocol”.²⁴¹⁷ The Committee concluded:

The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol.²⁴¹⁸

In other words, according to the Committee, the reservation of Trinidad and Tobago did not exclude application of the Optional Protocol in respect of the applicant, who was a prisoner under sentence of death. It therefore produced neither the legal effect of an established reservation,²⁴¹⁹ nor that of a valid reservation to which an objection has been made.²⁴²⁰ It produced no effect.

(26) The Inter-American Court of Human Rights has also held that an impermissible reservation seeking to limit the Court’s jurisdiction could produce no effect. In *Hilaire v. Trinidad and Tobago*, the Court stressed:

Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American Convention [on Human Rights], because this limitation is incompatible with the object and purpose of the Convention.²⁴²¹

(27) The European Court of Human Rights took the same approach in the principle it invoked in *Belilos v. Switzerland*,²⁴²² *Weber v. Switzerland*,²⁴²³ and *Loizidou v. Turkey*.²⁴²⁴ In all three cases, the Court, after noting the invalidity of the reservations formulated by Switzerland and Turkey, applied the European Convention on Human Rights as if the reservations had not been formulated and, consequently, had produced no legal effect.

(28) In light of this general agreement, the Commission considers that the principle that an invalid reservation has no legal effect is part of positive law. This principle is set out in the second part of guideline 4.5.1.

(29) It is obviously correct (and inherent in the international legal system) that as long as an impartial third party

²⁴¹⁶ Also, in accordance with its conclusions in general comment No. 24, the Human Rights Committee maintained that the State party remained bound by the Optional Protocol; this cannot be taken for granted, even if it is agreed that Trinidad and Tobago was able to withdraw from the treaty and immediately reaccede to it (a point on which the Commission will not take a position), the validity of the reservation is doubtful, to say the least.

²⁴¹⁷ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40* (see footnote 730 above), para. 6.7.

²⁴¹⁸ *Ibid.*

²⁴¹⁹ See the guidelines in section 4.2 of the Guide to Practice.

²⁴²⁰ See the guidelines in section 4.3 of the Guide to Practice.

²⁴²¹ Judgment of 1 September 2001, *Hilaire v. Trinidad and Tobago*, Preliminary Objections, Series C, No. 80, para. 98. See also the Court’s judgment of 1 September 2001 on the preliminary objections in *Benjamin et al. v. Trinidad and Tobago* (footnote 2187 above), para. 89. In the latter judgment, the Court arrived at the same conclusions without, however, stating that the reservation was incompatible with the object and purpose of the Convention.

²⁴²² *Belilos v. Switzerland* (footnote 192 above), para. 60.

²⁴²³ *Weber v. Switzerland*, 22 May 1990, Series A no. 177, paras. 36–38.

²⁴²⁴ *Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995 (see footnote 304 above), paras. 89–98.

with decision-making authority has not taken a position on the matter, the question of the validity of a reservation remains an open one (this, in fact, is what makes the reservations dialogue significant). However, the generalized relativism that is inevitably inferred from this position should not be encouraged: the substance of the applicable law (which the Guide to Practice endeavours to enunciate) must not be confused with the settlement of disputes that results from its application. A reservation *is* or *is not* valid, irrespective of the individual positions taken by States or international organizations in that regard and, accordingly, its nullity is not a subjective or relative matter, but should, as far as possible, be determined objectively—although this does not mean that the reactions of other parties are devoid of interest—but this is the subject of the guidelines in section 4.3 of the Guide to Practice. The idea is also reflected in guideline 4.5.2.

4.5.2 Reactions to a reservation considered invalid

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

2. Nevertheless, a State or an international organization which considers that a reservation is invalid should formulate a reasoned objection as soon as possible.

Commentary

(1) Paragraph 1 of guideline 4.5.2 is essentially a reminder of a fundamental principle clearly implied in several previous guidelines, according to which the nullity of an invalid reservation depends on the reservation itself and not on the reactions it may elicit. Paragraph 2 should be seen as a recommendation to States and international organizations that they should not, as a consequence, refrain from objecting to such a reservation and specifying the reasons why they consider the reservation to be invalid.

(2) Paragraph 1 of guideline 4.5.2 follows directly from guideline 3.1 (Permissible reservations) (which reproduces the text of article 19 of the Vienna Conventions), guideline 3.3.3 (Absence of effect of individual acceptance of a reservation on the permissibility of the reservation) and guideline 4.5.1 (Nullity of an invalid reservation). It illustrates what is meant by the term “void” included in guideline 4.5.1, by serving as a reminder that the nullity of an invalid reservation is based on objective factors and does not depend on the reaction of a contracting State or contracting organization other than the author of the reservation—that is, as expressly indicated in paragraph 1, on their acceptance or their objection.

(3) In State practice, the great majority of objections are based on the invalidity of the reservation to which the objection is made. However, the authors of such objections draw very different conclusions from them: some simply note that the reservation is invalid while others state that it is null and void and devoid of legal effect. Sometimes (but very rarely), the author of the objection states that its objection precludes the entry into force of the treaty as

between itself and the reserving State; sometimes, on the other hand, it states that the treaty enters into force in its entirety in these same bilateral relations, and sometimes it remains silent on that point.²⁴²⁵

(4) The case law of the International Court of Justice does not appear to be consistent on this point.²⁴²⁶ In its 1999 orders concerning the requests for provisional measures submitted by Yugoslavia against Spain and the United States of America, the Court simply considered that

[w]hereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to Spain’s reservation to Article IX; and whereas the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties.²⁴²⁷

The Court’s reasoning did not include a review of the permissibility of the reservation, apart from the observation that the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 did not prohibit it. The only determining factor seems to have been the absence of an objection by the State concerned; this reflects the position which the Court had taken in 1951 but which has now been superseded by the Vienna Convention, with which it is incompatible.²⁴²⁸

The object and purpose [of the treaty] ... limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.²⁴²⁹

Nonetheless, in its order concerning the request for provisional measures in the case of *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the Court modified its approach by considering *in limine* the permissibility of the reservation of Rwanda:

²⁴²⁵ The reactions to the reservation formulated by Qatar upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women illustrate nearly the full range of conceivable objections: while the 18 objections (including two late ones by Mexico and Portugal) all note that the reservation is incompatible with the object and purpose of the Convention, one (that of Sweden) adds that it is “null and void”, and two others (those of Spain and the Netherlands) point out that the reservation does not produce any effect on the provisions of the Convention. Eight of these objections (those of Belgium, Finland, Hungary, Ireland, Italy, Mexico, Poland and Portugal) specify that the objections do not preclude the entry into force of the treaty, while 10 (those of Austria, the Czech Republic, Estonia, Latvia, the Netherlands, Norway, Romania, Slovakia, Spain and Sweden) consider that the treaty enters into force for Qatar without the reserving State being able to rely on its impermissible reservation. See *Multilateral Treaties ...* (footnote 37 above), chap. IV.8. See also the reactions mentioned above.

²⁴²⁶ See the joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma annexed to the *Judgment of 3 February 2006, Armed Activities on the Territory of the Congo* (footnote 1600 above), pp. 65–72.

²⁴²⁷ *Orders of 2 June 1999, Legality of Use of Force (Yugoslavia v. Spain)* (see footnote 1783 above), p. 772, para. 32, and *Legality of Use of Force (Yugoslavia v. United States of America)* (see footnote 1783 above), p. 924, para. 24.

²⁴²⁸ See paragraphs (2)–(9) of the commentary to guideline 2.6.2 (Right to formulate objections).

²⁴²⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 24.

[T]hat reservation does not bear on the substance of the law, but only on the Court's jurisdiction; ... it therefore does not appear contrary to the object and purpose of the Convention.²⁴³⁰

And in its judgment on the jurisdiction of the Court and the admissibility of the application, the Court confirmed that

Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.²⁴³¹

The Court thus "added its own assessment as to the compatibility of Rwanda's reservation with the object and purpose of the Genocide Convention".²⁴³² Even though an objection by the Democratic Republic of the Congo was not required in order to assess the permissibility of the reservation, the Court found it necessary to add:

[A]s a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it.²⁴³³

(5) This clarification is not superfluous. Indeed, although an objection to a reservation does not determine the validity of the reservation as such, it is an important element to be considered by all actors involved—the author of the reservation, the contracting States and contracting organizations, and any body with competence to assess the validity of a reservation. Nonetheless, it should be borne in mind that, as the Court indicated in its 1951 advisory opinion:

[E]ach State which is a party to the Convention is entitled to appraise the validity of the reservation and it exercises this right individually and from its own standpoint.²⁴³⁴

(6) The judgment of the European Court of Human Rights in the *Loizidou* case also attaches great importance to the reactions of States parties as an important element to be considered in assessing the validity of the reservation of Turkey.²⁴³⁵ The Human Rights Committee confirmed this approach in its general comment No. 24:

²⁴³⁰ *Order of 10 July 2002, Armed Activities on the Territory of the Congo* (see footnote 1785 above), p. 246, para. 72.

²⁴³¹ *Judgment of 3 February 2006, Armed Activities on the Territory of the Congo* (see footnote 1600 above), p. 32, para. 67.

²⁴³² Joint separate opinion, cited previously (footnotes 1789 and 2426 above), p. 70, para. 20.

²⁴³³ *Judgment of 3 February 2006, Armed Activities on the Territory of the Congo* (see footnote 1600 above), p. 33, para. 68.

²⁴³⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 26. See also Inter-American Court of Human Rights, advisory opinion, OC-2/82 of 24 September 1982, *The effect of reservations on the entry into force of the American Convention on Human Rights (arts. 74 and 75)* (footnote 2026 above) para. 38: "The States Parties have a legitimate interest, of course, in barring reservations incompatible with the object and purpose of the Convention. They are free to assert that interest through the adjudicatory and advisory machinery established by the Convention."

²⁴³⁵ *Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995 (see footnote 304 above), para. 95. See also paragraph (8) of the commentary to guideline 4.5.3 below.

The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant (...). However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.²⁴³⁶

(7) As established above,²⁴³⁷ the Vienna Conventions do not contain any rule concerning the effects of reservations that do not meet the conditions of permissibility set out in article 19, or—as a logical consequence thereof—concerning the potential reactions of States to such reservations. Under the Vienna regime, an objection is not an instrument by which contracting States or organizations determine the validity of a reservation; it has a different function: it renders the reservation unopposable as against the author of the objection.²⁴³⁸ The acceptances and objections mentioned in article 20 concern only valid reservations. The mere fact that these same instruments are used in State practice to react to invalid reservations does not mean that these reactions produce the same effects or that they are subject to the same conditions as objections to valid reservations.

(8) In the view of the Commission, however, this is not a sufficient reason not to consider such reactions as true objections. A negative reaction of this type is fully consistent with the definition of the term "objection" adopted by the Commission in guideline 2.6.1 and constitutes

a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation.

The mere fact that ultimately, it is not the objection that achieves the desired goal of depriving the reservation of effects, but rather the nullity of the reservation, does not change the goal sought by the objecting State or organization: to exclude all effects of the invalid reservation. Thus, it seems neither appropriate nor useful to create a new term for these reactions to reservations, since the current term not only corresponds to the definition of "objection" adopted by the Commission but is also used extensively in State practice and, it would appear, is universally accepted and understood.

(9) Moreover, although an objection to an invalid reservation adds nothing to the nullity of the reservation, it is undoubtedly a prime instrument both for initiating the reservations dialogue and for bringing the matter to the attention of treaty bodies and international and domestic courts if they are called upon to assess the validity of the reservation. Consequently, it would not be advisable—and would, in fact, be misleading—simply to note in the Guide to Practice that an objection to an invalid reservation is without effect.

(10) On the contrary, it is vitally important for States to continue to formulate objections to reservations that they consider invalid, even though such declarations do not add

²⁴³⁶ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), pp. 123–124, para. 17.

²⁴³⁷ See paragraphs (1)–(18) of the general commentary to section 4.5.

²⁴³⁸ See paragraphs (2)–(5) of the commentary to guideline 4.3.

anything to the effects resulting *ipso jure* and without any other condition from the invalidity of the reservation. This is all the more important as there is no need to focus on the scarcity of bodies that are competent to assess the validity of a contested reservation. As is usual in international law, in this area as in many others, the absence of an objective assessment mechanism remains the rule, and its existence the exception.²⁴³⁹ Hence, pending a very hypothetical intervention by an impartial third party, “each State establishes for itself its legal situation *vis-à-vis* other States”²⁴⁴⁰—including, of course, on the issue of reservations.

(11) States should not be discouraged from formulating objections to reservations that they consider invalid. On the contrary, in order to maintain stable treaty relations, they should be encouraged to do so and to provide, as far as possible, reasons for their position.²⁴⁴¹ This is why guideline 4.5.2 not only sets out the principle that an objection to an invalid reservation does not, as such, produce effects; it also discourages any hasty inference, from the statement of that principle, that such an objection is futile.

(12) Indeed, from all standpoints, it is very important for States and international organizations to formulate an objection, when they deem it justified, in order to state publicly their position on the invalidity of a reservation. Nevertheless, they do so on the basis merely of their own power of appraisal, which is why paragraph 2 of guideline 4.5.2 takes the form of a simple recommendation to States and international organizations, the purely optional nature of which is evidenced by the use of the conditional “should”.

(13) Moreover, while it may be preferable, it is not indispensable²⁴⁴² for these objections to be formulated within the time period of 12 months, or within any other time period set out in the treaty.²⁴⁴³ Although they have, as

²⁴³⁹ *South West Africa, Second Phase, Judgment of 18 July 1966, I.C.J. Reports 1966*, p. 6, at p. 46, para. 86: “In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception.”

²⁴⁴⁰ Decision of 9 December 1978, *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 443, para. 81.

²⁴⁴¹ See guideline 2.6.9 (Statement of reasons for objections), which recommends that the author of an objection to a reservation should indicate the reasons why it is being made.

²⁴⁴² The Government of Italy, in its late objection to the reservations of Botswana to the International Covenant on Civil and Political Rights, explained: “The Government of the Italian Republic considers these reservations to be incompatible with the object and the purpose of the Covenant according to article 19 of the 1969 Vienna Convention on the [L]aw of Treaties. These reservations do not fall within the rule of article 20, paragraph 5, and can be objected to at any time” (*Multilateral Treaties ...* (footnote 37 above), chap. IV.4); see also the objection of Italy to the reservation of Qatar to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*ibid.*, chap. IV.9); and the position expressed by Sweden in the Sixth Committee during consideration of the report of the Commission on the work of its fifty-seventh session (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 14th meeting, A/C.6/60/SR.14*, para. 22).

²⁴⁴³ For other recent examples, see the objections of Portugal and Mexico to the reservation formulated by Qatar upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties ...* (footnote 37 above), chap. IV.8). Both objections were made on 10 May 2010; the instrument of accession of Qatar was communicated by the Secretary-General on 8 May 2009.

such, no legal effect on the reservation, such objections still serve an important purpose not only for the author of the reservation—which would be alerted to the doubts surrounding its validity—but also for the other contracting States or contracting organizations and for any authority that may be called upon to assess the validity of the reservation.

(14) This comment is not, however, to be taken as an encouragement to formulate late objections on the reasoning that, even without the objection, the reservation is null and void and produces no effect. It is in the interest of the author of the reservation, the other contracting States and contracting organizations and, more generally, of a stable, clear legal situation, for objections to invalid reservations to be made and for them to be formulated as quickly as possible, so that the legal situation can be appraised rapidly by all the actors and so that the author of the reservation can potentially remedy the invalidity within the framework of a reservations dialogue. For this reason, paragraph 2 of guideline 4.5.2 calls on States and organizations to formulate a reasoned objection “as soon as possible”.

4.5.3 Status of the author of an invalid reservation in relation to the treaty

1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty.

2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation.

3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation.

4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.

Commentary

(1) Guideline 4.5.1 does not resolve all the issues concerning the effects of the nullity of an invalid reservation. While it is established that such a reservation cannot produce legal effects, it is essential to answer the question of whether its author becomes a contracting party without the benefit of its reservation, or whether the nullity of its reservation also affects its consent to be bound by the treaty. Both approaches are consistent with the principle that the reservation has no legal effect: either the treaty enters into force for the author of the reservation without

the latter benefiting from its invalid reservation, which thus does not have the intended effects; or the treaty does not enter into force for the author of the reservation and, obviously, the reservation also does not produce effects since no treaty relations exist.²⁴⁴⁴ Guideline 4.5.3 proposes the principle of a middle solution between these apparently irreconcilable positions, based on the (simple—“rebuttable”) presumption that the author of the reservation is bound by the treaty without being able to claim the benefit of the reservation, unless the author has expressed a contrary intention.

(2) The first alternative, the severability of an impermissible reservation from the reserving State’s consent to be bound by the treaty,²⁴⁴⁵ is currently supported to some extent by State practice. Many objections have clearly been based on the invalidity of a reservation and even, in many cases, have declared such a reservation to be null and void, and unable to produce effects; nevertheless, in nearly all cases, the objecting States have not opposed the treaty’s entry into force and have even declared themselves to be in favour of the establishment of a treaty relationship with the author of the reservation. Since a reservation that is null and void has no legal effect, such a treaty relationship can only mean that the reserving State is bound by the treaty as a whole without benefit of the reservation.

(3) This approach is confirmed by the practice, followed in particular by the Nordic States,²⁴⁴⁶ of formulating what have come to be called objections with “super-maximum” effect (or intent),²⁴⁴⁷ along the lines of the objection of Sweden to the reservation to the Convention on the Rights of Persons with Disabilities formulated by El Salvador:

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation.²⁴⁴⁸

(4) Such objections, of which the Nordic States—though not the originators of this practice²⁴⁴⁹—make frequent use, have been appearing for some 15 years and are used more

and more often, especially by the European States. Apart from Sweden, Austria,²⁴⁵⁰ the Czech Republic²⁴⁵¹ and the Netherlands²⁴⁵² have also sought to give super-maximum effect to their objections to the reservations of El Salvador and Thailand to the Convention on the Rights of Persons with Disabilities of 2006.

(5) More recently, in early 2010, several European States objected to the reservation formulated by the United States of America when expressing its consent to be bound by Protocol III to the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects. No fewer than five of these objections contain wording intended to produce so-called “super-maximum” effect.²⁴⁵³ Likewise, Austria, the Czech Republic, Estonia, Latvia, Norway, Romania, Slovakia and Spain included in their objections to the reservation of Qatar to the Convention on the Elimination of All Forms of Discrimination against Women the proviso that those objections did not preclude the entry into force of the Convention as between those States and the reserving State, without the latter benefiting from the reservation.²⁴⁵⁴ This largely European practice is undoubtedly influenced by the 1999 recommendation of the Council of Europe on responses to inadmissible reservations to international treaties, which includes a number of model response clauses for use by member States;²⁴⁵⁵ the above-mentioned objections closely mirror these clauses.

²⁴⁵⁰ *Multilateral Treaties ...* (footnote 37 above), chap. IV.15. In its objection, the Austrian Government stressed that “[t]his objection, however, does not preclude the entry into force, in its entirety”, of the Convention between Austria and El Salvador”.

²⁴⁵¹ *Ibid.*

²⁴⁵² *Ibid.*, chap. IV.15. The Government of the Netherlands explained that “[i]t is the understanding of the Government of the Kingdom of the Netherlands that the reservation of the Government of the Republic of El Salvador does not exclude or modify the legal effect of the provisions of the Convention in their application to the Republic of El Salvador”.

²⁴⁵³ *Ibid.*, chap. XXVI.2: Austria (“[T]he Government of Austria objects to the aforementioned reservation made by the United States of America to the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (Protocol III). This position however does not preclude the entry into force in its entirety of the Convention between the United States of America and Austria”); Cyprus (“[T]he Government of the Republic of Cyprus objects to the aforementioned reservation by the United States of America to Protocol III of the CCW. This position does not preclude the entry into force of the Convention between the United States of America and the Republic of Cyprus in its entirety”); Norway (“The Government of the Kingdom of Norway objects to the aforesaid reservation by the Government of the United States of America to the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. However, this objection shall not preclude the entry into force of the Protocol in its entirety between the two States, without the United States of America benefiting from its reservation”); and Sweden (“The Government of Sweden objects to the aforesaid reservation made by the Government of the United States of America to Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects and considers the reservation without legal effect. This objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefiting from its reservation”).

²⁴⁵⁴ *Ibid.*, chap. IV.8.

²⁴⁵⁵ Recommendation No. R(99)13, adopted on 18 May 1999 by the Committee of Ministers of the Council of Europe.

²⁴⁴⁴ Greig, “Reservations: equity as a balancing factor?” (footnote 28 above), p. 52; R. Goodman, “Human rights treaties, invalid reservations, and State consent”, *AJIL*, vol. 96 (2002), p. 531.

²⁴⁴⁵ For convincing arguments in favour of the negative presumption and severability, see de Frouville, *L’intangibilité des droits de l’homme ...* (footnote 1733 above), pp. 385–389; Coulée, “A propos d’une controverse ...” (footnote 1579 above), pp. 515–516; Simma and Hernández, “Legal consequences of an impermissible reservation” (footnote 1610 above), pp. 60–85; and Pellet and Müller, “Reservations to human rights treaties: not an absolute evil” (footnote 1619 above), pp. 547–551.

²⁴⁴⁶ Concerning this practice, see, in particular, Klabbbers, “Accepting the unacceptable? ...” (footnote 2199 above), pp. 183–186.

²⁴⁴⁷ See footnote 2411 above.

²⁴⁴⁸ *Multilateral Treaties ...* (footnote 37 above), chap. IV.15. See also the objection of Sweden to the reservation to the same Convention formulated by Thailand (*ibid.*).

²⁴⁴⁹ One of the earliest objections that, while not explicit in this regard, can be termed an objection with “super-maximum” effect was made by Portugal in response to the reservation by Maldives to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid.*, chap. IV.8); see also footnote 2402 above.

(6) It is clear that this practice is supported to some extent by the decisions of human rights bodies and regional courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights.

(7) In its landmark judgment in *Belilos v. Switzerland*,²⁴⁵⁶ the European Court of Human Rights, sitting in plenary session, not only recharacterized the interpretative declaration formulated by the Swiss Government, but also had to decide whether the reservation (incorrectly characterized as an interpretative declaration) was valid. Having concluded that the reservation of Switzerland was invalid, particularly in relation to the conditions set out in article 64²⁴⁵⁷ of the European Convention on Human Rights, the Court added:

At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration.²⁴⁵⁸

In its judgment in *Weber v. Switzerland*,²⁴⁵⁹ a chamber of the Court was called upon to decide whether article 6, paragraph 1, of the Convention was applicable, whether it had been violated by the respondent State and whether the reservation of Switzerland in respect of that provision—which, according to the respondent State, was separate from its interpretative declaration—was applicable. In that connection, the Swiss Government claimed that “Switzerland’s reservation in respect of Article 6 § 1 (art. 6-1) (...) would in any case prevent Mr. Weber from relying on non-compliance with the principle that proceedings before cantonal courts and judges should be public”.²⁴⁶⁰ The Court went on to consider the validity of the reservation of Switzerland and, more specifically, whether it satisfied the requirements of article 64 of the Convention. It noted that the reservation

does not fulfil one [of the requirements], as the Swiss Government did not append [to the reservation] “a brief statement of the law [or laws] concerned” to it. The requirement of paragraph 2 of article 64 (art. 64-2), however, “both constitutes an evidential factor and contributes to legal certainty”; its purpose is to “provide a guarantee—in particular for the other Contracting Parties and the Convention institutions—that a reservation does not go beyond the provisions expressly excluded by the State concerned” (see the *Belilos* judgment previously cited, *Series A no. 132*, pp. 27–28, § 59). Disregarding it is a breach not of “a purely formal requirement” but of “a condition of substance” (*ibid.*). The material reservation by Switzerland must accordingly be regarded as invalid.²⁴⁶¹

In contrast to its practice in the *Belilos* judgment, the Court did not go on to explore whether the nullity of the reservation had consequences for the consent of Switzerland to be bound by the Convention. It simply confined itself to considering whether article 6, paragraph 1, of the Convention had in fact been violated, and concluded that “there ha[d] therefore been a breach of Article 6 § 1 (art. 6-1)”.²⁴⁶² Thus, without saying so explicitly, the Court considered that Switzerland remained bound by the European Convention, despite the nullity of its reservation, and that it could

not benefit from the reservation; that being the case, article 6, paragraph 1, was enforceable against it.

(8) In its judgment on preliminary objections in *Loizidou v. Turkey*,²⁴⁶³ a chamber of the European Court took the opportunity to supplement and considerably clarify its jurisprudence. While in this case the issue of validity arose in respect not of a reservation to a provision of the Convention, but of a “reservation” to the optional declaration whereby Turkey recognized the compulsory jurisdiction of the Court pursuant to articles 25 and 46 of the Convention, the lessons of the judgment can easily be transposed to the problem of reservations. Having found that the restrictions *ratione loci* attached to the declarations of acceptance of Turkey of the Court’s jurisdiction were “invalid”, the Strasbourg judges pursued their line of reasoning by considering “whether, as a consequence of this finding, the validity of the acceptances themselves may be called into question”.²⁴⁶⁴ They went on to state as follows:

93. In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), “to ensure the observance of the engagements undertaken by the High Contracting Parties”.

94. It also recalls the finding in its *Belilos v. Switzerland* judgment of 29 April 1988, after having struck down an interpretative declaration on the grounds that it did not conform to Article 64 (art. 64), that Switzerland was still bound by the Convention notwithstanding the invalidity of the declaration (*Series A no. 132*, p. 28, para. 60).

95. The Court does not consider that the issue of the severability of the invalid parts of Turkey’s declarations can be decided by reference to the statements of her representatives expressed subsequent to the filing of the declarations either (as regards the declaration under Article 25) (art. 25) before the Committee of Ministers and the Commission or (as regards both Articles 25 and 46) (art. 25, art. 46) in the hearing before the Court. In this connection, it observes that the respondent Government must have been aware, in view of the consistent practice of Contracting Parties under Articles 25 and 46 (art. 25, art. 46) to accept unconditionally the competence of the Commission and Court, that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs.

It is of relevance to note, in this context, that the Commission had already expressed the opinion to the Court in its pleadings in the *Belgian Linguistic* (Preliminary objection) and *Kjeldsen, Busk Madsen and Pedersen v. Denmark* cases (judgments of 9 February 1967 and 7 December 1976, *Series A nos. 5* and *23* respectively) that Article 46 (art. 46) did not permit any restrictions in respect of recognition of the Court’s jurisdiction (see respectively, the second memorial of the Commission of 14 July 1966, *Series B no. 3*, vol. I, p. 432, and the memorial of the Commission (Preliminary objection) of 26 January 1976, *Series B no. 21*, p. 119).

The subsequent reaction of various Contracting Parties to the Turkish declarations ... lends convincing support to the above observation concerning Turkey’s awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46)—the latter subsequent to the statements by the Contracting Parties referred to above—indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves. Seen in this light, the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government’s basic—albeit qualified—intention to accept the competence of the Commission and Court.

96. It thus falls to the Court, in the exercise of its responsibilities under Article 19 (art. 19), to decide this issue with reference to

²⁴⁵⁶ *Belilos v. Switzerland* (see footnote 192 above).

²⁴⁵⁷ Now article 57.

²⁴⁵⁸ *Belilos v. Switzerland* (see footnote 192 above), para. 60.

²⁴⁵⁹ *Weber v. Switzerland* (see footnote 2423 above).

²⁴⁶⁰ *Ibid.*, para. 36.

²⁴⁶¹ *Ibid.*, para. 38.

²⁴⁶² *Ibid.*, para. 40.

²⁴⁶³ *Loizidou v. Turkey* (see footnote 304 above).

²⁴⁶⁴ *Ibid.*, para. 89.

the texts of the respective declarations and the special character of the Convention regime. The latter, it must be said, militates in favour of the severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured in all areas falling within Turkey's "jurisdiction" within the meaning of Article 1 (art. 1) of the Convention.

97. The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Articles 25 and 46 (art. 25, art. 46) declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.

98. It follows that the declarations of 28 January 1987 and 22 January 1990 under Articles 25 and 46 (art. 25, art. 46) contain valid acceptances of the competence of the Commission and Court.²⁴⁶⁵

(9) In its judgment on preliminary objections in *Hilaire v. Trinidad and Tobago*,²⁴⁶⁶ the Inter-American Court of Human Rights likewise noted that, in the light of the object and purpose of the American Convention on Human Rights, Trinidad and Tobago could not benefit from the limitation included in its instrument of acceptance of the Court's jurisdiction but was still bound by its acceptance of that compulsory jurisdiction.²⁴⁶⁷

(10) With the individual communication, *Rawle Kennedy v. Trinidad and Tobago*, a comparable problem concerning a reservation formulated by the State party upon reaccessing to the Optional Protocol to the International Covenant on Civil and Political Rights was brought before the Human Rights Committee. Having found the reservation thus formulated to be impermissible by reason of its discriminatory nature, the Committee merely noted: "The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol."²⁴⁶⁸ In other words, Trinidad and Tobago remained bound by the Protocol without benefit of the reservation.

(11) This decision of the Human Rights Committee is consistent with its conclusions in general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant,²⁴⁶⁹ in which the Committee stated:

The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.²⁴⁷⁰

(12) It should be noted that the wording adopted by the Committee does not suggest that this "normal" consequence is the "only" one possible or that other solutions may not exist.

