

Chapter VIII

RESERVATIONS TO TREATIES

A. Introduction

309. 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”.

310. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.²²³

311. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.²²⁴

312. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission’s consideration of the topic; they related to the title of the topic, which should now 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 Vienna Convention, the 1978 Vienna Convention on Succession of States in respect of Treaties (hereinafter the “1978 Convention”) and the 1986 Vienna Convention.²²⁵ In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in its resolutions 48/31 and 49/51. 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; those guidelines would, if necessary, be accompanied by model clauses.

313. Also at its forty-seventh session, the Commission, in accordance with its earlier practice,²²⁶ 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.²²⁷ 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.²²⁸

314. At its forty-eighth session, in 1996, the Commission had before it the Special Rapporteur’s second report on the topic.²²⁹ The Special Rapporteur had attached to his report a draft resolution of the Commission on reservations to normative multilateral 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.²³⁰ 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 following year.²³¹

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

316. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.²³²

317. 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.

318. At its fiftieth session, in 1998, the Commission had before it the Special Rapporteur’s third report on the topic,²³³ which dealt with the definition of reservations and interpretative declarations to treaties. At the same session, the Commission provisionally adopted six draft guidelines.²³⁴

²²⁸ As of 31 July 2003, 33 States and 25 international organizations had answered the questionnaires.

²²⁹ *Yearbook ... 1996*, vol. II (Part One), p. 37, document A/CN.4/477 and Add.1.

²³⁰ *Ibid.*, p. 83, para. 260. See also *Yearbook ... 1996*, vol. II (Part Two), p. 83, para. 136 and footnote 238.

²³¹ A summary of the debate is reproduced in *Yearbook ... 1996*, vol. II (Part Two), pp. 79–83, para. 137 in particular.

²³² *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

²³³ *Yearbook ... 1998*, vol. II (Part One), p. 221, document A/CN.4/491 and Add.1–6.

²³⁴ *Ibid.*, vol. II (Part Two), p. 99, para. 540.

²²³ *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 381.

²²⁴ *Yearbook ... 1995*, vol. II (Part One), p. 121, document A/CN.4/470.

²²⁵ *Ibid.*, vol. II (Part Two), p. 108, para. 487.

²²⁶ See *Yearbook ... 1983*, vol. II (Part Two), p. 83, para. 286.

²²⁷ See *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489. The questionnaires that were sent to Member States and international organizations are reproduced in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annexes II–III, pp. 97–117.

319. At the 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.²³⁵ 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 fourth report. That report also dealt with the definition of reservations and interpretative declarations. At the same session, the Commission provisionally adopted 17 draft guidelines.²³⁶

320. 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)).

321. At the fifty-second session, in 2000, the Commission had before it the Special Rapporteur's fifth report on the topic,²³⁷ 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.²³⁸ The Commission also deferred consideration of the second part of the fifth report of the Special Rapporteur to the following session.

322. At the fifty-third session, in 2001, the Commission initially had before it the second part of the fifth report relating to questions of procedure regarding reservations and interpretative declarations and then the Special Rapporteur's sixth report²³⁹ relating to modalities for formulating reservations and interpretative declarations (including their form and notification) as well as the publicity of reservations and interpretative declarations (their communication, addressees and obligations of depositaries).

323. At the same session the Commission provisionally adopted 12 draft guidelines.²⁴⁰

324. At the fifty-fourth session, in 2002, the Commission had before it the Special Rapporteur's seventh report²⁴¹ relating to the formulation, modification and withdrawal of reservations and interpretative declarations. At the same session the Commission provisionally adopted 11 draft guidelines.²⁴²

325. At the same session, the Commission decided to refer to the Drafting Committee draft guidelines 2.5.1

(Withdrawal of reservations), 2.5.2 (Form of withdrawal), 2.5.3 (Periodic review of the usefulness of reservations), 2.5.5 (Competence to withdraw a reservation at the international level), 2.5.5 *bis* (Competence to withdraw a reservation at the internal level), 2.5.5 *ter* (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations), 2.5.6 (Communication of withdrawal of a reservation), 2.5.6 *bis* (Procedure for communication of withdrawal of reservations), 2.5.6 *ter* (Functions of depositaries), 2.5.7 (Effect of withdrawal of a reservation), 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization), 2.5.9 (Effective date of withdrawal of a reservation) (including the related model clauses), 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation), 2.5.11 (Partial withdrawal of a reservation) and 2.5.12 (Effect of partial withdrawal of a reservation).

B. Consideration of the topic at the present session

326. At the present session the Commission had before it the Special Rapporteur's eighth report (A/CN.4/535 and Add.1) relating to withdrawal and modification of reservations and interpretative declarations as well as to the formulation of objections to reservations and interpretative declarations.

327. The Commission considered the Special Rapporteur's eighth report at its 2780th to 2783rd meetings from 25 to 31 July 2003.

328. At its 2783rd meeting, the Commission decided to refer draft guidelines 2.3.5 (Enlargement of the scope of a reservation),²⁴³ 2.4.9 (Modification of interpretative declarations), 2.4.10 (Modification of a conditional interpretative declaration), 2.5.12 (Withdrawal of an interpretative declaration) and 2.5.13 (Withdrawal of a conditional interpretative declaration) to the Drafting Committee.

