Chapter VI

RESERVATIONS TO TREATIES

A. Introduction

99. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

100. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.[952]

101. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[953]

102. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic. These related to the title of the topic, which should read "Reservations to treaties"; the form of the results of the study, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[954] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31, and 49/51 of 9 December 1994. As far as the Guide to Practice was concerned, it would take the form of draft guidelines with commentaries which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

103. Also at its forty-seventh session, the Commission, in accordance with its earlier practice,[955] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions.[956] The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[957]

104. At its forty-eighth session, in 1996, the Commission had before it the Special Rapporteur's second report on the topic.[958] The Special Rapporteur had annexed to his report a draft resolution of the Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[959] Owing to lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next session.[960]

105. At its forty-ninth session, in 1997, the Commission again had before it the second report of the Special Rapporteur on the topic.

106. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[961]

107. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

108. At its fiftieth session, in 1998, the Commission had before it the Special Rapporteur's third report on the topic,[962] which dealt with the definition of reservations and interpretative declarations to treaties. At the same

[952] See *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 381.

[953] *Yearbook ... 1995*, vol. II (Part One), p. 121, document A/CN.4/470.

[954] *Ibid.*, vol. II (Part Two), p. 108, document A/50/10, para. 487.

[955] See *Yearbook ... 1983*, vol. II (Part Two), p. 83, para. 286.

[956] See *Yearbook ... 1995*, vol. II (Part Two), p. 108, document A/50/10, para. 489.

[957] As at 27 July 2000, a total of 33 States and 24 international organizations had answered the questionnaire.

[958] *Yearbook ... 1996*, vol. II (Part One), p. 39, documents A/CN.4/477 and Add.1 and A/CN.4/478 and Rev.1.

[959] *Ibid.*, vol. II (Part Two), p. 83, document A/51/10, para. 136 and footnote 238.

[960] For a summary of the discussions, *ibid.*, chap. VI, sect. B, pp. 79 et seq., in particular, para. 137.

[961] *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

[962] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add. 1–6.

session, the Commission provisionally adopted six draft guidelines.[963]

109. At its fifty-first session, in 1999, the Commission again had before it the part of the Special Rapporteur's third report, which it had not had time to consider at its fiftieth session, and his fourth report on the topic.[964] Moreover, the revised bibliography on the topic, the first version of which the Special Rapporteur had submitted at the forty-eighth session attached to his second report, was annexed to the report. The fourth report also dealt with the definition of reservations and interpretative declarations. At the same session, the Commission provisionally adopted 17 draft guidelines.[965]

110. The Commission also, in the light of the consideration of interpretative declarations, adopted a new version of draft guideline 1.1.1 [1.1.4] (Object of reservations) and of the draft guideline without a title or number (which has become draft guideline 1.6 (Scope of definitions)).

111. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's fifth report on the topic,[966] dealing, on the one hand, with alternatives to reservations and interpretative declarations and, on the other hand, with procedure regarding reservations and interpretative declarations, particularly their formulation and the question of late reservations and interpretative declarations. At the same session, the Commission provisionally adopted five draft guidelines.[967] The Commission also deferred consideration of the second part of the fifth report of the Special Rapporteur contained in documents A/CN.4/508/Add.3 and 4 to the following session.

B. Consideration of the topic at the present session

1. Second part of the fifth report

112. At the present session, the Commission initially had before it the second part of the fifth report (A/CN.4/508/Add.3 and 4) relating to questions of procedure regarding reservations and interpretative declarations. The Commission considered that report at its 2677th, 2678th and 2679th meetings, on 18, 22 and 23 May 2001, respectively.

113. At its 2679th meeting, the Commission decided to refer to the Drafting Committee draft guidelines 2.2.1 (Reservations formulated when signing and formal confirmation), 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation), 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), 2.2.4 (Reservations formulated when signing for which the treaty makes express provision), 2.3.1 (Reservations formulated late), 2.3.2 (Acceptance of reservations formulated late), 2.3.3 (Objection to reservations formulated late), 2.3.4 (Late exclusion or modification of the legal effects of a treaty by procedures other than reservations), 2.4.3 (Times at which an interpretative declaration may be formulated), 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation), 2.4.5 (Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision), 2.4.7 (Interpretative declarations formulated late) and 2.4.8 (Conditional interpretative declarations formulated late).

114. At its 2694th meeting, on 24 July 2001, the Commission considered and provisionally adopted draft guidelines 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), 2.2.2 [2.2.3][968] (Instances of non-requirement of confirmation of reservations formulated when signing a treaty), 2.2.3 [2.2.4] (Reservations formulated upon signature when a treaty expressly so provides), 2.3.1 (Late formulation of a reservation), 2.3.2 (Acceptance of the late formulation of a reservation), 2.3.3 (Objection to the late formulation of a reservation), 2.3.4 (Subsequent exclusion or modification of the legal effects of a treaty by means other than reservations), 2.4.3 (Time at which an interpretative declaration may be formulated), 2.4.4 [2.4.5] (Non-requirement of confirmation of interpretative declarations made when signing a treaty), 2.4.5 [2.4.4] (Formal confirmation of conditional interpretative declarations formulated when signing a treaty), 2.4.6 [2.4.7] (Late formulation of an interpretative declaration), and 2.4.7 [2.4.8] (Late formulation of a conditional interpretative declaration).

115. The texts of these draft guidelines and the commentaries thereto are reproduced in section C below.

2. Sixth report

116. The Commission also had before it the sixth report of the Special Rapporteur on the topic (A/CN.4/518 and Add.1–3) relating to the modalities of formulating reservations and interpretative declarations (in particular, their form and notification) and to publicity of reservations and interpretative declarations (their communication, recipients and obligations of the depositary).

117. The Commission considered the report at its 2689th to 2693rd meetings, on 13, 17, 18, 19 and 20 July 2001.

(a) *Introduction by the Special Rapporteur of his sixth report*

118. The Special Rapporteur first indicated that chapter I of his sixth report contained the latest information on developments since the fifth report, including those concerning the topic in the Commission on

[963] *Ibid.*, vol. II (Part Two), p. 134, para. 540.

[964] *Yearbook … 1999*, vol. II (Part One), document A/CN.4/499.

[965] *Ibid.*, vol. II (Part Two), p. 91, para. 470.

[966] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4.

[967] *Ibid.*, vol. II (Part Two), p. 108, document A/55/10, para. 663.

[968] The numbering in square brackets corresponds to the original numbering of the draft guidelines proposed by the Special Rapporteur.

Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights. Chapter II discussed the highly complex problems associated with the formulation of reservations. (Acceptance of reservations and objection would be the subject of his next report.) The annex to the sixth report contained the consolidated text of all the draft guidelines contained in his fifth and sixth reports, although those in the fifth report had already been referred to the Drafting Committee, since it had not been possible to consider the fifth report at the fifty-second session of the Commission.

119. The Special Rapporteur began by introducing draft guidelines 2.1.1 to 2.1.4, 2.4.1 and 2.4.2 (including two *bis* draft guidelines, 2.1.3 *bis* and 2.4.1 *bis*, and two alternatives for guideline 2.1.3).

120. Draft guideline 2.1.1 (Written form),[969] on the requirement that reservations have to be in writing, basically reproduces the text of the first part of paragraph 1 of article 23 of the 1969 and 1986 Vienna Conventions. As the Guide to Practice should be able to stand on its own, the provisions of the Vienna Conventions on reservations should be reproduced word for word therein. The Special Rapporteur recalled that, as the *travaux préparatoires* indicated, there had been practically unanimous agreement that reservations must be in writing. While "oral reservations" were a theoretical possibility, the confirmation at the time of the definitive consent to be bound must undoubtedly be in written form, as stated in guideline 2.1.2 (Form of formal confirmation).[970]

121. It remained to be seen whether those rules could be transposed to interpretative declarations. Practice, which is neither readily accessible nor well established, is not very helpful in that respect. But here too a distinction should probably be drawn between "simple" and conditional interpretative declarations, the former category not requiring any particular form (draft guideline 2.4.1: Formulation of interpretative declarations).[971]

122. On the other hand, in the case of conditional interpretative declarations, the interpretation that the declaring State wishes to set against that of the other parties must be known by those parties if they intend to react to it, exactly as in the case of reservations. It therefore seems logical that the same rule should apply (draft guideline 2.4.2: Formulation of conditional interpretative declarations).[972]

123. In that context, the Special Rapporteur wished to point out that, like other members of the Commission, he wondered whether it was really necessary to devote specific draft guidelines to conditional interpretative declarations, since the legal rules applying to them appeared to be identical to those on reservations. It seemed to him, however, that it would be better to wait until the Commission had considered the effects of reservations and of conditional interpretative declarations before taking a decision on whether or not it was desirable to retain the guidelines concerning the latter category. If it were found that the effects of both were identical, it might be possible to delete all the guidelines relating to conditional interpretative declarations except for a single general guideline stating that the guidelines relating to reservations applied, *mutatis mutandis*, to conditional interpretative declarations.

124. Concerning draft guideline 2.1.3 (Competence to formulate a reservation at the international level),[973] the

[969] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.1 *Written form*

"A reservation must be formulated in writing."

[970] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.2 *Form of formal confirmation*

"When formal confirmation of a reservation is necessary, it must be made in writing."

[971] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.4.1 *Formulation of interpretative declarations*

"An interpretative declaration must be formulated by a person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State or international organization to be bound by a treaty."

[972] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.4.2 *Formulation of conditional interpretative declarations*

"1. A conditional interpretative declaration must be formulated in writing.

"2. Where necessary, the formal confirmation of a conditional interpretative declaration must be effected in the same manner.

"3. A conditional interpretative declaration 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. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ."

[973] The alternative formulations of the draft guideline read as follows:

"2.1.3 *Competenceto formulate a reservation at the international level*

"Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.

"2.1.3 *Competenceto formulate a reservation at the international level*

"1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization 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 other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

"2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State:

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

(Continued on next page.)