(13) On the other hand, in its observations on the Human Rights Committee's general comment No. 24, France stated categorically

that agreements, whatever their nature, are governed by the law of treaties, that they are based on States' consent and that reservations are conditions which States attach to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.²⁴⁷¹

(14) This view, which reflects the opposite answer to the question of whether the author of an impermissible reservation becomes a contracting State or contracting organization, is based on the principle that the nullity of the reservation affects the whole of the instrument of consent to be bound by the treaty. In its 1951 advisory opinion, the International Court of Justice responded to the General Assembly's question I along those same lines:

[A] State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention*.²⁴⁷²

(15) According to this approach, the reservation is seen as a *sine qua non* for the reserving State's consent to be bound by the treaty, which alone would be in conformity with the principle of consent. If the condition is not permissible, there is no consent on the part of the reserving State. In these circumstances, only the reserving State can take the necessary decisions to remedy the nullity of its reservation, and it should not be regarded as a party to the treaty until such time as it has withdrawn or modified its reservation.

(16) The practice of the Secretary-General as depositary of multilateral treaties also seems to confirm this radical solution. The *Summary of Practice* explains in this respect as follows:

191. If the treaty forbids any reservation, the Secretary-General will refuse to accept the deposit of the instrument. The Secretary-General will call the attention of the State concerned to the difficulty and shall not issue any notification concerning the instrument to any other State concerned (...).

192. If the prohibition is to only specific articles, or conversely reservations are authorized only in respect of specific provisions, the Secretary-General shall act, *mutatis mutandis*, in a similar fashion if the reservations are not in keeping with the relevant provisions of the treaty. (...).

193. However, only if there is *prima facie* no doubt that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit. Such would evidently be the case if the statement, for example, read "State XXX shall not apply article YYY", when the treaty prohibited all reservations or reservations to article YYY.²⁴⁷³

²⁴⁶⁵ *Ibid.*, paras. 93–98.

²⁴⁶⁶ *Hilaire v. Trinidad and Tobago* (see footnote 2421 above).

²⁴⁶⁷ *Ibid.*, para. 98.

²⁴⁶⁸ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40* (see footnote 730 above), para. 6.7. See also paragraph (25) of the commentary to guideline 4.5.1.

²⁴⁶⁹ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), annex V, pp. 119–125.

²⁴⁷⁰ *Ibid.*, p. 124, para. 18.

²⁴⁷¹ Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (see footnote 1691 above), p. 106, para. 13.

²⁴⁷² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 604 above), p. 29.

²⁴⁷³ *Summary of Practice of the Secretary-General ...* (see footnote 75 above), p. 57, paras. 191–193. Concerning such a distinction see, however, guideline 3.3.1 (Irrelevance of distinction among the grounds for non-permissibility) and commentary thereto.

(17) State practice, while not completely non-existent, is even less consistent in this regard. For example, Israel, Italy and the United Kingdom objected to the reservation formulated by Burundi upon acceding to the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents of 1973. But whereas these three States regard the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention and are unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn,²⁴⁷⁴ two other States (Federal Republic of Germany and France) that objected to the reservation of Burundi did not include such a statement in their objections.²⁴⁷⁵

(18) The Government of the Netherlands formulated the following objection in 1966:²⁴⁷⁶

The Government of the Kingdom of the Netherlands declares that it considers the reservations made by Albania, Algeria, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Morocco, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics in respect of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature at Paris on 9 December 1948, to be incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention.

Mention can also be made of the objections formulated by Israel, Italy and the United Kingdom to the reservation formulated by Burundi to the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents of 14 December 1973.²⁴⁷⁷

²⁴⁷⁴ *Multilateral Treaties ...* (footnote 37 above), chap. XVIII.7.

²⁴⁷⁵ The objection of the Federal Republic of Germany read: "The Government of the Federal Republic of Germany considers the reservation made by the Government of Burundi concerning article 2, paragraph 2, and article 6, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, to be incompatible with the object and purpose of the Convention" (*ibid.*). The Government of France, upon acceding to the Convention, stated that it "objects to the declaration made by Burundi on 17 December 1980 limiting the application of the provisions of article 2, paragraph 2[,] and article 6, paragraph 1" (*ibid.*).

²⁴⁷⁶ *Ibid.*, chap. IV.1.

²⁴⁷⁷ "The Government of the State of Israel regards the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention and is unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn.

"In the view of the Government of Israel, the purpose of this Convention was to secure the world-wide repression of crimes against internationally protected persons, including diplomatic agents, and to deny the perpetrators of such crimes a safe haven."

"With regard to the reservation expressed by Burundi on 17 December 1980, [the Italian Government considers that] the purpose of the Convention is to ensure the punishment, world-wide, of crimes against internationally protected persons, including diplomatic agents, and to deny a safe haven to the perpetrators of such crimes. Considering therefore that the reservation expressed by the Government of Burundi is incompatible with the aim and purpose of the Convention, the Italian Government can not consider Burundi's accession to the Convention as valid as long as it does not withdraw that reservation."

"The purpose of this Convention was to secure the world-wide repression of crimes against internationally protected persons, including diplomatic agents, and to deny the perpetrators of such crimes a safe haven. Accordingly the Government of the United Kingdom of Great Britain and Northern Ireland regard the reservation entered by the Government of Burundi as incompatible with the object and purpose

(19) In the vast majority of cases, States that formulate objections to a reservation that they consider invalid expressly state that their objection does not preclude the entry into force of the treaty in their relations with the reserving State, and see no need to elaborate further on the content of any such treaty relationship. In 2005, the Commission sought comments from Member States on the following question:

States often object to a reservation that they consider incompatible with the object and purpose of the treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. The Commission would be particularly interested in Governments' comments on this practice. It would like to know, in particular, what effects the authors expect such objections to have, and how, in the view of Governments, this practice accords with article 19 (c) of the 1969 Vienna Convention.²⁴⁷⁸

The views expressed by several delegations in the Sixth Committee in 2005 clearly showed that there was no agreement on the approach to be taken to the thorny question of the validity of consent to be bound by the treaty in the case of an invalid reservation. Several States²⁴⁷⁹ maintained that this practice was "paradoxical" and that, in any event, the author of the objection "could not simply ignore the reservation and act as if it had never been formulated".²⁴⁸⁰ The French delegation stressed that

such an objection would create the so-called "super-maximum effect", since it would allow for the application of the treaty as a whole without regard to the fact that a reservation had been entered. That would compromise the basic principle of consensus underlying the law of treaties.²⁴⁸¹

Others, however, noted that it would be better to have the author of the reservation become a contracting State or contracting organization than to exclude it from the circle of parties. In that regard, the representative of Sweden, speaking on behalf of the Nordic countries, said:

The practice of severing reservations incompatible with the object and purpose of a treaty accorded well with article 19, which made it clear that such reservations were not expected to be included in the treaty relations between States. While one alternative in objecting to impermissible reservations was to exclude bilateral treaty relations altogether, the option of severability secured bilateral treaty relations and opened up possibilities of dialogue within the treaty regime.²⁴⁸²

(20) However, it should be noted that the advocates of this point of view have made the entry into force of the treaty conditional on the will of the author of the reservation: "However, account must be taken of the will of the reserving State regarding the relationship between the ratification of a treaty and the reservation."²⁴⁸³

of the Convention, and are unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn."

(*Multilateral Treaties ...* (footnote 37 above), chap. XVIII.7.)

²⁴⁷⁸ *Yearbook ... 2005*, vol. II (Part Two), para. 29.

²⁴⁷⁹ See *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 14th meeting* (A/C.6/60/SR.14), para. 3 (United Kingdom); *ibid.*, para. 72 (France); *ibid.*, 16th meeting (A/C.6/60/SR.16), para. 20 (Italy); *ibid.*, para. 44 (Portugal).

²⁴⁸⁰ *Ibid.*, 14th meeting (A/C.6/60/SR.14), para. 72 (France).

²⁴⁸¹ *Ibid.*

²⁴⁸² *Ibid.*, para. 23. See also *ibid.*, 17th meeting (A/C.6/60/SR.17), para. 24 (Spain); *ibid.*, 18th meeting (A/C.6/60/SR.18), para. 86 (Malaysia); *ibid.*, 19th meeting (A/C.6/60/SR.19), para. 39 (Greece).

²⁴⁸³ *Ibid.*, 14th meeting (A/C.6/60/SR.14), para. 23 (Sweden). See also the position of the United Kingdom (*ibid.*, para. 4): "On the related

(21) The same lack of agreement was evident in the discussion in the Sixth Committee during the sixty-fifth session of the General Assembly and the comments and observations made by Governments on draft guideline 4.5.2 (current guideline 4.5.3) provisionally adopted by the Commission in 2010.²⁴⁸⁴ States were divided into two or more or less equal groups, one in favour²⁴⁸⁵ and one opposed²⁴⁸⁶ to the positive presumption retained provisionally by the Commission and to the principle of severability of the invalid reservation from the rest of the treaty. All agreed, however, that the intention of the author of the reservation was the key criterion for determining whether the author was bound by the treaty or not, and that the author of the reservation was best placed to specify what that intention was. This led some States to suggest a compromise solution, giving greater weight to the role of the intention; thus, Austria and the United Kingdom proposed to retain the positive presumption of former draft guideline 4.5.2 but to allow authors of reservations to have the last word, by granting them the possibility of expressing a contrary intention.²⁴⁸⁷ Guideline 4.5.3 is closely based on these proposals.

(22) Thus, the Commission has considered that, although the two approaches and the two points of view concerning the question of the entry into force of the treaty may initially appear diametrically opposed, both are consistent with the principle that underlies treaty law, namely, the principle of consent. Therefore, the Commission considers that the key to the problem is simply

issue of the ‘super-maximum effect’ of an objection, consisting in the determination not only that the reservation objected to was not valid but also that, as a result, the treaty as a whole applied *ipso facto* in the relations between the two States, his delegation considered that that could occur only in the most exceptional circumstances, for example, if the State making the reservation could be said to have accepted or acquiesced in such an effect.”

²⁴⁸⁴ *Yearbook ... 2010*, vol. II (Part Two), p. 112.

²⁴⁸⁵ See *Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee, 19th meeting* (A/C.6/65/SR.19), para. 66 (Denmark on behalf of the Nordic countries); para. 82 (qualified approval by Austria); para. 88 (Mexico); *ibid.*, 20th meeting (A/C.6/65/SR.20), para. 4 (Czech Republic); para. 30 (Belgium); *ibid.*, 21st meeting (A/C.6/65/SR.21), para. 10 (South Africa); para. 29 (qualified approval by Hungary); para. 39 (Greece) (see footnote 2487 below); see also the comments and observations received from Governments, *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/639 and Add.1, comments and observations on guideline 4.5.2, p. 70 (qualified approval by Austria); *ibid.* (El Salvador); pp. 70–71 (Finland); p. 73 (Norway); *ibid.* (qualified approval by Switzerland).

²⁴⁸⁶ See *Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee, 19th meeting* (A/C.6/65/SR.19), paras. 92–94 (Germany); *ibid.*, 20th meeting (A/C.6/65/SR.20), para. 10 (Italy); para. 14 (Portugal); para. 22 (Egypt); para. 54 (United Kingdom); para. 57 (Thailand); para. 59 (United States of America); para. 63 (France); para. 85 (qualified disapproval by India); *ibid.*, 21st meeting (A/C.6/65/SR.21), paras. 21–22 (Singapore); see also *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/639 and Add.1, pp. 69–70 (Australia); pp. 71–73 (Germany); p. 73 (Portugal); pp. 74–76 (United States); p. 71 (France); pp. 73–74 (qualified disapproval by United Kingdom).

²⁴⁸⁷ See *Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee, 19th meeting* (A/C.6/65/SR.19), para. 82 (Austria); see also *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/639 and Add.1, p. 70 (Austria); pp. 73–74 (United Kingdom). See also *Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee, 21st meeting* (A/C.6/65/SR.21), para. 39 (Greece) and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/639 and Add.1, p. 73 (Switzerland).

the will of the author of the reservation: does the author intend to be bound by the treaty even if its reservation is invalid without benefit of the reservation—or is its reservation a *sine qua non* for its commitment to be bound by the treaty?

(23) In the context of the specific but comparable issue of reservations to declarations formulated under the optional clause concerning the compulsory jurisdiction of the International Court of Justice in Article 36, paragraph 2, of the Statute of the Court, Judge Lauterpacht, in his dissenting opinion to the Court’s judgment on the preliminary objections in the *Interhandel* case, stated:

If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the Declaration.²⁴⁸⁸

Thus, the important issue is the will of the author of the reservation and its intention to be bound by the treaty, with or without benefit of its reservation. This is also true in the case of more classic reservations to treaty provisions.

(24) In its judgment in the *Belilos* case, the European Court of Human Rights paid particular attention to the position of Switzerland with regard to the European Convention on Human Rights. It expressly noted that “it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration”.²⁴⁸⁹ Thus, the Court clearly took into consideration the fact that Switzerland itself—the author of the invalid “reservation”—considered itself to be bound by the treaty despite the nullity of this reservation and had behaved accordingly.

(25) In the *Loizidou* case, the European Court of Human Rights also based its judgment, if not on the will of the Turkish Government—which had maintained during the proceedings before the Court that “if the restrictions attached to the Article 25 and 46 (art. 25, art. 46) declarations [of the European Convention on Human Rights] were not recognized to be valid, as a whole, the declarations were to be considered null and void in their entirety”²⁴⁹⁰—then on the fact that Turkey had knowingly run the risk that the restrictions resulting from its reservation would be declared invalid:

That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46)—the latter subsequent to the statements by the Contracting Parties referred to above—indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.²⁴⁹¹

(26) The “Strasbourg approach”²⁴⁹² thus consists of acting on the reserving State’s will to be bound by the

²⁴⁸⁸ *Interhandel case, Preliminary Objections, Judgment of 21 March 1959, I.C.J. Reports 1959*, p. 6, dissenting opinion of Sir Hersch Lauterpacht (footnote 1829 above), p. 117.

²⁴⁸⁹ *Belilos v. Switzerland* (see footnote 192 above), para. 60.

²⁴⁹⁰ *Loizidou v. Turkey* (see footnote 304 above), para. 90.

²⁴⁹¹ *Ibid.*, para. 95.

²⁴⁹² Simma, “Reservations to human rights treaties ...” (footnote 1042 above), p. 670.

treaty even if its reservation is invalid.²⁴⁹³ In so doing, the Court did not, however, rely only on the express declarations of the State in question—as, for example, it did in the *Belilos* case²⁴⁹⁴—it also sought to “reconstruct” the will of the State. As W. A. Schabas has written:

The European Court did not set aside the test of intention in determining whether a reservation is severable. Rather, it appears to highlight the difficulty in identifying such intention and expresses a disregard for such factors as formal declarations by the State.²⁴⁹⁵

Only if it is established that the reserving State did not consider its reservation (which has been recognized as invalid) to be an essential element of its consent to be bound by the treaty is the reservation severable from its treaty undertaking.

(27) Moreover, the European Court of Human Rights and the Inter-American Court of Human Rights do not limit their consideration to the will of the State that is the author of the invalid reservation; both Courts take into account the specific nature of the instruments that they are mandated to enforce. In the *Loizidou* case, for example, the European Court drew attention to the fact that

[i]n addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in article 19 (art. 19), “to ensure the observance of the engagements undertaken by the High Contracting Parties”.²⁴⁹⁶

(28) The Inter-American Court, for its part, stressed in its judgment in the *Hilaire v. Trinidad and Tobago* case:

Moreover, accepting the said declaration in the manner proposed by the State would lead to a situation in which the Court would have the State’s Constitution as its first point of reference, and the American Convention [on Human Rights] only as a subsidiary parameter, a situation which would cause a fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention.

The American Convention and the other human rights treaties are inspired by a set of higher common values (centered around the protection of the human being), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties.²⁴⁹⁷

²⁴⁹³ See also footnote 2397 above. According to Gaja, “Una soluzione alternativa alla quale si può giungere nella ricostruzione della volontà dello Stato autore della riserva è che tale Stato abbia inteso vincolarsi in base al trattato anche nel caso in cui la riserva fosse considerata inammissibile e quindi senza il beneficio della riserva” [An alternative conclusion that one might reach in analysing the will of the reserving State is that the State in question must have intended to be bound by the treaty even if the reservation was considered inadmissible, i.e., without the benefit of the reservation], Gaja, “Il regime della Convenzione di Vienna ...” (footnote 2269 above), p. 358.

²⁴⁹⁴ On this case and its impact, see Baratta, *Gli effetti delle riserve ...* (footnote 698 above), pp. 160–163; Bourguignon, “The *Belilos* case ...” (footnote 1827 above), pp. 347–386; Cameron and Horn, “Reservations to the European Convention ...” (footnote 205 above), pp. 69–116; Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme ...” (footnote 724 above), pp. 273–315; and S. Marks, “Reservations unhinged: the *Belilos* case before the European Court of Human Rights”, *International Comparative Law Quarterly*, vol. 39 (1990), pp. 300–327.

²⁴⁹⁵ Schabas, “Invalid reservations ...” (footnote 1610 above), p. 322.

²⁴⁹⁶ *Loizidou v. Turkey* (footnote 304 above), para. 93.

²⁴⁹⁷ *Hilaire v. Trinidad and Tobago* (see footnote 2421 above), paras. 93–94.

(29) The position expressed by the Human Rights Committee in its general comment No. 24 is even more categorical.²⁴⁹⁸ In fact, the Committee makes no connection between the entry into force of the treaty, despite the nullity of the invalid reservation, and the will of the author in that regard. It simply states that the “normal consequence”²⁴⁹⁹ is the entry into force of the treaty for the author of the reservation without benefit of the reservation. However, as noted above,²⁵⁰⁰ this “normal” consequence, which the Committee apparently views as somewhat automatic, does not exclude (and, on the contrary, suggests) the possibility that the invalid reservation may produce other, “abnormal” consequences. However, the Committee is silent on both the question of what these other consequences might be, and the question of how and by what the “normal” consequence or a possible “abnormal” consequence might be triggered.

(30) In any event, the position taken by the human rights bodies has become noticeably nuanced in recent years. For example, at the fourth inter-committee meeting of the human rights treaty bodies and the seventeenth meeting of chairpersons of these bodies, it was noted:

In a meeting with ILC on 31 July 2003, HRC confirmed that the Committee continued to endorse general comment No. 24, and several members of the Committee stressed that there was growing support for the severability approach, but that there was no automatic conclusion of severability for inadmissible reservations but only a presumption.²⁵⁰¹

In 2006, the working group on reservations established to examine the practice of human rights treaty bodies, in that regard, noted that there were several potential consequences of a reservation that had been ruled invalid. It ultimately proposed the following recommendation No. 7:

*The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation**. This intention must be identified during a serious examination of the available information, with the rebuttable presumption that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.²⁵⁰²

According to the revised recommendation No. 7 of 2007 submitted by the working group on reservations established to examine the practice of human rights treaty bodies,²⁵⁰³ which the sixth inter-committee meeting of the human rights treaty bodies endorsed²⁵⁰⁴ the same year:

As to the consequences of invalidity, the Working Group agrees with the proposal of the Special Rapporteur of the International Law Commission according to which an invalid reservation is to be

²⁴⁹⁸ In her expanded working paper on the question of reservations to human rights treaties (see footnote 2395 above), Ms. Hampson states: “A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty. The result is the application of the treaty without the reservation, whether that is called ‘severance’ or disguised by the use of some other phrase, such as non-application” (para. 59).

²⁴⁹⁹ See footnotes 2413 and 2470 above.

²⁵⁰⁰ See paragraph (11) of the commentary to this guideline above.

²⁵⁰¹ Report on the practice of the treaty bodies with respect to reservations made to the core international human rights treaties (HRI/MC/2005/5), para. 37.

²⁵⁰² See HRI/MC/2006/5, para. 16.

²⁵⁰³ See HRI/MC/2007/5, para. 19.

²⁵⁰⁴ Report of the sixth inter-committee meeting of the human rights treaty bodies (A/62/224, annex, para. 48 (v)).

considered null and void. It follows that a State will not be able to rely on such a reservation and, *unless its contrary intention is incontrovertibly established**, will remain a party to the treaty without the benefit of the reservation.

(31) The deciding factor is still clearly the intention of the State that is the author of the invalid reservation. This is the principle set forth in paragraph 1 of guideline 4.5.3 (although the Commission has intentionally omitted the adverb “incontrovertibly”, which appeared to impose a criterion that was too strict): the intention of the contracting State or contracting organization is the criteria on which its status as a party to the treaty must be assessed. Paragraph 3 clarifies that this intention can be expressed at any time.

(32) Consequently, the application of the treaty to the reserving State or organization without benefit of the reservation is not the automatic consequence of the nullity of a reservation, but simply the result of a presumption, as indicated in paragraph 2 of guideline 4.5.3. This position offers a reasonable compromise between the underlying principle of treaty law—mutual consent—and the principle that reservations prohibited by the treaty or incompatible with the object and purpose of the treaty are null and void.

(33) The statement that the author of the reservation “*is considered** a contracting State or a contracting organization” was chosen in order to indicate clearly that the guideline states a mere presumption and does not have the irrefutable nature of a rule. The word “[u]nless” at the beginning of paragraph 2 has the same function.

(34) There may, however, be hesitation as to which way the presumption should be expressed; intellectually, the presumption could just as well be an intention that the treaty should enter into force as the reverse, that the author of the reservation did not intend for the treaty to enter into force.

(35) A negative presumption—refusing to consider the author of the reservation to be a contracting State or contracting organization until an intention to the contrary had been established—might, at first glance, appear to reflect better the principle of consent according to which, in the words of the International Court of Justice, “in its treaty relations a State cannot be bound without its consent”.²⁵⁰⁵ From this point of view, a State or international organization that has formulated a reservation—even though it is invalid—has, in fact, expressed its disagreement with the provision or provisions which the reservation purports to modify or the legal effect of which it purports to exclude. In its observations on general comment No. 24, the United Kingdom states that it is “hardly feasible to try to hold a State to obligations under the [International] Covenant [on Civil and Political Rights] which it self-evidently has not ‘expressly recognized’ but rather has indicated its express unwillingness to accept”.²⁵⁰⁶ From that point of view, no agreement to the contrary can be noted or presumed

unless the State or organization in question consents, or at least acquiesces, to be bound by the provision or provisions without benefit of its reservation.

(36) The reverse, positive presumption has, nevertheless, several advantages which—apart from any consideration of desirability—argue in its favour even though undoubtedly it is not a rule established in the Vienna Conventions²⁵⁰⁷ or a rule of customary international law.²⁵⁰⁸ However, the decisions of the human rights courts, the positions taken by the human rights treaty bodies and the increasing body of State practice in this area should not be ignored. In fact, on closer inspection, it seems to be more in keeping with the principle of consent than the reverse presumption, because, more than the negative presumption, it preserves the will of the other contracting States and organizations while fully respecting that of the author of the reservation, on the understanding that the latter can express at any time its intention not to be bound by the treaty without the benefit of the reservation, as expressly stated in paragraph 3 of guideline 4.5.3.

(37) First of all, it should be borne in mind that the author of the reservation, by definition, wished to become a contracting party to the treaty in question. The reservation is formulated when the State or international organization expresses its consent to be bound by the treaty, thereby conveying its intention to enter the privileged circle of parties and committing itself to implementation of the treaty. The reservation certainly plays a role in this process, but it is not necessarily decisive.

(38) Furthermore, it is certainly wiser to presume that the author of the reservation is part of the circle of contracting States or contracting organizations in order to resolve the problems associated with the nullity of its reservation in the context of that privileged circle. In this regard, it must not be forgotten that, as the Commission has noted in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties that

in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State’s either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty.²⁵⁰⁹

To that end, as was stressed at the fourth inter-committee meeting of the human rights treaty bodies and the seventeenth meeting of chairpersons of those bodies, “[h]uman rights treaty bodies”—or any other mechanism established by the treaty or the parties to the treaty as a whole—“should be encouraged to continue their current practice of entering [into] a dialogue with reserving States,

²⁵⁰⁷ As noted above in the introduction to section 4.5 of the Guide to Practice, the Vienna Conventions do not address the issue of invalid reservations; see paragraphs (1)–(18) of the general commentary to section 4.5 above.

²⁵⁰⁸ See, in particular, R. Baratta, “Should invalid reservations to human rights treaties be disregarded?”, *European Journal of International Law*, vol. 11 (2000), pp. 419–421.

²⁵⁰⁹ *Yearbook ... 1997*, vol. II (Part Two), p. 57 (point 10 of the preliminary conclusions). The term “inadmissibility” (“*illicéité*”) is to be understood as referring, in this context, to “impermissibility”; see paragraphs (4)–(7) of the general commentary to Part 3 of the Guide to Practice.

²⁵⁰⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 21.

²⁵⁰⁶ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 1156 above), annex VI, p. 133, para. 14.

with a view to effecting such changes in the incompatible reservation as to make it compatible with the treaty”.²⁵¹⁰ This goal would certainly more readily be achieved if the reserving State or reserving international organization is deemed to be a party to the treaty.

(39) Moreover, presuming the entry into force of the treaty contributes to legal certainty. This presumption (which is simple, it must be emphasized, and therefore rebuttable) can help resolve the uncertainty between the formulation of the reservation and the establishment of its nullity; during this entire period (which may last several years),²⁵¹¹ the author of the reservation has conducted itself as a party and been deemed to be so by the other parties.

(40) In light of these considerations, the Commission supports the idea of a rebuttable *presumption*, according to which the treaty would apply to a State or international organization that is the author of an invalid reservation, notwithstanding that reservation, in the absence of a contrary intention on the part of the author. In other words, if this basic condition is met (absence of a contrary intention on the part of the author of the reservation), the treaty is presumed to have entered into force for the author without the benefit of the reservation²⁵¹²—provided that the treaty has effectively entered into force in respect of the other contracting States and contracting organizations.

(41) The expression “or such an intention is otherwise established”, which appears in paragraph 2 of guideline 4.5.3, reflects the limits of this positive presumption adopted by the Commission subject to the intention of the reserving State or reserving international organization. If a contrary intention can be established, by any means whatsoever, the presumption falls away.

(42) Paragraph 3 goes even further in softening the strength of the presumption by providing that the author of an invalid reservation “may express at any time its intention not to be bound by the treaty without the benefit of the reservation”. Although the Vienna Conventions do not envisage that possibility—in general, they are silent on how to deal with invalid reservations—it can be reconciled with the text of the Vienna Conventions. To be sure, article 42 provides that “the withdrawal of a party[,] may take place only as a result of the application of the provisions of the treaty or of the present Convention”.²⁵¹³ However, in the case in point, the author of the invalid reservation does not “withdraw” from the treaty, but signals its intention not to be bound by the treaty insofar as its reservation is considered invalid, since, in its eyes, the reservation is a decisive element of its treaty commitment.

(43) In practice, determining the intention of the author of an invalid reservation may be difficult. It is not easy to establish what led a State or an international organization to express its consent to be bound by the treaty, on the one hand, and to attach a reservation to that expression of

consent, on the other, since “the State *alone* could know the exact role of its reservation to its consent”.²⁵¹⁴ Since the starting presumption is rebuttable, however, it is vital to establish whether the author of the reservation would knowingly have ratified the treaty without the reservation or whether, on the contrary, it would have refrained from doing so.

(44) The text of the reservation itself may well contain elements that provide information about its author’s intention in the event that the reservation is invalid. At least, that is the case when reasons for the reservation are given as recommended in guideline 2.1.2 of the Guide to Practice.²⁵¹⁵ The reasons given for formulating a reservation, in addition to clarifying its meaning, may also make it possible to determine whether the reservation is deemed to be an essential condition for the author’s consent to be bound by the treaty. Any declaration made by the author of the reservation upon signing, ratifying or acceding to a treaty or making a notification of its succession thereto may also provide an indication. There are many possible formulations of the “contrary intention” of the author of the reservation not to be bound by the treaty without the benefit of the reservation, the intention referred to in paragraph 2 of guideline 4.5.3.

(45) When such an intention is not clearly expressed, other elements can provide guidance. This explains why the Commission stipulated in paragraph 2 that “such an intention” may be “otherwise established”. In this connection, the reactions of other States and international organizations must also be taken into account. Although these reactions obviously cannot, in themselves, produce legal effects by neutralizing the nullity of the reservation, they can facilitate an assessment of the intention of the author of the reservation or, more accurately, the risk that it may voluntarily have run in formulating an invalid reservation. In particular, the author’s failure to respond to the negative reactions may, in certain circumstances, help to establish its intention to be bound by the treaty. This is particularly well illustrated in the *Loizidou* case decided by the European Court of Human Rights; the Court, citing case law established before Turkey formulated its reservation, as well as the objections formulated by several States parties to the Convention,²⁵¹⁶ concluded as follows:

The subsequent reaction of various Contracting Parties to the Turkish declarations (...) lends convincing support to the above observation concerning Turkey’s awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46)—the latter subsequent to the statements by the Contracting Parties referred to above—indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.²⁵¹⁷

(46) In line with the approach taken by the European Court of Human Rights in its judgment in the *Belilos*

²⁵¹⁰ See HRI/MC/2005/5, para. 42.

²⁵¹¹ In the absence of a pronouncement by a competent organ, that uncertainty may last indefinitely.

²⁵¹² See paragraphs (14)–(17) of the commentary to guideline 4.5.1.

²⁵¹³ See also articles 54 and 56.

²⁵¹⁴ See *Yearbook ... 1997*, vol. II (Part Two), p. 49, para. 83.

²⁵¹⁵ Guideline 2.1.2 (Statement of reasons for reservations): “A reservation should, to the extent possible, indicate the reasons why it is being formulated.”