329. At its 2760th meeting on 21 May 2003, the Commission considered and provisionally adopted draft guidelines 2.5.1 (Withdrawal of reservations), 2.5.2 (Form of withdrawal), 2.5.3 (Periodic review of the usefulness of reservations), 2.5.4 [2.5.5] (Formulation of the withdrawal of a reservation at the international level), 2.5.5 [2.5.5 *bis*, 2.5.5 *ter*] (Absence of consequences at the international level of the violations of internal rules regarding the withdrawal of reservations), 2.5.6 (Communication of withdrawal of a reservation), 2.5.7 [2.5.7, 2.5.8] (Effect of withdrawal of a reservation), 2.5.8 [2.5.9] (Effective date of withdrawal of a reservation) (together with model clauses A, B and C), 2.5.9 [2.5.10] (Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation), 2.5.10 [2.5.11] (Partial withdrawal of a reservation), 2.5.11 [2.5.12] (Effect of a partial withdrawal of a reservation). These guidelines had already been referred to the Drafting Committee at the fifty-fourth session of the Commission (see paragraph 325 above).

²⁴³ Draft guideline 2.3.5 was referred following a vote.

²³⁵ *Yearbook ... 1999*, vol. II (Part One), p. 127, document A/CN.4/499.

²³⁶ *Ibid.*, vol. II (Part Two), p. 91, para. 470.

²³⁷ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1-4.

²³⁸ *Ibid.*, para. 663.

²³⁹ *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1-3.

²⁴⁰ *Ibid.*, vol. II (Part Two), p. 172, para. 114.

²⁴¹ *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1-3.

²⁴² *Ibid.*, vol. II (Part Two), p. 16, para. 50.

330. At its 2786th meeting on 5 August 2003, the Commission adopted the commentaries to the aforementioned draft guidelines.

331. The text of these draft guidelines and the commentaries thereto are reproduced in paragraph 368 below.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS EIGHTH REPORT

332. The eighth report on reservations to treaties was composed of an introduction, which related to the consideration by the Commission of the seventh report of the Special Rapporteur,²⁴⁴ the reactions of the Sixth Committee and recent developments with regard to reservations to treaties, and a substantive part, which dealt with the enlargement of the scope of reservations and the withdrawal and modification of interpretative declarations, on the one hand, and with the formulation of objections to reservations, on the other.

333. The Special Rapporteur recalled that, with the possible exception of draft guideline 2.1.8 (Procedure in case of manifestly [impermissible] reservations), the Sixth Committee had favourably welcomed the draft guidelines adopted at the fifty-fourth session. The discussion of draft guideline 2.5.X on the withdrawal of reservations held to be impermissible by a body monitoring the implementation of the treaty, which was withdrawn, was not very conclusive.

334. The Special Rapporteur referred to the document entitled "Preliminary Opinion of the Committee on the Elimination of Racial Discrimination on the issue of reservations to treaties on human rights",²⁴⁵ which had adopted an approach that was not at all dogmatic. The Committee was trying to establish a dialogue with States to encourage the fullest possible implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. That was the main lesson the Special Rapporteur had learned from the meeting between the members of the Commission and the members of the Committee against Torture and the Committee on Economic, Social and Cultural Rights (see paragraph 18 of the eighth report). The Special Rapporteur also referred to the very positive fact that the Legal Service of the European Commission had finally replied to section I of the questionnaire on reservations.²⁴⁶

335. With regard to the structure of the eighth report, the Special Rapporteur considered that it would be more logical for a chapter on objections to come before the chapter on the procedure for formulating the acceptance of reservations.

336. Chapter I of the report dealt with the enlargement of the scope of reservations and the withdrawal and modification of interpretative declarations. The enlargement of the scope of reservations is clearly similar to the late formulation of reservations and the restrictions adopted in that case (guidelines 2.3.1–2.3.3) must therefore be

transposed to cases of the assessment of the scope of reservations, as reflected, moreover, by modern-day practice, particularly of the Secretary-General. Draft guideline 2.3.5²⁴⁷ thus simply refers to the rules applicable to the late formulation of reservations. On the basis of draft guideline 2.5.10 (Partial withdrawal of a reservation), as adopted by the Commission at the current session, paragraph 1 might contain a definition of enlargement.

337. With regard to the withdrawal and modification of interpretative declarations, State practice was fairly scarce. According to draft guideline 2.5.12,²⁴⁸ States can withdraw simple interpretative declarations whenever they want, provided that that is done by a competent authority. Similarly, simple interpretative declarations can be modified at any time (draft guideline 2.4.9).²⁴⁹ Since the rules relating to the modification of a simple interpretative declaration are the same as those relating to their formulation, the Special Rapporteur suggested that it would probably be enough to make slight changes in the text of, and commentaries to, draft guidelines 2.4.3 and 2.4.6 (which have already been adopted) so that they combine the formulation and the modification of interpretative declarations.

338. Draft guidelines 2.5.13²⁵⁰ and 2.4.10²⁵¹ relate to the withdrawal and modification of conditional interpretative declarations. The Special Rapporteur considered that it was difficult to determine whether the modification of an interpretative declaration, whether conditional or not, strengthens it or limits it and that any modification of conditional interpretative declarations should therefore follow the regime applicable to the late formulation or strengthening of a reservation and be subordinate to the lack of any "objections" by any of the other Contracting

²⁴⁷ The draft guideline proposed by the Special Rapporteur reads as follows:

"2.3.5 *Enlargement of the scope of a reservation*

"The modification of an existing reservation for the purpose of enlarging the scope of the reservation shall be subject to the rules applicable to late formulation of a reservation [as set forth in guidelines 2.3.1, 2.3.2 and 2.3.3]."