Special Rapporteur recalled that, in 1962, Sir Humphrey Waldock suggested specifying the kind of instruments in which reservations should appear and also the persons or organizations competent to make reservations. In his view, Sir Humphrey Waldock's attempted definition was somewhat tautological and repetitive. On the other hand, it seems necessary to specify the authorities competent to make reservations at the international level. For such purposes, the Commission might be guided by the provisions of the 1969 and 1986 Vienna Conventions concerning the authorities or persons considered as representing a State or an international organization for the purpose of expressing consent to be bound by a treaty (art. 7 of the Conventions). Practice, both that of the Secretary-General and that of other depositaries (the Council of Europe, OAS), also confirms that it is the rules set forth in those provisions that are followed, *mutatis mutandis*, with regard to competence to make reservations at the international level. The Special Rapporteur wondered whether the rules of article 7 should be made more flexible by adding to the three traditional authorities other categories, such as the permanent representative to an international organization which is a depositary. He finally decided on a hybrid solution, adding the phrase "subject to the customary practices in international organizations which are depositaries of treaties", so as not to challenge existing practices. However, both solutions had their merits and drawbacks and the advice of the Commission on the question would be valuable.

125. The Special Rapporteur also sought the Commission's advice as to which of the two versions of draft guideline 2.1.3 was preferable: the longer version (reproducing the relevant provisions of the 1969 Vienna Convention) or the shorter, more elliptical version.

126. Turning to another issue, the Special Rapporteur discussed the process of formulating reservations (and interpretative declarations) at the internal level. He questioned whether the Guide to Practice should contain guidelines on the wide variety of internal practices or should simply indicate that the whole process was a matter for internal law. Having opted for the latter solution, he had proposed two draft guidelines: 2.1.3 *bis* (Competence to formulate a reservation at the internal level)[974] and 2.4.1 *bis* (Competence to formulate an interpretative declaration at the internal level),[975] although he was not sure whether they were entirely necessary. He looked forward to hearing the Commission's view on that point.

127. Having examined draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations),[976] the Special Rapporteur wondered whether article 46 of the Vienna Conventions on "defective ratification", which was a pragmatic and balanced provision, should be transposed to reservations and interpretative declarations. He had concluded that that was not necessary either for practical reasons (it would be extremely difficult, if not impossible, to establish a clear-cut violation of internal law in respect of reservations) or for technical reasons (the internal procedure in respect of reservations is often empirical and difficult of access); there, too, the Commission's opinion would be valuable to him. Draft guideline 2.1.4 and paragraph 2 of draft guideline 2.4.1 *bis* on interpretative declarations are based on that position.

128. The Special Rapporteur then introduced draft guidelines 2.1.5 to 2.1.8, relating to procedures for the communication and publicity of reservations; and 2.4.2 (paragraph 3) and 2.4.9 (paragraph 2), relating to interpretative declarations.

129. The six draft guidelines were prompted solely by the concern to ensure that the partners of the reserving State or organization were aware of how they could respond, in due course. The relevant provision of the Vienna Conventions—article 23, paragraph 1—referred to "contracting States or international organizations" or those "entitled to become parties to the treaty". Whereas the first category was well defined, determining the second could prove very delicate in some cases, as the practice of certain depositaries also showed. The Special Rapporteur had not thought it appropriate to be more specific, however, unless the Commission decided otherwise, since the question related to the law of treaties in general and not to the more specialized law of reservations.

(*Footnote 973 continued.*)

"(*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 by that organization or body;

"[(*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.]"

[974] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.3 *bis* *Competence to formulate a reservation at the internal level*

"The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization."

[975] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.4.1 *bis* *Competence to formulate an interpretative declaration at the internal level*

"1. The determination of the competent body and the procedure to be followed for formulating an interpretative declaration at the internal level is a matter for the internal law of each State or international organization.

"2. A State or 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 as invalidating the declaration."

[976] The draft guideline proposed by the Special Rapporteur reads as follows:

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

"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 as invalidating the reservation."

130. Guideline 2.1.5 (Communication of reservations)[977] is thus based on article 23, paragraph 1, of the 1986 Vienna Convention. It also adds to it, however, by referring to reservations to constituent instruments of international organizations and by largely following current practice. In addition, the expression "deliberative organ" is used to cover the case of hybrid or doubtful international organizations which nonetheless set up such organs. The Commission's opinion on that point and on whether a reservation should be communicated both to the organization itself and to the member States or States entitled to become parties to the constituent instrument would be most useful. Moreover, the Special Rapporteur did not think it appropriate to require reservations to be communicated specifically to the heads of secretariats of international organizations, and questioned whether they should be so communicated to preparatory committees established before the entry into force of the constituent instrument of an international organization.

131. The same rules seemed to be transposable to conditional interpretative declarations, as provided for in paragraph 3 of draft guideline 2.4.2.[978] By contrast, simple interpretative declarations do not involve any formalities.

132. The role of the depositary was the focus of draft guidelines 2.1.6 (Procedure for communication of reservations)[979] and 2.1.7 (Functions of depositaries).[980] The former relates to the procedure for communicating reservations which have to be confirmed in writing if they are made in a way other than in writing, while the latter concerns the depositary's role with regard to reservations. The Special Rapporteur recalled the development of the depositary's role and the largely passive functions accorded to the depositary under the Vienna Conventions. The rules of article 78 (*b*) of the 1969 Vienna Convention, which became article 79 (*b*) of the 1986 Vienna Convention, are therefore reproduced almost in their entirety. Draft guideline 2.1.8 (Effective date of communications relating to reservations),[981] meanwhile, relates to the effective date of communications relating to reservations. It would be useful to transpose these rules (2.1.6, 2.1.7 and 2.1.8) to conditional interpretative declarations by the addition of a third paragraph to that effect in draft guideline 2.4.9 (Communication of conditional interpretative declarations),[982] which deals with the communication of conditional interpretative declarations.

133. In concluding his introduction, the Special Rapporteur expressed the hope that all the draft guidelines would be referred to the Drafting Committee.

(b) *Summary of the debate*

134. With regard to draft guidelines 2.1.1, 2.1.2, 2.4.1 and 2.4.2, the members who expressed their views said that they agreed to consider that the written form of reservations and conditional interpretative declarations guaranteed the stability and security of contractual relations.

135. As for draft guideline 2.1.3, several members said that they preferred the longer version for practical reasons having to do with facilitating its use and taking account of all the possibilities envisaged by the 1986 Vienna Convention, while others would have preferred a more simplified version. According to some members, the reference to heads of permanent missions to an international organization (draft guideline 2.1.3, paragraph 2 (*d*)) should be deleted.

136. The opinion was expressed that the term "competence" used in the title of draft guideline 2.1.3 could give rise to confusion since the text itself was taken from that of article 7 of the 1969 and 1986 Vienna Conventions dealing with "full powers". A distinction

[977] The draft guideline proposed by the Special Rapporteur reads as follows:

"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 or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ."

[978] See footnote 972 above.

[979] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.6 *Procedure for communication of reservations*

"1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to 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 organizations for which it is intended as soon as possible.

"2. Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile]."

[980] The draft guideline proposed by the Special Rapporteur reads as follows:

"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.

"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."

[981] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.8 *Effective date of communications relating to reservations*

"A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon its receipt by the State or organization to which it was transmitted."

[982] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.4.9 *Communication of conditional interpretative declarations*

"1. A conditional interpretative declaration 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 under the same conditions as a reservation.

"2. A conditional interpretative declaration to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ."

should be made between competence to make a reservation (under article 46 of the Conventions) and its "expression" at the international level. According to one point of view, competence to formulate reservations should belong to the organs empowered to express the consent of the State to be bound by the treaty.

137. As to the question of "deliberative organ" mentioned in draft guideline 2.1.5, certain members found the expression appropriate (particularly in view of disagreements about the capacity or otherwise of certain entities as international organizations), whereas others preferred the terms "treaty organs", "conventional organs", "competent organs" or quite simply "organs".

138. According to one opinion, draft guideline 2.4.1 seemed far too restrictive, since, in practice, a great variety of representatives of States made interpretative declarations. Furthermore, even simple interpretative declarations should be formulated in writing and it was the responsibility of depositaries to transmit them to the States and international organizations concerned in the same way as reservations.

139. According to another opinion, the question of procedures could not easily be dissociated from the questions of validity or permissibility.

140. As for draft guideline 2.1.4, the opinion was expressed that there could be cases where the violation of internal rules on the formulation of reservations could have consequences for the State's consent to be bound. That point deserved to be considered further in comparison with article 46, paragraph 1, of the 1969 Vienna Convention.

141. The question of the *communication* of reservations and conditional interpretative declarations (draft guidelines 2.1.5 and 2.4.9) involved problems of the definition of States and international organizations entitled to become parties to the treaty. In any case, all those States and organizations had the right to be informed of reservations made by other States. In the view of several members, it would not be appropriate to try to define the term "States or international organizations entitled to become parties to the treaty", a fairly general expression which could also include those which had taken part in the negotiations and which related to the law of treaties as a whole, not to the law of reservations.

142. Some members also shared the Special Rapporteur's opinion that reservations to the constituent instrument of an international organization should *also* be communicated to the contracting States and organizations. However, they were more hesitant when it came to preparatory committees, which might not have any competence in respect of reservations.

143. It was also emphasized that it is often very difficult to determine whether an international organization has treaty-making power, as is shown by the complex example of the European Union.

144. According to several members, communications by electronic mail had to be confirmed by another means, i.e. by post, which is usually in keeping with current depositary practice. According to one opinion, however, the use of electronic mail should be prohibited.

145. Several members expressed doubts about whether draft guidelines 2.1.3 *bis* and 2.4.1 *bis* should be retained. Some questioned, however, whether a link should not be established between internal and international competence.

146. Although draft guideline 2.1.7 presupposed a purely mechanical role on the part of the depositary, there was a case, in the view of certain members, for including the possibility of the depositary rejecting an instrument containing a prohibited reservation under article 19 (*a*) and (*b*) of the 1969 Vienna Convention. However, it was necessary to be very careful in that regard. In that case and if there was a difference of opinion between the depositary and the reserving State, the provision of article 77, paragraph 2, of the Convention could be transposed to the draft guideline in question.