²⁵¹⁶ *Loizidou v. Turkey* (footnote 304 above), paras. 18–24.

²⁵¹⁷ *Ibid.*, para. 95.

case,²⁵¹⁸ one could also take into consideration the author's subsequent conduct with respect to the treaty. The representatives of Switzerland, by their actions and their statements before the Court, left no doubt that Switzerland would regard itself as bound by the European Convention on Human Rights even in the event that its "interpretative declaration" was deemed invalid.²⁵¹⁹ Moreover, as has been pointed out in relation to the reservations made by the United States of America to the International Covenant on Civil and Political Rights of 1966:

Certain aspects of the U.S. practice lend weight to the argument that its general intent is to be bound by the Covenant, whatever the outcome of litigation concerning the legality of the reservation. It is useful to recall that Washington fully participated in the drafting of the American Convention whose provisions are very similar to articles 6 and 7 of the Covenant and were in fact inspired by them ... Although briefly questioning the juvenile death penalty and the exclusion of political crimes, [the U.S. representative] did not object in substance to the provisions dealing with the death penalty or torture. The United States signed the American Convention on June 1, 1977 without reservation.²⁵²⁰

Although caution is certainly warranted when making comparisons between different treaties owing to the relative effect of any reservation,²⁵²¹ it is certainly not out of the question to refer to the prior attitude of the reserving State with regard to provisions similar to those to which the reservation relates. If a State consistently and systematically excludes the legal effect of a particular obligation contained in several instruments, such practice could certainly constitute significant proof that the author of the reservation does not wish to be bound by that obligation under any circumstances.

(47) In addition to the actual text of the reservation and the reasons given for its formulation, as well as these circumstantial and contextual elements, the content and context of the provision or provisions of the treaty to which the reservation relates, on the one hand, and the object and purpose of the treaty, on the other, should also be taken into account. As mentioned above, the European Court of Human Rights and the Inter-American Court of Human Rights have paid considerable attention to the "special character" of the treaty in question; there is no reason to limit these considerations to human rights treaties, which do not constitute a special category of treaty for the purposes of applying rules relating to reservations and are not the only treaties to establish "higher common values".

(48) The combination of these factors—and of others, where appropriate—should serve as a guide to the authorities required to issue a ruling on the consequences of the nullity of an invalid reservation, given that this list is by no means exhaustive and that all elements that are likely to identify the intention of the author of the

reservation must be taken into consideration. Their relative importance depends on the specific circumstances of each situation.

(49) That said, the Commission is of the view that the provisions of guideline 4.5.3, which form part of the cautious progressive development of international law, should not be taken as approval of what are now generally called objections with "super-maximum" effect. Whereas an objection with "super-maximum" effect apparently purports to require that the author of the reservation should be bound by the treaty without the benefit of its reservation simply because the reservation is invalid, the presumption embodied in guideline 4.5.3 acts merely as a safety net if it is impossible to determine the intention of the author of the reservation and it refrains from making its true intention known to the other contracting States and contracting organizations.

(50) Thus, the requirement that the treaty must be implemented in its entirety would derive not from a subjective assessment by another contracting party, but solely from the nullity of the reservation and the intention of its author. An objection, whether simple or with "super-maximum" effect, cannot produce such an effect. "No State can be bound by contractual obligations it does not consider suitable."²⁵²²

(51) Paragraph 4 of guideline 4.5.3 must be read in the light of guideline 3.2.1, according to which a treaty monitoring body may assess the permissibility of reservations formulated by a State or an international organization, it being understood that such an assessment "has no greater legal effect than that of the act which contains it". While the findings of the treaty body in question are not binding—as is usually the case—the State or international organization must give consideration to this assessment,²⁵²³ but is not obliged to act on it, nor, consequently, to express its intention as indicated in paragraph 4. However, if the matter were referred to a dispute settlement body with decision-making powers,²⁵²⁴ the Commission is of the view that the author of a reservation deemed to be invalid should make the declaration provided for in paragraph 4 as soon as possible and, in any event, within a period of no later than 12 months from the date at which the assessment was made.

(52) Guideline 4.5.3 deliberately refrains from specifying the date on which the treaty enters into force in such a situation. In most cases, this is subject to specific conditions established in the treaty itself.²⁵²⁵ The concrete effects, including the date on which the treaty enters into

²⁵¹⁸ See paragraphs (24)–(26) above.

²⁵¹⁹ Any declaration made subsequently, particularly declarations that the author of the reservation may be required to make in the context of judicial proceedings concerning the validity, and the effects of the invalidity, of its reservation, should, however, be treated with caution; see in this regard *Loizidou v. Turkey* (footnote 304 above), para. 95.

²⁵²⁰ Schabas, "Invalid reservations ..." (footnote 1610 above), p. 322 (footnotes omitted).

²⁵²¹ See guideline 4.4.1 (Absence of effect on rights and obligations under other treaties) and commentary thereto.

²⁵²² Tomuschat, "Admissibility and legal effects of reservations ..." (footnote 1080 above), p. 466; see also the second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 57, paras. 97 and 99; see also Müller, "1969 Vienna Convention. Article 20: Acceptance of and objection to reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties ...* (footnote 30 above), pp. 496–498, paras. 18–22.

²⁵²³ See guideline 3.2.3 (Consideration of the assessments of treaty monitoring bodies).

²⁵²⁴ See guideline 3.2.5 (Competence of dispute settlement bodies to assess the permissibility of reservations) and commentary thereto.

²⁵²⁵ Article 24, paragraph 1, of the 1969 Vienna Convention states: "A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree."

force for the author of the invalid reservation, are therefore determined by the relevant provisions of the treaty or, failing any such provision, by treaty law in general²⁵²⁶ and are not derived specifically from the rules concerning reservations.

(53) Similarly, the Commission is aware that paragraphs 3 and 4 of guideline 4.5.3 leave open the question of precisely when the expression by the author of the reservation of its intention to be bound—or not—by the treaty without the benefit of its reservation produces its effects.

(54) If the author declares that it accepts the application of the treaty without the benefit of the reservation, no real problem arises, and the treaty may be deemed to continue to apply *for the future*, on the understanding that the State or international organization that made the reservation cannot rely on it, *either for the past or for the future*. It is more difficult to respond to the question raised in the previous paragraph if the author of the declaration intends not to be bound by the treaty; in this scenario, it would no doubt be logical for the author to be considered never to have been bound by the treaty, because the nullity (from the outset) of the reservation led the author to choose not to regard itself as bound. However, such a solution might give rise to great practical difficulties in terms of reverting to the situation that existed at the time the State or international organization had expressed its consent to be bound (subject to the reservation).

(55) Since guideline 4.5.3 largely corresponds to the progressive development of international law, it would seem expedient to let practice evolve, although different circumstances might call for different solutions.

4.6 Absence of effect of a reservation on the relations between the other parties to the treaty

A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

Commentary

(1) Guideline 4.6 reproduces verbatim the text of article 21, paragraph 2, of the 1969 and 1986 Vienna Conventions (the wording of which is identical in the two Conventions).

(2) Pursuant to this provision, treaty relations between the parties to the treaty other than the author of the reservation are not affected by the reservation. This rule of the relativity of legal relations is designed to preserve the normative system applicable as between the other parties to the treaty. This is not necessarily the only regime, since the other parties may also make their consent subject to reservations which would then modify their mutual relations as envisaged in paragraph 1 or paragraph 3 of

²⁵²⁶ See article 24, paragraphs 2 and 3, of the 1969 Vienna Convention. These paragraphs state:

“2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

“3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.”

article 21.²⁵²⁷ Like paragraph 2 of that article, the purpose of guideline 4.6 is not to prevent the multiplication of normative systems that could be established within the same treaty, but only to limit the effects of the reservation to the bilateral relations between its author, on the one hand, and each of the other parties, on the other.²⁵²⁸

(3) The scope of the guideline is not limited to “established” reservations, that is, reservations that satisfy the requirements of articles 19, 20 and 23 of the Vienna Conventions,²⁵²⁹ and the omission is not a drafting inconsistency. Indeed, the principle of the relativity of reservations applies irrespective of the reservation’s permissibility or formal validity.²⁵³⁰

(4) Furthermore, the acceptance of a reservation or the objections to which it gives rise also have no bearing on the effects of the reservation beyond the bilateral relations between the author of the reservation and each of the other parties. Whether tacit or express, acceptance merely identifies the parties for whom the reservation is considered to be established—those which have accepted the reservation²⁵³¹—in order to distinguish them from parties for whom the reservation does not produce all the effects intended by its author—those which have made an objection to the reservation. However, in relations between all parties other than the author of the reservation, the reservation cannot modify or exclude the legal effects of one or more provisions of the treaty, or of the treaty as a whole, regardless of whether these States or organizations have accepted the reservation or objected to it.

(5) Although article 21, paragraph 2 (and hence guideline 4.6, which uses the same wording), does not mention any limitation or exception, it might be wondered whether the rule of the “relativity of legal relations” is as absolute as this provision indicates.²⁵³² In any case, Sir Humphrey Waldock made this point more cautiously in the annex to his first report, entitled “Historical summary of the question of reservations to multilateral conventions”: “*in principle**, a reservation only operates in the relations of States with the reserving State”.²⁵³³ This then raises the question of whether there are treaties to which the principle of relativity does not apply.

(6) The specific treaties referred to in article 20, paragraphs 2 and 3, are certainly not an exception to the relativity rule. It is true that the relativity of legal relations is, to some extent, limited in the case of these treaties, since by definition the reservation produces its effects

²⁵²⁷ See Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 142.

²⁵²⁸ It is not appropriate here to speak of a “contracting State” or “contracting organization”, as guideline 4.6 has no practical effect until the treaty has entered into force.

²⁵²⁹ See guideline 4.1 (Establishment of a reservation with regard to another State or international organization) and commentary thereto above.

²⁵³⁰ See paragraphs (14)–(28) of the commentary to guideline 4.5.1 above.

²⁵³¹ See guideline 4.1 and commentary thereto above.

²⁵³² Szafarz maintains that “[i]t is obvious, of course, that ‘the reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*’”, “Reservations to multilateral treaties” (footnote 27 above), p. 311.

²⁵³³ First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 76, para. 5, footnote (e).

in the relations between the author and *all* other parties; however, it has no effect with regard to the other States parties' relations *inter se*, which remain unchanged.

(7) Although, in the case of treaties that must be applied in their entirety, the parties must all give their consent in order for the reservation to produce its effects, this unanimous consent does not, in itself, constitute a modification of the treaty itself as between the parties thereto. Here, too, a distinction should therefore be made between two normative systems within the same treaty: the system governing relations between the author of the reservation and each of the other parties, which have, by definition, all accepted the reservation, on the one hand, and the system governing relations between these other parties, on the other. The relations between the other parties remain unchanged.

(8) The same reasoning applies in the case of constituent instruments of international organizations. Although in this case the consent is not necessarily unanimous, it does not in any way modify the treaty relations between parties other than the author of the reservation. The majority system simply imposes on the minority members the position of the majority in respect of the author of the reservation, precisely to avoid the establishment of multiple normative systems within the constituent instrument. But in this case, it is the acceptance of the reservation by the organ of the organization which generalizes the application of the reservation, and probably exclusively in the other parties' relations with the reserving State or organization.

(9) Even in the event of unanimous acceptance of a reservation which is *a priori* invalid,²⁵³⁴ it is not the reservation which has been "validated" by the consent of the parties that modifies the "general" normative system applicable as between the other parties. Granted, this normative system is modified if—assuming that such a possibility is admitted²⁵³⁵—the prohibition of the reservation is lifted or the object and purpose of the treaty are modified (or deemed to be modified) in order to make the reservation valid. Nonetheless, such a modification of the treaty, which has implications for all the parties, arises not from the reservation, but from the unanimous consent of the States and organizations that are parties to the treaty. It is this consent which provides the basis of an agreement to modify the treaty for the purpose of authorizing the reservation within the meaning of article 39 of the Vienna Conventions.²⁵³⁶

(10) It should be noted, however, that the parties are still free to modify their treaty relations if they deem it necessary.²⁵³⁷ This possibility may be deduced *a contrario* from the Commission's commentary to draft article 19 of the 1966 draft articles on the law of treaties (which became article 21 of the 1969 Vienna Convention). In the commentary, the Commission stated that a reservation "does not modify the provisions of the treaty for the other

parties, *inter se*, since they have not accepted it as a term of the treaty in their mutual relations".²⁵³⁸

(11) Moreover, nothing prevents the parties from accepting the reservation as a true clause of the treaty ("negotiated reservations"²⁵³⁹) or from changing any other provision of the treaty, if they deem it necessary. However, such a modification can neither result automatically from acceptance of a reservation nor be presumed. The parties must follow the procedures set out for this purpose in the treaty or, in the absence thereof, the procedure established by articles 39 *et seq.* of the Vienna Conventions. In fact, it may become necessary, if not indispensable, to modify the treaty in its entirety.²⁵⁴⁰ This depends, however, on the circumstances in each case and remains at the discretion of the parties. Consequently, it does not seem indispensable to provide for an exception to the principle established in article 21, paragraph 2, of the Vienna Conventions. In addition, like all the guidelines in the Guide to Practice, guideline 4.6 should be construed to mean "without prejudice to any agreement reached between the parties as to its application".

4.7 Effect of interpretative declarations

Commentary

(1) Despite a long-standing and highly developed practice, neither the Vienna Convention of 1969 nor that of 1986 contains rules concerning interpretative declarations, much less the possible effects of such a declaration.²⁵⁴¹

(2) The *travaux préparatoires* to the Conventions explain this absence. While the problem of interpretative declarations was completely overlooked by the first special rapporteurs,²⁵⁴² Sir Humphrey Waldock²⁵⁴³ was aware

²⁵³⁸ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 209, paragraph (1).

²⁵³⁹ See paragraph (10) of the commentary to guideline 1.1.6 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty).

²⁵⁴⁰ Such a situation may occur, *inter alia*, in commodity treaties, in which even the principle of reciprocity cannot restore the balance between the parties (see Schermers, "The suitability of reservations ..." (footnote 2151 above), p. 356). Article 65, paragraph 2 (c), of the International Sugar Agreement of 1968 seemed to provide for the possibility of adapting provisions the application of which had been compromised by the reservation: "In any other instance where reservations are made [that is, in cases where the reservation concerns the economic operation of the Agreement], the [International Sugar] Council shall examine them and decide, by special vote, whether, and if so under what conditions*, they are to be accepted. Such reservations will only become effective after the Council has taken its decision on the matter." See also Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 250, and Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 142–143.

²⁵⁴¹ See paragraph (1) of the commentary to guideline 1.2.

²⁵⁴² Sir Gerald Fitzmaurice limited himself to specifying that the term "reservation" "does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty" (first report on the law of treaties, *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 110).

²⁵⁴³ In his definition of the term "reservation", Sir Humphrey Waldock explained that "An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation" (first report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 31–32).

²⁵³⁴ See paragraphs (9)–(13) of the commentary to guideline 3.3.3.

²⁵³⁵ The Commission deliberately refrained from adopting a categorical position on this point (see paragraph (13) of the commentary to guideline 3.3.3).

²⁵³⁶ See paragraphs (10) and (13) of the commentary to guideline 3.3.3.

²⁵³⁷ Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), pp. 142–143.

both of the practical difficulties such declarations created, and of the solution, a very simple solution, required. Indeed, several Governments referred in their comments to the draft articles adopted on first reading, not just to the absence of interpretative declarations and to the distinction that should be drawn between such declarations and reservations,²⁵⁴⁴ but also to the elements to be taken into account when interpreting a treaty.²⁵⁴⁵ In 1965, the Special Rapporteur made an effort to reassure those States by affirming that the question of interpretative declarations had not escaped the notice of the Commission. Sir Humphrey Waldock continued:

Interpretative declarations, however, remained a problem, and possibly also statements of policy made in connection with a treaty. The question was what the effect of such declarations and statement should be. Some rules which touched the subject were contained in article 69, particularly its paragraph 3 on the subject of agreement between the parties regarding the interpretation of the treaty and of the subsequent practice in its application. Article 70, which dealt with further means of interpretation, was also relevant.²⁵⁴⁶

(3) Contrary to the positions expressed by some members of the Commission,²⁵⁴⁷ the effect of an interpretative declaration “was governed by the rules on interpretation”.²⁵⁴⁸ Although “[i]nterpretative statements are certainly important, (...) it may be doubted whether they should be made the subject of specific provisions; for the legal significance of an interpretative statement must always depend on the particular circumstances in which it is made”.²⁵⁴⁹

(4) At the United Nations Conference on the Law of Treaties of 1968–1969, the question of interpretative declarations was debated once again, in particular in connection with a Hungarian amendment to the definition of the term “reservation”²⁵⁵⁰ and to article 19

²⁵⁴⁴ See, in particular, the comments of the Government of Japan summarized in Sir Humphrey Waldock’s fourth report on the law of treaties (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 49), and the comment of the Government of the United Kingdom that “article 18 deals only with reservations and assumes that the related question of statements of interpretation will be taken up in a later report” (*ibid.*).

²⁵⁴⁵ See the comments of the United States of America on draft articles 69 and 70 concerning interpretation, summarized in Sir Humphrey Waldock’s sixth report on the law of treaties, *Yearbook ... 1966*, vol. II, document A/CN.4/186 and Add.1–7, p. 93.

²⁵⁴⁶ *Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 165, para. 13. See also the fourth report on the law of treaties by Sir Humphrey Waldock, *ibid.*, vol. II, document A/CN.4/177 and Add.1–2, p. 49, para. 2.

²⁵⁴⁷ See the comments of Mr. Verdross (*ibid.*, vol. I, 797th meeting, 8 June 1965, p. 151, para. 37, and 799th meeting, 10 June 1965, p. 166, para. 23) and Mr. Ago (*ibid.*, 798th meeting, 9 June 1965, p. 162, para. 76). See also Mr. Castrén (*ibid.*, 799th meeting, 10 June 1965, p. 166, para. 30) and Mr. Bartoš (*ibid.*, p. 166, para. 29).

²⁵⁴⁸ *ibid.*, 799th meeting, 10 June 1965, p. 165, para. 14. See also the fourth report on the law of treaties by Sir Humphrey Waldock, *ibid.*, vol. II, document A/CN.4/177 and Add.1–2, p. 49, para. 2 (“Statements of interpretation were not dealt with by the Commission in the present [section] for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties”³⁷).

²⁵⁴⁹ *Ibid.*

²⁵⁵⁰ A/CONF.39/C.1/L.23, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (see footnote 54 above), p. 112, para. 35 (vi) (e). The Hungarian delegation proposed the following text: “‘Reservation’ means a unilateral statement, however phrased or named, made by a

(which became article 21) concerning the effects of a reservation.²⁵⁵¹ The effect of this amendment would have been to assimilate interpretative declarations to reservations, without making any distinction between the two categories, in particular with regard to their respective effects. Several delegations were nevertheless clearly opposed to such an assimilation.²⁵⁵² Sir Humphrey Waldock, in his capacity as Expert Consultant, had

issued a warning against the dangers of the addition of interpretative declarations to the concept of reservations. In practice, a State making an interpretative declaration usually did so because it did not want to become enmeshed in the network of the law on reservations.²⁵⁵³

Consequently, he appealed

to the Drafting Committee to bear the delicacy of the question in mind and not to regard the assimilation of interpretative declarations to reservations as an easy matter.²⁵⁵⁴

In the end, the Drafting Committee did not retain the Hungarian amendment. Although Mr. Sepúlveda Amor, on behalf of Mexico, had drawn attention to “the absence of a definition of the instrument envisaged in paragraph 2 (b) of article 27 [which became article 31]”, while “interpretative declarations of that type were common in practice”²⁵⁵⁵ and suggested that “[i]t was essential to set forth clearly the legal effects of such declarations, as distinct from those of actual reservations”,²⁵⁵⁶ no provisions of the Vienna Convention were devoted specifically to interpretative declarations. Sir Humphrey Waldock’s conclusions regarding the effects of such declarations²⁵⁵⁷ were thus confirmed by the work of the Conference.

(5) Neither the *travaux* of the Commission nor those of the 1986 United Nations Conference on the Law of Treaties between States and International Organizations have further elucidated the question of the concrete effects of an interpretative declaration.

(6) Here, too, the Commission has found itself obliged to fill a gap in the Vienna Conventions and has done so in section 4.7 of the Guide to Practice while endeavouring to remain faithful to the logic of the Conventions and, in particular, of their articles 31 and 32 on the interpretation of treaties.

State, when signing, ratifying, acceding to, accepting or approving a *multilateral* treaty, whereby it purports to exclude, to vary or to *interpret* the legal effect of certain provisions of the treaty in their application to that State.”

²⁵⁵¹ A/CONF.39/C.1/L.177, *ibid.*, p. 140, para. 199 (ii) (d) and (iii). See also the explanations provided at the Conference, *Official Records of the United Nations Conference on the Law of Treaties, First Session ...* (A/CONF.39/11) (see footnote 35 above), 25th meeting, 16 April 1968, p. 137, paras. 52–53.

²⁵⁵² See, in particular, the position of Australia (*ibid.*, 5th meeting, 29 March 1968, p. 29, para. 81), Sweden (*ibid.*, p. 30, para. 102), the United States of America (*ibid.*, 6th meeting, p. 31, para. 116) and the United Kingdom (*ibid.*, 25th meeting, 16 April 1968, p. 137, para. 60).

²⁵⁵³ *Ibid.*, p. 137, para. 56.

²⁵⁵⁴ *Ibid.*

²⁵⁵⁵ *Ibid.*, 21st meeting, 10 April 1968, p. 113, para. 62.

²⁵⁵⁶ *Ibid.*

²⁵⁵⁷ See paragraph (2) of this introductory commentary above.

4.7.1 Clarification of the terms of the treaty by an interpretative declaration

1. An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

2. 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.

Commentary

(1) The absence of a specific provision in the Vienna Conventions concerning the legal effects that an interpretative declaration²⁵⁵⁸ is likely to produce does not mean, however, that they contain no indications on the matter, as the comments made during their elaboration will show.²⁵⁵⁹

(2) As their name clearly indicates, their object and function consist in proposing an interpretation of the treaty.²⁵⁶⁰ Consequently, in accordance with the definition retained by the Commission:

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.²⁵⁶¹

(3) To specify or clarify the provisions of a treaty is precisely to interpret the treaty, which is why the Commission used those terms to define interpretative declarations.²⁵⁶² Although, as the commentary to guideline 1.2 (Definition of interpretative declarations) makes clear, the definition “in no way prejudices the validity or the effect of such declarations”,²⁵⁶³ it seems almost self-evident that the effect of an interpretative declaration is essentially produced through the highly complex process of interpretation.

(4) Before considering the role that such a declaration may play in the interpretation process, it is useful to specify the effect that it may definitely not produce. It is clear from the comparison between the definition of interpretative declarations and that of reservations that, whereas the latter are intended to modify the legal effect of the treaty or exclude certain of its provisions in their application to the author of the reservation, the former have no aim other than to specify or clarify the meaning. The author of an interpretative declaration does not seek to relieve itself of its international obligations under the treaty; it

intends to give a particular meaning to those obligations. As Mr. Yasseen clearly explained:

A State which formulated a reservation recognised that the treaty had, generally speaking, a certain force; but it wished to vary, restrict or extend one or several provisions of the treaty in so far as the reserving State itself was concerned.

A State making an interpretative declaration declared that, in its opinion, the treaty or one of its articles should be interpreted in a certain manner; it attached an objective and general value to that interpretation. In other words, it considered itself bound by the treaty and wished, as a matter of conscience, to express its opinion concerning the interpretation of the treaty.²⁵⁶⁴

(5) If the effect of an interpretative declaration consisted in modifying the treaty, it would actually constitute a reservation, not an interpretative declaration. The Commission’s commentary to article 2, paragraph 1 (d), of its 1966 draft articles describes this dialectic unequivocally:

States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State’s position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.²⁵⁶⁵

(6) The International Court of Justice has also maintained that the interpretation of a treaty may not lead to its modification. As it held in its advisory opinion concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*: “[i]t is the duty of the Court to interpret the Treaties, not to revise them.”²⁵⁶⁶

(7) It may be deduced from the foregoing that an interpretative declaration may in no way modify “the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects”.²⁵⁶⁷ Whether or not the interpretation is correct, its author remains bound by the provisions of the treaty. This is certainly the meaning to be given to the *dictum* of the European Commission of Human Rights in the *Belilos* case, in which the Commission held that an interpretative declaration

may be taken into account when an article of the Convention is being interpreted; but if the Commission or the Court reached a different interpretation, the State concerned would be bound by that interpretation.²⁵⁶⁸

²⁵⁶⁴ *Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 166, paras. 25–26.

²⁵⁶⁵ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 189–190, paragraph (11) of the commentary. See also Sir Humphrey Waldock’s explanations: “the crucial point was that, if the interpretative declaration constituted a reservation, its effect would be determined by reference to the provisions of articles 18 to 22. In that event, consent would operate, but in the form of rejection or acceptance of the reservation by other interested States. If, however, the declaration did not purport to vary the legal effect of some of the treaty’s provisions in its application to the State making it, then it was interpretative and was governed by the rules on interpretation” (*Yearbook ... 1965*, vol. I, 799th meeting, p. 165, para. 14).

²⁵⁶⁶ *Advisory Opinion of 18 July 1950, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (see footnote 157 above), p. 229. See also the *Judgment of 27 August 1952, Rights of Nationals of the United States of America in Morocco (ibid.)*, p. 196, and the *Judgment of 18 July 1966 in South West Africa* (footnote 2439 above), p. 48, para. 91.

²⁵⁶⁷ Paragraph 2 of guideline 1.1 (Definition of reservations).

²⁵⁶⁸ Council of Europe, Report of the European Commission of Human Rights, 7 May 1986, para. 102.

²⁵⁵⁸ See the introductory commentary to section 4.7 of the Guide to Practice.

²⁵⁵⁹ See paragraph (2) of the introductory commentary to section 4.7.

²⁵⁶⁰ See paragraph (16) of the commentary to guideline 1.2.

²⁵⁶¹ Guideline 1.2 (Definition of interpretative declarations).

²⁵⁶² See paragraph (18) of the commentary to guideline 1.2.

²⁵⁶³ Paragraph (33) of the commentary to guideline 1.2.

(8) In other words, a State (or an international organization) may not escape the risk of violating its international obligations by basing itself on an interpretation that it put forward unilaterally. In the case where the State's interpretation does not correspond to the "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",²⁵⁶⁹ the conduct adopted by the author of the declaration in the implementation of the treaty runs a serious risk of violating its treaty obligations.²⁵⁷⁰

(9) If a State or international organization has made its interpretation a condition for its consent to be bound by the treaty, by formulating a conditional interpretative declaration within the meaning of guideline 1.4 (Conditional interpretative declarations), the situation is slightly different. Of course, if the interpretation proposed by the author of the declaration and the interpretation of the treaty given by a competent third party²⁵⁷¹ are in agreement, there is no problem: the interpretative declaration remains merely interpretative and may play the same role in the process of interpreting the treaty as that of any other interpretative declaration. If, however, the interpretation of the author of the interpretative declaration does not correspond to the interpretation of the treaty objectively established (following the rules of the Vienna Conventions) by a third party, a problem arises: the author of the declaration does not intend to be bound by the treaty as it has thus been interpreted, but only by the treaty text as interpreted and applied in the manner which it has proposed. It has therefore made its consent to be bound by the treaty dependent upon a particular "interpretation" which—*ex hypothesi*—does not fall within the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this case—but in this case only—the conditional interpretative declaration produces the effects of a reservation, if the corresponding conditions have been met. This eventuality, which is not merely hypothetical, explains why such an interpretative declaration, although not intended under its terms to modify the treaty, must nonetheless be subject to the same legal regime that applies to reservations.²⁵⁷² As has been emphasized:

Since the declaring State is maintaining its interpretation regardless of the true interpretation of the treaty, it is purporting to exclude or to

²⁵⁶⁹ Article 31, paragraph 1, of the 1969 and 1986 Vienna Conventions.

²⁵⁷⁰ See also McRae, "The legal effect of interpretative declarations" (footnote 129 above), p. 161; Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), p. 126; or Horn, *Reservations and Interpretative Declarations ...* (footnote 25 above), p. 326.

²⁵⁷¹ It is hardly likely that the "authentic" interpretation of the treaty (that is, the one agreed by all the parties) will differ significantly from that put forward by the author of the interpretative declaration: by definition, an authentic interpretation arises from the parties themselves (see J. Salmon (ed.), *Dictionnaire de droit international public* (footnote 1013 above), p. 604: "*Interprétation émise par l'auteur ou par l'ensemble des auteurs de la disposition interprétée – notamment, pour un traité, par toutes les parties – , selon des formes telles que son autorité ne puisse être contestée*" [An interpretation issued by the author or by all the authors of the provision being interpreted—in the case of a treaty, by all the parties—in due form so that its authority may not be questioned]).