²⁴⁸ The draft guideline proposed by the Special Rapporteur reads as follows:

"2.5.12 *Withdrawal of an interpretative declaration*

"Unless the treaty provides otherwise, an interpretative declaration may be withdrawn at any time following the same procedure as is used in its formulation and applied by the authorities competent for that purpose [in conformity with the provisions of guidelines 2.4.1 and 2.4.2]."

²⁴⁹ The draft guideline proposed by the Special Rapporteur reads as follows:

"2.4.9 *Modification of interpretative declarations*

"Unless the treaty provides that an interpretative declaration may be made [or modified] only at specified times, an interpretative declaration may be modified at any time."

²⁵⁰ The draft guideline proposed by the Special Rapporteur reads as follows:

"2.5.13 *Withdrawal of a conditional interpretative declaration*

"The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of a reservation to a treaty [given in guidelines 2.5.1 to 2.5.9]."

²⁵¹ The draft guideline proposed by the Special Rapporteur reads as follows:

"2.4.10 *Modification of a conditional interpretative declaration*

"A State or an international organization may not modify 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 modification of the conditional interpretative declaration."

²⁴⁴ See footnote 241 above.

²⁴⁵ CERD/C/62/Misc.20/Rev.3.

²⁴⁶ See footnote 227 above.

Parties. However, the withdrawal of conditional interpretative declarations seems to have to follow the rules relating to the withdrawal of reservations.

339. Chapter II relates to the formulation of objections, which are not defined anywhere. The Special Rapporteur considered that one element of the definition should be the moment when objections must be made, a question dealt with indirectly in the 1969 and 1986 Vienna Conventions (art. 20, para. 5). Intention, which is the key element of an objection, as shown by the decision handed down by the arbitral tribunal in the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *English Channel* case,²⁵² is a complex issue. Draft guideline 2.6.1²⁵³ proposes a definition of objections taking account of theoretical considerations and the study of practice. At the same time, it leaves out a number of elements, one of which is the question of whether or not a State or an international organization formulating an objection must be a Contracting Party, which will be dealt with in a later study. The proposed definition also does not take a stance on the validity of objections. Draft guideline 2.6.1 *bis*²⁵⁴ is intended to eliminate the confusion over terminology as a result of which the Commission uses the word "objection" to mean both an objection to a reservation and opposition to the formulation of the late reservation. Draft guideline 2.6.1 *ter*²⁵⁵ completes

²⁵² See footnote 12 above.

²⁵³ The draft guideline proposed by the Special Rapporteur reads as follows:

"2.6.1 *Definition of objections to reservations*

"'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection."

Another possibility would be a draft guideline including draft guideline 2.6.1 *ter* reading as follows:

"2.6.1 *Definition of objections to reservations*

"'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which has formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection."

²⁵⁴ This draft guideline reads as follows:

2.6.1 *bis* *Objection to late formulation of a reservation*

"Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation.

²⁵⁵ The draft guideline proposed by the Special Rapporteur reads as follows:

"2.6.1 *ter* *Object of objections*

"When it does not seek to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection, an objection purports to prevent the application of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which has formulated the objection, to the extent of the reservation."

the definition of objections by referring to objections to "across-the-board" reservations (draft guideline 1.1.1).

2. SUMMARY OF THE DEBATE

340. Most of the draft guidelines proposed by the Special Rapporteur were endorsed, subject to some clarifications or minor amendments. Several members also expressed their satisfaction with the exchange of views between the Commission and the human rights treaty monitoring bodies. The debate focused primarily on draft guidelines 2.3.5 (Enlargement of the scope of a reservation) and 2.6.1 (Definition of objections to reservations).

341. Several members indicated that the definition of objections to reservations related to the substance of a number of interesting questions.

342. Some members were of the opinion that the Special Rapporteur's proposal was, quite rightly, entirely in line with the 1969 and 1986 Vienna Conventions and was intended only to adapt their definition of reservations to objections. They considered that the intention of the objecting State, a key element of the proposed definition, had to be in keeping with article 21, paragraph 3, and article 20, paragraph 4 (*b*), of the 1969 Vienna Convention. The definition must not include "quasi-objections" or the expression of "wait-and-see" positions in relation to a reservation.

343. According to another point of view, the definition proposed by the Special Rapporteur was not entirely satisfactory.

344. It was pointed out that the legal effects of an objection to a reservation under the 1969 and 1986 Vienna Conventions were uncertain and could even be likened to those of acceptance, in the sense that the provision to which the reservation related did not apply. However, the objecting State's intention was obviously not to accept the reservation, but, rather, to encourage the reserving State to withdraw it. The definition of objections should therefore reflect the real intention of the objecting State and not tie that position to the effects attributed to objections under the Conventions.

345. The practice of States showed that objecting States sometimes had effects in mind that were different from those provided for in articles 20 and 21 of the 1969 and 1986 Vienna Conventions. There could also be different types of objections: those purporting to exclude only the provision to which the reservation related, but also an entire part of the treaty; those which stated that a reservation was contrary to the object and purpose of the treaty, but nevertheless allowed for the establishment of treaty relations between the reserving State and the objecting State; and even objections to "across-the-board reservations" purporting to prevent the application of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation. (The latter category was covered by draft guideline 2.6.1 *ter*.) The intention of the objecting State was usually to ensure that a reservation could

not be opposable to it. According to that viewpoint, the definition of objections contained in draft guideline 2.6.1 should therefore be broadened.