147. The question of the communication of simple interpretative declarations was also raised. In fact, if the depositary received such a declaration from the declaring State, it must communicate it to the other States, which could thereby determine its real nature. One member pointed out that the depositary practice of OAS provided useful information on these two draft guidelines.

148. The view was expressed that draft guideline 2.1.8 ran counter to article 78 (*b*) of the 1969 Vienna Convention, which states that the date of receipt by the depositary must be accepted. On the other hand, the period during which a State may object to a reservation is determined as from the date of notification of the other States (art. 20, para. 5, of the Convention).

149. Several members said that they agreed with the Special Rapporteur that the Commission should wait until it had considered the effects of reservations and conditional interpretative declarations before deciding whether specific guidelines on the latter would be necessary. Others strongly emphasized that they were opposed to the draft guidelines dealing separately with conditional interpretative declarations.

150. Summing up the debate, the Special Rapporteur once again underlined the pedagogic and "utilitarian" nature of the Guide to Practice. That was why he had included such draft guidelines as 2.1.1, 2.1.3 *bis* and 2.4.1 *bis*, which seemed to be self-evident. In the same vein, he preferred to repeat provisions of the Vienna Conventions in the draft guidelines rather than refer to them. The transposition must, of course, not be selective, as some members seemed to want. Furthermore, the idea that the violation of internal rules for the formulation of reservations could have consequences for the State's (or international organization's) consent to be bound seemed interesting, although he was persuaded that the notion of an evident and formal violation was practically impossible to transpose to the formulation of reservations.

151. He further noted that there was no clear response to the question whether it was necessary to clarify the term "States or international organizations entitled to become parties to the treaty", a question which was all the more

complicated in that there were organizations having competence which was exclusive or concurrent with that of member States. It was therefore better not to try to rewrite the entire law of treaties.

152. The Special Rapporteur was also sceptical about the expression proposed for draft guideline 2.1.5, namely, "competent organ", given that it was not easy to define. As to the question whether the depositary must communicate reservations to constituent instruments of international organizations not only to the organization itself, but also to all States concerned, it seemed to him from the debate that the answer should be in the affirmative.

153. He was also in favour of the idea of reflecting the current depositary practice whereby the depositary refused to accept a reservation prohibited by the treaty itself.

154. He was, however, more sceptical about the communication at any time of simple interpretative declarations. With regard to the draft guidelines as a whole, he also reiterated the Commission's position that it would not depart from the letter or spirit of the Vienna Conventions, but would supplement them where necessary.

155. At its 2692nd meeting, on 19 July 2001, the Commission decided to refer to the Drafting Committee draft guidelines 2.1.1 (Written form), 2.1.2 (Form of formal confirmation), 2.1.3 (Competence to formulate a reservation at the international level), 2.1.3 *bis* (Competence to formulate a reservation at the internal level), 2.1.4 (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), 2.1.7 (Functions of depositaries), 2.1.8 (Effective date of communications relating to reservations), 2.4.1 (Formulation of interpretative declarations), 2.4.1 *bis* (Competence to formulate an interpretative declaration at the internal level), 2.4.2 (Formulation of conditional interpretative declarations) and 2.4.9 (Communication of conditional interpretative declarations).

C. Draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. Text of the draft guidelines

156. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below. [983]

[983] See the commentaries to draft guidelines 1.1, 1.1.2, 1.1.3 [1.1.8], 1.1.4 [1.1.3] and 1.1.7 [1.1.1] in *Yearbook … 1998*, vol. II (Part Two), pp. 99–107; the commentaries to draft guidelines 1.1.1 [1.1.4], 1.1.5 [1.1.6], 1.1.6, 1.2, 1.2.1 [1.2.4], 1.2.2 [1.2.1], 1.3, 1.3.1, 1.3.2 [1.2.2], 1.3.3 [1.2.3], 1.4, 1.4.1 [1.1.5], 1.4.2 [1.1.6], 1.4.3 [1.1.7], 1.4.4 [1.2.5], 1.4.5 [1.2.6], 1.5, 1.5.1 [1.1.9], 1.5.2 [1.2.7], 1.5.3 [1.2.8] and 1.6 in *Yearbook … 1999*, vol. II (Part Two), pp. 93–126; and the commentaries to draft guidelines 1.1.8, 1.4.6 [1.4.6, 1.4.7], 1.4.7 [1.4.8], 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] and 1.7.2 [1.7.5] in *Yearbook … 2000*, vol. II (Part Two), pp. 108–123. The commentaries to draft guidelines 2.2.1, 2.2.2 [2.2.3], 2.2.3 [2.2.4], 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.4.3, 2.4.4 [2.4.5], 2.4.5 [2.4.4], 2.4.6 [2.4.7] and 2.4.7 [2.4.8] are listed in section 2 below.

RESERVATIONS TO TREATIES

GUIDE TO PRACTICE

1 ***Definitions***

1.1 ***Definition of reservations***

"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.

1.1.1 [1.1.4][984] ***Object of reservations***

A 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 State or to the international organization which formulates the reservation.

1.1.2 ***Instances in which reservations may be formulated***

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of 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.

1.1.3 [1.1.8] ***Reservations having territorial scope***

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 [1.1.3] ***Reservations formulated when notifying territorial application***

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] ***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.

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

A unilateral statement formulated by a State or an international organization 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 equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 [1.1.1] ***Reservations formulated jointly***

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

[984] The numbers in square brackets refer to the numbering adopted in the reports of the Special Rapporteur.

1.1.8 ***Reservations made under exclusionary clauses***

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 in their application to those parties, constitutes a reservation.

1.2 ***Definition of interpretative declarations***

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

1.2.1 [1.2.4] ***Conditional interpretative declarations***

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, shall constitute a conditional interpretative declaration.

1.2.2 [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 nature of that interpretative declaration.

1.3 ***Distinction between reservations and interpretative declarations***

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

1.3.1 ***Method of implementation of 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, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 [1.2.2] ***Phrasing and name***

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 [1.2.3] ***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 thereof by a State or an international organization shall be presumed not to constitute a reservation except when 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 ***Unilateral statements other than reservations and interpretative declarations***

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

1.4.1 [1.1.5] ***Statements purporting to undertake unilateral commitments***

A unilateral statement formulated by a State or an international organization in relation to a treaty whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 [1.1.6] ***Unilateral statements purporting to add further elements to a treaty***

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] ***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 constitutes a statement of non-recognition which 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.

1.4.4 [1.2.5] ***General statements of policy***

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] ***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 purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

1.4.6. [1.4.6, 1.4.7] ***Unilateral statements made under an optional clause***

1. A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] ***Unilateral statements providing for a choice between the provisions of a treaty***

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 ***Unilateral statements in respect of bilateral treaties***

1.5.1 [1.1.9] ***"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 to which it is subjecting the expression of its

final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

1.5.2 [1.2.7] ***Interpretative declarations in respect of bilateral treaties***

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] ***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 the authentic interpretation of that treaty.

1.6 ***Scope of definitions***

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

1.7 ***Alternatives to reservations and interpretative declarations***

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] ***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 restrictive clauses 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 effects of certain provisions of the treaty as between themselves.

1.7.2 [1.7.5] ***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 same treaty;

(*b*) the conclusion of a supplementary agreement to the same end.

2 ***Procedure***

…[985]

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 made on the date of its confirmation.

2.2.2 [2.2.3] ***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 its signature the consent to be bound by the treaty.

[985] Section 2.2 as proposed by the Special Rapporteur deals with confirmation of reservations when signing.

2.2.3 [2.2.4] ***Reservations formulated upon signature when a treaty expressly so provides***

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

…[986]

2.3.1 ***Late formulation of a reservation***

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 ***Acceptance of late formulation of a reservation***

Unless the treaty provides otherwise, or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 ***Objection to late formulation of a reservation***

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 ***Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations***

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(*a*) interpretation of a reservation made earlier; or

(*b*) a unilateral statement made subsequently under an optional clause.

…[987]

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

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

2.4.4 [2.4.5] ***Non-requirement of confirmation of interpretative declarations made when signing a treaty***

An interpretative declaration made 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.

2.4.5 [2.4.4] ***Formal confirmation of conditional interpretative declarations formulated when signing a treaty***

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case, the interpretative declaration shall be considered as having been made on the date of its confirmation.

[986] Section 2.3 as proposed by the Special Rapporteur deals with formulation of a reservation.

[987] Section 2.4 as proposed by the Special Rapporteur deals with procedure regarding interpretative declarations.

2.4.6 [2.4.7] ***Late formulation of an interpretative declaration***

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

2.4.7 [2.4.8] ***Late formulation of a conditional interpretative declaration***

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.

2. Text of the draft guidelines with commentaries thereto adopted by the Commission at its fifty-third session

157. The text of the draft guidelines with commentaries thereto adopted by the Commission at its fifty-third session is reproduced below:

2.2 *Confirmation of reservations when signing*

Draft guidelines 2.2.1, 2.2.2 and 2.2.3 relate to the confirmation of reservations formulated when signing a treaty. Although this rule is provided for by article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions, it is not absolute. It would obviously be meaningless if a treaty entered into force merely as a result of its signature, as made clear in draft guideline 2.2.2. Requiring respect for it when the treaty itself contains a provision dealing expressly with the possibility of reservations when signing would, moreover, deprive this reservation clause of any useful purpose (see draft guideline 2.2.3).

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 made on the date of its confirmation.

Commentary

(1) Draft 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 draft guideline 1.1,[988] 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 article 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".[989] 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"[990] and mentioned, in particular, article 14 (*d*)[991] of the Harvard Draft Convention on the Law of Treaties, which posited the contrary assumption.[992]

(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 at the fourteenth session, in 1962,[993] 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:

> 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.[994]

(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".[995] The new provision, which was adopted on the basis of the proposals by the Special Rapporteur, Sir Humphrey Waldock,[996] 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",[997] which was deleted at the United Nations Conference on the Law of Treaties under circumstances that have been described as

[988] *Yearbook … 1998*, vol. II (Part Two), p. 99, paragraph (2) of the commentary.