²⁵⁷² See paragraphs (13)–(14) of the commentary to guideline 1.4.

modify the terms of the treaty. Thus, the consequences attaching to the making of reservations should apply to such a declaration.²⁵⁷³

(10) In the case of a simple interpretative declaration, however, the fact of proposing an interpretation which is not in accordance with the provisions of the treaty in no way changes the position of its author with regard to the treaty, who remains bound by it and must respect it. This position is also that of McRae:

[T]he State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. Provided, therefore, that the State making the reservation still contemplates an ultimate official interpretation that could be at variance with its own view, there is no reason for treating the interpretative declaration in the same way as an attempt to modify or to vary the treaty.²⁵⁷⁴

(11) Although an interpretative declaration does not affect the normative force and binding character of the obligations contained in the treaty, it may still produce legal effects or play a role in interpreting those obligations. As the Commission noted during its consideration of the permissibility of interpretative declarations,²⁵⁷⁵ "[e]n vertu de sa souveraineté, chaque État a le droit d'indiquer le sens qu'il donne aux traités auxquels il est partie, en ce qui le concerne" [on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party, in regard to itself].²⁵⁷⁶ This reflects a necessity: those to whom a legal rule is addressed must necessarily interpret it in order to apply it and meet their obligations.²⁵⁷⁷

(12) Interpretative declarations are above all an expression of the parties' concept of their international obligations under the treaty. They are a means of determining the intention of the contracting States or contracting organizations with regard to their treaty obligations. It is in this connection, as an element relating to the interpretation of the treaty, that case law²⁵⁷⁸ and the literature have affirmed the need to take into account interpretative declarations in the treaty process. McRae puts it this way:

In fact, it is here that the legal significance of an interpretative declaration lies, for it provides evidence of intention in the light of which the treaty is to be interpreted.²⁵⁷⁹

²⁵⁷³ McRae, "The legal effect of interpretative declarations" (footnote 129 above), p. 161. See also Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), pp. 147–148. Heymann is of the view that a conditional interpretative declaration must be treated as a reservation only in the case where the treaty creates a body competent to provide an authentic interpretation. In other cases, she considers that the conditional interpretative declaration may never modify the treaty provisions (*ibid.*, pp. 148–150).

²⁵⁷⁴ McRae, "The legal effect of interpretative declarations" (footnote 129 above), p. 160.

²⁵⁷⁵ See paragraph (13) of the commentary to guideline 3.5.

²⁵⁷⁶ Daillier, Forteau and Pellet, *Droit international public ...* (footnote 254 above), p. 277.

²⁵⁷⁷ See G. Abi-Saab, "'Interprétation' et 'auto-interprétation': quelques réflexions sur leur rôle dans la formation et la résolution du différend international", in *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt*, Berlin, Springer, 1995, p. 14.

²⁵⁷⁸ See footnote 2568 above.

²⁵⁷⁹ McRae, "The legal effect of interpretative declarations" (footnote 129 above), p. 169.

(13) According to another view, on the one hand, an interpretation which is not accepted or is accepted only by certain parties cannot constitute an element of interpretation under article 31 of the Vienna Convention; and on the other hand:

*Das schließt aber nicht aus, dass sie unter Umständen als Indiz für einen gemeinsamen Parteiwillen herangezogen werden könnte.*²⁵⁸⁰

[That does not exclude the possibility, however, that it may be used, under certain conditions, as an indication of the common intention of the parties.]

(14) The French Constitutional Council shares this view and has clearly limited the object and role of an interpretative declaration by the Government of France solely to the interpretation of the treaty: “When the French Government signed the Charter, it also made an interpretative statement specifying the meaning and scope it intends to give to the Charter or to certain of its provisions in the light of the Constitution; a unilateral statement of this kind is no more than an instrument relating to the treaty which, in the event of a dispute, may be used to interpret it.”²⁵⁸¹

(15) Paragraph 1 of guideline 4.7.1 takes up these two ideas in order to clarify, on the one hand, that an interpretative declaration has no impact on the rights and obligations under the treaty and, on the other, that it produces its effects only in the process of interpretation.

(16) Because of the very nature of the operation of interpretation—which is a process, an art rather than an exact science²⁵⁸²—it is not possible in a general and abstract manner to assess the value of an interpretation other than by referring to the “general rule of interpretation” which is set out in article 31 of the Vienna Conventions on the law of treaties and which cannot be called into question or “revisited” in the context of the present exercise.²⁵⁸³ Therefore, in the Guide to Practice, the problem must necessarily be limited to the question of the authority of an interpretation proposed in an interpretative declaration and the question of its probative value for any third-party interpreter, that is, its place and role in the process of interpretation.

(17) With regard to the first question—the authority of the interpretation proposed by the author of an interpretative declaration—it should be recalled that, according to the definition of interpretative declarations, they are unilateral statements.²⁵⁸⁴ The interpretation that such a statement proposes, therefore, is itself only a unilateral interpretation which, as such, has no particular value

and certainly cannot bind the other parties to the treaty. This common-sense principle was affirmed as far back as Vattel:

Neither of the parties who have an interest in the contract or treaty may interpret it after his own mind.²⁵⁸⁵

(18) During the discussion on draft article 70 (which became article 31 of the 1969 Vienna Convention) containing the general rule of interpretation, Mr. Rosenne expressed the view

that a situation might arise where, for instance, there might be a unilateral understanding on the meaning of a treaty by the United States Senate that was not always accepted by the other side. A purely unilateral interpretative statement of that kind made in connexion with the conclusion of a treaty could not bind the parties.²⁵⁸⁶

(19) The Appellate Body of the WTO has expressed the same idea as follows:

The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined “expectations” of *one* of the parties to a treaty.²⁵⁸⁷

(20) Since the declaration expresses only the unilateral intention of the author—or, if it has been approved by some of the parties to the treaty, at best a shared intention²⁵⁸⁸—it certainly cannot be given an objective value that is opposable *erga omnes*, much less the value of an authentic interpretation accepted by all the parties.²⁵⁸⁹ Although it does not determine the meaning to be given to the terms of the treaty, it nonetheless affects the process of interpretation to some extent.

(21) However, it is difficult to determine precisely on what basis an interpretative declaration would be considered an “element” in interpretation under articles 31 and 32 of the Vienna Conventions. In his day, Sir Humphrey

²⁵⁸⁵ E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Washington, D.C., Carnegie Institution of Washington, 1916, Book II, chap. XVII, p. 200, para. 265.

²⁵⁸⁶ *Yearbook ... 1964*, vol. I, 769th meeting, 17 July 1964, p. 313, para. 52.

²⁵⁸⁷ Report of the Appellate Body, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, para. 84 (available from the WTO website: http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm).

²⁵⁸⁸ Heymann has explained in this regard: “Wird eine einfache Interpretationserklärung nur von einem Teil der Vertragsparteien angenommen, ist die interpretation partagée kein selbständiger Auslegungsfaktor im Sinne der [Wiener Vertragsrechtskonvention]. Dies liegt daran, dass bei der Auslegung eines Vertrags die Absichten aller Vertragsparteien zu berücksichtigen sind und die interpretation partagée immer nur den Willen einer mehr oder weniger großen Gruppe von Vertragsparteien zum Ausdruck bringt” [If a simple interpretative declaration is accepted by only some of the parties to the treaty, the *interprétation partagée* does not constitute an independent element of interpretation in the sense of the [Vienna Convention on the law of treaties]. This is because, when the treaty is interpreted, the intentions of all the parties must be taken into account, while the *interprétation partagée* expresses only the will of a more or less large group of parties], Heymann, *Einseitige Interpretationserklärungen ...*, footnote 147 above, p. 135 (footnote omitted).

²⁵⁸⁹ Concerning this hypothesis, see guideline 4.7.3 and commentary thereto below.

²⁵⁸⁰ Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), p. 135.

²⁵⁸¹ Constitutional Council, Decision No. 99-412 DC of 15 June 1999, European Charter for Regional or Minority Languages, *Official Gazette of the French Republic*, 18 June 1999, p. 8965, para. 4.

²⁵⁸² See paragraphs (11)–(12) of the commentary to guideline 3.5.

²⁵⁸³ This is the reason why the final phrase in paragraph 1 of guideline 4.7.1, recalling the title of article 31 of the Vienna Conventions, refers to “the general rule of interpretation of treaties”, without going into detail on its complex ramifications.

²⁵⁸⁴ See the report of the International Law Commission on the work of its fifty-first session, *Yearbook ... 1999*, vol. II (Part Two), pp. 97–103.

Waldock, in a particularly cautious manner, had allowed for the persistence of some uncertainty on the matter:

Statements of interpretation were not dealt with by the Commission in the present [section] for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear rather to fall under articles 69–71. These articles provide that the “context of the treaty, for the purposes of its interpretation”, is to be understood as comprising “any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion” (article 69, paragraph 2); that “any agreement between the parties regarding the interpretation of the treaty” and “any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation” are to be taken into account “together with the context” of the treaty for the purposes of its interpretation (article 69, paragraph 3); that as “further means of interpretation” recourse may be had, *inter alia*, to the “preparatory work of the treaty and the circumstances of its conclusion” (article 70); and that a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning. Any of these provisions may come into play in appreciating the legal effect of an interpretative declaration in a given case ... In the view of the Special Rapporteur the Commission was entirely correct in deciding that the matter belongs under articles 69–71 rather than under the present section.²⁵⁹⁰

(22) Whether interpretative declarations are regarded as one of the elements to be taken into consideration in the interpretation of the treaty essentially depends on the context of the declaration and the assent of the other States parties. But it is particularly noteworthy that, in 1966, the Special Rapporteur very clearly refused to include unilateral declarations or agreements *inter partes* in the “context”, even though the United States had suggested doing so by means of an amendment. The Special Rapporteur explained that only a degree of assent by the other parties to the treaty would have made it possible to include declarations or agreements *inter partes* in the interpretative context:

As to the substance of paragraph 2, ... the suggestion of the United States Government that it should be made clear whether the “context” includes (1) a unilateral document and (2) a document on which several but not all of the parties to a multilateral instrument have agreed raises problems both of substance and of drafting which the Commission was aware of in 1964 but did not find it easy to solve at the sixteenth session ... But it would seem clear on principle that a unilateral document cannot be regarded as part of the “context” for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State’s acceptance of the treaty is acquiesced in by the other parties. Similarly, in the case of a document emanating from a group of the parties to a multilateral treaty, principle would seem to indicate that the relevance of the document in connexion with the treaty must be acquiesced in by the other parties. Whether a “unilateral” or a “group” document forms part of the context depends on the particular circumstances of each case, and the Special Rapporteur does not think it advisable that the Commission should try to do more than state the essential point of the principle—the need for express or implied assent.²⁵⁹¹

(23) Sapienza also concludes that interpretative declarations which have not been approved by the other parties do not fall under article 31, paragraph 2 (b), of the Vienna Conventions:

In primo luogo, ci si potrebbe chiedere quale significato debba attribuirsi all’espressione “accepté par les autres parties en tant qu’instrument ayant rapport au traité”. Deve intendersi nel senso che

²⁵⁹⁰ Fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 49, para. 2 (observations of the Special Rapporteur on draft articles 18–20).

²⁵⁹¹ Sixth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1966*, vol. II, document A/CN.4/186 and Add.1–7, p. 98, para. 16.

*l’assenso delle altre parti debba limitarsi al fatto che lo strumento in questione possa ritenersi relativo al trattato o, invece, nel senso che debba estendersi anche al contenuto dell’interpretazione? Ci pare che l’alternativa non abbia, in realtà, motivo di porsi, dato che il paragrafo 2 afferma che dei documenti in questione si terrà conto “ai fini dell’interpretazione”. Dunque, l’accettazione delle altre parti nei confronti degli strumenti di cui alla lettera (b) non potrà che essere un consenso a che l’interpretazione contenuta nella dichiarazione venga utilizzata nella ricostruzione del contenuto normativo delle disposizioni convenzionali cui afferisce, anche nei confronti degli altri Stati.*²⁵⁹²

[First, it could be asked what meaning should be given to the phrase “accepted by the other parties as an instrument related to the treaty”. Does it mean that the assent of the other parties should be limited to the fact that the instrument in question could be considered to be related to the treaty or should it be understood as extending to the content of the interpretation? It seems that, in fact, the alternative should not be considered, since paragraph 2 states that the instruments in question will be taken into account “for the purpose of the interpretation”. Consequently, acceptance by the other parties of the instruments referred to in subparagraph (b) can only be consent to the use of the interpretation contained in the declaration for the reconstruction of the normative content of the treaty provisions in question, even with respect to other States.]

(24) Nonetheless, although at first glance such interpretative declarations do not seem to fall under articles 31 and 32 of the Vienna Conventions, they still constitute the (unilateral) expression of the intention of one of the parties to the treaty and may, on that basis, play a role in the process of interpretation.

(25) In its advisory opinion on the *International Status of South-West Africa*, the International Court of Justice noted, on the subject of the declarations of the Union of South Africa regarding its international obligations under the Mandate:

These declarations constitute recognition by the Union [of South Africa] Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. 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. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court.²⁵⁹³

(26) The Court thus clarified that declarations by States relating to their international obligations have “probative value” for the interpretation of the terms of the legal instruments to which they relate, but that they “corroborate” or support an interpretation that has already been determined by other methods. In this sense, an interpretative declaration may therefore confirm an interpretation that is based on the objective elements listed in articles 31 and 32 of the Vienna Conventions.

(27) In the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*,²⁵⁹⁴ the Court was again seized with the question as to the value of an interpretative declaration. In signing and ratifying the United

²⁵⁹² Sapienza, *Dichiarazioni interpretative unilaterali ...* (footnote 129 above), pp. 239–240. See also *Oppenheim’s International Law* (footnote 210 above), p. 1268 (“An interpretation agreed between some only of the parties to a multilateral treaty may, however, not be conclusive, since the interests and intentions of the other parties may have to be taken into consideration”).

²⁵⁹³ *Advisory Opinion of 11 July 1950, International Status of South-West Africa* (see footnote 167 above), pp. 135–136.

²⁵⁹⁴ *Judgment of 3 February 2009, Maritime Delimitation in the Black Sea* (see footnote 743 above), p. 61.

Nations Convention on the Law of the Sea, Romania formulated the following interpretative declaration:

Romania states that according to the requirements of equity as it results from articles 74 and 83 of the [United Nations] Convention on the Law of the Sea[,] the uninhabited islands and without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States.²⁵⁹⁵

In its judgment, however, the Court merely noted the following with respect to the Romanian declaration:

Finally, regarding Romania's declaration [...], the Court observes that under Article 310 of UNCLOS, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of UNCLOS in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of UNCLOS as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation.²⁵⁹⁶

(28) The wording is rather peremptory and seems to cast serious doubt on the utility of interpretative declarations. It seems to suggest that the declaration has “no bearing” on the interpretation of the provisions of the United Nations Convention on the Law of the Sea that the Court has been asked to make. However, the use of the expression “as such” allows one to shade this radical observation: while the Court does not consider itself bound by the unilateral interpretation proposed by Romania, that does not preclude the unilateral interpretation from having an effect as a means of proof or an element that might corroborate the Court's interpretation “in accordance with Article 31 of the Vienna Convention on the Law of Treaties”.

(29) The European Court of Human Rights took a similar approach. After the European Commission of Human Rights, which had already affirmed that an interpretative declaration “may be taken into account when an article of the Convention is being interpreted”,²⁵⁹⁷ the Court chose to take the same approach in the case of *Krombach v. France*, namely, that interpretative declarations may confirm an interpretation derived on the basis of the relevant rules. Thus, in order to respond to the question of whether the higher court in a criminal case may be limited to a review of points of law, the Court first examined State practice, then its own case law in the matter and ultimately cited a French interpretative declaration:

The Court reiterates that the Contracting States dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the [European] Convention [on Human Rights] is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Furthermore, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Haser v. Switzerland* (dec.), no. 33050/96, 27 April 2000, unreported). This rule is in itself consistent with the exception authorised by paragraph 2 of Article 2

and is backed up by the French declaration regarding the interpretation of the Article, which reads: “... in accordance with the meaning of Article 2, paragraph 1, the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court”.²⁵⁹⁸

(30) States, too, put forward their interpretative declarations in this subdued manner. Thus, the argument by the Agent for the United States in the case concerning *Legality of Use of Force (Yugoslavia v. United States of America)* was tangentially based on the interpretative declaration made by the United States to article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, in order to demonstrate that *mens rea specialis* is an essential element in characterizing an act of genocide:

[T]he need for a demonstration in such circumstances of the specific intent required by the Convention was made abundantly clear by the United States Understanding at the time of the United States ratification of the Convention. That Understanding provided that “acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention”. The Socialist Federal Republic of Yugoslavia did not object to this Understanding, and the Applicant made no attempt here to take issue with it.²⁵⁹⁹

(31) It is therefore clear from practice and doctrinal analyses that interpretative declarations come into play only as an auxiliary or complementary means of interpretation, corroborating a meaning revealed by the terms of the treaty considered in the light of its object and purpose. As such, they do not produce an autonomous effect: when they have an effect at all, interpretative declarations are associated with another instrument of interpretation, which they usually uphold.

(32) The interpreter can thus rely on interpretative declarations to confirm his conclusions regarding the interpretation of a treaty or a provision of it. Interpretative declarations constitute the expression of a subjective element of interpretation—the intention of one of the States parties—and, as such, may confirm “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The phrase “as appropriate” that appears in both paragraph 1 and paragraph 2 of guideline 4.7.1 is meant to emphasize that interpretative declarations (and reactions to them) are taken into consideration on the basis of individual circumstances.

(33) In that same vein, and as guideline 4.7.1, paragraph 2, stresses, the reactions (approval or opposition) that may have been expressed with regard to the interpretative declaration by the other parties—all of them potential interpreters of the treaty as well—should also be taken into consideration. An interpretative declaration that has been approved by one or more States certainly has greater probative value as to the intention of the parties than an interpretative declaration to which there has been opposition.²⁶⁰⁰

²⁵⁹⁸ European Court of Human Rights, Judgment of 13 February 2001, *Krombach v. France*, Application no. 29731/96, *Reports of Judgments and Decisions, 2001-II*, para. 96.

²⁵⁹⁹ Report 1999/35, 12 May 1999, p. 9 (Mr. Andrews) (available from the website of the International Court of Justice: www.icj-cij.org).

²⁶⁰⁰ See McRae, “The legal effect of interpretative declarations” (footnote 129 above), pp. 169–170.

²⁵⁹⁵ *Multilateral Treaties ...* (footnote 37 above), chap. XXI.6.

²⁵⁹⁶ *Maritime Delimitation in the Black Sea* (see footnote 743 above), p. 78, para. 42.

²⁵⁹⁷ See footnote 2568 above.

4.7.2 *Effect of the modification or the withdrawal of an interpretative declaration*

The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.

Commentary

(1) Despite the auxiliary role to which interpretative declarations are confined under guideline 4.7.1, it should be recalled that they are unilateral statements expressing their author's intention to adhere to a given interpretation of the provisions of the treaty. Accordingly, although the declaration in itself does not create rights and obligations for its author or for the other parties to the treaty, it may prevent its author from taking a position contrary to that expressed in its declaration. It does not matter whether or not this phenomenon is called estoppel;²⁶⁰¹ in any case it is a corollary of the principle of good faith²⁶⁰² in its international relations, a State cannot blow hot and cold. It cannot declare that it interprets a given provision of the treaty in one way and then take the opposite position before an international judge or arbitrator, at least if the other parties have relied on it. As indicated by principle 10 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006 by the International Law Commission:

A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:

²⁶⁰¹ As Judge Alfaro explained in the important separate opinion he attached to the Court's second judgment in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, "[w]hatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). (...) Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)" (*Temple of Preah Vihear* (see footnote 1435 above), p. 40). See also the Permanent Court of International Justice, Judgment of 12 July 1929, *Serbian loans*, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20, pp. 38–39; International Court of Justice, Judgment of 20 February 1969, *North Sea Continental Shelf* (footnote 1521 above), p. 26, para. 30; Judgment of 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua* (footnote 2319 above), p. 415, para. 51; or Judgment of 13 September 1990, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application to Intervene, Judgment, I.C.J. Reports 1990, p. 92, at p. 118, para. 63.

²⁶⁰² See the International Court of Justice, Judgment of 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (footnote 339 above), p. 305, para. 130. The legal literature is in agreement on this point. Thus, as D. Bowett explained more than a half-century ago, the *raison d'être* of estoppel lies in the principle of good faith: "The basis of the rule is the general principle of good faith and as such finds a place in many systems of law" ("Estoppel before international tribunals and its relation to acquiescence", BYBIL, vol. 33 (1957), p. 176 (footnotes omitted)). See also J. Crawford and A. Pellet, "Anglo Saxon and Continental approaches to pleading before the ICJ", in I. Buffard et al. (eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden/Boston, Nijhoff, 2008, pp. 831–867.

... (b) The extent to which those to whom the obligations are owed have relied on such obligations;...²⁶⁰³

(2) It should not be inferred from the above that the author of an interpretative declaration is bound by the interpretation it puts forward—which might ultimately prove unfounded. The validity of the interpretation depends on other circumstances and can be assessed only under the rules governing the interpretation process. In this context, Bowett presents a sound analysis:

The estoppel rests on the representation of fact, whereas the conduct of the parties in construing their respective rights and duties does not appear as a representation of fact so much as a representation of law. The interpretation of the rights and duties of parties to a treaty, however, should lie ultimately with an impartial international tribunal and it would be wrong to allow the conduct of the parties in interpreting these rights and duties to become a binding interpretation on them.²⁶⁰⁴

(3) It should be recalled that under guidelines 2.4.8 (Modification of an interpretative declaration) and 2.5.12 (Withdrawal of interpretative declarations), the author of an interpretative declaration is free to modify or withdraw it at any time. Depending on the circumstances, the withdrawal or modification of an interpretative declaration may be of some relevance to the interpretation of the treaty to which it relates. However, the Commission decided not to make express mention of these two provisions because they relate to procedural rules, whereas guideline 4.7.2 is included in the section of the Guide to Practice concerning the effects of interpretative declarations.

(4) Like the author of an interpretative declaration, any State or international organization that has approved this declaration is bound by the same principles *vis-à-vis* the author of the declaration; it may modify or withdraw its approval at any time, provided that the author of the declaration (or third parties) have not relied on it.

(5) Moreover, despite its limited binding force, an interpretative declaration might constitute the basis for agreement on the interpretation of the treaty; it could also preclude such an agreement from being reached.²⁶⁰⁵ In this connection, McRae noted as follows:

The "mere interpretative declaration" serves notice of the position to be taken by the declaring State and may herald a potential dispute between that State and other contracting parties.²⁶⁰⁶

4.7.3 *Effect of an interpretative declaration approved by all the contracting States and contracting organizations*

An interpretative declaration that has been approved by all the contracting States and contracting organizations

²⁶⁰³ *Yearbook ... 2006*, vol. II (Part Two), p. 161. According to principle 10, the two other factors to be taken into account when assessing the arbitrary nature of a revocation are: "(a) any specific terms of the declaration relating to revocation" and "(c) the extent to which there has been a fundamental change in the circumstances" (*ibid.*). *Mutatis mutandis*, these two factors may also be relevant to the implementation of guideline 4.7.2.

²⁶⁰⁴ Bowett, "Estoppel before international tribunals ..." (footnote 2602 above), pp. 189–190. See also McRae, "The legal effect of interpretative declarations" (footnote 129 above), p. 168.

²⁶⁰⁵ Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), p. 129.

²⁶⁰⁶ McRae, "The legal effect of interpretative declarations" (footnote 129 above), pp. 160–161 (footnotes omitted).

organizations may constitute an agreement regarding the interpretation of the treaty.

Commentary

(1) Assent to an interpretative declaration by all the other parties to the treaty, however, radically alters the situation. Thus, in the International Law Commission, Sir Humphrey Waldock recalled that the Commission

agreed that the relevance of statements of the parties for purposes of interpretation depended on whether they constituted an indication of common agreement by the parties. Acquiescence by the other parties was essential.²⁶⁰⁷

(2) Unanimous agreement by all the parties therefore constitutes a true interpretative agreement which represents the will of the “masters of the treaty” and thus an authentic interpretation.²⁶⁰⁸ One example is the unanimous approval by the contracting States to the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) of 1928 of the interpretative declaration of the United States of America concerning the right to self-defence.²⁶⁰⁹

(3) In this case, it is just as difficult to determine whether the interpretative agreement is part of the internal context (article 31, paragraph 2, of the Vienna Conventions) or the external context (article 31, paragraph 3) of the treaty.²⁶¹⁰ The fact is that everything depends on the circumstances in which the declaration was formulated and in which it was approved by the other parties. In a case where a declaration is made before the signing of the treaty and approved when (or before) all the parties have expressed their consent to be bound, the declaration and its unanimous approval, combined, give the appearance of an interpretative agreement that could be construed as being an “agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty” within the meaning of article 31, paragraph 2 (a), or as “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty” within the meaning of paragraph 2 (b) of the same article. If, however, the interpretative agreement is reached only after the treaty has been concluded, a question might arise as to whether it is merely a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” within the meaning of article 31, paragraph 3 (b), or if, by virtue of their formal nature, the declaration and unanimous approval combined constitute a veritable “subsequent agreement between the parties regarding the interpretation of

the treaty or the application of its provisions” (art. 31, para. 3 (a)).²⁶¹¹

(4) Without really resolving the question, the Commission wrote in its commentary to article 27 of its 1966 draft articles (which became article 31, paragraph 3 (a), of the 1969 Vienna Convention):

A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation. But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case the Court said: “... the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty ...” Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.²⁶¹²

(5) The fact remains, however, depending on the circumstances—the lack of an automatic effect being indicated by the verb “may” in guideline 4.7.3—the unanimous approval by the parties of an interpretative declaration made by one of them may constitute an agreement, and an agreement among the parties as to the interpretation of the treaty must be taken into consideration when interpreting the provisions to which it relates.

5. Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases of succession of States

Commentary

(1) As the title suggests, Part 5 of the Guide to Practice deals with reservations, acceptances of and objections to reservations and interpretative declarations in cases of succession of States. Part 5 is organized in five sections as follows:

- Reservations in cases of succession of States (5.1);
- Objections to reservations in cases of succession of States (5.2);
- Acceptances of reservations in cases of succession of States (5.3);
- Legal effects of reservations, acceptances and objections in cases of succession of States (5.4);
- Interpretative declarations in cases of succession of States (5.5).

(2) The inclusion of guidelines in this area in the Guide to Practice is all the more important given that:

- the 1969 and 1986 Vienna Conventions have no provisions on this subject except a safeguard clause,

²⁶⁰⁷ *Yearbook ... 1966*, vol. I (Part One), 829th meeting, 12 January 1966, p. 47, para. 53. See also R. Kolb, *Interprétation et création du droit international*, Brussels, Bruylant, 2006, p. 609.

²⁶⁰⁸ See footnote 2571 above. See also Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), pp. 130–135; I. Voicu, *De l'interprétation authentique des traités internationaux*, Paris, Pedone, 1968, p. 134; or M. Herdegen, “Interpretation in international law”, *Max Planck Encyclopedia of Public International Law* (available from www.mpepil.com), para. 34.

²⁶⁰⁹ AJIL, *Supplement*, vol. 23 (1929), pp. 1–13.

²⁶¹⁰ See paragraph (21) of the commentary to guideline 4.7.1 above.

²⁶¹¹ In this regard, see, in particular, Heymann, *Einseitige Interpretationserklärungen ...* (footnote 147 above), p. 130.

²⁶¹² *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, paragraph (14) of the commentary (footnotes omitted).

which, by definition, gives no indication as to the applicable rules.²⁶¹³

– the Vienna Convention on succession of States in respect of treaties of 1978 contains only one provision on reservations, namely article 20, which is worded as follows:

Article 20. Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be 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 of States 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.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of sub paragraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.

(3) Article 20 of the 1978 Vienna Convention scarcely deals with, much less resolves, potential problems arising in connection with reservations in the case of succession of States.²⁶¹⁴ First, it should be noted that the article is contained in Part III of the Convention, which deals with “newly independent States” within the meaning of article 2, paragraph 1 (f), of the Convention, that is, States arising from decolonization,²⁶¹⁵ whereas the question of the rules applicable in the case of the succession of States in respect of part of a territory, the uniting of States or the separation of States is left aside completely. Secondly, while article 20, paragraph 2, provides for the right of the newly independent State to formulate new reservations and while the effect of paragraph 3 is that third States may formulate objections in that event, it fails to stipulate whether the latter can object to a reservation being maintained. Lastly, article 20 of the 1978 Vienna Convention makes no reference whatever to succession in respect of objections to reservations—whereas the initial proposals of

²⁶¹³ Article 73 of the 1969 Vienna Convention reads: “The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States”. A similar safeguard clause appears in article 74, paragraph 1, of the 1986 Vienna Convention.

²⁶¹⁴ See, in this regard, the observations contained in the first report on the law and practice relating to reservations to treaties by Mr. Alain Pellet, Special Rapporteur, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 147–148, paras. 132–135. See also *ibid.*, pp. 136–137, paras. 62–71, and the second report on reservations to treaties by Mr. Alain Pellet, Special Rapporteur, *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 50, para. 46, as well as the memorandum by the Secretariat on reservations to treaties in the context of succession of States, *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/616, paras. 1–2.

²⁶¹⁵ Under article 2, paragraph 1 (f), of the 1978 Vienna Convention, “‘newly independent State’ means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible”.

Sir Humphrey Waldock did deal with this point²⁶¹⁶—and the reasons for this omission are not clear.²⁶¹⁷

(4) This Part of the Guide to Practice seeks to fill these gaps to the extent possible and, in particular, covers cases of succession of States other than that covered by article 20 of the 1978 Vienna Convention. It is this diversity of situations that is highlighted by the title of this Part: “Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases [plural] of succession of States”. Similarly, the various sections make explicit reference to the different possible scenarios for the succession of States by using the plural “cases”.