346. In that connection, it was recalled that the regime of objections was very incomplete. According to one point of view, the proposal that an objection applying the doctrine of severability (“super-maximum” effect) was not actually an objection was contrary to one of the basic principles of the 1969 and 1986 Vienna Conventions, namely, that the intention of States took precedence over the terms used. Other members took the view that, although independent bodies (such as the European Court of Human Rights and the Inter-American Court of Human Rights) handed down rulings on the permissibility of reservations, the doctrine of severability was still controversial, especially if it was applied by States (in the case of human rights treaties, in particular). In that case, States wanted to preserve the integrity of the treaty, sometimes at the expense of the principle of consensus.

347. According to that point of view, even controversial objections should always be regarded as objections, despite uncertainty about their legal consequences. The definition of objections should therefore be much broader and include all types of unilateral responses to reservations, including those purporting to prevent the application of the treaty as a whole, and those known as “quasi-objections”. The Commission should also reconsider its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties²⁵⁶ in the light of recent practice, which took account of the specific object and purpose of the treaty. A careful balance should be struck between the consent of sovereign States and the integrity of treaties.

348. Some members pointed out that only an analysis of the text of the objection would reveal the intention behind it. According to another point of view, an analysis of the context showed whether what was involved was an objection proper or some other kind of response to get the reserving State to withdraw its reservation. In that connection, however, reference was also made to recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe on responses to inadmissible reservations to international treaties as a means of analysing the intention of the objecting State. That recommendation by a regional organization showed that there was an emerging practice in respect of objections.

349. It was also noted that the intention should not be limited, as it was in the Special Rapporteur’s proposal, and that, if the intention was linked to the effects of the objection, the question of the definition should be postponed until the effects of reservations and objections had been considered. According to another point of view, the Special Rapporteur had followed the 1969 and 1986 Vienna Conventions too slavishly and restrictively. The practice of States should also be taken into account. The definition of objections should be much more flexible. That very complex question was a matter of the progressive development of international law.

350. It was also considered that, while the definition of objections should take account of *intention*, it could be elaborated without reference to the *effects* of objections. In order to avoid a complex and cumbersome definition, a choice would have to be made between the elements to be included. In any event, a distinction should be made between objections to “impermissible” reservations and objections to “permissible” reservations. The effects of objections to those two categories of reservations should be dealt with separately. It was also considered that the case where the provision to which the reservation related was a customary rule should be set aside.

351. The view was expressed that the definition of an objecting State should be based on article 23, paragraph 1, and include States or international organizations entitled to become parties to the treaty.

352. There was general support for the Special Rapporteur’s proposal that a draft guideline should be prepared to encourage States to give the reasons for their objections.

353. With regard to draft guideline 2.3.5, some members said that they were surprised and concerned at the possibility of the enlargement of the scope of a reservation. In their opinion, there was a basic difference between the late formulation of a reservation and the enlargement of its scope. In the first case, the State forgot, in good faith, to append the reservation to its instrument of ratification, while, in the second, a dangerous course was being charted for treaties and international law in general. The reservation was in fact a new one which jeopardized international legal certainty and was contrary to the definition of reservations contained in the 1969 and 1986 Vienna Conventions. It was thus an abuse of rights that must not be authorized. It was also questioned whether any legitimate reasons could justify the enlargement of a reservation. It was therefore not accurate to say that the draft guidelines on the late formulation of a reservation were applicable to the enlargement of reservations.

354. Consequently, according to that opinion, the practice of the Secretary General of the Council of Europe should be followed and the enlargement of the scope of the reservation should be prohibited; that draft guideline should either not be included in the Guide to Practice or should lay down very strict requirements. States should be requested to give their opinions on that practice. According to one view, the guideline contradicted draft guideline 2.3.4 (Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations) since it was never possible to give a broader interpretation to a reservation made earlier, even if the parties to the treaty agreed to it. During the second reading of the draft guidelines, moreover, the Commission should restrict the possibility of formulating a late reservation.

355. The majority of members nevertheless agreed that the enlargement of the scope of a reservation should be treated as the late formulation of a reservation, since the restrictions applicable to the late formulation of a reservation should definitely be maintained. In that regard, it was noted that guideline 2.3.3 on objections to late formulation of a reservation had to be adapted to the case of the enlargement of a reservation because, in the case of an

²⁵⁶ See footnote 232 above.

objection, the reservation was kept in its original form. Ruling out the possibility of the enlargement of reservations would be much too rigid an approach. It would also be unwise to impose a regional practice on the rest of the world.

356. Several members were of the opinion that a second paragraph should be added on the definition of enlargement.

357. As to the question of terminology, several members agreed with the Special Rapporteur that a distinction should be made between an objection to the reservation and opposition to the procedure for the formulation of a late reservation. At present, the Commission should not go back on decisions already adopted.

358. Several members supported the draft guidelines on the modification and withdrawal of interpretative declarations (simple and conditional), while stating that conditional interpretative declarations should be treated as reservations. According to one point of view, the Commission should prepare a draft guideline restricting modification in the sense of the enlargement of interpretative declarations.

359. The members were generally in favour of the exchange of views established between the Commission and the human rights treaty monitoring bodies. Several members also drew attention to the importance of the "reservations dialogue", on which the Special Rapporteur intended to submit draft guidelines at the next session.