[989] *Yearbook … 1962*, vol. II, p. 66.

[990] *Ibid.*

[991] Waldock was citing article 15 (*d*) by mistake.

[992] "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.

[993] Cf. the summary records of the 651st to 656th meetings (25 May–4 June 1962), *Yearbook … 1962*, vol. I, pp. 139–179.

[994] *Yearbook … 1962*, vol. II, p. 180.

[995] Comments by Sweden, *Yearbook … 1965*, vol. II, p. 47.

[996] *Ibid.*, pp. 53–54.

[997] "If formulated on the occasion of the adoption of the text or upon signing the treaty ..." (*Yearbook … 1966*, vol. II, p. 208).

"mysterious".[998] The commentary to this provision reproduces the 1962 text[999] 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 [20 in the text of the Convention].[1000]

(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 organizations[1001] 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).[1002] The Vienna Conference on the Law of Treaties of 1986 adopted the text of the Commission[1003] without changing the French text.[1004]

(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,[1005] 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 (but not systematically)[1006] and seems to satisfy an *opinio necessitatis juris*, which allows a customary value to be assigned to it.[1007]

(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,[1008] even if that was not always true in the past.[1009] 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"[1010] 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 notifi-

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[998] "In paragraph 2, the phrase 'on the occasion of the adoption of the text' mysteriously disappeared from the Commission's text when it was finally approved by the Conference" (J. M. Ruda, "Reservations to treaties", *Recueil des cours…, 1975–III* (Leiden), Sijthoff, vol. 146 (1977), p. 195).

[999] See paragraph (5) of the commentary to this draft guideline.

[1000] *Yearbook … 1966*, vol. II, p. 208. Article 20 of the Convention relates to acceptance of and objection to reservations.

[1001] See the fourth and fifth reports of Special Rapporteur Paul Reuter, *Yearbook … 1975*, vol. II, p. 38, document A/CN.4/285, and *Yearbook … 1976*, vol. II (Part One), p. 146, document A/CN.4/290 and Add.1.

[1002] See the discussions on this subject at the 1434th meeting, on 6 June 1977 (*Yearbook … 1977*, vol. I, pp. 101–103). The Commission is aware of these risks, but did not believe that it should amend terminology that is now widely accepted.

[1003] *Yearbook … 1982*, vol. II (Part Two), p. 37.

[1004] The Chairman 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" (*United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986, Official Records*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5, Vol. I)), fifth plenary meeting, 18 March 1986, p. 15, para. 63).

[1005] See the first report of Sir Humphrey Waldock (footnote 989 above). See also D. W. Greig, "Reservations: equity as a balancing factor?", *Australian Year Book of International Law*, 1995, vol. 16, p. 28, or 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. 41.

[1006] Thus, 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 the footnote below), since the former includes in the valuable 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 definitive consent to be bound; see, for example, United Nations, *Multilateral Treaties Deposited with the Secretary-General*: *Status as at 31 December 2000*, vol. I (United Nations publication, Sales No. E.01.V.5) (reservations by Turkey to the Customs Convention on Containers, 1972, p. 537; or reservations by the Islamic Republic of Iran and Peru to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, pp. 398–399); such practice probably reflects a purely mechanical approach to the role of the depositary and does not involve any value judgement about the validity or nature of the declarations in question.

[1007] 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* (United Nations publication, Sales No. E.78.V.5), pp. 209 and 211); the Council of Europe changed its practice in this regard in 1980 (cf. F. Horn, *op. cit.* (footnote 1005 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 which indicated that they usually confirmed reservations formulated when the treaty was signed at the time of ratification or accession.

[1008] See, in particular, D. W. Greig, *loc. cit.* (footnote 1005 above), and P. H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), p. 285.

[1009] See Imbert, *ibid*., pp. 253–254.

[1010] See paragraph (5) of the commentary to this draft guideline.

cation of succession in accordance with draft guideline 1.1,[1011] 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 State[1012] or formulate a new reservation when it makes a notification of succession;[1013] in neither of these two cases is the successor State thus 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 and 1986 Vienna Conventions, 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 signature. It follows, conversely, that there can be no "succession to the signing" of a treaty (subject to ratification or an equivalent procedure[1014])[1015] and that the concept of notification of succession should not be introduced into draft guideline 2.1.1.[1016]

(12) The Commission also questioned whether it should take account, in the preparation of this draft, of draft guideline 1.1.2 (Instances in which reservations may be formulated).[1017] The problem does not arise with regard to the designation of the moment when the confirmation should take place, since the formula contained in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions is equivalent to the one adopted by the Commission in draft guideline 1.1.2 ("when expressing its consent to be bound"). It might be thought, however, that the number of cases to which article 23, paragraph 2, seems to limit the possibility of subordinating definitive consent to be bound (ratification, act of formal confirmation, acceptance or approval) is too small and does not correspond to the one in article 11.

(13) However, although some of its members did not so agree, the Commission considered that such a concern was 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 of two possibilities contemplated in the former: "exchange of instruments constituting a treaty" and "any other means if so agreed".[1018] The probability that a State or an international organization would subordinate the expression of its definitive consent to be bound by a multilateral treaty subject to reservations to one of these modalities is sufficiently low that it did not seem useful to overburden the wording of draft guideline 2.2.1 or to include a draft guideline equivalent to draft guideline 1.1.2 in chapter 2 of the Guide to Practice.

(14) Thirdly, several members of the Commission considered that account should be taken of the possible case where a reservation is formulated not at the time of signing the treaty, but before that. In their opinion, nothing prevents a State or an international organization from indicating formally to its partners the "reservations" which it has regarding the adopted text at the authentication stage[1019] or, for that matter, at any previous stage of negotiations.[1020]

(15) The Commission had, moreover, considered that possibility in draft article 18 (which became article 23 of the 1969 Vienna Convention), of which paragraph 2, as contained in the final text of the draft articles adopted at the eighteenth session, 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.[1021]

Commenting on this provision, the Commission stated that "statements 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,[1022] adding that:

[1011] *Yearbook … 1998*, vol. II (Part Two), p. 99.

[1012] Cf. article 20, paragraph 1, of the 1978 Vienna Convention.

[1013] Cf. article 20, paragraph 2.

[1014] See draft guideline 2.2.2.

[1015] The publication *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II (United Nations publication, Sales No. E.01.V.5) does, however, mention, in the footnotes and without special comment, reservations formulated when signing by a predecessor State and apparently not formally confirmed by the successor State or States; see, for example, reservations by Czechoslovakia to the United Nations Convention on the Law of the Sea, noted in connection with the Czech Republic and Slovakia (note 4, p. 237).

[1016] According to Claude Pilloud, "in applying by analogy the rule provided for in article 23, paragraph 2, of the Vienna Convention concerning reservations expressed at the time of signature, one might say that the States which have made a declaration of continuity [to the Geneva Conventions of 1949] should, if they had 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; the matter will be considered by the Commission when it carries out a more systematic study of the problems relating to succession to reservations.

[1017] "Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of 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" (*Yearbook … 1998*, vol. II (Part Two), p. 99).

[1018] For a similar comment concerning the comparison of article 2, paragraph 1 (*d*), and article 11, see paragraph (8) of the commentary to draft guideline 1.1.2, *ibid.*, p. 104.

[1019] In addition to signing, article 10 of the 1969 and 1986 Vienna Conventions mentions initialling and signing *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 Vienna Conference on the Law of Treaties), *Yearbook … 1966*, vol. II, p. 195.

[1020] See, in this connection, the reservation by Japan to article 2 of the Food Aid Convention, 1971, 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 (ILM, vol. 11, No. 5 (September 1972), p. 1179).

[1021] *Yearbook … 1966*, vol. II, p. 208.

[1022] See paragraph (3) of the commentary to this draft article (*ibid.*, p. 208).

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.[1023]

(16) As indicated above,[1024] the reference to the adoption of the text disappeared from the text of article 23, paragraph 2, of the 1969 Vienna Convention in "mysterious" circumstances during the Vienna Conference on the Law of Treaties, probably out of concern for consistency with the wording of the *chapeau* of article 19.

(17) However, a majority of members objected to the adoption of a draft guideline along those lines for fear of encouraging a growing number of statements which were intended to limit the scope of the text of the treaty, were formulated before the adoption of its text and were thus not in keeping with the definition of reservations.

2.2.2 [2.2.3] *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 its signature the consent to be bound by the treaty.

Commentary

(1) The solution which was adopted for draft guideline 2.2.1 and which is faithful to the Vienna text obviously implies that the rule thus codified applies only to treaties in formal form, those that do not enter into force solely by being signed.[1025] With regard to treaties not requiring any post-signing formalities in order to enter into force and which are referred to as "agreements in simplified form",[1026] however, it is self-evident that, if formulated when the treaty is signed, a reservation becomes effective immediately without any formal confirmation being necessary or even conceivable.

(2) The Commission is not aware, however, of any clear-cut example of a reservation made at the time when a multilateral agreement in simplified form was signed. This eventuality certainly cannot be ruled out, however, if only because there are "mixed treaties", which can, if the parties so choose, enter into force solely upon signature or following ratification and which are subject to reservations or contain reservation clauses.[1027]

(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 draft 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 draft guideline 2.2.2.

(4) Although some members of the Commission would have preferred the term "agreements in simplified form", which is commonly used in French writings, it seemed preferable not to use this term which was not used in the 1969 Vienna Convention.

(5) It may also be asked whether a reservation to a treaty provisionally entering into force or provisionally implemented pending its ratification[1028]—and hypothetically formulated when signing—must be confirmed at the time of its author's expression of definitive consent to be bound by the treaty. The Commission took the view that that was a different case than the one covered by draft guideline 2.2.2, and that there was no reason for a solution departing from the principle laid down in draft guideline 2.2.1. Accordingly, a separate draft guideline does not appear to be necessary.