(5) That said, this Part of the Guide to Practice is based on the rules and principles set out in the 1978 Vienna Convention. In particular, it relies on the definition of succession of States given in that instrument.²⁶¹⁸ More generally, the guidelines of this Part of the Guide use the same terminology as the 1978 Vienna Convention, attribute the same meaning to the terms and expressions used in that Convention and defined in its article 2 and are based, where applicable, on the distinctions made in that instrument among the various forms of succession of States, namely:

- “Succession in respect of part of territory” (art. 15);
- “Newly independent States” (art. 2, para. 1 (f), and arts. 16 *et seq.*);
- “Newly independent States formed from two or more territories” (art. 30);
- “Uniting of States” (arts. 31–33); and
- “Separation of parts of a State” (arts. 34–37).

(6) Moreover, Part 5 of the Guide to Practice starts from the premise that the question of a State’s succession to a treaty has been settled as a preliminary issue. This is the implication of the word “when”, which begins several of the guidelines of this Part and refers to concepts that are considered as settled and need not be revisited by the Commission in dealing with this subject. By this logic, then, the point of departure is that a successor State has the status of a contracting State or even a State party to a treaty as a consequence of the succession of States, not because it has expressed its consent to be bound by the treaty within the meaning of article 11 of the 1969 Vienna Convention.²⁶¹⁹

²⁶¹⁶ See paragraph (3) of the commentary to guideline 5.1.1 below.

²⁶¹⁷ See Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), pp. 318–322.

²⁶¹⁸ Article 2, paragraph 1 (b): “‘Succession of States’ means the replacement of one State by another in the responsibility for the international relations of territory”; see also article 2, paragraph 1 (a), of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 8 April 1983, or article 2 (a) of the articles on the nationality of natural persons in relation to the succession of States, adopted by the Commission at its fifty-first session (*Yearbook ... 1999*, vol. II (Part Two), pp. 20 *et seq.*) and annexed to General Assembly resolution 55/153 of 12 December 2000.

²⁶¹⁹ “The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”

(7) Lastly, like the 1978 Vienna Convention,²⁶²⁰ the guidelines of Part 5 of the Guide to Practice concern only reservations formulated by a predecessor State that was a *contracting State* to the treaty in question as of the date of the succession of States.²⁶²¹ They do not deal with reservations formulated by a predecessor State that had only signed the treaty subject to ratification, acceptance or approval, without having completed the relevant action prior to the date of the succession of States. Reservations of this second kind cannot be considered as being maintained by the successor State because they did not, at the date of the succession of States, produce any legal effects, not having been formally confirmed by the State in question when expressing its consent to be bound by the treaty, as required by article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions.²⁶²²

5.1 Reservations in cases of succession of States

5.1.1 Newly independent States

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be 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 of States 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.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

4. For the purposes of this Part of the Guide to Practice, “newly independent State” means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

Commentary

(1) Guideline 5.1.1 reproduces paragraphs 1–3 of article 20 of the 1978 Vienna Convention. This provision

²⁶²⁰ See article 20.

²⁶²¹ In this connection, it should be noted that the wording of article 20 of the 1978 Vienna Convention is tautological, since contracting State is defined as a State “which has consented to be bound by the treaty, whether or not the treaty has entered into force” [if the treaty has entered into force, it is also a State party] (article 2, paragraph 1 (k), of the 1978 Vienna Convention, which reproduces article 2, paragraph 1 (f), of the 1969 Vienna Convention). The addition of the words “or party” is therefore confusing. Accordingly, the Commission decided to retain this addition only in guideline 5.1.1, which reproduces faithfully the wording of article 20.

²⁶²² See guideline 2.2.1 above and commentary thereto.

relates only to a “newly independent State” within the meaning of article 2, paragraph 1 (f), of the Convention, namely a State that gains independence at the end of a decolonization process.²⁶²³ The Commission decided to place this guideline at the beginning of Part 5 of the Guide to Practice since it is based on the only provision of the 1978 Vienna Convention which deals with reservations in relation to succession of States.

(2) Paragraph 4 of this guideline, which has no equivalent in article 20 of the 1978 Vienna Convention, reproduces the definition of “newly independent State” set out in article 2, paragraph 1 (f), of that Convention. The definition has been reproduced in the Guide to Practice to avoid any misunderstanding regarding the use of this expression, given the importance of the distinction between successor States with the status of newly independent States and other successor States in dealing with legal issues concerning reservations, objections to reservations, acceptances of reservations and interpretative declarations in relation to the succession of States. This limitation of the scope of guideline 5.1.1 is reflected in its title (“Newly independent States”).

(3) The origin of the rules set out in article 20 of the 1978 Vienna Convention and reproduced in this

²⁶²³ See paragraph (3) of the general commentary to Part 5 of the Guide to Practice above. See also the memorandum by the Secretariat on reservations to treaties in the context of succession of States (footnote 2614 above), para. 2. This limitation of the scope of article 20 to newly independent States is confirmed by the fact that, at the United Nations Conference on Succession of States in respect of Treaties of 1977–1978, it was suggested that, with respect to other cases of succession, a provision regulating the issue of reservations should be included. The delegation of India, for example, pointed out that there was a gap in the Convention in that respect and, accordingly, a need to add an article on reservations to the part of the Convention which dealt with the uniting and separation of States (*Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. I, First Session, Vienna, 4 April–6 May 1977, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.80/16*, United Nations publication, Sales No. E.78.V.8), Committee of the Whole, 28th meeting, 26 April 1977, para. 17). Meanwhile, the delegation of the Federal Republic of Germany proposed a new article 36 *bis* (*Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. II, Resumed Session, Vienna, 31 July–23 August 1978, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.80/16/Add.1*, United Nations publication, Sales No. E.79.V.9), Committee of the Whole, 43rd meeting, 3 August 1978, paras. 9–12) that provided in particular for the transposition, to the cases of succession referred to in Part IV of the Convention, of the rules on reservations applicable to newly independent States:

“1. When under articles 30, 31, 33 and 35 a treaty continues in force for a successor State or a successor State participates otherwise in a treaty not yet in force for the predecessor State, the successor State shall be considered as maintaining:

“(a) any reservation to that treaty made by the predecessor State in regard to the territory to which the succession of States relates;

...

“2. Notwithstanding paragraph 1, the successor State may however:

“(a) withdraw or modify, wholly or partly, the reservation (paragraph 1, subparagraph (a)) or formulate a new reservation, subject to the conditions laid down in the treaty and the rules set out in articles 19, 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties”

(A/CONF.80/30, para. 118, reproduced in *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. III, 1977 Session and Resumed Session 1978, Vienna, 4 April–6 May 1977 and 31 July–23 August 1978, Documents of the Conference (A/CONF.80/16/Add.2*, United Nations publication, Sales No. E.79.V.10), pp. 163–164.)

guideline dates back to a proposal put forward in the third report on succession in respect of treaties, by Sir Humphrey Waldock.²⁶²⁴ The report contained a draft article 9 on “Succession in respect of reservations to multilateral treaties”, its purpose being to determine the position of the successor State in regard to reservations, acceptances and objections. After enunciating certain “logical principles” and noting that the—still developing—practice of depositaries was not wholly consistent with them, the Special Rapporteur concluded “that a flexible and pragmatic approach to the problem of succession in respect of reservations is to be preferred”.²⁶²⁵ Concerning reservations, Sir Humphrey Waldock proposed that rules should be adopted to reflect:

– a presumption in favour of succession to the reservations of the predecessor State unless the successor State has expressed a contrary intention or unless, by reason of its object and purpose, the reservation is appropriate only to the predecessor State (art. 9, para. 1); and

– the possibility for the successor State to formulate new reservations, in which case: (a) the successor State is considered to have withdrawn any different reservations made by the predecessor State; and (b) the provisions of the treaty itself and of the 1969 Vienna Convention apply to the reservations of the successor State (para. 2).²⁶²⁶

(4) Paragraph 1 of guideline 5.1.1 reproduces the rebuttable presumption set forth in article 20, paragraph 1, of the 1978 Vienna Convention that a newly independent State shall be considered as maintaining the reservations formulated by the predecessor State. While article 20, paragraph 1, of the Convention makes reference in this context to a newly independent State which establishes its status as a contracting State or a party²⁶²⁷ to a multilateral treaty through a notification of succession under article 17 or article 18 of the Convention,²⁶²⁸ reference

²⁶²⁴ *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 25.

²⁶²⁵ *Ibid.*, pp. 47 and 50, paragraphs (2) and (11) of the commentary.

²⁶²⁶ *Ibid.*, pp. 46–47.

²⁶²⁷ On this point, see footnote 2621 above.

²⁶²⁸ These provisions read as follows:

“Article 17. *Participation in treaties in force at the date of the succession of States*

“1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.

“2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

“3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the newly independent State may establish its status as a party to the treaty only with such consent.”

“Article 18. *Participation in treaties not in force at the date of the succession of States*

“1. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a contracting State to a multilateral treaty which is not in force if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

to these articles was omitted in the text of the guideline. Such a reference seemed unnecessary to the Commission given that the basic principle—the *modus operandi*—of the whole Part 5 of the Guide to Practice consists in assuming that the relevant rules of the 1978 Vienna Convention apply.

(5) First proposed by Sir Humphrey Waldock in his third report,²⁶²⁹ this presumption was then endorsed by the Commission, despite the proposals put forward subsequently by some States (Australia, Belgium, Canada and Poland) to reverse the presumption; those proposals were neither followed by the second Special Rapporteur, Sir Francis Vallat,²⁶³⁰ nor subscribed to by the Commission.²⁶³¹

(6) The presumption in favour of the maintenance of the predecessor State’s reservations gave rise to little debate at the United Nations Conference on Succession of States in respect of Treaties, which met in Vienna from 4 April to 6 May 1977 and from 31 July to 23 August 1978. Even though some States again proposed that the presumption should be reversed having regard to the “clean slate” principle,²⁶³² the Committee of the Whole, and then the

“2. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

“3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

“4. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties or of all the contracting States, the newly independent State may establish its status as a party or as a contracting State to the treaty only with such consent.

“5. When a treaty provides that a specified number of contracting States shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be counted as a contracting State for the purpose of that provision unless a different intention appears from the treaty or is otherwise established.”

²⁶²⁹ See paragraph (3) of the commentary to this guideline above.

²⁶³⁰ First report on succession of States in respect of treaties by Sir Francis Vallat, *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, pp. 52–54, paras. 278–286.

²⁶³¹ *Ibid.*, vol. I, 1272nd meeting, 6 June 1974, p. 117, paras. 46–54, and *ibid.*, vol. II (Part One), document A/9610/Rev.1, pp. 226–227, paragraphs (17)–(18) of the commentary to article 19.

²⁶³² For example, at the 1977–1978 United Nations Conference on Succession of States in respect of Treaties, the representative of the United Republic of Tanzania proposed an amendment reversing the presumption in favour of the maintenance of reservations formulated by the predecessor State and providing that the successor State was considered to have withdrawn reservations formulated by the predecessor State unless it expressed a contrary intention (see *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. I, First Session ... (A/CONF.80/16)* (footnote 2623 above), Committee of the Whole, 28th meeting, 26 April 1977, para. 37; and A/CONF.80/14, para. 118 (c) (reproduced in *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. III, 1977 Session and Resumed Session 1978, Documents of the Conference ... (A/CONF.80/16/Add.2)* (footnote 2623 above), p. 115)). The representative of the United Republic of Tanzania expressed a preference for a “clean slate” in regard to reservations and pointed out that reservations formulated by the predecessor State were not necessarily in the interest of the successor State (*Official Records*

Conference itself, approved the article on reservations (which had become article 20) as proposed by the International Law Commission, apart from some very minor drafting changes,²⁶³³ and the presumption in favour of the maintenance of reservations was reflected in the final text of article 20 as adopted at the United Nations Conference.

(7) This presumption had already been proposed by Mr. D. P. O'Connell, Rapporteur of the International Law Association on the topic "The Succession of New States to the Treaties and Certain Other Obligations of their Predecessors",²⁶³⁴ one year before Sir Humphrey Waldock endorsed the concept.²⁶³⁵ It reflects the concern to respect the actual intention of the successor State by avoiding the creation of an irreversible situation: "if a presumption in favour of maintaining reservations were not to be made, the actual intention of the successor State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the successor State's intention, the latter could always redress the matter by withdrawing the reservations".²⁶³⁶

(8) This solution is not self-evident and has been criticized in the literature. For example, according to Imbert, "*il n'y aucune raison pour penser que l'État n'étudiera pas le texte de la convention avec suffisamment de soin, pour savoir exactement les réserves qu'il veut maintenir, abandonner ou formuler*" [there is no reason to think that the State would not study the text of the convention carefully enough to know exactly which reservations it wished to maintain, abandon or formulate].²⁶³⁷ This author cast doubt in particular on the assumption that the predecessor State's reservations would be "*nécessairement avantageuses pour l'État nouvellement indépendant ... [L]es réserves constituant des dérogations, des limitations aux engagements de l'État, elles ne devraient pas pouvoir être présumées. Il serait au contraire normal de partir du principe que, en l'absence d'une déclaration de volonté formelle de sa part, un État est lié par l'ensemble du traité*" [necessarily

advantageous to the newly independent State ... Since reservations constitute derogations from or limitations on a State's commitments, they should not be a matter of presumption. On the contrary, it makes more sense to assume that, in the absence of a formal statement of its intention, a State is bound by the treaty as a whole].²⁶³⁸

(9) The commentary to draft article 19 as finally adopted by the Commission nonetheless puts forward some convincing arguments supporting the presumption in favour of the maintenance of reservations formulated by the predecessor State:

First, the presumption of an intention to maintain the reservations was indicated by the very concept of succession to the predecessor's treaties. Secondly, a State is in general not to be understood as having undertaken more onerous obligations unless it has unmistakably indicated an intention to do so; and to treat a newly independent State, on the basis of its mere silence, as having dropped its predecessor's reservations would be to impose upon it a more onerous obligation. Thirdly, if presumption in favour of maintaining reservations were not to be made, the actual intention of the newly independent State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the newly independent State's intention, the latter could always redress the matter by withdrawing the reservations.²⁶³⁹

(10) This seems to be the majority position in the literature, tending to support the presumption in favour of the maintenance of the predecessor State's reservations. Thus, O'Connell explains:

Since a State which makes a reservation to a multilateral convention commits itself only to the convention as so reserved, its successor State cannot, logically, succeed to the convention without reservations. Should the reservation be unacceptable to it the appropriate procedure would be to ask the depositary to remove it and notify all parties accordingly.²⁶⁴⁰

Similarly, Gaja takes this view:

The opinion that the predecessor State's reservations are maintained is also based on the reasonable assumption that when a newly independent State elects to become a party to a treaty by means of a notification of succession, in principle it wants the treaty to continue to be applied to its territory in the same way as it did before independence.²⁶⁴¹

(11) One can see in this presumption a logical implication from the fact that succession to a treaty by a newly independent State, though voluntary, is a true succession that must be distinguished from accession. Because it is a succession, it seems reasonable to presume that treaty obligations are transmitted to the successor State as modified by the reservation formulated by the predecessor State.

of the United Nations Conference on Succession of States in respect of Treaties, Vol. I, First Session ... (A/CONF.80/16) (see footnote 2623 above), 27th meeting of the Committee of the Whole, 25 April 1977, para. 79). That amendment was rejected by 26 votes to 14, with 41 abstentions (*ibid.*, 28th meeting, para. 41). A preference for the opposite presumption had also been expressed by other delegations (*ibid.*, 28th meeting, para. 13 (Romania), para. 18 (India) and para. 33 (Kenya)).

²⁶³³ *Ibid.*, 28th meeting, para. 42.

²⁶³⁴ "Additional point" No. 10 proposed by the Rapporteur of the Committee on "The Succession of New States to the Treaties and Certain Other Obligations of their Predecessors", International Law Association, Buenos Aires Conference (1968), *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, cited in Sir Humphrey Waldock's second report on succession in respect of treaties (*Yearbook ... 1969*, vol. II, document A/CN.4/214 and Add.1 and 2, p. 49, para. 17): "A successor State can continue only the legal situation brought about as a result of its predecessor's signature or ratification. Since a reservation delimits that legal situation it follows that the treaty is succeeded to (if at all) with the reservation."

²⁶³⁵ See paragraph (3) above.

²⁶³⁶ Third report on succession in respect of treaties by Sir Humphrey Waldock, *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 50 (paragraph (12) of the commentary to article 9); see also the elements of practice invoked in support of this solution, *ibid.*, pp. 47–49.

²⁶³⁷ Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 309.

²⁶³⁸ *Ibid.*, p. 310. Imbert thus echoes the criticisms of some States (see footnote 2632 above) put forward at the 1977–1978 United Nations Conference on Succession of States in respect of Treaties, in particular by the representative of the United Republic of Tanzania, who expressed a preference for a "clean slate" in regard to reservations and pointed out that reservations formulated by the predecessor State were not necessarily in the interest of the successor State.

²⁶³⁹ *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, p. 226, paragraph (17) of the commentary to article 19.

²⁶⁴⁰ D. P. O'Connell, *State Succession in Municipal Law and International Law*, Cambridge Studies in International and Comparative Law, No. 7, vol. II: International Relations, Cambridge, Cambridge University Press, 1967, p. 229 (footnote omitted).

²⁶⁴¹ G. Gaja, "Reservations to treaties and the newly independent States", *The Italian Yearbook of International Law*, vol. I (1975), p. 55. See also Ruda, "Reservations to treaties" (footnote 56 above), p. 206; also P. K. Menon, "The newly independent States and succession in respect of treaties", *Korean Journal of Comparative Law*, vol. 18 (1990), p. 152.

(12) Nevertheless, as the last clause of paragraph 1 of this guideline shows, the presumption in favour of the newly independent State's maintenance of reservations formulated by the predecessor State is rebuttable. The presumption is reversed not only if a "contrary intention" is specifically expressed by the successor State when making the notification of succession, but also if that State formulates a reservation "which relates to the same subject matter" as the reservation formulated by the predecessor State. The exact wording of this second possibility was a subject of debate in the Commission when this provision was being drafted.

(13) Sir Humphrey Waldock had proposed, in his third report on succession in respect of treaties, a different formulation that provided for the reversal of the presumption that the predecessor State's reservations were maintained if the successor State formulated "reservations different from those applicable at the date of succession".²⁶⁴² In its draft article 15 adopted on first reading in 1972, the Commission settled on a solution according to which the presumption that the predecessor State's reservations were maintained was reversed if the successor State formulated a new reservation "which relates to the same subject matter and is incompatible with [the reservation formulated by the predecessor State]".²⁶⁴³ However, in his first report in 1974, Sir Francis Vallat, who had been appointed Special Rapporteur, endorsed a proposal made by Zambia and the United Kingdom and returned if not to the letter then at least to the spirit of Sir Humphrey Waldock's proposal, though he described the change in question as minor, by removing the "incompatibility" test and providing only that a reservation of the predecessor State is not maintained if the successor State formulates a reservation relating to the same subject matter.²⁶⁴⁴ Subject to a further drafting change, the Commission agreed with him on that point.²⁶⁴⁵

(14) It should be noted that the wording that was finally adopted by the Commission and reflected in the 1978 Vienna Convention has been criticized in the literature for omitting the test of "incompatibility" between a reservation formulated by the predecessor State and one formulated by the successor State.²⁶⁴⁶ Nonetheless, in accordance with Sir Francis Vallat's proposal,²⁶⁴⁷ the Commission finally deleted this requirement from the final draft article for pragmatic reasons, which it explained in the commentary to the corresponding article adopted on second reading in 1974:

The test of incompatibility for which the paragraph provided might be difficult to apply and ... if the newly independent State were to formulate a reservation relating to the same subject matter as that of

the reservation made by the predecessor State, it could reasonably be presumed to intend to withdraw that reservation.²⁶⁴⁸

(15) Paragraph 2 of guideline 5.1.1 reproduces article 20, paragraph 2, of the 1978 Vienna Convention. It recognizes that a newly independent State has the right to formulate a reservation when making its notification of succession to the treaty. This right is subject to the general conditions laid down in article 19, subparagraphs (a), (b) and (c), of the 1969 Vienna Convention and reiterated in guideline 3.1, to which paragraph 2 of this guideline refers. Under article 20, paragraph 3, of the 1978 Vienna Convention, the rules set out in articles 20–23 of the 1969 Vienna Convention apply in respect of reservations formulated by a newly independent State when making a notification of succession. Given that the relevant rules regarding the formulation of a reservation are duly specified in Part 2 of the Guide to Practice, paragraph 3 of this guideline refers to that part of the Guide.²⁶⁴⁹

(16) In its commentary to draft article 19, the Commission noted that the right of a newly independent State to formulate reservations to a treaty to which it has made a notification of succession seemed to be confirmed in practice.²⁶⁵⁰ In support of this solution, Sir Humphrey Waldock, in his third report on succession in respect of treaties, based his views in particular on the practice of the Secretary-General of the United Nations, who, on several occasions, had recognized that newly independent States enjoyed that right without prompting any objections from States to that assumption.²⁶⁵¹ The second Special Rapporteur was also in favour, for "practical" reasons, of recognizing the right of a newly independent State to make new reservations when making a notification of succession.²⁶⁵²

(17) The view of the two Special Rapporteurs prevailed in the Commission, which, as indicated in the commentary to draft article 19 as finally adopted, had a choice between two alternatives:

(a) to decline to regard any notification of succession made subject to new reservations as a true instrument of succession and to treat it in law as a case of accession, or (b) to accept it as having the character of a succession but at the same time apply to it the law governing reservations as if it were a wholly new expression of consent to be bound by the treaty.

²⁶⁴⁸ *Ibid.*, document A/9610/Rev.1, p. 226, paragraph (18) of the commentary to article 19.

²⁶⁴⁹ The correspondences between the 1969 Vienna Convention and the Guide to Practice are as follows:

1969 Vienna Convention, article 20: paragraph 1 = guidelines 2.8.1 and 2.8.2 (with drafting changes); paragraph 2 = guideline 2.8.7 (*idem*); paragraph 3 = guideline 2.8.8 (*idem*); paragraph 4 (a) = guideline 4.2.1; paragraph 4 (b) = guideline 2.6.7 (with drafting changes); paragraph 5 = guideline 2.8.2 (*idem*).

Article 21: guideline 4.2.4.

Article 22: paragraph 1 = guideline 2.5.1 (with drafting changes); paragraph 2 = guideline 2.7.1 (*idem*); paragraph 3 (a) = guidelines 2.5.8 and 2.5.9 (*idem*); paragraph 3 (b) = guideline 2.7.5 (*idem*).

Article 23: paragraph 1 = guidelines 2.1.1, 2.6.5 and 2.8.4 (*idem*); paragraph 2 = guideline 2.2.1 (*idem*); paragraph 3 = guideline 2.8.6 (*idem*); paragraph 4 = guidelines 2.5.2 and 2.7.2 (*idem*).

²⁶⁵⁰ *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, pp. 224–225, paras. (7)–(12).

²⁶⁵¹ *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, pp. 48–50.

²⁶⁵² First report on succession of States in respect of treaties by Sir Francis Vallat, *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, p. 54, paras. 291–294.

²⁶⁴² *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 46, draft article 9, paragraph 1 (a).

²⁶⁴³ *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 260 (para. 1 (a)).

²⁶⁴⁴ *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, p. 54, para. 287.

²⁶⁴⁵ *Ibid.*, document A/9610/Rev.1, p. 222 (art. 19).

²⁶⁴⁶ See Gaja, "Reservations to treaties ..." (footnote 2641 above), pp. 59–60.

²⁶⁴⁷ First report on succession of States in respect of treaties by Sir Francis Vallat, *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, pp. 52–54.

Drawing upon the practice of the Secretary-General and wishing to take a “flexible” approach in that regard, the Commission opted for the second alternative, noting also that it might ease the access of a newly independent State to a treaty that was not, “for technical reasons, open to its participation by any other procedure than succession”.²⁶⁵³

(18) At the 1977–1978 United Nations Conference on Succession of States in respect of Treaties, the Austrian delegation challenged that solution—which, in purely logical terms, was somewhat incompatible with the preceding paragraph—and proposed the deletion of paragraphs 2 and 3 of the provision that would become article 20 of the 1978 Vienna Convention.²⁶⁵⁴ Austria contended that recognizing the right of a newly independent State to formulate new reservations when notifying its succession “seemed to be based on an erroneous concept of succession”²⁶⁵⁵ and that “if a newly independent State wished to make reservations, it should use the ratification or accession procedure provided for becoming a party to a multilateral treaty”.²⁶⁵⁶ However, the Austrian amendment was rejected by 39 votes to 4, with 36 abstentions.²⁶⁵⁷ The States opposing the Austrian amendment at the United Nations Conference on Succession of States in respect of Treaties put forth various arguments, including the desirability of ensuring that the newly independent State would “not be obliged to conform with more complicated ratification procedures than those provided for by the International Law Commission”,²⁶⁵⁸ the alleged incompatibility of the Austrian amendment with the principle of self-determination²⁶⁵⁹ or the principle of the “clean slate”,²⁶⁶⁰ the need to be “realistic” rather than “puristic”,²⁶⁶¹ and the fact that a succession of States was not a “legal inheritance or a transmission of rights and obligations”.²⁶⁶² Some authors have echoed these criticisms,²⁶⁶³ while others take the view that “the right to make reservations is not a right that is transmissible through inheritance, but a prerogative that is part of the set of supreme powers attributed by virtue of the protective

principle to sovereign States” and that “the recognition of this capacity [on the part of a newly independent State] may be considered a ‘pragmatic’ solution that takes account of the ‘non-automatic’, i.e. voluntary, nature of succession to treaties on the part of newly independent States”.²⁶⁶⁴

(19) In fact, the principles laid down in article 20 of the 1978 Vienna Convention are not overly rigid and are flexible enough to accommodate a wide variety of practices, as shown by a number of cases of succession to treaties deposited with the Secretary-General of the United Nations:

(a) in many cases, newly independent States have deposited a notification of succession to a particular treaty without making any mention of the question of reservations; in such cases, the Secretary-General has included the newly independent State in the list of States parties to the treaty concerned without passing judgment upon the status of reservations formulated by the predecessor State;²⁶⁶⁵

(b) some newly independent States have expressly maintained the reservations formulated by the predecessor State;²⁶⁶⁶

(c) in other cases, the newly independent State has essentially reformulated the same reservations made by the predecessor State;²⁶⁶⁷

(d) there have been cases in which the newly independent State has maintained the reservations formulated by the predecessor State while adding new reservations;²⁶⁶⁸

(e) there have also been cases in which the newly independent State has “reworked” reservations made by the predecessor State;²⁶⁶⁹

(f) in a few cases, the newly independent State has withdrawn the predecessor State’s reservations while formulating new reservations.²⁶⁷⁰

All these possibilities are acceptable under the terms of article 20, whose flexibility is unquestionably one of its greatest virtues.

²⁶⁵³ Paragraph (20) of the commentary to draft article 19 (*ibid.*, document A/9610/Rev.1, p. 227).

²⁶⁵⁴ *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. I, First Session ... (A/CONF.80/16)* (footnote 2623 above), 27th meeting of the Committee of the Whole, 25 April 1977, paras. 59–64.

²⁶⁵⁵ *Ibid.*, para. 60.

²⁶⁵⁶ *Ibid.* See also 28th meeting, 26 April 1977, para. 30.

²⁶⁵⁷ *Ibid.*, 28th meeting, para. 40.

²⁶⁵⁸ *Ibid.*, 27th meeting, para. 71 (Netherlands).

²⁶⁵⁹ *Ibid.*, para. 73 *in fine* (Algeria) and para. 89 (Guyana).

²⁶⁶⁰ *Ibid.*, para. 86 (Madagascar).

²⁶⁶¹ *Ibid.*, para. 77 (Poland).

²⁶⁶² *Ibid.*, 28th meeting, para. 7 (Israel). According to the representative of Israel, “A newly independent State ... would simply have the right of option to establish itself as a separate party to the treaty in virtue of the legal nexus established by its predecessor. Its right was to notify its own consent to be considered as a separate party to the treaty; that was not a right to step into the predecessor’s shoes. The significance of article 19 was that a newly independent State should be ‘considered’ as maintaining its succession to the treaty. In other words, notification of succession was an independent act of the successor State’s own volition”.

²⁶⁶³ See K. Zemanek, “State succession after decolonization”, *Collected Courses of The Hague Academy of International Law*, vol. 116 (1965), pp. 234–235; A. Gonçalves Pereira, *La succession d’États en matière de traité*, Paris, Pedone, 1969, pp. 175–176, footnote 50; and H. Bokor-Szegö, *New States and International Law*, Budapest, Akadémiai Kiadó, 1970, p. 100.

²⁶⁶⁴ M. G. Marcoff, *Accession à l’indépendance et succession d’États aux traités internationaux*, Fribourg, Éditions universitaires, 1969, p. 346. See also the memorandum by the Secretariat on reservations to treaties in the context of succession of States (footnote 2614 above), para. 22.

²⁶⁶⁵ See, for example, *Multilateral Treaties ...* (footnote 37 above), chap. IV.2: the Solomon Islands succeeded to the International Convention on the Elimination of All Forms of Racial Discrimination without making any mention of the reservations made by the predecessor State (the United Kingdom), which are not reproduced in relation to the Solomon Islands. The same is true in the case of the succession of Senegal and Tunisia to the Convention relating to the Status of Refugees of 1951 (*ibid.*, chap. V.2).

²⁶⁶⁶ Cyprus, Gambia and Tuvalu (*ibid.*, Convention relating to the Status of Refugees).

²⁶⁶⁷ Fiji and Jamaica (*ibid.*).

²⁶⁶⁸ Botswana and Lesotho (*ibid.*, chap. V.3, Convention relating to the Status of Stateless Persons of 1954).