3. THE SPECIAL RAPporteur's CONCLUDING REMARKS

360. At the end of the debate, the Special Rapporteur said that the Commission should not go back on its own decisions and call into question draft guidelines that had already been adopted. The draft guidelines on the late formulation of reservations, already adopted in 2001, should not be called into question because some members were not convinced that the rules on the enlargement of a reservation could be brought into line with those applicable to late formulation. The draft guideline on the enlargement of a reservation accurately reflected the practice of which he had given examples in his eighth report. He was not sure that States necessarily enlarged a reservation in bad faith. There were cases where that could be justified by purely technical or legislative considerations. He also recalled that the opposition of a single State would prevent the reservation from being enlarged.

361. He did not understand why the strict practice of the Secretary General of the Council of Europe as depositary (which was, incidentally, less strict than had been claimed) would be imposed on the rest of the world; in his opinion, the practice of the Secretary-General of the United Nations, which was more flexible, would be more suitable. In any event, as far as the enlargement of reservations was concerned, there was thus no reason to depart from the rules on the late formulation of reservations.

362. With regard to draft guideline 2.6.1 on the definition of objections, the Special Rapporteur had listened

with great interest to the various opinions that had been expressed. He nevertheless wished to dispel some confusion about recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe: those model responses to inadmissible reservations were quite clearly all *objections* and they used that term. However, that is not always the case in the responses of States to reservations and it must not be assumed that, when the author of a response to a reservation used unclear or ambiguous terms, that response was an objection. As the 1977 Court of Arbitration stated in the *English Channel* case,²⁵⁷ a response to a reservation was not necessarily an objection. The reservations dialogue must not be a pretext for uncertainties or misunderstandings. Reserving States and others, whether they objected or not, must know where they stood and what the real objections were by comparison with responses to reservations which were not objections.

363. The Special Rapporteur considered that the *intention* of States or international organizations was a key element of the definition of objections, as the majority of the members seemed to agree. That intention was obviously to prevent any effects of a reservation from being opposable to the objecting State. In that connection, he found that objections with super-maximum effects took such an intention to its extreme limits because, for all practical purposes, it "destroyed" the reservation and he continued to have doubts about the validity of that practice. In any event, as reservations had been defined without taking account of their permissibility, the same should probably be done with the definition of objections, without worrying about their validity. He therefore proposed the following new wording for draft guideline 2.6.1:

"'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the reservation having any or some of its effects."

364. The Special Rapporteur proposed either that the new wording of draft guideline 2.6.1 should be referred to the Drafting Committee or that the Commission should give it further consideration and come back to it at the next session. He noted that all of the members who had spoken on the other draft guidelines on the withdrawal and amendment of interpretative declarations had supported them, subject to some minor drafting improvements.

365. In conclusion, the Special Rapporteur recalled that the Commission would still have to be patient about the question of conditional interpretative declarations. Although they were not reservations (see guideline 1.2.1), they seemed to act like reservations. Further progress on the topic would have to be made in order to determine whether that separate category was subject to the same rules as reservations.

366. In view of the interest expressed by several members, the Special Rapporteur intended to submit a draft guideline that would encourage objecting States to state their reasons for formulating their objections.

²⁵⁷ See footnote 12 above.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. TEXT OF THE DRAFT GUIDELINES

367. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.²⁵⁸

RESERVATIONS TO TREATIES

GUIDE TO PRACTICE

Explanatory note

Some draft guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

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]²⁵⁹ 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.

²⁵⁸ See the commentary to 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], *Yearbook ... 1998*, vol. II (Part Two), pp. 99–108; the commentary to 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, *Yearbook ... 1999*, vol. II (Part Two), pp. 93–126; the commentary to guidelines 1.1.8, 1.4.6 [1.4.6, 1.4.7], 1.4.7 [1.4.8], 1.7, 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] and 1.7.2 [1.7.5], *Yearbook ... 2000*, vol. II (Part Two), pp. 108–123; the commentary to 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], *Yearbook ... 2001*, vol. II (Part Two), pp. 180–195; and the commentary to guidelines 2.1.1, 2.1.2, 2.1.3, 2.1.4 [2.1.3 bis, 2.1.4], 2.1.5, 2.1.6 [2.1.6, 2.1.8], 2.1.7, 2.1.8 [2.1.7 bis], 2.4, 2.4.1, 2.4.2 [2.4.1 bis] and 2.4.7 [2.4.2, 2.4.9], *Yearbook ... 2002*, vol. II (Part Two), pp. 28–48. The commentary to the explanatory note and guidelines 2.5, 2.5.1, 2.5.2, 2.5.3, 2.5.4 [2.5.5], 2.5.5 [2.5.5 bis, 2.5.5 ter], 2.5.6, 2.5.7 [2.5.7, 2.5.8], 2.5.8 [2.5.9], 2.5.9 [2.5.10], 2.5.10 [2.5.11] and 2.5.11 [2.5.12] is reproduced in paragraph 368 below.

²⁵⁹ The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

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 a number of States or international organizations does not affect the unilateral nature of that reservation.

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 or 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*

2.1 *Form and notification of reservations*

2.1.1 *Written form*

A reservation must be formulated in writing.

2.1.2 *Form of formal confirmation*

Formal confirmation of a reservation must be made in writing.

2.1.3 *Formulation of a reservation at the international level*

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

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

(b) It appears from practice or 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 considered as representing a State for the purpose of formulating a reservation at the international level:

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

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

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted 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.

2.1.4 [2.1.3 bis, 2.1.4] *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

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

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

2.1.5 *Communication of reservations*

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

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

2.1.6 [2.1.6, 2.1.8] *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. A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or as the case may be, upon its receipt by the depositary.