2.2.3 [2.2.4] *Reservations formulated upon signature when a treaty expressly so provides*

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, 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 provided for by draft guideline 1.2.1, there is 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 Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality provides that:

Any Contracting Party may, when *signing this Convention** or depositing its instrument of ratification, acceptance or accession, declare that it

[1023] *Ibid*.

[1024] See paragraph (6) of the commentary to this draft guideline.

[1025] On the distinction between treaties in formal form and agreements in simplified form, see, in particular, C. Chayet, "Les accords en forme simplifiée", *Annuaire français de droit international*, vol. 3 (1957), pp. 3–13; P. Dailler and A. Pellet, *op. cit.* (footnote 49 above), pp. 136–144; and P. F. Smets, *La conclusion des accords en forme simplifiée* (Brussels, Bruylant, 1969).

[1026] 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 General Agreement on Tariffs and Trade of 1947 (at least in terms of the entry into force of the bulk of its provisions following the signing of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade), the Declaration on the Neutrality of Laos and the Agreement establishing a Food and Fertiliser Technology Centre for the Asian and Pacific Region.

[1027] Cf. article XIX of the Agreement relating to the International Telecommunications Satellite Organization "INTELSAT"; see also the Convention on Psychotropic Substances (art. 32), the Convention on a Code of Conduct for Liner Conferences and the International Convention on Arrest of Ships, 1999 (art. 12, para. 2).

[1028] Cf. articles 24 and 25 of the 1969 and 1986 Vienna Conventions.

avails itself of one or more of the reservations provided for in the Annex to the present Convention.[1029]

(2) In a case of this kind, it seems that practice consists of not requiring a party which formulates a reservation when signing to confirm it when expressing definitive consent to be bound. Thus, France made a reservation when it signed this Convention and did not subsequently confirm it.[1030] Similarly, Hungary and Poland did not confirm their reservation to article 20 of the 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, and Ecuador did not confirm its reservation to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[1031] It is true that other States[1032] nonetheless confirmed their reservation at the time of ratification.

(3) The members of the Commission had different opinions about this uncertain practice, although all agreed that a position should be adopted on this point in the Guide to Practice.

(4) Some members took the view that, in cases of this kind, the general rule laid down in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions should not be excluded because the reservation clauses in question, which mechanically reproduce the provisions of article 11, would then not actually have any particular scope.

(5) In the opinion of the majority of the members of the Commission, however, the rule embodied in article 23, paragraph 2, of the Vienna Conventions, which, like all their provisions, was only dispositive in nature, should be applicable only where a treaty was silent; otherwise, the provisions relating to the possibility of reservations when signing would serve no useful purpose. In their view, the uncertainties of practice may be explained by the fact that, if a formal confirmation in a case of this kind is not essential, it is also not ruled out: reservations made when signing a convention expressly authorizing reservations on signing are sufficient in and of themselves, it being understood, however, that nothing prevents reserving States from confirming them,[1033] even though nothing compels them to do so.

(6) Accordingly, the Commission endorsed the "minimum" practice, something that seems logical, since the treaty expressly provides for reservations when signing. According to the majority opinion, if this principle was not recognized, many unconfirmed reservations formulated when signing would have to be deemed without effect, even where the States which formulated them did so on the basis of the text of the treaty itself.

2.3 *Late formulation of a reservation*

(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 a reservation", however, in order clearly to indicate 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 moments at which reservations may be formulated are specified in the definition of reservations itself.[1034]

(2) In practice, however, it is not uncommon for a State[1035] to try to formulate a reservation at a different moment from those provided for by the Vienna definition and this possibility, which may have some definite advantages, has not been totally ruled out by practice.

(3) After the expression of its consent to be bound, a State cannot, by means of the interpretation of a reservation, shirk certain obligations established by a treaty. This principle is not to be sanctioned lightly and the primary objective of this section of the Guide to Practice is to indicate the rigorous conditions to which it is subject. Draft guideline 2.3.1 states the rule that the late formulation of a reservation is, in principle, excluded and the draft guidelines that follow it stipulate the basic conditions to which any exception to this principle is subject: the absence of objections within a 12-month period by all the other parties without exception (draft guidelines 2.3.1, 2.3.2 and 2.3.3). In addition, draft guideline 2.3.4 is designed to prevent the exclusion of the principle of the late formulation of reservations from being circumvented by means other than reservations.

[1029] See also, among many examples, article 17 of the Convention on the Reduction of Statelessness; article 30 of the Convention on Mutual Administrative Assistance on Tax Matters; article 29 of the European Convention on Nationality; and article 24 of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons.

[1030] Council of Europe, European Committee on Legal Cooperation (CCJ), *CCJ Conventions and Reservations to those Conventions*, note by the secretariat, CCJ (99) 36, Strasbourg, 30 March 1999, p. 11; the same applied to reservations by Belgium to the Convention on Mutual Administrative Assistance on Tax Matters (p. 50).

[1031] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. I (see footnote 1006 above), p. 255; *ibid*., p. 311; and *ibid.*, vol. II (see footnote 1015 above), p. 115. The reservation by Hungary was subsequently withdrawn.

[1032] Belarus, Bulgaria (reservation subsequently withdrawn), Czechoslovakia (reservation subsequently withdrawn by the Czech Republic and Slovakia), Morocco, Tunisia and Ukraine (reservation subsequently withdrawn); see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. I (footnote 1006 above), pp. 255–268.

[1033] 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 Convention on Psychotropic Substances, *ibid*., pp. 378–385).

[1034] Cf. article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions, article 2, paragraph 1 (*j*), of the 1978 Vienna Convention and draft 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"(*Yearbook … 1998*, vol. II (Part Two), p. 99); see also draft guideline 1.1.2, *ibid*.

[1035] To the Commission's knowledge, there has to date been no example of the late formulation of a reservation by an international organization.

2.3.1 *Late formulation of a reservation*

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

Commentary

(1) Unless otherwise provided by a treaty, something which is always possible,[1036] the expression of definitive consent to be bound constitutes, for the contracting parties, the last (and in view of the requirement concerning formal confirmation of reservations formulated during negotiations and when signing, only) time when a reservation may be formulated. This rule, which is unanimously recognized in legal writings[1037] and which arose from the very definition of reservations[1038] and is also implied by the chapeau of article 19 of the 1969 and 1986 Vienna Conventions,[1039] is widely observed in practice.[1040] It was regarded as forming part of positive law by ICJ in its judgment in the *Border and Transborder Armed Actions* case:

> Article LV of the Pact of Bogotá 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 adhesion to that instrument.[1041]

(2) According to some members of the Commission, it was questionable whether this kind of declaration was compatible with the definition of reservation under guideline 1.1. Nevertheless, 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"[1042] or restrict still further the moments at which a reservation is possible.

(3) Although the possibility of late formulation of a reservation "has never been contemplated, either in the context of the International Law Commission or during the Vienna Conference",[1043] it is relatively frequent.[1044] Thus, for example:

– Article 29 of the Convention on Bills of Exchange and Promissory Notes of 1912 provided that:

> 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 reservations[1045] above mentioned, must notify its intention in writing to the Government of the Netherlands.[1046]

– Likewise, under article 26 of the Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air:

> 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 provides that:

> 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*.[1047]

– Under article 30, paragraph 3, of the Convention on Mutual Administrative Assistance in Tax Matters:

> 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

[1036] Some reservation clauses specify, for example, that "reservations 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, art. 18) or "at the latest at the moment of ratification or at adhesion, 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, art. 23; these examples are quoted by Imbert, *op. cit.* (footnote 1008 above), pp. 163–164); see also the examples given in paragraph (3) of this commentary.

[1037] It has been stated particularly forcefully by Giorgio 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", *Le droit international à l'heure de sa codification–Études en l'honneur de Roberto Ago* (Milan, Giuffrè, 1987), vol. I, p. 310).

[1038] See footnote 1034 above.

[1039] "A State [or an international organization] may, when signing, ratifying, [formally confirming], accepting, approving or acceding to a treaty, formulate a reservation."

[1040] 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 draft guideline 1.2 (Definition of interpretative declarations), *Yearbook … 1999*, vol. II (Part Two), p. 102).

[1041] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 85.

[1042] J.-F. Flauss, "Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: requiem pour la déclaration interprétative relative à l'article 6, paragraphe 1", *Revue universelle des droits de l'homme*, vol. 5, No. 9 (December 1993), p. 302.

[1043] Imbert, *op. cit.* (see footnote 1008 above), p. 12.

[1044] In addition, see those examples given by Imbert (footnote 1008 above), pp. 164–165.

[1045] In fact, what is meant here is not *reservations*, but *reservation clauses*.

[1046] See also article 1 of the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes of 1930 and article 1 of the Convention providing a Uniform Law for Cheques: "[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."

[1047] See also article 26 of the Convention on the Law Applicable to Matrimonial Property Regimes: "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* 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.

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.[1048]

– Similarly, article 10, paragraph 1, of the International Convention on Arrest of Ships, 1999, provides that:

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.

(4) This is not especially problematic in itself and is in conformity with the idea that the Vienna rules are only of a residual nature (as the guidelines in the Guide to Practice will be, and with all the more reason). However, since what is involved is a derogation from a rule now accepted as customary and enshrined in the Vienna Conventions, it seems necessary that such a derogation should be expressly provided for in the treaty. The Commission wanted to clarify this principle in the text of draft guideline 2.3.1, although this was not legally indispensable in order to emphasize the exceptional character that the late formulation of reservations should have.

(5) 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 Rome Convention 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 64 of the Convention. The scope of this precedent[1049] is not clear, however, and it may be that the Commission took this position because, in reality, the amendment of its legislation did not in fact result in an additional limitation on the obligations of the State concerned.[1050]

(6) 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 set out in paragraph (3) of its commentary to draft guideline 1.1.2, 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 had progressively gained ground, given the magnitude of the drawbacks in terms of stability of legal relations of a system which 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; in addition, this would excessively complicate the task of the depositary."[1051] Because the late formulation of reservations should be avoided as much as possible, the words "Unless the treaty provides otherwise" at the beginning of draft guideline 2.3.1 should be interpreted narrowly.