²⁶⁶⁹ Fiji (*ibid.*).

²⁶⁷⁰ Zambia (*ibid.*); Zimbabwe (*ibid.*, chap. V.2, Convention relating to the Status of Refugees).

(20) According to article 20, paragraph 2, of the 1978 Vienna Convention, “a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of sub paragraph (a), (b) or (c) of article 19 of the [1969] Vienna Convention on the Law of Treaties”. Paragraph 2 of guideline 5.1.1 provides a reminder that any reservation formulated by a newly independent State when making a notification of succession is subject to the condition of permissibility set out in subparagraphs (a), (b) and (c) of guideline 3.1, which reproduces article 19 of the 1969 and 1986 Vienna Conventions.

(21) Paragraph 3 of guideline 5.1.1 recalls that the rules set out in Part 2 (Procedure) of the Guide to Practice apply to reservations formulated by a newly independent State when making a notification of succession. This accords with paragraph 3 of article 20 of the 1978 Vienna Convention, which states that “When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.” The reference includes article 20, paragraph 4 (c), of the 1969 Vienna Convention, which provides that “an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation”. It follows that a notification of succession containing a reservation will take effect only from that date.

(22) Although article 20 of the 1978 Vienna Convention applies only to reservations formulated in respect of treaties between States, guideline 5.1.1, like the other guidelines in the Guide to Practice, also covers reservations to treaties between States and international organizations.

5.1.2 *Uniting or separation of States*

1. Subject to the provisions of guideline 5.1.3, a successor State which is a party to a treaty as the result of a uniting or separation of States shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses its intention not to maintain one or more reservations of the predecessor State at the time of the succession.

2. A successor State which is a party to a treaty as the result of a uniting or separation of States may neither formulate a new reservation nor widen the scope of a reservation that is maintained.

3. When a successor State formed from a uniting or separation of States makes a notification whereby it establishes its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, that State shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses a

contrary intention when making the notification or formulates a reservation which relates to the same subject matter as that reservation. That successor State may formulate a new reservation to the treaty.

4. A successor State may formulate a reservation in accordance with paragraph 3 only if the reservation is one the formulation of which would not be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1. The relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

Commentary

(1) As the title suggests, this guideline deals with the uniting or separation of States. These cases are not covered by article 20 of the 1978 Vienna Convention or by guideline 5.1.1, which apply only to newly independent States, that is to say those arising from a decolonization process.²⁶⁷¹ This guideline is intended to fill a gap in the Vienna Convention. Given the general scope of this guideline, which covers both cases involving the separation of parts of a State and cases involving the uniting of two or more States, the term “predecessor State” should be understood, in cases involving the uniting of States, to mean one or more of the predecessor States.

(2) Guideline 5.1.2 deals with two situations separately. Paragraphs 1 and 2 deal with the case in which a State formed from a uniting or separation of States succeeds *ipso jure* to a treaty, whereas paragraph 3 deals with the case in which such a successor State succeeds to a treaty only through a notification whereby it expresses its intention to succeed thereto. While the presumption in favour of the maintenance of the predecessor State’s reservations is applicable in both situations envisaged,²⁶⁷² the distinction between the two situations proves decisive with respect to the right to formulate new reservations, which is recognized to a State formed from a uniting or separation of States only in the event that succession to a treaty is voluntary in nature.²⁶⁷³

(3) The reference in paragraphs 1 and 2 of this guideline to “a successor State which is a party to a treaty *as the result of a uniting or separation of States**” was used to indicate that the guideline covers the situation in which a succession to the treaty occurs *ipso jure*, and not on the basis of a notification to that effect by the successor State. Under Part IV of the 1978 Vienna Convention, such is the situation of a State formed from a uniting or separation of States with regard to treaties in force for any of the predecessor States at the date of the succession of States; in principle,²⁶⁷⁴ these treaties remain in force for a State formed from a uniting of two or more States.²⁶⁷⁵ The same applies to the case of a State formed from a separation of States, with respect to treaties in force at the date of the succession of States in

²⁶⁷¹ See paragraph (2) of the general commentary to Part 5 of the Guide to Practice and paragraphs (1)–(2) of the commentary to guideline 5.1.1 above.

²⁶⁷² See paragraphs (5)–(10) of the present commentary below.

²⁶⁷³ See paragraphs (11)–(15) of the present commentary below.

²⁶⁷⁴ Articles 31 and 34 of the Convention recognize exceptions concerning the express or tacit agreement of the parties.

²⁶⁷⁵ See article 31 of the Convention.

respect of the entire territory of the predecessor State, and also treaties in force in respect only of that part of the territory of the predecessor State which has become the territory of the successor State.²⁶⁷⁶ However, the practice of States and depositaries does not seem unanimous in terms of recognition of the automatic nature of succession to treaties in the context of a separation or uniting of States.

(4) In any event, under the 1978 Vienna Convention, succession does not occur *ipso jure* in respect of a State formed from a uniting or separation of States with regard to treaties to which the predecessor State was a contracting State at the date of succession of States but which at that date were not in force for the State concerned. In such cases, succession to the treaty is of a voluntary nature and implies a notification whereby the successor State establishes, as the case may be, its status as a contracting State.²⁶⁷⁷ These situations are referred to in paragraph 3 of this guideline.

(5) Paragraphs 1 and 3 of this guideline extend to the two different situations envisaged therein the presumption in favour of the maintenance of the predecessor State's reservations, which is provided for explicitly in article 20, paragraph 1, of the 1978 Vienna Convention for newly independent States in the context of a notification of succession and which is reproduced in guideline 5.1.1. There can be no doubt as to the application of this presumption to successor States other than newly independent States; it may even be said that the presumption is even stronger when succession occurs *ipso jure*. This corresponds, moreover, to the view expressed during the 1977–1978 Vienna Conference by some delegations which considered that the presumption was self-evident in cases of the uniting or separation of States, in the light of the principle of continuity reflected in the Convention in relation to these kinds of succession.²⁶⁷⁸

(6) While this provision establishes a general presumption in favour of the maintenance of reservations, there are nonetheless exceptions to this presumption in certain cases involving the uniting of two or more States; these are covered by guideline 5.1.3, which is referred to in paragraph 1 of the present guideline.

(7) The applicability of the presumption in favour of the maintenance of the predecessor State's reservations to States formed from the uniting or separation of States seems to be reflected to some extent in practice.

(8) While the Secretary-General of the United Nations, in the exercise of his functions as depositary, generally avoids taking a position on the status of reservations formulated by the predecessor State, the practice in cases

involving separation of States, in particular those of the States that emerged from the former Yugoslavia and from Czechoslovakia,²⁶⁷⁹ shows that the predecessor State's reservations have been maintained. It should be noted in this regard that the Czech Republic,²⁶⁸⁰ Slovakia,²⁶⁸¹ the Federal Republic of Yugoslavia²⁶⁸² and, subsequently, Montenegro²⁶⁸³ formulated general declarations whereby these successor States reiterated the reservations of the predecessor State.²⁶⁸⁴ In addition, in some cases the predecessor State's reservations have been expressly

²⁶⁷⁹ There appears to be virtually no relevant practice in relation to the successor States of the former Soviet Union.

²⁶⁸⁰ In a letter dated 16 February 1993 addressed to the Secretary-General and accompanied by a list of multilateral treaties deposited with the Secretary-General, the Government of the Czech Republic communicated the following: "In conformity with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor State to the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, *i.e.*, the date of the dissolution of the Czech and Slovak Federal Republic, by multinational international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by the Czech and Slovak Federal Republic.

The Government of the Czech Republic has examined multilateral treaties the list of which is attached to this letter. [The Government of the Czech Republic] considers to be bound by these treaties as well as by all reservations and declarations to them by virtue of succession as of 1 January 1993. The Czech Republic, in accordance with the well established principles of international law, recognizes signatures made by the Czech and Slovak Federal Republic in respect of all signed treaties as if they were made by itself", in *Multilateral Treaties ...* (footnote 37 above), *Status of Treaties, Historical Information*, under "Czech Republic".

²⁶⁸¹ In a letter dated 19 May 1993 and also accompanied by a list of multilateral treaties deposited with the Secretary-General, the Government of the Slovak Republic communicated the following: "In accordance with the relevant principles and rules of international law and to the extent defined by it, the Slovak Republic, as a successor State, born from the dissolution of the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, *i.e.*, the date on which the Slovak Republic assumed responsibility for its international relations, by multilateral treaties to which the Czech and Slovak Federal Republic was a party as of 31 December 1992, including reservations and declarations made earlier by Czechoslovakia, as well as objections by Czechoslovakia to reservations formulated by other treaty-parties" (*ibid.*, *Historical Information*, under "Slovakia").

²⁶⁸² By a notification dated 8 March 2001, the Government of the Federal Republic of Yugoslavia deposited an instrument, *inter alia*, communicating its intent to succeed to various multilateral treaties deposited with the Secretary-General and confirming certain actions relating to such treaties: "[T]he Government of the Federal Republic of Yugoslavia maintains the signatures, reservations, declarations and objections made by the Socialist Federal Republic of Yugoslavia to the treaties listed in the attached annex 1, prior to the date on which the Federal Republic of Yugoslavia assumed responsibility for its international relations" (*ibid.*, *Historical Information*, under "Yugoslavia").

²⁶⁸³ On 23 October 2006 the Secretary-General received a letter dated 10 October 2006 from the Government of Montenegro, accompanied by a list of multilateral treaties deposited with the Secretary-General, informing him that: "[The Government of] ... the Republic of Montenegro does maintain the reservations, declarations and objections made by Serbia and Montenegro, as indicated in the annex to this instrument, prior to the date on which the Republic of Montenegro assumed responsibility for its international relations" (*ibid.*, *Historical Information*, under "Montenegro").

²⁶⁸⁴ See also the case of other successors to the former Yugoslavia (apart from Serbia), which appear in the list of successor States for a number of treaties deposited with the Secretary-General with the indication, in footnotes, of reservations formulated by the former Yugoslavia (see, for example, Bosnia and Herzegovina, Croatia, Serbia and the former Yugoslav Republic of Macedonia in relation to the Convention on the privileges and immunities of the United Nations (*ibid.*, chap. III.1), the Protocol relating to the Status of Refugees (*ibid.*, chap. V.5) and the Convention relating to the Status of Stateless Persons (*ibid.*, chap. V.3).

²⁶⁷⁶ See article 34 of the Convention.

²⁶⁷⁷ See articles 32 and 36 of the Convention.

²⁶⁷⁸ See, in this regard, the statements by the delegations of Poland (*Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. II, Resumed Session ...* (A/CONF.80/16/Add.1) (footnote 2623 above), 43rd meeting of the Committee of the Whole, 3 August 1978, para. 13), France (*ibid.*, para. 16), Cyprus (*ibid.*, para. 20), Yugoslavia (*ibid.*, para. 21) and Australia (*ibid.*, para. 22). See also the draft article 36 *bis* proposed by Germany (see footnote 2623 above), which sought, among other things, to extend the presumption in question to cases of uniting and separation of States.

confirmed²⁶⁸⁵ or reformulated²⁶⁸⁶ by the successor State in relation to a particular treaty. In the case of the Republic of Yemen (united), there was also maintenance of reservations by the successor State. In a letter dated 19 May 1990 addressed to the Secretary-General, the Ministers for Foreign Affairs of the Yemen Arab Republic and the People's Democratic Republic of Yemen communicated the following:

As concerns the treaties concluded prior to their union by the Yemen Arab Republic or the People's Democratic Republic of Yemen, the Republic of Yemen (as now united) is accordingly to be considered as a party to those treaties as from the date when one of these States first became a party to those treaties. Accordingly the tables showing the status of treaties will now indicate under the designation "Yemen" the date of the formalities (signatures, ratifications, accessions, declarations and reservations, etc.) effected by the State which first became a party, those eventually effected by the other being described in a footnote.²⁶⁸⁷

(9) In addition, some elements of the practice in relation to treaties deposited with other depositaries seem to confirm the general presumption in favour of the maintenance of the predecessor State's reservations, although, admittedly, the practice is rather sparse. The Czech Republic and Slovakia transmitted to a number of depositaries notifications of succession similar to those transmitted to the Secretary-General of the United Nations and providing for the maintenance of reservations formulated by the predecessor State.²⁶⁸⁸ Neither the depositaries in question nor the other parties to the treaties concerned raised any objections to this practice. The Universal Postal Union's reply to the questionnaire²⁶⁸⁹ is also worth noting. That organization's practice is to consider that valid reservations applicable to a member State are automatically transferred to the successor State; the same is true in the case of States that have become independent by separating from a member State. The Council of Europe applied the same presumption with respect to Montenegro. In a letter dated 28 June 2006 addressed to the Minister for Foreign Affairs of Montenegro, the Director General of Legal Affairs of the Council of Europe indicated that, in accordance with article 20 of the Vienna Convention of 1978, the Republic of Montenegro was considered "as maintaining these reservations and declarations because the Republic of Montenegro's declaration of succession does not express a contrary intention in that respect".²⁶⁹⁰ That letter also included a list of reservations and declarations that had been revised in places to remove references to the Republic of Serbia. By a letter dated 13 October 2006, the Minister for Foreign Affairs of Montenegro communicated his agreement on the wording of those reservations and declarations. The practice followed by Switzerland as depositary of a number of multilateral treaties likewise does

²⁶⁸⁵ Convention on the Prevention and Punishment of the Crime of Genocide, reservation formulated by the Federal Republic of Yugoslavia (*ibid.*, chap. IV.1).

²⁶⁸⁶ Convention on the rights of the child (*ibid.*, chap. IV.11, under "Slovenia").

²⁶⁸⁷ *Ibid.*, *Historical Information*, under "Yemen".

²⁶⁸⁸ See V. Mikulka, "The dissolution of Czechoslovakia and succession in respect of treaties", in M. Mrak (ed.), *Succession of States*, The Hague/Boston/London, M. Nijhoff, 1999, pp. 111–112.

²⁶⁸⁹ Regarding the questionnaire, see footnote 39 above.

²⁶⁹⁰ JJ55/2006, PJD/EC (extract translated by the Secretariat in its memorandum on reservations to treaties in the context of succession of States (see footnote 2614 above), para. 67).

not appear to be in fundamental contradiction to that of the Secretary-General of the United Nations. It is true that Switzerland had initially applied, to a successor State that made no reference to the status of the predecessor State's reservations, the presumption that such reservations were not maintained. Today, however, Switzerland no longer applies any presumption, as its practice is to invite the successor State to communicate its intentions as to whether or not it is maintaining reservations formulated by the predecessor State.²⁶⁹¹

(10) As with newly independent States, the presumption in favour of the maintenance of the predecessor State's reservations is also rebuttable in respect of successor States formed from a uniting or separation of States. In this respect, as can be seen from paragraphs 1 and 3 of this guideline, there is no doubt that such a successor State may reverse the presumption by expressing its intention not to maintain one or more reservations of the predecessor State. Under paragraph 1 of guideline 5.1.1, the reversal of the presumption also occurs when a newly independent State formulates a reservation which relates to the "same subject matter" as the reservation formulated by the predecessor State.²⁶⁹² In guideline 5.1.2, this possibility is referred to in paragraph 3, which applies to situations in which succession to the treaty by a State formed from a uniting or separation of States is of a voluntary nature. In contrast, the possibility of reversing the presumption by the formulation of a reservation relating to the same subject is not mentioned in paragraph 1, as the right to formulate reservations is not recognized to a successor State when the succession does not depend on an expression of will on its part.

(11) If, in cases involving the uniting or separation of States, succession is considered to take place *ipso jure* in respect of treaties that were in force for the predecessor State at the time of the succession of States, it is difficult to contend that a successor State may evade or lighten its obligations by formulating reservations. Paragraph 2 of the guideline thus rules out the right of such a successor State to formulate new reservations to the treaty. By the same reasoning, as the last phrase of paragraph 2 indicates, a State which succeeds *ipso jure* to a treaty may not be recognized as having the right to extend the scope of a reservation it maintains.²⁶⁹³

(12) Also worth mentioning in this regard, in addition to the arguments made against this possibility during the

²⁶⁹¹ See the letter dated 3 May 1996 from the Directorate of Public International Law addressed to an individual, describing changes in the practice of Switzerland as depositary State for the Geneva Conventions for the protection of war victims, in relation to the succession of States to treaties, reproduced in L. Caflisch, "La pratique suisse en matière de droit international public 1996", *Revue suisse de droit international et de droit européen*, 1997, vol. 7, pp. 682–685, in particular p. 684. This approach was confirmed in an opinion given on 6 February 2007 by the Directorate of Public International Law of the Federal Department of Foreign Affairs, entitled "Pratique de la Suisse en tant qu'État dépositaire. Réserves aux traités dans le contexte de la succession d'États", reproduced in *Jurisprudence des autorités administratives de la Confédération (JAAC)*, 5 December 2007, pp. 328–330, in particular p. 330 (available from www.bk.admin.ch/dokumentation/02574/02600/index.html?lang=fr).

²⁶⁹² See paragraph 1 of guideline 5.1.1 above.

²⁶⁹³ See guideline 2.3.4 above.

drafting of the 1978 Vienna Convention,²⁶⁹⁴ is the position taken by the Council of Europe in its letter of 28 June 2006 to Montenegro,²⁶⁹⁵ to the effect that that State did “not have the possibility, at this stage, to make new reservations to the treaties already ratified” and to which it had notified its succession.²⁶⁹⁶ This position seems to be consistent with the rule of *ipso jure* succession to treaties, as set out in the 1978 Vienna Convention for cases involving the uniting or separation of States. This solution also seems to have been confirmed in practice, as successor States other than newly independent States have not formulated new reservations upon succeeding to treaties.

(13) The solution set out in paragraph 2 of guideline 5.1.2 also seems to be echoed in the separate opinion by Judge Tomka appended to the judgment of the International Court of Justice of 26 February 2007 in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case:

There can be no doubt that this decision to notify of the accession to the Genocide Convention, with a reservation to Article IX and *not succession (where no reservation is allowed)** was motivated by the considerations relating to the present case. (...)

That single notification of accession, in my view, was totally inconsistent with the succession by the Federal Republic of Yugoslavia—notified the very same day to the United Nations Secretary-General as accession to the Genocide Convention—to the Vienna Convention on Succession of States in Respect of Treaties*, which in Article 34 provides that the treaties of the predecessor State continue in force in respect of each successor State. By the latter notification of succession, the Federal Republic of Yugoslavia became a contracting State of the Vienna Convention on Succession of States in Respect of Treaties as of April 1992. That Convention entered into force on 6 November 1996. Although not formally applicable to the process of the dissolution of the former Yugoslavia, which occurred in the 1991–1992 period, in light of the fact that the former Yugoslavia consented to be bound by the Vienna Convention already in 1980, and the Federal Republic of Yugoslavia has been a contracting State to that Convention since April 1992, one would not expect, by analogy to Article 18 of the Vienna Convention on the Law of Treaties, a State which, through notification of its accession, expresses its consent to be considered as bound by the Vienna Convention on Succession of States in Respect of Treaties to act in a singular case inconsistently with the rule contained in Article 34 of that Convention, while in a great number of other cases to acting in full conformity with that rule*. These considerations, taken together, lead me to the conclusion that the Court should not attach any legal effect to the notification of accession by the Federal Republic of Yugoslavia to the Genocide Convention, and should instead consider it bound by that Convention on the basis of*

²⁶⁹⁴ It is worth recalling in this regard the objections formulated by certain delegations to the proposal by the Federal Republic of Germany (later withdrawn) to include a draft article 36 *bis* in the Convention which would have granted to successor States other than newly independent States, among other things, the right to formulate new reservations, even in respect of a treaty that remains in force for the successor State (*Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. II, Resumed Session ... (A/CONF.80/16/Add.1)* (footnote 2623 above), 43rd meeting of the Committee of the Whole, 3 August 1978, paras. 9–12). The delegations in question considered that giving a successor State the right to formulate new reservations was inconsistent with the principle of *ipso jure* continuity of treaties set out by the Convention for cases involving the uniting or separation of States (*ibid.*, para. 14 (Poland), para. 15 (United States of America), para. 18 (Nigeria), para. 19 (Mali), para. 20 (Cyprus), para. 21 (Yugoslavia), para. 22 (Australia) and para. 24 (Swaziland, albeit in more nuanced terms)).

²⁶⁹⁵ See footnote 2690 above.

²⁶⁹⁶ Translated by the Secretariat in its memorandum on reservations to treaties in the context of succession of States (see footnote 2614 above), para. 69.

the operation of the customary rule of *ipso jure* succession codified in Article 34 as applied to cases of the dissolution of a State.²⁶⁹⁷

(14) However, as guideline 5.1.8 below indicates, it is necessary to consider that the formulation of a reservation by a successor State, formed from a uniting or separation of States, in respect of which the treaty remains in force should be likened to the late formulation of a reservation.

(15) In contrast, the right to formulate new reservations that is recognized in the case of newly independent States in paragraph 2 of guideline 5.1.1 could be extended, it would seem, to successor States formed from a uniting or separation of States when their succession to a treaty is of a voluntary nature in that it occurs through a notification. Such is the case with respect to treaties which, on the date of the succession of States, were not in force for the predecessor State but to which it was a contracting State.²⁶⁹⁸ In terms of the right to formulate new reservations, there is no reason to differentiate between those successor States and newly independent States to the extent that, in both cases, succession to the treaty involves an expression of intention on the part of the State concerned.

(16) Finally, paragraph 4 of guideline 5.1.2 recalls that any reservation formulated by a successor State formed from a uniting or separation of States, in accordance with paragraph 3 of this guideline, is subject to the conditions of permissibility set out in subparagraphs (a), (b) and (c) of guideline 3.1, which reproduces article 19 of the 1969 and 1986 Vienna Conventions. It also recalls that the relevant rules set out in Part 2 of the Guide to Practice apply in respect of that reservation. Paragraph 4 is the counterpart of paragraphs 2 and 3 of guideline 5.1.1.

5.1.3 Irrelevance of certain reservations in cases involving a uniting of States

When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

Commentary

(1) Unlike the separation of a State, where succession to a treaty results in the application of a single reservations regime to that treaty, a uniting of States entails a risk that two or more reservations regimes that may be different or even contradictory will apply to the same treaty. Such cases are not merely hypothetical. Nonetheless, the relevant practice does not seem to provide satisfactory answers to the many questions raised by this situation. For example, the aforementioned letter of 19 May 1990 from the Ministers for Foreign Affairs of the Yemen Arab Republic and the People's Democratic

²⁶⁹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007 (see footnote 1600 above), p. 330 (separate opinion of Judge Tomka, para. 35).

²⁶⁹⁸ See paragraph (4) of the commentary to this guideline above.

Republic of Yemen to the Secretary-General,²⁶⁹⁹ in suggesting a solution to the technical problem of how the actions of the two predecessor States in relation to the same treaty should be recorded, referred to a time test whose legal scope appears uncertain in many respects and leaves unanswered the possible future question of the status of reservations formulated by the States concerned prior to the date of their union.

(2) In the case of a treaty which, at the date of a uniting of States, was in force in respect of any of the uniting States and continues in force in respect of the State so formed,²⁷⁰⁰ guideline 5.1.2, paragraph 1, establishes the principle that any reservations to such a treaty that were formulated by any of the uniting States continue to apply to the unified State unless the latter expresses a contrary intention. The application of this presumption raises no difficulty provided that the uniting States were both either parties or contracting States to the treaty, in respect of which the treaty was not in force. However, the situation is more complicated if one of those States was a party to the treaty and the other was a contracting State in respect of which the treaty was not in force.

(3) It is this situation that the present guideline seeks to address: it provides only for the maintenance of reservations formulated by the State that was a party to the treaty. This solution is based on the fact that a State—in this case a State formed from a uniting of States—can have only one status in respect of a particular treaty: in this case that of a State party to the treaty (principle of *ipso jure* continuity). Thus, for a treaty that continues in force in respect of a State formed from a uniting of States, it seems logical to consider that only those reservations formulated by the State or States in respect of which the treaty was in force at the date of uniting of States may be maintained. Any reservations formulated by a contracting State in respect of which the treaty was not in force become irrelevant.

(4) Guideline 5.1.3²⁷⁰¹ is worded so as to cover not only the situations contemplated in articles 31–33 of the 1978 Vienna Convention, but also other situations involving the uniting of States in which one of the uniting States retains its international legal personality (a situation not covered by those provisions of the 1978 Vienna Convention).

5.1.4 Maintenance of the territorial scope of reservations formulated by the predecessor State

Subject to the provisions of guideline 5.1.5, a reservation considered as being maintained in conformity

²⁶⁹⁹ The relevant text of this letter reads:

“As concerns the treaties concluded prior to their union by the Yemen Arab Republic or the People’s Democratic Republic of Yemen, the Republic of Yemen (as now united) is accordingly to be considered as a party to those treaties as from the date when one of these States first became a party to those treaties. Accordingly the tables showing the status of treaties will now indicate under the designation ‘Yemen’ the date of the formalities (signatures, ratifications, accessions, declarations and reservations, etc.) effected by the State which first became a party, those eventually effected by the other being described in a footnote” (see paragraph (8) of the commentary to guideline 5.1.2 and footnote 2687 above).

²⁷⁰⁰ See article 31 of the 1978 Vienna Convention.

²⁷⁰¹ The same is true of guidelines 5.1.5 and 5.2.2.

with guideline 5.1.1, paragraph 1, or guideline 5.1.2, paragraph 1 or 3, shall retain the territorial scope that it had at the date of the succession of States, unless the successor State expresses a contrary intention.

Commentary

(1) It seems self-evident that a reservation considered as being maintained following a succession of States retains the territorial scope that it had at the date of the succession of States. This guideline sets out this principle, which follows logically from the idea of continuity inherent in the concept of succession to a treaty, whether it occurs *ipso jure* or by virtue of a notification of succession.

(2) Nonetheless, the successor State’s freedom to express its intention to change the territorial scope of a reservation considered as being maintained should be recognized. That is the meaning of the phrase “unless the successor State expresses a contrary intention” with which this guideline ends. However, it is understood that a declaration by which a successor State expresses its intention to extend the territorial scope of a reservation considered as being maintained would not, by itself, affect the rights and obligations of other contracting States or contracting organizations.

(3) Furthermore, there are exceptions to the principle of the maintenance of the territorial scope of reservations considered as being maintained in certain situations involving the uniting of two or more States. These exceptions, which raise complex issues, are addressed in guideline 5.1.5 and are explicitly excluded from the scope of the present guideline.

(4) In addition, there is a need to address separately the problems that arise in relation to reservations in cases of succession involving part of a territory. While these cases do not constitute an exception to the principle established in the present guideline (as, in principle, the State that has acquired the territory in question does not in consequence succeed to the treaties by which the predecessor State was bound), they nonetheless require more specific treatment, which guideline 5.1.6 seeks to afford.

5.1.5 Territorial scope of reservations in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:

(a) the successor State expresses a contrary intention when making the notification extending the territorial scope of the treaty; or

(b) 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.

2. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:

(a) an identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;

(b) the successor State expresses a different intention when making the notification extending the territorial scope of the treaty; or

(c) a contrary intention otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty.

3. A notification purporting to extend the territorial scope of a reservation in accordance with paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.

4. The provisions of paragraphs 1 to 3 apply *mutatis mutandis* to reservations considered as being maintained by a successor State that is a contracting State, following a uniting of States, to a treaty which was not in force for any of the uniting States at the date of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

Commentary

(1) This guideline addresses the specific problems that can arise with respect to the territorial scope of reservations considered as being maintained following a uniting of two or more States. Paragraphs 1–3 deal with the case of a treaty that, following the uniting of States, remains in force, with reservations, in respect of the successor State. Paragraph 4 provides for the application *mutatis mutandis* of the same solutions to the case in which, following the uniting of States, the successor State is the contracting State to a treaty that was not in force for any of the predecessor States at the date of the uniting.

(2) The principle set out in guideline 5.1.4, namely that the territorial scope of a reservation considered as being maintained following a succession of States remains unchanged, applies also to cases involving the uniting of two or more States, albeit with certain exceptions, which are set out in this guideline. Such exceptions can occur when, following a uniting of two or more States, a treaty becomes applicable to a part of the territory of the unified State to which it did not apply at the date of the succession of States.

(3) Two possible situations should be distinguished in this connection:

– the situation in which, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply previously; and

– the situation in which a treaty that was in force at the date of the succession of States in respect of two or more of the uniting States—but was not applicable to the whole of what was to become the territory of the successor State—becomes applicable to a part of the territory of the successor State to which it did not apply before the uniting.

(4) Paragraph 1 concerns the first situation, that is, where a treaty in force, with reservations, at the date of the succession of States for *only one* of the States that unite to form the successor State becomes applicable to a part of the territory of the unified State to which it did not apply at the date of the succession of States. Where the territorial scope of a treaty is thus extended by the successor State—which implies its consent (expressed either by a notification or in an agreement with other States parties),²⁷⁰² there is every reason to believe that this extension concerns the treaty relationship as modified by the reservations formulated by the State in respect of which the treaty was in force at the date of the uniting. Paragraph 1, subparagraphs (a) and (b), however, provide for two exceptions:

– first, there is in principle nothing to prevent the State formed from a uniting of States, when it gives notification of the extension of the territorial scope of the treaty, from expressing a contrary intention in that regard and electing not to extend the territorial scope of the reservations. Paragraph 1 (a) establishes this possibility;

– secondly, the reservation's nature or purpose may rule out its extension beyond the territory to which it was applicable at the date of the succession of States. This could be the case, in particular, of a reservation the application of which was already limited to a part of the territory of the State that formulated it, or a reservation that specifically concerns certain institutions belonging only to that State. Paragraph 1 (b) refers to this possibility.