3. The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

4. Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 *Functions of depositaries*

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

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

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

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

2.1.8 [2.1.7 bis] *Procedure in case of manifestly [impermissible] reservations*

1. Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the

author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

2. If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

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.

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.

...²⁶⁰

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.

²⁶⁰ Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

2.4 *Procedure for interpretative declarations*

2.4.1 *Formulation of interpretative declarations*

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

[2.4.2 [2.4.1 bis] *Formulation of an interpretative declaration at the internal level*

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

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

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.

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 [2.4.2, 2.4.9] *Formulation and communication of conditional interpretative declarations*

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

2. Formal confirmation of a conditional interpretative declaration must also be made in writing.

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.

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

2.4.8 Late formulation of a conditional interpretative declaration²⁶¹

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.

2.5 *Withdrawal and modification of reservations and interpretative declarations*

2.5.1 *Withdrawal of reservations*

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

2.5.2 *Form of withdrawal*

The withdrawal of a reservation must be formulated in writing.

2.5.3 *Periodic review of the usefulness of reservations*

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

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

2.5.4 [2.5.5] *Formulation of the withdrawal of a reservation at the international level*

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(a) That person produces appropriate full powers for the purposes of that withdrawal; 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 withdraw a reservation at the international level on behalf of a State:

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

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

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

2.5.5 [2.5.5 bis, 2.5.5 ter] *Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

1. The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a mat-

²⁶¹ This draft guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new draft guidelines at the fifty-fourth session.

ter for the internal law of each State or the relevant rules of each international organization.

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

2.5.6 *Communication of withdrawal of a reservation*

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

2.5.7 [2.5.7, 2.5.8] *Effect of withdrawal of a reservation*

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

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

2.5.8 [2.5.9] *Effective date of withdrawal of a reservation*

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

Model clauses

A. *Deferment of the effective date of the withdrawal of a reservation*

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

B. *Earlier effective date of withdrawal of a reservation*

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

C. *Freedom to set the effective date of withdrawal of a reservation*

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

2.5.9 [2.5.10] *Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation*

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

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

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

2.5.10 [2.5.11] *Partial withdrawal of a reservation*

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

2. The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

2.5.11 [2.5.12] *Effect of a partial withdrawal of a reservation*

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

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

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIFTH SESSION

368. The text of the draft guidelines with commentaries thereto adopted by the Commission at its fifty-fifth session are reproduced below.

Explanatory note

Some draft guidelines in the Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

Commentary

(1) The Commission considered that it would be useful to place “explanatory notes” at the beginning of the Guide to Practice in order to provide information to users of the Guide on its structure and purpose. Other questions that might arise in future could also be included in these preliminary notes.

(2) The purpose of this first explanatory note is to define the function and the “instructions for use” of the model clauses that accompany some draft guidelines, in accordance with the decision taken by the Commission at its forty-seventh session.²⁶²

(3) These model clauses are intended mainly to give States and international organizations examples of provisions that it might be useful to include in the text of a treaty in order to avoid the uncertainties or drawbacks that might result, in a particular case, from silence about a specific problem relating to reservations to that treaty.

²⁶² *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (b).

(4) Model clauses are alternative provisions from among which negotiators are invited to choose the one best reflecting their intentions, on the understanding that they may adapt them, as appropriate, to the objectives being sought. It is therefore essential to refer to the commentaries to these model clauses in determining whether the situation is one in which their inclusion in the treaty would be useful.

2.5 *Withdrawal and modification of reservations and interpretative declarations*

Commentary

(1) The purpose of the present section of the Guide to Practice is to specify the conditions of substance and of form in which a reservation may be modified or withdrawn.

(2) As in the case of the Guide to Practice as a whole, the point of departure of the draft guidelines included in this section is constituted by the provisions of the 1969 and 1986 Vienna Conventions on the question under consideration. These provisions are article 22, paragraphs 1 and 3 (a), and article 23, paragraph 4, which deal only with the question of withdrawal of reservations, not with that of their modification. The Commission endeavoured to fill this gap by proposing guidelines on declarations of parties to a treaty intended to modify the content of a reservation made previously, whether the purpose of the modification is to limit or strengthen its scope.²⁶³

(3) The Commission deemed it appropriate, for the convenience of users, to include all the draft guidelines on the withdrawal of reservations in section 2.5, without restricting it to procedure, the subject of chapter 2 of the Guide. Draft guidelines 2.5.7 [2.5.7, 2.5.8] and 2.5.11 [2.5.12] thus relate to the effect of the withdrawal, in whole or in part, of a reservation.

2.5.1 *Withdrawal of reservations*

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

Commentary

(1) Draft guideline 2.5.1 reproduces the text of article 22, paragraph 1, of the 1986 Vienna Convention, which is itself based on that of article 22, paragraph 1, of the 1969 Vienna Convention, with the addition of international organizations. These provisions were hardly discussed during the *travaux préparatoires*.