(7) This basic requirement of an express provision is not, however, the only exception to the rule that a reservation must, in principle, be made not later than the moment at which consent to be bound is expressed.

(8) It emerges from current practice that the other contracting parties 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.

(9) 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".[1052] In any event, as has been pointed out, "[t]he solution must be understood as dictated by pragmatic considerations. A party remains always[1053] 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 alternative actions one might choose, it seemed simply more expedient to settle for the more rapid procedure".[1054]

(10) 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, as a result, he had 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.[1055] Two years later, however, he softened his position considerably in a letter to the Permanent Mission to the United Nations of

[1048] This Convention entered into force on 1 April 1995; it seems that no State party has exercised the option envisaged in this provision. See also article 5 of the 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".

[1049] See, for instance, *Association X* v. *Austria*, application No. 473/59, *Yearbook of the European Convention on Human Rights 1958-1959*, vols. 1 and 2 (1960), p. 400; *X* v. *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, Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 20, p. 26.

[1050] In the case *X* v. *Austria*, application No. 1731/62, the Commission took the view that "the reservation made by Austria on 3 September 1958 ... 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**" (see the footnote above), p. 202.

[1051] *Yearbook … 1998*, vol. II (Part Two), p. 103.

[1052] D. W. Greig, *loc. cit.* (footnote 1005 above), pp. 28–29.

[1053] The author is referring to a specific treaty: the Convention providing a Uniform Law for Cheques (see paragraph (10) of the commentary to this draft guideline), in which article VIII expressly provides for the option of denunciation; but the practice also applies in the case of treaties that do not include a withdrawal clause (see paragraph (12) of the commentary to this draft guideline).

[1054] F. Horn, *op. cit.* (see footnote 1005 above), p. 43.

[1055] Memorandum to the Director of the Division of Human Rights, 5 April 1976, *United Nations Juridical Yearbook 1976* (see footnote 1007 above), p. 221.

France,[1056] which was considering the possibility of denouncing the Convention providing a Uniform Law for Cheques with a view to reacceding 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.[1057]

(11) That is what happened: the French Government addressed to the Secretary-General, on 7 February 1979, 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".[1058]

(12) 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.[1059] It was 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.[1060]

(13) This practice is not limited to the treaties of which the Secretary-General is the depositary. In the above-mentioned 1978 legal opinion (paragraph (10) above), 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, which was deposited with the Secretary-General of the Customs Cooperation 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".[1061]

(14) Several States parties to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), which entered into force on 2 October 1983, have widened the scope of their earlier reservations[1062] or added new ones after expressing their consent to be bound.[1063] Likewise, late reservations to certain conventions of the Council of Europe have been formulated without any objection being raised.[1064]

(15) As these examples show, it is not out of the question that late reservations should be deemed to have been legitimately made, in the absence of any objection by the other contracting parties consulted by the depositary. 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 before the entry into force

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[1056] F. Horn, *op. cit.* (see footnote 1005 above), p. 42.

[1057] Letter to the Permanent Mission of a Member State to the United Nations, 14 September 1978, *United Nations Juridical Yearbook 1978* (United Nations publication, Sales No. E.80.V.1), pp. 199–200.

[1058] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II (see footnote 1015 above), p. 424, note 4; curiously, the Government of the Federal Republic of Germany expressly stated, on 20 February 1980, that it "raise[d] no objections thereto", *ibid*.

[1059] In addition to the examples given by Giorgio Gaja, *loc. cit.* (footnote 1037 above), p. 311, see, for instance, the reservation by 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 Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II (footnote 1015 above), p. 273, note 9).

[1060] Letter to governmental official in a Member State, *United Nations Juridical Yearbook 1984* (United Nations publication, Sales No. E.91.V.1), p. 183.

[1061] See the footnote above.

[1062] 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 December 1999*, p. 77).

[1063] Liberia (ratification 28 October 1980, new reservations 27 July 1983, subject of a *procès-verbal* of 31 August 1983), *ibid*., p. 81; Romania (accession 8 March 1993, rectified subsequently, in the absence of any objection, to include reservations adopted by Parliament), p. 83; United States of America (ratification 12 August 1980, reservations communicated 27 July 1983, subject of a *procès-verbal* of rectification of 31 August 1983), p. 86. 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.

[1064] See, for example, the reservation by 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). The reservations by 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 reservations contained in the Assembly resolution and the decree of the President of the Republic published in the official gazette of the Portuguese Republic)); or 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 (http://conventions.coe.int). See also the example of the late reservations by Belgium and Denmark to the European Agreement on the Protection of Television Broadcasts cited by Giorgio Gaja, *loc. cit.* (footnote 1037 above), p. 311.

of the treaty for the reserving State,[1065] or else the planned reservation was duly published in the official publications, but "forgotten" at the time of the deposit of the instrument of notification, something which can, at a pinch, be regarded as "rectification of a material error".

(16) A pamphlet published 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."[1066] 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.[1067]

(17) These are also the considerations that led the members of the Commission to consider that particular caution should be shown in sanctioning a practice which ought to remain exceptional and narrowly circumscribed. For that reason, the Commission decided to give a negative formulation to the rule contained in draft guideline 2.3.1: the *principle is, and must remain, that the late formulation of a reservation is not lawful; it may become so, in the most exceptional cases, only if none of the other contracting parties objects*.[1068]

(18) 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".[1069] In fact, it is difficult to imagine what might prevent all the contracting States 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.[1070]

(19) It is this requirement of unanimity, be it passive or tacit,[1071] 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.[1072] But this requirement is not meaningful, nor does it fulfil its objectives, unless a single objection renders the reservation impossible. Failing this, the very principle established in the first phrase of article 19 of the 1969 and 1986 Vienna Conventions would be reduced to nothing: any State could add a new reservation to its acceptance of a treaty at any time because there would always be one other contracting State that would not object to such a reservation and the situation would revert to that in which States or international organizations find themselves at the time of becoming parties, when they enjoy broad scope for formulating reservations, subject only to the limits set in articles 19 and 20.

(20) 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) late reservations. 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 reacceding subsequently and formulating anew the rejected reservations) only in conformity with either the provisions of the treaty itself or the general rules codified in articles 54 to 64 of the Vienna Conventions.

(21) The question also arises whether a distinction should not be made between, on the one hand, objections in principle to the formulation of late reservations 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 not 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 which formulated it from doing so, whereas they may have reasons that are acceptable to their partners. Furthermore, in the absence of such a distinction, States and international organizations which are not parties when the late reservation is formulated, but which become parties subsequently through accession or other means, would be confronted with a *fait accompli*. Paradoxically, they could not object to a late reservation, whereas they are permitted to do so under article 20,

[1065] In this connection, Giorgio Gaja 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 relating to the Status of Stateless Persons of 1954 (cf. *Multilateral Treaties Deposited with the Secretary-General*: *Status as at 31 December 2000*, vol. I (footnote 1006 above), p. 332, note 4).

[1066] J. Polakiewicz, *op. cit.* (see footnote 1007 above), p. 94.

[1067] Cf. R. W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, vol. 10, No. 2 (1989), p. 383; and R. Baratta, *Gli effeti delle riserve ai trattati* (Milan, Giuffrè, 1999), p. 27, footnote 65.

[1068] On the problems to which the word "object" gives rise, see paragraph (23) of the commentary to this draft guideline.

[1069] G. Gaja, *loc. cit.* (see footnote 1037 above), p. 312.

[1070] 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* case (application Nos. 15299/89, 15300/89 and 15318/89, Council of Europe, *Yearbook of the European Convention on Human Rights, 1991*, vol. 34 (1995), p. 35), 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) and (6) of the commentary to draft guideline 2.3.4).

[1071] Draft guidelines 2.3.2 and 2.3.3 explain the terms and conditions concerning the acceptance of the late formulation of a reservation.

[1072] See paragraph (9) of the commentary to this draft guideline.

paragraph 5,[1073] relating to reservations formulated when the reserving State expresses its consent to be bound.[1074]

(22) The unanimous consent of the other contracting parties 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 to 23 of the Vienna Conventions, should be applicable with regard to the actual content of late reservations, to which the other parties should be able to object "as usual", a point to which the Commission intends to return in the section of the Guide to Practice on objections to reservations.

(23) 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[1075]), some members of the Commission wondered whether it was appropriate to use the word "objects" in draft guideline 2.3.1 to refer to the opposition of a State not to the planned reservation, but to its very formulation.[1076] Nevertheless, most members took the view that it was inadvisable to introduce the distinction formally, since in practice the two operations are indistinguishable.

2.3.2 *Acceptance of late formulation of a reservation*

Unless the treaty provides otherwise, or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

Commentary

(1) The purpose of draft guideline 2.3.2 is to clarify and supplement the last part of draft guideline 2.3.1 which rules out any possibility of the late formulation of a reservation "except if none of the other contracting Parties objects to the late formulation of the reservation".

(2) Some members of the Commission who were concerned to restrict the practice of the late formulation of reservations as far as possible believed that such a practice should require express acceptance.

(3) According to the dominant opinion, it appeared, however, that, just as reservations formulated within the set periods may be accepted tacitly,[1077] it should likewise be possible for late reservations to be accepted in that manner (whether their late formulation or their content is at issue) and for the same reasons. It seems fairly clear that to require an express unanimous consent would rob of any substance the (at least incipient) rule that late reservations are possible under certain conditions (which must be strict), for, in practice, the express acceptance of reservations at any time is rare indeed. 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.

(4) 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 Cooperation Council of WCO, IMO and the Council of Europe,[1078] all of whom considered that certain reservations which had been formulated late had entered into force in the absence of objections from the other contracting parties.

(5) It remains to be determined, however, how much time the other contracting parties 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 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) correspondingly.