(5) Paragraph 2 concerns, on the other hand, the second situation envisaged in paragraph (3) above, namely the case in which the treaty whose territorial scope is extended by the successor State was in force at the date of the succession of States in respect of *at least two* of the uniting States but was not at that time applicable to the whole of what was to become the territory of the unified State. The question, then, is whether reservations formulated by any of those States also become applicable to the parts of the territory of the unified State to which the treaty was not applicable at the date of the succession of States. In the absence of specific indications from the successor State, it may be unclear whether and to what extent that State, in extending the territorial scope of the treaty, meant to extend the territorial scope of the reservations formulated by one or another of the States in respect of which the treaty was in force at the date of the succession of States. Unless there are indications to the contrary, it appears reasonable to set out the presumption that none

²⁷⁰² See article 31, paragraph 2, of the 1978 Vienna Convention.

of those reservations extends to parts of the territory of the unified State to which the treaty was not applicable at the date of the succession of States. However, there is no reason not to regard this presumption as rebuttable. A different solution should apply:

- when an identical reservation has been formulated by each of the predecessor States in respect of which the treaty was in force, the situation referred to in paragraph 2 (a); in that case one should, on the contrary, presume that the unified State intends to maintain a reservation that is common to its predecessors and follow the logic reflected in paragraph 1 of this guideline;

- if a State formed from a uniting of States, when it accepts to extend the territorial scope of a treaty, expresses a different intention by specifying the reservations that will apply to the territory to which the treaty has been extended, the situation referred to in paragraph 2 (b); or

- if it becomes otherwise apparent from the circumstances that a State formed from a uniting of States intends to maintain reservations formulated by one of the States in particular, the situation referred to in paragraph 2 (c); this is the case, for example, when the unified State, upon extending the territorial scope of a treaty, refers specifically to formalities performed in respect of the treaty, prior to the date of the union, by one of the States concerned.

(6) In the case of identical reservations, referred to in paragraph 2 (a), the territorial extension of such a reservation to the part of the territory of the State formed from a uniting of States to which it did not apply before the date of succession of the States may, however, not be possible in some situations because of the nature or purpose of the reservation in question. That situation is similar to the one envisaged in paragraph 1 (b). In the context of identical reservations, this situation may arise in the case of the uniting of more than two States, since it is conceivable that an identical reservation formulated by all of the predecessor States in respect of which the treaty was in force at the date of the succession of States could not be extended, because of its nature or its purpose, to the part of the territory of the successor State that, prior to the uniting of States, belonged to another uniting State in respect of which the treaty was not in force at the date of the succession of States. While aware of this possibility, the Commission did not mention it in the text of guideline 5.1.5 so as to avoid overburdening the text.

(7) In the situation contemplated in paragraph 2 (b), the decision of a unified State to extend the scope of various reservations to the territory concerned is acceptable only if those reservations, formulated by two or more of the uniting States, are compatible with each other. They may indeed be incompatible. In that situation, a declaration to that effect by the successor State cannot be regarded as having any effect if it would give rise to the application of contradictory reservations. This is the meaning of paragraph 3 of this guideline.

(8) The rules set out in paragraphs 1–3 concern the situation in which the treaty to which the predecessor States' reservation or reservations relate was in force in respect of at least one of them at the date of the succession of States. However, according to paragraph 4, they apply *mutatis*

mutandis to reservations considered as being maintained by a unified State that extends the territorial scope of a treaty to which, following the succession of States, it is a contracting State when the treaty was not in force, at the date of the succession of States, in respect of any of the predecessor States even though one, or two or more, of the uniting States, respectively, had the status of a contracting party.²⁷⁰³ In the same spirit, this solution should be applied to situations—undoubtedly rare, but provided for in article 32, paragraph 2, of the 1978 Vienna Convention—in which a treaty to which one or more of the uniting States were contracting States at the date of the succession of States enters into force after that date because the conditions provided for in the relevant clauses of the treaty have been met; in such a case, the successor State would become a party to the treaty.

(9) Lastly, concerning paragraph 4, it should also be recalled that the issue of the territorial scope of reservations formulated by a contracting State in respect of which the treaty was not in force at the date of the succession of States arises only if the treaty was not in force, on that date, for any of the uniting States; otherwise, the reservations formulated by that contracting State are not considered as being maintained.²⁷⁰⁴

5.1.6 *Territorial scope of reservations of the successor State in cases of succession involving part of territory*

When, as a result of a succession of States involving part of the territory of a State, a treaty to which the successor State is a contracting State becomes applicable to that territory, any reservation to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:

(a) the successor State expresses a contrary intention; or

(b) it appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a part of this territory.

Commentary

(1) This guideline concerns cases involving the cession of territory or other territorial changes referred to in article 15 (Succession in respect of part of territory) of the 1978 Vienna Convention. This article provides that, as from the date of the succession of States, treaties of the successor State are in force in respect of the territory to which the succession of States relates, while treaties of the predecessor State cease to be in force in respect of that territory. This provision represents an extension of the rule, established in article 29 of the 1969 Vienna Convention, concerning flexibility in the territorial application of treaties. Accordingly, guidelines 5.1.1 and 5.1.2 would not apply to situations falling under article 15 of the Convention because, in these cases, there is in principle no succession to treaties as such. While the State in question is referred to as a “successor State” within the

²⁷⁰³ See article 32 of the 1978 Vienna Convention.

²⁷⁰⁴ See guideline 5.1.3.

meaning of article 2, paragraph 1 (d), of the 1978 Vienna Convention, in a manner of speaking it “succeeds” itself, and its status as a contracting State remains as it was when that State acquired it by expressing its own consent to be bound by the treaty in accordance with article 11 of the 1969 Vienna Convention.

(2) When this situation arises as a result of a succession involving part of a territory, the treaty of the successor State is extended to the territory in question. In this case, it seems logical to consider that the treaty’s application to that territory is subject, in principle, to the reservations which the successor State itself had formulated to the treaty.

(3) Here again, however, this principle should be qualified by two exceptions, also based on the principle of consent so prevalent in the law of treaties in general and of reservations in particular. Accordingly, a reservation should not extend to the territory to which the succession relates:

– when the successor State expresses a contrary intention (subparagraph (a)); this case can be likened to a partial withdrawal of the reservation, limited to the territory to which the succession of States relates;²⁷⁰⁵ or

– when it appears from the reservation itself that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a part of that territory (subparagraph (b)).

(4) Guideline 5.1.6 is formulated so as to cover not only treaties in force for the successor State at the time of the succession of States, but also treaties not in force for the successor State on that date but to which it is a contracting State, a situation not covered by article 15 of the 1978 Vienna Convention. The verb “apply” in relation to such a treaty should be understood as encompassing both situations, which need not be distinguished from one another in this context in relation to the question of reservations.

(5) However, this guideline does not apply to “territorial treaties” (concerning a border regime or other regime relating to the use of a specific territory). If a succession occurs in relation to such a treaty,²⁷⁰⁶ the solutions provided for in guideline 5.1.2 concerning the uniting or separation of States apply *mutatis mutandis* to reservations formulated in respect of that treaty.

5.1.7 Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State

The non-maintenance, in conformity with guideline 5.1.1 or 5.1.2, by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or a contracting organization only when notice of it has been received by that State or organization.

²⁷⁰⁵ On the partial withdrawal of a reservation, see guidelines 2.5.10 and 2.5.11 and commentaries thereto.

²⁷⁰⁶ For international jurisprudence on this point, see, *inter alia*, the Permanent Court of International Justice, Order of 6 December 1930, in the case concerning *Free Zones of Upper Savoy and the District of Gex*, P.C.I.J., Series A, No. 24, p. 17, and Judgment of 7 June 1932 in the same case, P.C.I.J., Series A/B, No. 46, p. 96, in particular p. 145.

Commentary

(1) Article 20 of the 1978 Vienna Convention does not directly address the effects *ratione temporis* of a declaration whereby a newly independent State announces, when notifying its succession to a treaty, that it is not maintaining a reservation formulated by the predecessor State; even less does it clarify the issue in the context of a succession of States resulting from a uniting or separation of States, as the 1978 Vienna Convention does not specify the status of the predecessor State’s reservations in that context. Neither practice nor the literature seems to provide a clear answer to this question, which could nonetheless be of some practical importance.

(2) Whether resulting from the expression of a “contrary intention” or from the successor State’s formulation of a reservation that “relates to the same subject matter” as a reservation formulated by the predecessor State,²⁷⁰⁷ it seems reasonable, in relation to its effects *ratione temporis*, to treat the non-maintenance of a reservation following a succession of States as a withdrawal of the reservation in question and to consider it subject, as such, to the ordinary rules of the law of treaties, codified in article 22 of the 1969 and 1986 Vienna Conventions. Pursuant to paragraph 3 (a) of that article, “[u]nless the treaty otherwise provides, or it is otherwise agreed[,] the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State”.

(3) This guideline reproduces *mutatis mutandis* the rule set out in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions and reflected in guideline 2.5.8 concerning the effects *ratione temporis* of the withdrawal of a reservation: this solution, which is particularly important when succession to the treaty (and to the reservation) takes place *ipso jure*, seems to lend itself to all types of succession: not until they are aware of the successor State’s intention (by means of a written notification)²⁷⁰⁸ can the other parties take the withdrawal into account.

5.1.8 Late formulation of a reservation by a successor State

A reservation shall be considered as late if it is formulated:

(a) by a newly independent State after it has made a notification of succession to the treaty;

(b) by a successor State other than a newly independent State after it has made a notification establishing its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or

(c) by a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.

²⁷⁰⁷ See paragraph 1 of guideline 5.1.1 and paragraphs 1 and 3 of guideline 5.1.2 above.

²⁷⁰⁸ See guideline 2.5.2 on form of withdrawal of a reservation and commentary thereto.

Commentary

(1) The right of a newly independent State to formulate reservations to a treaty to which it intends to succeed is not in doubt, nor is the right of other successor States to formulate reservations in respect of a treaty that was not in force at the date of the succession of States.²⁷⁰⁹ However, that right ought not to be unlimited in time. This guideline deals with three situations in which a reservation formulated by a successor State should be subject to the legal regime for late reservations, as set out in guidelines 2.3, 2.3.1, 2.3.2 and 2.3.4. In this respect, it should be recalled that guideline 2.3 provides that the late formulation of a reservation is permitted only if none of the contracting States and contracting organizations objects, thereby fully upholding the principle of consent.

(2) The first situation is referred to in subparagraph (a). It concerns reservations that a newly independent State might formulate after it has made a notification of succession. It seems reasonable to consider that if the newly independent State intends to exercise its right to formulate reservations to the treaty to which it is succeeding, it should do so when it makes a notification of succession. This is clearly implied by the very definition of reservations contained in guideline 1.1 of the Guide to Practice, which, like article 2, paragraph 1 (j), of the 1978 Vienna Convention—and unlike article 2, paragraph 1 (d), of the 1969 Vienna Convention—mentions among the temporal elements included in the definition of reservations the time “when [a State is] making a notification of succession to a treaty”.²⁷¹⁰ It seems legitimate to conclude from this that reservations formulated by a newly independent State after that date should be considered as late within the meaning of the guidelines referred to in the previous paragraph of this commentary.

(3) For similar reasons, it seems that the regime for late reservations should apply to the reservations referred to under subparagraph (b) formulated by a successor State other than a newly independent State after the date on which it has established, by a notification to that effect, its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State, under the conditions stipulated in guideline 5.1.2, paragraph 3. As in that provision, the term “predecessor State” should be understood here, in cases involving a uniting of States, to mean one or more of the predecessor States.

(4) In fact, as indicated in subparagraph (c) of the present guideline, the same solution should also apply to any reservation formulated by a successor State other than

²⁷⁰⁹ See paragraph 2 of guideline 5.1.1 and paragraph 3 of guideline 5.1.2.

²⁷¹⁰ The full definition of reservations in paragraph 1 of guideline 1.1 reads as follows: “‘Reservation’ means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty”, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.” On the reasons for the inclusion of this reference to the succession of States in guideline 1.1, see paragraphs (5) and (6) of the commentary to that guideline.

a newly independent State to a treaty which, following the succession of States, continues in force for that State. In such a case, guideline 5.1.2, paragraph 2, does not recognize a right on the part of the successor State to formulate reservations that had not been formulated by the predecessor State. Nonetheless, should the successor State formulate a new reservation to the treaty in question, there are no grounds for treating that State differently from any other State by denying it the benefit of the legal regime for late reservations.²⁷¹¹

5.2 *Objections to reservations in cases of succession of States*

5.2.1 *Maintenance by the successor State of objections formulated by the predecessor State*

Subject to the provisions of guideline 5.2.2, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting organization, unless it expresses a contrary intention at the time of the succession.

Commentary

(1) This guideline and guidelines 5.2.2–5.2.6 seek to fill gaps in the 1978 Vienna Convention. That Convention does not deal with objections to reservations (nor with acceptances of reservations) in relation to the succession of States. The Commission itself had decided to leave the question of objections open despite a partial proposal by Sir Humphrey Waldock.²⁷¹² Notwithstanding a request to that effect from the representative of the Netherlands²⁷¹³ and some concerns expressed at the United Nations Conference on Succession of States in respect of Treaties about this gap in the Convention,²⁷¹⁴ the gap was allowed to remain.

(2) That was a deliberate stance, as explained at the Conference by Mr. Yasseen, Chairperson of the Drafting Committee: “The Drafting Committee had paid particular attention to the question of objections to reservations and objections to such objections, which had been raised by the Netherlands representative. It had noted that, as was clear from the International Law Commission’s commentary to article 19, particularly paragraph (15) (A/CONF.80/4, p. 66),^[2715] the article did not deal with that matter, which was left to be regulated by general international law.”²⁷¹⁶

(3) Draft article 19 (the forerunner of article 20 of the 1978 Vienna Convention), as adopted by the Commission on second reading in 1974, also did not address the question of objections to reservations in the context

²⁷¹¹ See the commentary to guideline 5.1.2 above.

²⁷¹² See paragraph (5) of the commentary to this guideline below.

²⁷¹³ *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. I, First Session ... (A/CONF.80/16)* (footnote 2623 above), Committee of the Whole, 27th meeting, 25 April 1977, para. 70; 28th meeting, 26 April 1977, para. 32; and 35th meeting, 4 May 1977, para. 19.

²⁷¹⁴ *Ibid.*, 27th meeting, para. 85 (Madagascar).

²⁷¹⁵ See paragraph (3) of this commentary below.

²⁷¹⁶ *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. I, First Session ... (A/CONF.80/16)* (footnote 2623 above), Committee of the Whole, 35th meeting, para. 17.

of succession of States. Here again, the omission was deliberate; in the commentary to this provision, the Commission noted that

it would be better, in accordance with its fundamental method of approach to the draft articles, to leave these matters to be regulated by the ordinary rules applicable to acceptances and objections on the assumption that, unless it was necessary to make some particular provision in the context of the succession of States, the newly independent State would “step into the shoes of the predecessor State”.²⁷¹⁷

These last words could imply that the Commission considered that the transmission of objections should be the rule.²⁷¹⁸

(4) In order to justify its silence on the question of objections to reservations, the Commission invoked an argument based on their legal effects. It noted, on the one hand, that unless the objecting State has definitely indicated that by its objection it means to preclude the entry into force of the treaty as between the reserving State and the objecting State, the legal position created by an objection to a reservation is much the same as if no objection had been lodged;²⁷¹⁹ and, on the other, that if such an indication is given, the treaty will not have been in force at all between the predecessor State and the reserving State at the date of the succession.²⁷²⁰ This also implies that the Commission considered that the prior (maximum-effect) objections of the predecessor State continued to apply.

(5) This was, moreover, the position of Sir Humphrey Waldock, who, while highlighting the scarcity of practice in this regard, had suggested, again along the lines of the proposals put forward by Mr. O’Connell to the International Law Association,²⁷²¹ that the rules regarding reservations should apply *mutatis mutandis* to objections.²⁷²² In

²⁷¹⁷ *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, p. 226, paragraph (15) of the commentary; see also paragraph (23), p. 227. This explanation was recalled at the 1977–1978 United Nations Conference on Succession of States in respect of Treaties by Sir Francis Vallat, acting as an Expert Consultant; see *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. I, First Session ... (A/CONF.80/16)* (footnote 2623 above), Committee of the Whole, 27th meeting, para. 83.

²⁷¹⁸ In this regard, see Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 320, footnote 126.

²⁷¹⁹ See however, guidelines 4.3 and 4.3.1–4.3.8 and commentaries thereto above.

²⁷²⁰ See *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, p. 226, paragraph (14) of the commentary to article 19. This reasoning is supported by Ruda, “Reservations to treaties” (footnote 56 above), pp. 207–208. See, however, the critical remarks of J. Klabbers, “State succession and reservations to treaties”, in J. Klabbers and R. Lefeber (eds.), *Essays on the Law of Treaties. A Collection of Essays in Honour of Bert Vierdag*, The Hague/Boston/London, Nijhoff, 1998, pp. 109–110.

²⁷²¹ “Additional point” No. 13 proposed by the Committee Rapporteur on “The Succession of New States to the Treaties and Certain Other Obligations of their Predecessors”: “Since a new State takes over the legal situation of its predecessor, it takes over the consequences of its predecessor’s objections to an incompatible reservation made to a multilateral convention by another party. Therefore the reservation would not be effective against the new State unless the latter formally waives the objection” (International Law Association, *Interim Report of the Committee* (see footnote 2634 above), quoted in the second report on succession in respect of treaties by Sir Humphrey Waldock (*Yearbook ... 1969*, vol. II, document A/CN.4/214 and Add.1–2, p. 49, para. 17)).

²⁷²² See draft article 9, paragraph 3 (a), contained in the third report on succession in respect of treaties by Sir Humphrey Waldock: “The

particular, that meant that the same presumption that the Commission would later make with respect to reservations formulated by newly independent States in its draft article 19, paragraph 1, which was reproduced in article 20, paragraph 1, of the 1978 Vienna Convention, would apply to objections.²⁷²³ The second Special Rapporteur on the topic, Sir Francis Vallat, also supported the presumption in favour of the maintenance of objections formulated by the predecessor State: “on the whole, the reasoning which supports the retention of the presumption in favour of the maintenance of reservations also supports the presumption in favour of the maintenance of objections which is inherent in the present draft”, especially, he stressed, since in any event it would “always be open to the successor State to withdraw the objection if it wishes to do so”. Nonetheless, Sir Francis Vallat considered that there seemed to be “no need to complicate the draft by making express provisions with respect to objections”.²⁷²⁴

(6) Already noted 35 years ago by Gaja,²⁷²⁵ the dearth of practice in this area is still apparent. It should be noted, however, that certain elements of recent practice also seem to support the maintenance of objections.²⁷²⁶ Mention should be made of a number of cases in which a newly independent State, in notifying its succession, confirmed the objections made by the predecessor State to reservations formulated by States parties to the treaty.²⁷²⁷ There have also been a few cases in which objections formulated by the predecessor State have been withdrawn and, at the same time, new objections have been formulated.²⁷²⁸ With respect to successor States other than newly independent States, it may be noted, for example, that Slovakia explicitly maintained the objections made by Czechoslovakia to reservations formulated by other parties to the treaties to which it succeeded.²⁷²⁹ Similarly, the Federal Republic of Yugoslavia stated that it maintained the objections made by the former Yugoslavia,²⁷³⁰ and Montenegro stated that it maintained the objections made by Serbia and Montenegro.²⁷³¹

rules laid down in paragraphs 1 and 2 regarding reservations apply also, *mutatis mutandis*, to objections to reservations” (*Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 47).

²⁷²³ See paragraph 1 of guideline 5.1.1 above.

²⁷²⁴ First report on succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, p. 54, para. 289.

²⁷²⁵ Gaja, “Reservations to treaties ...” (footnote 2641 above), p. 56.

²⁷²⁶ See, in this sense, R. Szafarz, “Vienna Convention on Succession of States in respect of Treaties: a general analysis”, *Polish Yearbook of International Law*, vol. 10 (1980), p. 96. G. Gaja, meanwhile, takes the view that practice does not contradict the presumption in favour of the maintenance of objections formulated by the predecessor State, but also does not suffice to support this presumption (Gaja, “Reservations to treaties ...” (footnote 2641 above), p. 57).

²⁷²⁷ Vienna Convention on Diplomatic Relations: Malta repeated, upon succession, some of the objections formulated by the United Kingdom, and Tonga indicated that it “adopted” the objections made by the United Kingdom with respect to the reservations and statements made by Egypt (*Multilateral Treaties ...* (footnote 37 above), chap. III.3); Convention on the Territorial Sea and the Contiguous Zone (*ibid.*, chap. XXI.1); Convention on the High Seas (Fiji) (*ibid.*, chap. XXI.2); Convention on the Continental Shelf (Tonga) (*ibid.*, chap. XXI.4).

²⁷²⁸ Convention on the High Seas (Fiji) (*ibid.*, chap. XXI.2).

²⁷²⁹ See footnote 2681 above.

²⁷³⁰ See footnote 2682 above.

²⁷³¹ See footnote 2683 above.

(7) It is not immediately clear how this recent practice should be interpreted: it leans in the direction of continuity but could also reflect the absence of a set rule; otherwise, such statements would have been unnecessary.²⁷³² It nevertheless seems reasonable and logical to revert, in guideline 5.2.1, to the solution proposed by Sir Humphrey Waldock, who suggested that the rules regarding reservations should apply *mutatis mutandis* to objections,²⁷³³ bearing in mind that, even though the Commission ultimately opted not to include in its draft articles a provision dealing specifically with objections to reservations, the solution proposed by the Special Rapporteur did not give rise to any substantive objections in the Commission.

(8) Like the presumption in favour of the maintenance of reservations, established in article 20, paragraph 1, of the 1978 Vienna Convention, the presumption in favour of the maintenance of objections is warranted for both newly independent States and other successor States. However, there are exceptions to the presumption in favour of the maintenance of objections in certain cases involving the uniting of two or more States, which are referred to in guideline 5.2.2.

(9) Although it refers generally to “a successor State”, that is, a State that replaces another in the responsibility for the international relations of the territory,²⁷³⁴ guideline 5.2.1 refers only to cases whereby a successor State acquires its status as a contracting State to a treaty *by succession*, regardless of whether this succession occurs *ipso jure* or through notification. Conversely, the presumption set out in this guideline does not apply to situations in which a successor State that does not succeed *ipso jure* to a treaty decides to become a contracting State to that treaty by means other than making a notification of its succession, for instance by acceding to it within the meaning of article 11 of the 1969 Vienna Convention.

5.2.2 Irrelevance of certain objections in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any of those States in respect of which the treaty was not in force on the date of the succession of States shall not be maintained.

2. When, following a uniting of two or more States, the successor State is a contracting State to a treaty to which it has maintained reservations in conformity with guideline 5.1.1 or 5.1.2, objections to a reservation made by another contracting State or a contracting organization shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.

²⁷³² The same could be said of a number of the clarifications proposed under Part 5 of the Guide to Practice, but the case at hand is especially striking, owing to the extreme scarcity of precedents.

²⁷³³ See paragraph (5) of the commentary to this guideline above.

²⁷³⁴ See the definitions of “succession of States” and “successor State” contained, respectively, in article 2, paragraph 1 (b) and (d), of the 1978 Vienna Convention.

Commentary

(1) Guideline 5.1.3 (Irrelevance of certain reservations in cases involving a uniting of States) sets out the exception that must qualify the principle of the maintenance of the predecessor State’s reservations in certain situations that may arise in connection with the uniting of two or more States. Such situations arise when, at the date of the succession of States, a treaty in force for one of the predecessor States continues in force for the State formed from a uniting of States: in these circumstances, the reservations formulated by a predecessor State that, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.²⁷³⁵

(2) As the same causes produce the same effects, guideline 5.2.1, which sets out the principle that the successor State is presumed to maintain the predecessor State’s objections to reservations formulated by other contracting States or contracting international organizations to a treaty to which it has succeeded, should be qualified by the same exception when the above-mentioned situations arise. Paragraph 1 of this guideline specifies that when a treaty continues in force in respect of a unified State, objections to a reservation formulated by one of the uniting States which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

(3) Provision may, however, be made for another situation, one that is specific to objections, by establishing a second exception to the principle laid down in guideline 5.2.1. Paragraph 2 of guideline 5.2.2 sets out this exception, which is justified on logical grounds and relates to the fact that a successor State cannot maintain both a reservation formulated by one of the uniting States and, at the same time, objections made by another such State to an identical or equivalent reservation formulated by a contracting State that is a third State in relation to the succession of States.

5.2.3 Maintenance of objections to reservations of the predecessor State

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, any objection to that reservation formulated by another contracting State or by a contracting organization shall be considered as being maintained in respect of the successor State.

Commentary

(1) This guideline sets out the presumption in favour of the maintenance of objections formulated by a contracting State or a contracting organization in relation to reservations of the predecessor State that are considered as being maintained by the successor State in conformity with guidelines 5.1.1 and 5.1.2.

(2) This presumption seems to be called for. It would be difficult to explain why a contracting State or a

²⁷³⁵ See guideline 5.1.3 and commentary thereto.

contracting organization should have to reiterate an objection it has already formulated with respect to a reservation of the predecessor State that applied to the territory to which the succession of States relates.²⁷³⁶ The author of the objection will always have the right to withdraw its objection if it does not wish to maintain it in respect of the successor State.

(3) The presumption in favour of the maintenance of objections to reservations of the predecessor State that are maintained by the successor State also finds support in the views expressed by certain delegations at the 1977–1978 United Nations Conference on Succession of States in respect of Treaties. For example, the representative of Japan indicated that his delegation could go along with the International Law Commission’s text of draft article 19 on the understanding that “a State party which had objected to the original reservation which had been made by the predecessor State did not need to repeat the objection with regard to the successor State”.²⁷³⁷ A similar view was expressed by the representative of the Federal Republic of Germany, who considered, with respect to both newly independent States and other successor States, that “the successor State was bound *ipso jure* by the individual treaty relationship created by the predecessor State, including the reservations and other declarations made by that State *and the objections thereto entered by its treaty partners*”²⁷³⁸.

5.2.4 Reservations of the predecessor State to which no objections have been made

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, a State or an international organization that had not formulated an objection to the reservation in respect of the predecessor State may not object to it in respect of the successor State, unless:

(a) the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period; or

(b) the territorial extension of the reservation radically changes the conditions for the operation of the reservation.

Commentary

(1) This guideline addresses the situation where a contracting State has not objected in time to a reservation formulated by a predecessor State and considered as being maintained by the successor State after a succession of States. In these circumstances, it would be difficult to

²⁷³⁶ See Gaja, “Reservations to treaties ...” (footnote 2641 above), p. 67, and the memorandum by the Secretariat on reservations to treaties in the context of succession of States (footnote 2614 above), para. 37.

²⁷³⁷ *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. I, First Session ... (A/CONF.80/16)* (footnote 2623 above), Committee of the Whole, 28th meeting, 26 April 1977, para. 16.

²⁷³⁸ *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. II, Resumed Session ... (A/CONF.80/16/Add.1)* (footnote 2623 above), Committee of the Whole, 43rd meeting, 3 August 1978, para. 11.

conceive why such a tacit acceptance of the reservation should be called into question merely because a succession of States has taken place. Accordingly, the guideline excludes, in principle, the right of a contracting State to object, in respect of a successor State, to a reservation to which it had not objected in respect of the predecessor State. However, there are two possible exceptions.

(2) The first exception, addressed in subparagraph (a), concerns the case in which the succession of States takes place prior to the expiry of the time period during which a contracting State could have objected to a reservation formulated by the predecessor State.²⁷³⁹ In such a situation, the right of a contracting State or contracting international organization to formulate an objection up until the expiry of that period should be recognized.

(3) The second exception, addressed in subparagraph (b), concerns the case in which “the territorial extension of the reservation radically changes the conditions for the operation of the reservation”. This hypothesis may be realized in the situations dealt with in guideline 5.1.5, in which the territorial scope of a reservation is extended because of the extension of the territorial scope of the treaty itself following a uniting of States. Even in such a situation, in order for a State or international organization that has not objected in time to the reservation prior to the date of the succession of States to be able to object to it, it would be necessary that the maintenance of the reservation the territorial scope of which has been extended should upset the balance of the treaty: that is the sense of the restrictive formulation of this exception, which covers only those situations in which the territorial extension of the reservation “radically changes the conditions for the operation of the reservation”.

5.2.5 Right of a successor State to formulate objections to reservations

1. When making a notification of succession establishing its status as a contracting State, a newly independent State may, in accordance with the relevant guidelines, formulate an objection to reservations formulated by a contracting State or a contracting organization, even if the predecessor State made no such objection.

2. A successor State, other than a newly independent State, shall also have the right provided for in paragraph 1 when making a notification establishing its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

3. The right referred to in paragraphs 1 and 2 is nonetheless excluded in the case of treaties falling under guidelines 2.8.7 and 4.1.2.

Commentary

(1) This guideline concerns the right of the successor State to formulate objections to reservations formulated in respect of a treaty to which it becomes a contracting State

²⁷³⁹ See guideline 2.6.1.2 and commentary thereto.

following a succession of States. As in other guidelines, it is necessary to distinguish in that regard two different situations, which call for different solutions.