(2) The question of the withdrawal of reservations did not attract the attention of special rapporteurs on the law of treaties until fairly recently and even then only to a limited degree. Mr. J. L. Brierly and Sir Hersch Lauterpacht were preoccupied with admissibility of reservations and

²⁶³ See draft guidelines 2.5.10 [2.5.11] and 2.5.11 [2.5.12].

did not devote a single draft article to the question of the criterion for the withdrawal of reservations.²⁶⁴ It was not until 1956 that, in his first report, Sir Gerald Fitzmaurice proposed the following wording for draft article 40, paragraph 3:

A reservation, though admitted, may be withdrawn by formal notice at any time. If this occurs, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties.²⁶⁵

(3) The draft was not discussed by the Commission, but, in his first report on the law of treaties, Sir Humphrey Waldock returned to the concept in a draft article 17, entitled “Power to formulate and withdraw reservations”,²⁶⁶ which posited the principle of “the absolute right of a State to withdraw a reservation unilaterally, even when the reservation has been accepted by other States”.²⁶⁷

A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.²⁶⁸

This proposal was not discussed in plenary, but the Drafting Committee, while retaining the spirit of the provision, made extensive changes not only to the wording, but even to the substance: the new draft article 19, which dealt exclusively with the withdrawal of reservations, no longer mentioned the notification procedure, but included a paragraph 2 relating to the effect of the withdrawal.²⁶⁹ This draft was adopted with the addition of a provision in the first paragraph specifying when the withdrawal took legal effect.²⁷⁰ According to draft article 22 on first reading:

1. A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of the reservation, the provisions of article 21 cease to apply.²⁷¹

²⁶⁴ The furthest Sir Hersch Lauterpacht went was to draw attention to some proposals made in April 1954 to the Commission on Human Rights on the subject of reservations to the “Covenant of Human Rights”, expressly providing for the possibility of withdrawing a reservation simply by notifying the Secretary-General of the United Nations (see his second report on the law of treaties, *Yearbook ... 1954*, vol. II, document A/CN.4/87, pp. 131–132, para. 5 of the commentary to article 9).

²⁶⁵ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 116. In his commentary on this provision, Sir Gerald restricted himself to saying that it did not require any explanation (*ibid.*, p. 127, para. 101).

²⁶⁶ *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 60–61.

²⁶⁷ *Ibid.*, p. 66, para. (12) of the commentary to article 17.

²⁶⁸ *Ibid.*, p. 61, para. 6 of draft article 17.

²⁶⁹ At the request of Mr. Bartoš (*Yearbook ... 1962*, vol. I, 664th meeting, p. 234, para. 67).

²⁷⁰ *Ibid.*, paras. 69–71, and 667th meeting, p. 253, paras. 73–75.

²⁷¹ *Ibid.*, vol. II, document A/5209, p. 181; article 21 related to the application of reservations.

(4) Only three States reacted to draft article 22,²⁷² which was consequently revised by the Special Rapporteur.²⁷³ He proposed that:

(a) The provision should take the form of a residual rule;

(b) It should be specified that notification of a withdrawal should be made by the depositary, if there was one;

(c) A period of grace should be allowed before the withdrawal became operative.²⁷⁴

(5) During the consideration of these proposals, two members of the Commission maintained that, where a reservation formulated by a State was accepted by another State, an agreement existed between those two States.²⁷⁵ This proposition received little support and the majority favoured the notion, expressed by Mr. Bartoš, that “normally, a treaty was concluded in order to be applied in full; reservations constituted an exception which was merely tolerated”.²⁷⁶ Following this discussion, the Drafting Committee effectively reverted, in a different formulation, to the two concepts in paragraph 1 of the 1962 text.²⁷⁷ The new text was the one eventually adopted²⁷⁸ and it became the final version of draft article 20 (Withdrawal of reservations):

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

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States.²⁷⁹

²⁷² See the fourth report of Sir Humphrey Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, pp. 55–56. Israel considered that notification should be through the channel of the depositary, while the United States of America welcomed the “provision that the withdrawal of the reservation ‘takes effect when notice of it has been received by the other States concerned’”; the comment by the United Kingdom related to the effective date of the withdrawal; see also paragraph (4) of the commentary to draft guideline 2.5.8 [2.5.9] below. For the text of the comments by the three States, see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 351 (United States), 295, para. 14 (Israel) and 344 (United Kingdom).

²⁷³ For the text of the draft article proposed by Sir Humphrey Waldock, see *Yearbook ... 1965* (footnote 272 above), p. 56, or *ibid.*, vol. I, 800th meeting, p. 174, para. 43.

²⁷⁴ On this point, see paragraph (4) of the commentary to draft guideline 2.5.8 [2.5.9] below.

²⁷⁵ See the comments by Mr. Verdross and (less clearly) Mr. Amado, *Yearbook ... 1965*, vol. I, 800th meeting, p. 175, para. 49, and p. 176, para. 60.

²⁷⁶ *Ibid.*, p. 175, para. 50.

²⁷⁷ See paragraph (3) of the commentary to draft guideline 2.5.1 above; for the first text adopted by the Drafting Committee in 1965, see *Yearbook ... 1965*, vol. I, 814th meeting, p. 272, para. 22.

²⁷⁸ See *Yearbook ... 1965*, vol. I, 816th meeting, p. 284, paras. 56–60, and *Yearbook ... 1966*, vol. I (Part Two), 892nd meeting, p. 327, para. 106.

²⁷⁹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 209; drafted along the same lines, the corresponding text was article 22 of the 1965 draft (*Yearbook ... 1965*, vol. II, document A/6009, p. 162).