(6) Practice in this respect is ambiguous. It seems that the Secretaries-General of IMO, the Council of Europe and WCO proceeded in an empirical manner and did not set any specific periods when they consulted the other contracting parties.[1079] That was not true for the Secretary-General of the United Nations.

(7) In the first place, when the Secretary-General's current practice was inaugurated in the 1970s, the parties were given a period of 90 days in which "to object" to a late reservation, where appropriate. Nevertheless, 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 Convention for the Settlement of Certain Conflicts of Laws in connec-

[1073] "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 12 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*"*.

[1074] 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.

[1075] Some late reservations have, however, been expressly accepted (for an example, see footnote 1058 above).

[1076] In that case, the words "except if none of the other contracting Parties *objects to the late formulation of the reservation*" at the end of the draft guideline could have been replaced by the words "if none of the other contracting Parties *is opposed to* the late formulation of the reservation".

[1077] Cf. article 20, paragraph 5, of the Vienna Conventions (in the 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 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty".

[1078] See paragraphs (10) to (14) of the commentary to draft guideline 2.3.1.

[1079] 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 (cf. footnote 1063 above and 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 December 1999*, concerning the reservation of Liberia, p. 81, and that of the United States, p. 86).

tion with Cheques, to which France wanted to make a new reservation.[1080] 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.[1081]

(8) In practice, however, this 90-day period proved to be too short; owing to the delays in transmission of the communication by the Office of the Legal Counsel to States, the latter had very little time in which to examine these notifications and respond to them, whereas 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".[1082] It is significant, moreover, that, in the few situations in which parties took action, such actions were formulated well after the 90-day period that had theoretically been set for them.[1083] For this reason, following a note verbale from Portugal reporting, on behalf of the European Union, on 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".

(9) In taking this decision, which will also apply to the amendment of an existing reservation, "the Secretary-General [was] guided by article 20, paragraph 5, of the [Vienna] Convention, which indicates a period of 12 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".[1084]

(10) Some members of the Commission expressed some concerns about the length of that period, which has the drawback that, during the 12 months following notification by the Secretary-General,[1085] total uncertainty prevails as to the fate of the reservation that has been formulated and, if a single State objects to it at the last minute, that is sufficient to consider it as not having been made. These members then wondered whether an intermediate solution (six months, for example) would not have been wiser. Nevertheless, taking into account the provisions of article 20, paragraph 5, of the Vienna Conventions and the recent announcement of the Secretary-General of his intentions, 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.

(11) Likewise, in view of the different practices followed by other international organizations acting as depositaries,[1086] 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, that is of little concern save to international depositary organizations; some members of the Commission nevertheless thought that it was inadvisable to rule out such a possibility *a priori* when the depositary was a State or Government.

(12) The wording of draft guideline 2.3.2, 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,[1087] but adapts them to the specific case of the late formulation of reservations.

2.3.3 *Objection to late formulation of a reservation*

If a Contracting Party to a treaty objects to late formulation of a reservation, 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) Draft guideline 2.3.3 draws the consequences of an objection made by a contracting State or international organization to the late formulation of a reservation: it follows from draft guideline 2.3.1 that such a reservation is in principle impossible and that a single "objection" is sufficient to prevent it from producing any effect. That is what is necessarily implied by the expression "except if none of the other Contracting Parties objects".

(2) Given the strict interpretation the Commission intends to give to this rule,[1088] it seemed useful to explain its consequences, i.e. that conventional relations remain unaffected by the declaration made by the State or the international organization which is its author and that this declaration may not be considered a reservation, which is the meaning of the expression "without the reservation being established", borrowed from article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions.[1089]

(3) On the other hand, the objection, which its author does not have to justify, produces its full effects when lodged within the 12-month period indicated in draft

[1080] See the commentary to draft guideline 2.3.1, paras (10) and (11).

[1081] *Ibid*., para. (12).

[1082] See footnote 9 above.

[1083] Cf. the response by Germany to the French reservation to the Convention providing a Uniform Law for Cheques, issued one year following the date of the French communication (see footnote 1058 above).

[1084] See footnote 9 above.

[1085] In other words, not the communication from the State announcing its intention to formulate a late reservation. This may seem debatable, for the fate of the reservation depends on how fast the depositary acts.

[1086] See paragraph (6) of the commentary to this draft guideline.

[1087] See footnote 1073 above.

[1088] See commentary to draft guideline 2.3.1, especially paras. (6), (16) and (17).

[1089] "A reservation established with regard to another party in accordance with articles 19, 20 and 23."

guideline 2.3.2. This is why the Commission uses the word "objects", as opposed to "formulates", for an intended reservation.

(4) The Commission is aware of the fact that, by including this provision in the section of the Guide to Practice relating to the late formulation of reservations, it seems to be departing from the rule it established that it would deal in chapter 2 of the Guide only with questions of procedure, to the exclusion of the effects which irregularities marring that procedure might produce. However, it seems to the Commission that this apparent breach of the rule is justified by the fact that, in the present case, an objection not only prevents the declaration of the author of the intended reservation from producing effects, but also creates an obstacle to it being deemed a reservation.

(5) It is therefore advisable not to equate the "objections" in question here with those which are the subject of articles 20 to 23 of the Vienna Conventions: while these prevent a genuine reservation from producing all its effects in the relations between its author and the State or international organization which is objecting to it, an "objection" to the late formulation of a reservation "destroys" the latter as a reservation. It was to avoid such confusion that some members of the Commission wanted to use different terminology in draft guidelines 2.3.1 to 2.3.3.[1090] However, a majority of members considered such a distinction pointless.[1091]

(6) The Commission also debated the particular procedures which should 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 is not deemed useful to state it formally in a draft guideline, on the understanding that the principle established in this provision will be taken up in the relevant section of the Guide to Practice.

2.3.4 *Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations*

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(*a*) interpretation of a reservation made earlier; or

(*b*) a unilateral statement made subsequently under an optional clause.

Commentary

(1) The Commission intends to expand on and clarify the consequences of the principle stated in draft guideline 2.3.1 when it considers problems relating to effects and the permissibility of reservations (since the fundamental questions are clearly how to determine the consequences produced, on the one hand, by the late formulation of a reservation and, on the other hand, by its possible entry into force when it has not given rise to any objection). It nevertheless seemed to the Commission that the exclusion in principle of "late reservations" should be made even stricter by the adoption of draft guideline 2.3.4, the purpose of which is to indicate that a party to a treaty may not get round this prohibition by means which have the same purpose as reservations, but do not meet the definition of reservations. Otherwise, the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions[1092] would be deprived of any specific scope.

(2) To this end, draft guideline 2.3.4 targets two means in particular: the (extensive) interpretation of reservations made earlier, on the one hand, and statements made under an optional 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 stated by draft guideline 2.3.1; it goes without saying that the reasoning which justifies the express prohibitions enunciated in draft guideline 2.3.4 should therefore be applied *mutatis mutandis*.

(3) The principle that a reservation may not be formulated after the expression of definitive consent to be bound appeared to be sufficiently established at the Inter-American Court of Human Rights for the Court to consider, in its advisory opinion concerning *Restrictions to the death penalty*, that, once made,[1093] 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).[1094]

[1090] See paragraphs (21) to (23) of the commentary to draft guideline 2.3.1 and especially footnote 1076.

[1091] See paragraph (23) of the commentary to draft guideline 2.3.1.

[1092] For the text of this provision, see footnote 1039 above. The Commission has not considered it necessary formally to reproduce in the Guide to Practice the rule enunciated in this provision: that would overlap with the definition set out in draft guidelines 1.1 and 1.1.2.

[1093] The word "made" is probably more appropriate here than "formulated", since the Inter-American Court of Human Rights considers (perhaps questionably) that "a reservation becomes an integral part of the treaty", which is conceivable only if it is "in effect".

[1094] *Restrictions to the Death Penalty* (see footnote 216 above), paras. 63–64. On the interpretation of this advisory opinion, see G. Gaja, *loc. cit.* (footnote 1037 above), p. 310.

(4) In the same way, following the *Belilos* case,[1095] the Swiss Government initially revised its 1974 "interpretative declaration", which the European Court of Human Rights regarded as an impermissible reservation, by adding a number of clarifications to its new "declaration".[1096] The permissibility of this new declaration, which was criticized by the relevant doctrine,[1097] was challenged before the Federal Court, which, in its decision *Elisabeth B.* v. *Council of State of Thurgau Canton* of 17 December 1992, declared the declaration invalid on the ground that it was a new reservation[1098] that was incompatible with article 64, paragraph 1, of the European Convention on Human Rights.[1099] *Mutatis mutandis*, the limit on the formulation of reservations imposed by article 64 of the Convention is similar to the limit resulting from article 19 of the Vienna Conventions, and the judgement of the Swiss Federal Court should certainly be regarded as a reaffirmation of the prohibition in principle on reservations formulated following the definitive 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* case leads to the same conclusion, but provides an additional lesson. In the case in question, the Commission believed that it followed from the "clear wording" of article 64, paragraph 1, of the European Convention on Human Rights "that a High Contracting Party may not, in subsequent recognition of the individual right of appeal, make a major change in its obligations arising from the Convention for the purposes of procedures under article 25".[1100] Here again, the decision of the European Commission of Human Rights 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 following ratification by adding to a declaration made under an opting-in clause (which does not in itself constitute a reservation)[1101] conditions or limitations with effects identical to those of a reservation, at least in cases where the optional clause in question does not make any corresponding provision.

(6) Although, in the *Loizidou* judgment of 23 March 1995, the European Court of Human Rights was not as precise, the following passage can be regarded as a reaffirmation of the position in question:

> The Court further notes that article 64 of the Convention enables States to enter reservations when signing the Convention or when depositing their instruments of ratification. The power to make reservations under article 64 is, however, a limited one, being confined to particular provisions of the Convention.[1102]

(7) The decisions of the Inter-American Court of Human Rights, the European Court of Human Rights and the Swiss Federal Court reaffirm the stringency of the rule set out at the beginning of article 19 of the 1969 and 1986 Vienna Conventions and in draft guideline 2.3.1, and draw very direct and specific consequences therefrom, as is made explicit in draft guideline 2.3.4.