(2) In this guideline, the term “right” has the same meaning and is used for the same reasons as in guideline 2.6.2 (Right to formulate objections):

– on the one hand, cases where a successor State is free to decide whether or not to succeed to a treaty and establishes its status as a contracting State when notifying its succession; and

– on the other hand, cases of “automatic succession” in which the successor State “inherits” an existing treaty without being called upon to express its consent.

Guideline 5.2.5 covers only the first hypothesis, while guideline 5.2.6 covers the second.

(3) The hypothesis covered by guideline 5.2.5 in turn encompasses two different situations:

– the situation, dealt with in paragraph 1, of a newly independent State making a notification of succession;²⁷⁴⁰

– the situation, dealt with in paragraph 2, of a successor State other than a newly independent State which, by making a notification to that effect, establishes its status as a contracting State to a treaty which, at the date of succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

(4) In both cases envisaged in the guideline, the successor State has the choice as to whether or not to become bound by the treaty. That being the case, there is no reason in principle why it cannot formulate new objections when establishing its status as a contracting State by a notification pursuant to paragraph 1 of guideline 5.1.1 or paragraph 3 of guideline 5.1.2. That is the solution set out for each of those two situations in paragraphs 1 and 2, respectively, of guideline 5.2.5.

(5) Sir Humphrey Waldock had briefly considered this issue in his third report on succession in respect of treaties and took the view that, “whenever a successor State becomes a party not by inheritance but by an independent act establishing its consent to be bound, logic would indicate that it should be wholly responsible for its own reservations, acceptances and objections, and that its relation to any reservations, acceptances and objections of its predecessor should be the same as that of any other new party to the treaty”.²⁷⁴¹ It does indeed seem logical to apply to objections the same reasoning that underlies guidelines 5.1.1, paragraph 2, and 5.1.2, paragraph 3, concerning the formulation of reservations by a successor State. Since, in the cases considered here, succession to a treaty takes place only by virtue of a deliberate act on the part of the successor State (a “notification of succession”

or, in the case of successor States other than newly independent States, a “notification”), the successor State should be free to modify its treaty obligations, not only by formulating reservations but also, if it so desires, by objecting to reservations formulated by other States even before the date of its succession to the treaty.²⁷⁴²

(6) Moreover, while practice in this area is scarce, there have been cases in which newly independent States have formulated new objections when notifying their succession to a treaty. For example, Fiji withdrew objections made by the predecessor State and formulated new objections upon making a notification of succession to the Convention on the High Seas of 1958.²⁷⁴³

(7) Paragraph 3 of the guideline, however, states an exception to the right of the successor State to formulate objections that is recognized in paragraphs 1 and 2. The exception concerns the situations covered by article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions—the content of which is reproduced in guideline 4.1.2—in which a reservation to the treaty must be accepted by all parties. The exception was proposed by Sir Humphrey Waldock in his third report; draft article 9, paragraph 3, which established the principle that the same rules should apply to both objections and reservations, included a subparagraph (b) worded as follows:

(b) However, in the case of a treaty falling under Article 20, paragraph 2, of the Vienna Convention, no objection may be formulated by a new State to a reservation which has been accepted by all the parties to the treaty.²⁷⁴⁴

This exception is intended to ensure that a successor State cannot, by formulating an objection, compel the reserving State to withdraw from such a treaty. It is also consistent with guideline 2.8.7 (Unanimous acceptance of reservations), to which paragraph 3 refers.

(8) The brevity of the reference in paragraph 1 of the guideline to “the relevant guidelines” is warranted by the fact that it would be difficult if not impossible to give an exhaustive list in the guideline itself of all the guidelines applicable to the formulation of objections. For the most part, the relevant guidelines are contained in section 2.6 of the Guide to Practice concerning the formulation of objections.

(9) Among those guidelines particular attention should be paid to guideline 2.6.12, which reproduces the temporal requirement set forth in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions. In the case of an objection by a successor State to a prior reservation, the application of the time limit leads to the conclusion that the successor State has a period of 12 months, from the date it has established by notification its status as a contracting State, within which to formulate the objection. In view of the voluntary nature of succession in the cases contemplated by the present guideline, it is not until the successor State establishes its status as a contracting State

²⁷⁴⁰ See articles 17 and 18 of the 1978 Vienna Convention, the text of which is reproduced in footnote 2628 above.

²⁷⁴¹ *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 47, paragraph (2) of the commentary to draft article 9; see also paragraph (5) of the commentary to guideline 5.2.1 above.

²⁷⁴² In this regard, in the case of newly independent States, see Gaja, “Reservations to treaties ...” (footnote 2641 above), p. 66.

²⁷⁴³ See footnote 2728 above.

²⁷⁴⁴ *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 47; see also the explanation of the grounds for this proposal, *ibid.*, p. 52, paragraph (17) of the commentary to draft article 9.

that it can be expected to inquire into all the reservations that have been formulated to the treaty and to examine them in order to decide whether or not it intends to object. In that light, it would appear, then, to be in keeping with the spirit of article 20, paragraph 5, of the 1969 Vienna Convention, as reproduced in guideline 2.6.12, to allow successor States that fall under guideline 5.2.5 a time period of 12 months from the date of notification of their succession to the treaty.

5.2.6 *Objections by a successor State other than a newly independent State in respect of which a treaty continues in force*

A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States may not formulate an objection to a reservation to which the predecessor State had not objected, unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

Commentary

(1) This guideline, which deals with a situation excluded from the scope of guideline 5.2.5, applies to a successor State other than a newly independent State when, following a uniting or separation of States, a treaty remains in force in respect of that State in the context of a succession that can be termed “automatic”: that is, when a treaty *remains in force* following a succession of States in respect of a successor State other than a newly independent State even though there has been no expression of consent by that State. Under Part IV of the 1978 Vienna Convention, such a situation arises, in principle, in the case of a State formed from a uniting of two or more States in relation to treaties in force at the date of the succession of States in respect of any of the predecessor States.²⁷⁴⁵ The same is true of a State formed from a separation of States in relation to treaties in force at the date of the succession of States in respect of the entire territory of the predecessor State, as well as treaties that were in force in respect only of that part of the territory of the predecessor State that corresponds to the territory of the successor State.²⁷⁴⁶

(2) Since, in the situations contemplated in the present guideline, the succession to the treaty does not depend on an expression of intent on the part of the State formed from the uniting or separation of States, that State inherits all of the predecessor State’s rights and obligations under the treaty,²⁷⁴⁷ including objections (or the absence thereof) that the predecessor State had (or had not) formulated in respect of a reservation to the treaty. As one author has written:

When ... succession is considered to be automatic, the admissibility of objections on the part of the successor State must be ruled out ... If the predecessor State had accepted the reservation, such consent cannot be subsequently revoked either by the same State or by its successor.²⁷⁴⁸

²⁷⁴⁵ See article 31 of the Convention.

²⁷⁴⁶ See article 34 of the Convention.

²⁷⁴⁷ See the commentary to guideline 5.1.2, in particular the commentary to paragraphs 1 and 2 of that guideline.

²⁷⁴⁸ Gaja, “Reservations to treaties ...” (footnote 2641 above), p. 67.

It does not appear, moreover, that successor States other than newly independent States have claimed the right to formulate objections to reservations to which the predecessor State had not objected.²⁷⁴⁹

(3) As in the case of guideline 5.2.4 (Reservations of the predecessor State to which no objections have been made), an exception should nonetheless be made for cases in which a succession of States takes place prior to the expiry of the time period during which the predecessor State could have objected to a reservation formulated by another contracting State or party to the treaty. In such a situation, recognizing the successor State’s right to formulate an objection to such a reservation up until the expiry of that period seems warranted.²⁷⁵⁰

5.3 *Acceptances of reservations in cases of succession of States*

5.3.1 *Maintenance by a newly independent State of express acceptances formulated by the predecessor State*

When a newly independent State establishes, by a notification of succession, its status as a contracting State to a treaty, it shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization, unless it expresses a contrary intention within twelve months of the date of the notification of succession.

Commentary

(1) This guideline deals with the status of express acceptances formulated by the predecessor State. In the case of tacit acceptances by a predecessor State which did not object to a reservation in time prior to the date of the succession of States, the applicable rules are set out in guidelines 5.2.5 and 5.2.6.

(2) As with reservations and objections, the question of the status of express acceptances formulated by a predecessor State calls for an approach that varies, at least in part, according to whether the succession to the treaty occurs through a notification by the successor State or *ipso jure*.

(3) In the case of newly independent States, succession to a treaty occurs by virtue of a notification of succession.²⁷⁵¹ In this context, article 20, paragraph 1, of the 1978 Vienna Convention, reproduced in guideline 5.1.1, paragraph 1, establishes the presumption in favour of the newly independent State’s maintenance of the predecessor State’s reservations unless, when making the notification of succession, the newly independent State expresses a contrary intention or formulates a reservation

²⁷⁴⁹ The memorandum by the Secretariat on reservations to treaties in the context of succession of States (see footnote 2614 above) does not mention any cases in which a successor State formed from a uniting or separation of States has formulated objections to reservations to which the predecessor State had not objected.

²⁷⁵⁰ See also paragraph (2) of the commentary to guideline 5.2.4.

²⁷⁵¹ See paragraph (4) of the commentary to guideline 5.1.1 and footnote 2628 above.

which relates to the same subject matter as the reservation of the predecessor State. The Commission is of the view that, although practice regarding express acceptances of reservations in connection with the succession of States appears to be non-existent, the presumption in favour of the maintenance of reservations should logically be transposed to express acceptances.

(4) By analogy, it also seems appropriate to recognize the right of the newly independent State to express its intention not to maintain an express acceptance formulated by the predecessor State in respect of a reservation. That right does not constitute a derogation from the general rule regarding the final nature of acceptance of a reservation, set forth in guideline 2.8.13: the voluntary nature of succession to the treaty by the newly independent State justifies this apparent derogation, just as it justifies the newly independent State's right to formulate new reservations when making its notification of succession to the treaty²⁷⁵²—as recognized in article 20, paragraph 2, of the 1978 Vienna Convention—or the right of such a State to formulate objections to reservations that were formulated prior to the date of the notification of succession, as recognized in guideline 5.2.5.

(5) However, the question of the time period within which the newly independent State may express its intention not to maintain an express acceptance by the predecessor State remains to be addressed. With respect to the non-maintenance of a reservation made by the predecessor State, article 20, paragraph 1, of the 1978 Vienna Convention requires that the newly independent State must express its intention to that effect when making its notification of succession to the treaty. Does the same requirement apply with respect to the non-maintenance of an express acceptance? In the latter case, logic suggests that, by analogy, the approach taken with regard to a newly independent State's formulation of an objection to a reservation formulated prior to the date of the notification of succession should be followed. In fact, it appears that the potential effects of non-maintenance of an express acceptance can be likened, to a great extent, to those of the formulation of a new objection. Consequently, guideline 5.3.1 on the maintenance by a newly independent State of the express acceptances formulated by the predecessor State should be based on the rule applicable to the formulation of an objection by the successor State, and 12 months should be retained as the time period within which the newly independent State may express its intention not to maintain an express acceptance formulated by the predecessor State.²⁷⁵³ Whereas guideline 5.2.5 concerning objections formulated by a successor State merely refers in that connection to the "relevant guidelines", which of course include the temporal requirement mentioned, in the case of the present guideline it is not sufficient to refer to general rules, since the question of the maintenance or non-maintenance by the successor State of an express acceptance of a reservation made by the predecessor State does not arise except in relation to the succession of States. It is thus appropriate to stipulate expressly a period of 12 months, on the basis of the approach taken with respect to the formulation of an objection by a successor State.

²⁷⁵² See paragraph 2 of guideline 5.1.1.

²⁷⁵³ See paragraph (9) of the commentary to guideline 5.2.5.

(6) A newly independent State's expression of its intention on this matter may be conveyed either through its explicit withdrawal of the express acceptance formulated by the predecessor State, or through the formulation by a newly independent State of an objection to the reservation which had been expressly accepted by the predecessor State, the content of which objection would be incompatible, in whole or in part, with that acceptance.

5.3.2 *Maintenance by a successor State other than a newly independent State of express acceptances formulated by the predecessor State*

1. A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization.

2. When making a notification of succession establishing its status as a contracting State to a treaty which, on the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization, unless it expresses a contrary intention within twelve months of the date of the notification of succession.

Commentary

(1) In the case of successor States other than newly independent States, the question of the status of express acceptances formulated by the predecessor State calls for a more nuanced approach. It is necessary to distinguish situations in which succession occurs *ipso jure* from those in which it occurs through notification.

(2) The first situation is governed by paragraph 1 of the present guideline. It arises, in cases involving the uniting or separation of States, with respect to treaties which, on the date of the succession of States, were in force for the predecessor State and remain in force for the successor State.²⁷⁵⁴ Guideline 5.2.6 provides that, in such a situation, the successor State does not have the right to formulate an objection to a reservation to which the predecessor State did not object in a timely manner. *A fortiori*, such a successor State does not have the right to call into question an express acceptance formulated by the predecessor State.

(3) On the other hand, matters are different in the situation covered by paragraph 2 of the present guideline, in which succession to a treaty by a State formed from the uniting or separation of States occurs only through notification to that effect—as is the case with treaties which, on the date of the succession of States, were not in force for the predecessor State but to which it was a contracting State. In that situation—as for the formulation

²⁷⁵⁴ See the commentary to guideline 5.1.2 above, particularly paragraph (3).

of new reservations²⁷⁵⁵ and new objections²⁷⁵⁶—such other successor States must be recognized as having the same right that newly independent States have under guideline 5.3.1.

5.3.3 *Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State*

The non-maintenance, in conformity with guideline 5.3.1 or guideline 5.3.2, paragraph 2, by the successor State of the express acceptance by the predecessor State of a reservation formulated by a contracting State or a contracting organization becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Commentary

This guideline concerns the effects *ratione temporis* of the non-maintenance by a successor State of an express acceptance of a reservation by the predecessor State. On that point, there seems to be no reason to depart from the approach adopted in guideline 5.1.7 concerning the timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State.

5.4 *Legal effects of reservations, acceptances and objections in cases of succession of States*

1. Reservations, acceptances and objections considered as being maintained pursuant to the guidelines contained in this Part of the Guide to Practice shall continue to produce their legal effects in conformity with the provisions of Part 4 of the Guide.

2. Part 4 of the Guide to Practice is also applicable, *mutatis mutandis*, to new reservations, acceptances and objections formulated by a successor State in conformity with the provisions of the present Part of the Guide.

Commentary

(1) This guideline, based on a former draft guideline in which the reference to Part 4 of the Guide to Practice concerned the effects of reservations alone,²⁷⁵⁷ was introduced by the Commission when it adopted the final version of the Guide and extends the reference to include acceptances and objections. The aim of the guideline is to serve as a reminder that Part 4 of the Guide to Practice, which concerns the legal effects of a reservation, objection or acceptance, applies also to new reservations, objections and acceptances formulated by a successor State. With regard to reservations, objections and acceptances formulated by a newly independent State, this derives from the reference to articles 20–23 of the 1969 Vienna Convention contained in article 20, paragraph 3, of the 1978 Vienna

Convention. The present guideline also covers new reservations that a successor State may formulate in accordance with guideline 5.1.2, paragraph 3, and new objections formulated in accordance with guidelines 5.2.5 and 5.2.6.

(2) While this statement might seem self-evident, it is useful to set it out in a guideline so as to emphasize that a successor State that formulates a new reservation or a new objection or acceptance²⁷⁵⁸ is in the same position, with respect to their legal effects, as any other State or international organization that is the author of a reservation or objection.²⁷⁵⁹

5.5 *Interpretative declarations in cases of succession of States*

1. A successor State should clarify its position concerning interpretative declarations formulated by the predecessor State. In the absence of such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

2. Paragraph 1 is without prejudice to cases in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.

Commentary

(1) The succession of States to treaties may also raise questions with regard to interpretative declarations, on which the 1978 Vienna Convention, despite an unsuccessful attempt at an amendment,²⁷⁶⁰ is as silent as the 1969 and 1986 Vienna Conventions.

²⁷⁵⁸ These can only be express acceptances; by definition, tacit acceptances are not “formulated”.

²⁷⁵⁹ See the text of the guidelines in Part 4 of the Guide to Practice and commentaries thereto.

²⁷⁶⁰ At the United Nations Conference on the Law of Treaties, the delegation of the Federal Republic of Germany proposed an amendment that would have expanded the scope of article 20, the only provision of the 1978 Vienna Convention in which the status of reservations is mentioned. The amendment would have preceded the rules concerning reservations, as proposed by the International Law Commission, with a statement that “any statement or instrument made in respect to the treaty in connexion with its conclusion or signature by the predecessor State, shall remain effective for the newly independent State” (*Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. I, First Session ... (A/CONF.80/16)* (footnote 2623 above), Committee of the Whole, 28th meeting, 26 April 1977, para. 2, and A/CONF.80/14, para. 118 (b) (reproduced in *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. III, 1977 Session and Resumed Session 1978, Documents of the Conference ... (A/CONF.80/16/Add.2)* (footnote 2623 above), p. 115)). The delegation of the Federal Republic of Germany later withdrew this proposed amendment, to which, for various reasons, several delegations had objected (*Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vol. I, First Session ... (A/CONF.80/16)* (footnote 2623 above), Committee of the Whole, 27th meeting, 25 April 1977, para. 73 (Algeria, which considered that the proposed amendment seemed to affect the principle of self-determination); para. 78 (Poland, which believed that the proposed amendment was not sufficiently clear); para. 87 (Madagascar, which was of the view that the wording of the proposed amendment was “much too broad in scope”); para. 90 (Guyana); and para. 95 (Italy, which found the wording of the proposed amendment “very strong and inflexible”)).

²⁷⁵⁵ See article 20, paragraph 2, of the 1978 Vienna Convention and guideline 5.1.1, paragraph 2.

²⁷⁵⁶ See paragraph 2 of guideline 5.2.5.

²⁷⁵⁷ Former draft guideline 5.1.4. For the commentary thereto, see *Yearbook ... 2010*, vol. II (Part Two), p. 143.

(2) Although the text of the Convention is silent on this matter, two questions remain: the first concerns the status of interpretative declarations formulated by the predecessor State, while the second is whether the successor State has the right to formulate its own interpretative declarations when it succeeds to the treaty, or thereafter. In either case, it must be borne in mind that, according to guideline 2.4.4, “[w]ithout prejudice to the provisions of guidelines 1.4 and 2.4.7, an interpretative declaration may be formulated at any time”.²⁷⁶¹

(3) Guideline 5.5, which is formulated in general terms in order to cover all cases of succession, seeks to answer the first of the two questions raised in the preceding paragraph, namely, the status of interpretative declarations formulated by the predecessor State. Practice provides no answer to this question. Furthermore, interpretative declarations are extremely diverse, both in their intrinsic nature and in their potential effects. It is these considerations, moreover, that explain, at least in part, the lack of detail in the rules applicable to interpretative declarations in the Guide to Practice. Under these conditions, it is probably best to opt for prudence and pragmatism.

(4) In this spirit, paragraph 1 of the guideline makes a recommendation that States should clarify their position concerning interpretative declarations formulated by the predecessor State. On several occasions, the Commission has taken the view that such an approach was appropriate in the context of a Guide to Practice that is not intended to

²⁷⁶¹ Guideline 1.4 concerns conditional interpretative declarations, which appear to be subject to the legal regime applicable to reservations. Guideline 2.4.7 concerns the late formulation of an interpretative declaration where a treaty provides that an interpretative declaration may be made only at specified times, in which case this special rule takes precedence over the general rule.

become the text of a convention.²⁷⁶² This is especially true in the present case since, in the absence of express treaty provisions, States have broad discretion as to whether and when to make such declarations.

(5) That said, paragraph 1 also sets forth the presumption, which seems reasonable in the context of succession to treaties, that, in the absence of such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

(6) Furthermore, paragraph 2 of the guideline recognizes that there are situations in which, in the absence of an explicit position taken by the successor State, the latter’s conduct might answer the question of whether or not it subscribes to an interpretative declaration formulated by the predecessor State; in such cases, this conduct would suffice to establish the status of the predecessor State’s interpretative declarations.

(7) With regard to the second question raised in paragraph (2) of the commentary to this guideline, namely the successor State’s right to formulate interpretative declarations, including declarations that the predecessor State did not formulate, there is little doubt that the existence of this right derives directly from guideline 2.4.4, which states that an interpretative declaration may, with some exceptions, be formulated at any time.²⁷⁶³ Hence there appears to be no valid reason to deprive any successor State of a right that the predecessor State could have exercised at any time. The Commission therefore did not deem it necessary to devote a specific guideline to this question.

²⁷⁶² See, in particular, guidelines 2.1.2, 2.4.1, 2.4.5, 2.6.9 and 2.9.3.

²⁷⁶³ See also footnote 2761 above.

ANNEX

CONCLUSIONS ON THE RESERVATIONS DIALOGUE

The International Law Commission,

Recalling the provisions on reservations to treaties contained in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,

Taking into account the seventeenth report* presented by the Special Rapporteur on the topic “Reservations to treaties”, which addresses the question of the reservations dialogue,

Bearing in mind the need to achieve a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein,

Recognizing the role that reservations to treaties may play in achieving this balance,

Concerned at the number of reservations that appear incompatible with the limits imposed by the law of treaties, in particular article 19 of the Vienna Conventions on the Law of Treaties,

Aware of the difficulties raised by the assessment of the validity of reservations,

Convinced of the usefulness of a pragmatic dialogue with the author of a reservation,

Welcoming the efforts made in recent years, including within the framework of international organizations and human rights treaty bodies, to encourage such a dialogue,

I. Considers that:

1. States and international organizations intending to formulate reservations should do so as precisely and narrowly as possible, consider limiting their scope and ensure that they are not incompatible with the object and purpose of the treaty to which they relate;

2. In formulating a unilateral statement, States and international organizations should indicate whether it

amounts to a reservation and, if so, explain why the reservation is deemed necessary and the effect it will have on the fulfilment by its author of its obligations under the treaty;

3. Statements of reasons by the author of a reservation are important for the assessment of the validity of the reservation, and States and international organizations should state the reason for any modification of a reservation;

4. States and international organizations should periodically review their reservations with a view to limiting their scope or withdrawing them where appropriate;

5. The concerns about reservations that are frequently expressed by States and international organizations, as well as monitoring bodies, may be useful for the assessment of the validity of reservations;

6. States and international organizations, as well as monitoring bodies, should explain to the author of a reservation the reasons for their concerns about the reservation and, where appropriate, request any clarification that they deem useful;

7. States and international organizations, as well as monitoring bodies, if they deem it useful, should encourage the withdrawal of reservations, the reconsideration of the need for a reservation or the gradual reduction of the scope of a reservation through partial withdrawals;

8. States and international organizations should address the concerns and reactions of other States, international organizations and monitoring bodies and take them into account, to the extent possible, with a view to reconsidering, modifying or withdrawing a reservation;

9. States and international organizations, as well as monitoring bodies, should cooperate as closely as possible in order to exchange views on reservations in respect of which concerns have been raised and coordinate the measures to be taken; and

II. Recommends that:

The General Assembly call upon States and international organizations, as well as monitoring bodies, to initiate and pursue such a reservations dialogue in a pragmatic and transparent manner.

* A/CN.4/647 and Add.1, paras. 2–68.

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In principle, the following pages feature only works dealing directly with reservations, except for general works on international law (manuals and treaties) and those on the law of treaties in general.

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¹ This is an updated version of the bibliography which was included in annex I of the second report on reservations to treaties (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/478, pp. 89–100), first completed in 1999 (*Yearbook ... 1999*, vol. II (Part One), document A/CN.4/478/Rev.1, pp. 153–164). The present version has been established with Ms. Maria A. Etchegorry's assistance.

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B. Studies on particular aspects of the problems of reservations

1. LAWFULNESS, OPPOSABILITY AND EFFECTS OF RESERVATIONS

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CHECKLIST OF DOCUMENTS OF THE SIXTY-THIRD SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/634	Provisional agenda for the sixty-third session	Mimeographed. The agenda as adopted is reproduced in <i>Yearbook ... 2011</i> , vol. II (Part Two), p. 17.
A/CN.4/635 and Add.1–3	Filling of casual vacancies in the Commission. Note by the Secretariat	A/CN.4/635 and Add.2 reproduced in <i>Yearbook ... 2011</i> , vol. II (Part One). A/CN.4/635/Add.1 and 3 mimeographed.
A/CN.4/636 and Add.1–2	Responsibility of international organizations. Comments and observations received from Governments	Reproduced in <i>Yearbook ... 2011</i> , vol. II (Part One).
A/CN.4/637 and Add.1	Responsibility of international organizations. Comments and observations received from international organizations	<i>Idem.</i>
A/CN.4/638	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fifth session, prepared by the Secretariat	Mimeographed.
A/CN.4/639 and Add.1	Reservations to treaties. Comments and observations received from Governments	Reproduced in <i>Yearbook ... 2011</i> , vol. II (Part One).
A/CN.4/640	Eighth report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur	<i>Idem.</i>
A/CN.4/641	Peaceful settlement of disputes. Working paper prepared by Sir Michael Wood	<i>Idem.</i>
A/CN.4/642	Seventh report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	<i>Idem.</i>
A/CN.4/643 [and Corr.1]	Fourth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	<i>Idem.</i>
A/CN.4/644	Effects of armed conflicts on treaties. Note on the recommendation to be made to the General Assembly about the draft articles on the effects of armed conflicts on treaties, by Mr. Lucius Cafilisch, Special Rapporteur	<i>Idem.</i>
A/CN.4/645	Effects of armed conflicts on treaties. Note on draft article 5 and the annex to the draft articles, by Mr. Lucius Cafilisch, Special Rapporteur	<i>Idem.</i>
A/CN.4/646	Third report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman A. Kolodkin, Special Rapporteur	<i>Idem.</i>
A/CN.4/647 and Add.1	Seventeenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/648	Fourth report on the obligation to extradite or prosecute (<i>aut dedere aut judicare</i>), by Mr. Zdzislaw Galicki, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.777	Effects of armed conflicts on treaties. Titles and texts of the draft articles on the effects of armed conflicts on treaties adopted by the Drafting Committee on second reading	Mimeographed.
A/CN.4/L.778	Responsibility of international organizations. Texts and titles of draft articles 1 to 67 adopted by the Drafting Committee on second reading in 2011	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.779	Reservations to treaties. Text and title of the draft guidelines constituting the Guide to Practice on Reservations to treaties, as finalized by the Working Group on reservations to treaties from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011	<i>Idem.</i>
A/CN.4/L.780	Draft report of the International Law Commission on the work of its sixty-third session, chapter I (Organization of the session)	<i>Idem.</i> See the adopted text in <i>Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10)</i> . The final text appears in <i>Yearbook ... 2011</i> , vol. II (Part Two), p. 15.
A/CN.4/L.781 and Add.1	<i>Idem</i> , chapter II (Summary of the work of the Commission at its sixty-third session)	<i>Idem</i> , p. 18.
A/CN.4/L.782	<i>Idem</i> , chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem</i> , p. 20.
A/CN.4/L.783 and Add.1–8	<i>Idem</i> , chapter IV (Reservations to treaties)	Mimeographed. See the adopted text in <i>Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10 and Add.1)</i> . The final text appears in <i>Yearbook ... 2011</i> , vol. II (Part Two), p. 22, and in the present volume.
A/CN.4/L.784 and Add.1–2	<i>Idem</i> , chapter V (Responsibility of international organizations)	Mimeographed. See the adopted text in <i>Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10)</i> . The final text appears in <i>Yearbook ... 2011</i> , vol. II (Part Two), p. 39.
A/CN.4/L.785 and Add.1–2	<i>Idem</i> , chapter VI (Effects of armed conflicts on treaties)	<i>Idem</i> , p. 106.
A/CN.4/L.786 and Add.1	<i>Idem</i> , chapter VII (Immunity of State officials from foreign criminal jurisdiction)	<i>Idem</i> , p. 131.
A/CN.4/L.787	<i>Idem</i> , chapter VIII (Expulsion of aliens)	<i>Idem</i> , p. 143.
A/CN.4/L.788 and Add.1–2	<i>Idem</i> , chapter IX (Protection of persons in the event of disasters)	<i>Idem</i> , p. 150.
A/CN.4/L.789	<i>Idem</i> , chapter X (The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>))	<i>Idem</i> , p. 163.
A/CN.4/L.790 and Add.1	<i>Idem</i> , chapter XI (Treaties over time)	<i>Idem</i> , p. 168.
A/CN.4/L.791	<i>Idem</i> , chapter XII (The most-favoured-nation clause)	<i>Idem</i> , p. 172.
A/CN.4/L.792	<i>Idem</i> , chapter XIII (Other decisions and conclusions of the Commission)	<i>Idem</i> , p. 175.
A/CN.4/L.793	Reservations to treaties. Conclusions on the reservations dialogue provisionally adopted by the Working Group on reservations to treaties on 6, 12 and 14 July 2011	Mimeographed.
A/CN.4/L.794	Protection of persons in the event of disasters. Texts and titles of draft articles 10 and 11 provisionally adopted by the Drafting Committee on 19 July 2011	<i>Idem.</i>
A/CN.4/L.795	Reservations to treaties. Recommendation on mechanisms of assistance in relation to reservations, provisionally adopted by the Working Group on reservations to treaties on 27 July 2011	<i>Idem.</i>
A/CN.4/L.796	Report of the Planning Group	<i>Idem.</i>
A/CN.4/SR.3080–A/CN.4/SR.3127	Provisional summary records of the 3080th to 3127th meetings	<i>Idem.</i> The final text appears in <i>Yearbook ... 2011</i> , vol. I.

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