(8) Subparagraph (*b*) of this draft guideline refers implicitly to draft guideline 1.4.6 and, less directly, to draft guideline 1.4.7 relating to unilateral statements made under an optional clause and providing for a choice between the provisions of a treaty, which the Commission has clearly excluded from the scope of the Guide to Practice. However, the purpose of draft guideline 2.3.4 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.

(9) Some members of the Commission expressed doubts on the inclusion of this guideline because it used terms that lacked exactitude.

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

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

Commentary

(1) As a result *a contrario* of guideline 1.2, which defines interpretative declarations independently of any time element,[1103] a "simple" interpretative declaration (as opposed to a conditional interpretative declaration) may, unlike a reservation, be formulated at any time. It is therefore enough to refer to the Commission's commentaries to that provision,[1104] and draft guideline 1.4.3

[1095] *Belilos* v. *Switzerland, Eur. Court H.R., Series A, No. 132*, judgement of 29 April 1988.

[1096] http://conventions.coe.int.

[1097] 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. Also see the other references made by J.-F. Flauss, *loc. cit.* (footnote 1042 above), p. 300, footnote 28.

[1098] The European Court of Human Rights would have declared the 1974 "declaration" as a whole invalid: "The interpretative declaration concerning article 6, paragraph 1, of the 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" (*Journal des Tribunaux*, 1995, p. 536; German text in *Europäische Grundrechte-Zeitschrift*, vol. 20 (1993), p. 72).

[1099] "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."

[1100] Decision of 4 March 1991, *Revue universelle des droits de l'homme*, vol. 3, No. 5 (July 1991), p. 200, para. 15. See also footnote 1070 above.

[1101] See draft guidelines 1.4.6 and 1.4.7 and the commentaries thereto, *Yearbook … 2000*, vol. II (Part Two), pp. 112–116, document A/55/10.

[1102] *Loizidou, Preliminary Objections* (see footnote 160 above), p. 28, para. 76.

[1103] *Yearbook … 1999*, vol. II (Part Two), p. 97.

[1104] *Ibid*., pp. 101–103, paras. (21) to (32) of the commentary.

follows specifically therefrom. This option 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.[1105] It is clear that, in a case of this kind, the contracting parties 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) The Commission questioned whether this exception, which actually seems quite obvious, should be mentioned in draft guideline 2.4.3, but it found that it was not necessary to be so specific: 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.[1106] 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 option of formulating such a reservation *ratione temporis*. This case is covered by draft guideline 2.4.6, to which draft guideline 2.4.3 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. 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 a case, the author of the initial declaration is prevented from modifying it. This hypothesis will be considered in connection with the draft guidelines relating to the modification of reservations and interpretative declarations.[1107]

(5) The third exception relates to conditional interpretative declarations, which, unlike simple interpretative declarations, cannot be formulated at any time, as stated in draft guideline 1.2.1 on the definition of such instruments,[1108] to which draft guideline 2.4.3 expressly refers.

(6) It also provides for the case covered by draft guideline 2.4.7 relating to the late formulation of a conditional interpretative declaration.

(7) Lastly, it appeared to be obvious that only an existing instrument could be interpreted and that it was therefore not necessary to specify that a declaration could be made only after the text of the treaty had been finally adopted.

2.4.4 [2.4.5] *Non-requirement of confirmation of interpretative declarations made when signing a treaty*

An interpretative declaration made 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 draft guideline 2.4.3. 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 final consent to be bound by the treaty.

(2) In this connection, there is a marked contrast between the rules applicable to reservations[1109] and those relating to interpretative declarations, since the principle is the exact opposite: reservations formulated when signing a treaty must in principle be confirmed, but interpretative declarations do not have to be.

(3) In the light of the very broad wording of draft guideline 2.4.4, the transposition to interpretative declarations of the principle established in draft guideline 2.2.2,[1110] 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 draft guideline 2.4.4 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 nonetheless not as clear-cut as it may seem: first, nothing prevents a State or an international organization which has made a declaration when signing from confirming it when expressing its final consent to be bound; secondly, the principle stated in draft guideline 2.4.4 is not applicable to conditional

[1105] "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." Also see, for example, article 26, paragraph 2, of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 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.

[1106] The Commission nevertheless departed from this principle in a few cases when it decided to place the emphasis on the exceptional and derogative nature of the guidelines it was proposing (see, in particular, guideline 2.3.1 and paragraph (6) of the commentary thereto, above).

[1107] See also paragraph (31) of the commentary to draft guideline 1.2, *Yearbook … 1999*, vol. II (Part Two), p. 102.

[1108] "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** ... shall constitute a conditional interpretative declaration" (*ibid.*); see paragraphs (15) to (18) of the commentary to this draft guideline, *ibid*., pp. 105–106.

[1109] See draft guideline 2.2.1 and commentary.

[1110] See the commentary to this draft guideline.

interpretative declarations, as clearly stated in draft guideline 2.4.5.

2.4.5 [2.4.4] *Formal confirmation of conditional interpretative declarations formulated when signing a treaty*

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case, the interpretative declaration shall be considered as having been made on the date of its confirmation.

Commentary

(1) Draft guideline 2.4.5 makes an important exception to the principle set out in draft guideline 2.4.4 whereby an interpretative declaration formulated when signing the treaty does not need to be confirmed by the author. This rule cannot apply to conditional interpretative declarations.

(2) In the case of the latter, the Commission noted in the commentary to draft guideline 1.2 that, if the conditional interpretative declaration had been formulated at the time of signature of the treaty, it should "probably" be "confirmed at the time of the expression of definitive consent to be bound".[1111] There would appear to be no logical reason for a different solution as between reservations and conditional interpretative declarations, to which the other parties must be in a position to react where necessary.

(3) It will be noted that in practice 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 definitive consent to be bound, when it has been formulated at the time of signature or at any earlier point in the negotiations.[1112]

(4) As a departure from the principle set out in draft guideline 2.4.4 for "simple" interpretative declarations, the rules concerning formal confirmation of reservations formulated on signature, contained in draft guideline 2.2.1, should therefore be transposed to conditional interpretative declarations.

2.4.6 [2.4.7] *Late formulation of an interpretative declaration*

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

Commentary

(1) Draft guideline 2.4.6 is the counterpart, for interpretative declarations, of draft guideline 2.3.1, relating to reservations.

(2) Despite the principle enunciated in draft guideline 2.4.3, whereby interpretative declarations may be made at any time after the adoption of the text of the treaty, interpretative declarations, like reservations, may be late. This is obviously true for conditional interpretations, which, like reservations themselves, can be formulated (or confirmed) only at the time of the expression of definitive consent to be bound, as specified in draft guidelines 1.2.1[1113] and 2.4.5. But this may also be so in the case of simple interpretative declarations, particularly when the treaty itself establishes the period within which they may be made.[1114] The object of draft guideline 2.4.6 is to cover this situation, which is expressly allowed for in draft guideline 2.4.3.

(3) The Commission wishes to emphasize that this is not an academic question. For example, the Government of Egypt had in 1993 ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal without attaching any particular declarations to its instrument of ratification, but on 31 January 1995 it formulated declarations interpreting certain provisions of the treaty,[1115] which limited such a possibility solely to the time of expression by a party of its consent to be bound.[1116] 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 late,[1117] the Secretary-General, the depositary of the Basel Convention, "in

[1111] *Yearbook … 1999*, vol. II (Part Two), p. 106, footnote 371.

[1112] Cf. the confirmation by Germany and the United Kingdom of their declarations formulated upon signing the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II (footnote 1015 above), pp. 356–357); see also the practice followed by Monaco upon signing and then ratifying the International Covenant on Civil and Political Rights (*ibid.*, vol. I (footnote 1006 above), p. 180); by Austria in the case of the European Convention on the Protection of the Archaeological Heritage (http://conventions.coe.int); or by the European Community in regard to the Convention on Environmental Impact Assessment in a Transboundary Context (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II, pp. 379–380). See further the declarations by Italy and the United Kingdom concerning the Convention on Biological Diversity (*ibid*., pp. 381–382).

[1113] *Yearbook … 1999*, vol. II (Part Two), p. 103.

[1114] See paragraphs (2) and (3) of the commentary to draft guideline 2.4.3.

[1115] See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II (footnote 1015 above), pp. 358–359.

[1116] 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".

[1117] See the observations by the United Kingdom, Finland, Italy, the Netherlands and Sweden (*Multilateral Treaties Deposited with the*

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".[1118] 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"[1119] and declined to include them in the section entitled "Declarations and Reservations" and reproduce 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 States parties 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 draft guideline 2.3.1. The commentaries to that provision are therefore transposable, *mutatis mutandis*, to draft guideline 2.4.6.

(5) It is self-evident that the approaches laid down in draft guidelines 2.3.2 and 2.3.3 can also be transposed to acceptances of interpretative declarations formulated late and objections to such formulation. Nevertheless, the Commission considered that it was not useful to overburden the Guide to Practice by including express draft guidelines in this respect.

Secretary-General: Status as at 31 December 1995 (United Nations publication, Sales No. E.96.V.5), p. 897.

[1118] *Ibid.*

[1119] *Ibid.*

2.4.7 [2.4.8] *Late formulation of a conditional interpretative declaration*

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.

Commentary

(1) The considerations which led the Commission to adopt draft guideline 2.4.6 apply in all respects to draft guideline 2.4.7.

(2) It follows from draft guideline 1.2.1 that, like a reservation, 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".[1120] Any conditional interpretative declaration not made at any of these times is therefore late and can be envisaged only if all the contracting parties consent, at least tacitly, to do so.

(3) The commentaries to draft guidelines 2.3.1 and 2.4.6 can therefore be fully transposed to draft guideline 2.4.7.

[1120] See footnote 1108 above.