(6) The commentary to the provision was, apart from a few clarifications, a repetition of that of 1962.²⁸⁰ The Commission expressed the view that the parties to the treaty “ought to be presumed to wish a reserving State to abandon its reservation, unless a restriction on the withdrawal of reservations has been inserted in the treaty”.²⁸¹

(7) At the United Nations Conference on the Law of Treaties, the text of this draft article (which had by now become article 22 of the 1969 Vienna Convention) was incorporated unchanged, although several amendments of detail had been proposed.²⁸² However, on the proposal of Hungary, two important additions were adopted:

(a) First, it was decided to bring the procedure relating to the withdrawal of objections to reservations into line with that relating to the withdrawal of reservations themselves;²⁸³ and,

(b) Secondly, a paragraph 4 was added to article 23 specifying that the withdrawal of reservations (and of objections) should be made in writing.²⁸⁴

(8) Basing himself on the principle that “there is no reason to put international organizations in a situation different from that of States in the matter of reservations”,²⁸⁵ Mr. Paul Reuter, in his fourth report on the question of treaties concluded between States and international organizations, or between two or more international organizations, restricted himself to submitting “draft articles which extend the rules embodied in articles 19 to 23 of the 1969 Convention to the agreements to which international organizations are parties”, subject only to “minor drafting changes”.²⁸⁶ So it proved with article 22, in which the Special Rapporteur restricted himself to adding a reference to international organizations, and article 23, paragraph 4, which he reproduced in its entirety.²⁸⁷ These proposals were adopted by the

Commission without amendment²⁸⁸ and retained on second reading.²⁸⁹ The 1986 United Nations Conference on the Law of Treaties did not bring about any fundamental change.²⁹⁰

(9) It appears from the provisions thus adopted that the withdrawal of a reservation is a unilateral act. This puts an end to the once deeply debated theoretical question of the legal nature of withdrawal: is it a unilateral decision or a conventional act?²⁹¹ Article 22, paragraph 1, of the two Vienna Conventions of 1969 and 1986 rightly opts for the first of these positions. As the Commission stated in the commentary to the draft articles adopted on first reading:²⁹²

It has sometimes been contended that when a reservation has been accepted by another State it may not be withdrawn without the latter’s consent, as the acceptance of the reservation establishes a régime between the two States which cannot be changed without the agreement of both. The Commission, however, considers that the preferable rule is that the reserving State should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted.²⁹³

(10) This is still the Commission’s view. By definition, a reservation is a unilateral²⁹⁴ act, even though States or international organizations may, by agreement, reach results comparable to those produced by reservations,²⁹⁵ but the decision to opt for a reservation, by contrast, rightly implies a resort to unilateral action.

(11) It could perhaps be argued that, in accordance with article 20 of the 1969 and 1986 Vienna Conventions, a reservation which is made by a State or an international organization and is not expressly provided for by the treaty

²⁸⁰ See paragraph (3) of the commentary to draft guideline 2.5.1 above.

²⁸¹ *Yearbook ... 1966* (see footnote 279 above), para. (1) of the commentary to article 20.

²⁸² See the list and the text of these amendments and sub-amendments in *Official Records of the United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969* (United Nations publication, Sales No. E.70.V.5), *Documents of the Conference*, report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, pp. 141–142, paras. 205–211.

²⁸³ For the text of the Hungarian amendment, see A/CONF.39/L.18, which was reproduced in *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 282 above), p. 267; for the discussion of it, see the debates at the eleventh plenary meeting of the Conference (30 April 1969), *ibid.*, *Second session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 36–38, paras. 14–41.

²⁸⁴ On this amendment, see paragraph (2) of the commentary to draft guideline 2.5.2 below.

²⁸⁵ *Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 36, para. (2) of the general commentary on section 2.

²⁸⁶ *Ibid.*, p. 37, para. (5) of the general commentary on section 2.

²⁸⁷ *Ibid.*, p. 38, and his fifth report, *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/290 and Add.1, p. 146.

²⁸⁸ See the Commission’s discussions in 1977, *Yearbook ... 1977*, vol. I, 1434th meeting, pp. 100–101, paras. 30–34; 1435th meeting, p. 103, paras. 1–2; and 1451st meeting, pp. 194–195, paras. 12–16; and the report of the Commission to the General Assembly on the work of its forty-ninth session, *ibid.*, vol. II (Part Two), pp. 114–115.

²⁸⁹ States and international organizations made no comment on these provisions. See the tenth report of Mr. Reuter, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, pp. 63–64; the Commission’s discussions in 1981, *Yearbook ... 1981*, vol. I, 1652nd meeting, p. 54, paras. 27–29; 1692nd meeting, pp. 264–265, paras. 38–41; the reports of the Commission to the General Assembly on the work of its thirty-third and thirty-fourth sessions, *Yearbook ... 1981*, vol. II (Part Two), p. 140; and *Yearbook ... 1982*, vol. II (Part Two), p. 37.

²⁹⁰ See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5, vol. I), fifth plenary meeting, 18 March 1986, p. 14, paras. 62–63.

²⁹¹ On this disagreement on the theory, see particularly P.-H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), p. 288; and F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague, T.M.C. Asser Instituut, 1988), pp. 223–224, and the references cited. For a muted comment on this disagreement during the *travaux préparatoires* on article 22, see paragraph (5) of the commentary to draft guideline 2.5.1 above.

²⁹² See paragraph (3) of the commentary to draft guideline 2.5.1 above.

²⁹³ *Yearbook ... 1962*, vol. II, document A/5209, pp. 181–182, para. (1) of the commentary to article 22.

²⁹⁴ See article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and draft guideline 1.1 of the Guide to Practice.

²⁹⁵ See draft guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4].

is effective only for the parties which have accepted it, if only implicitly. On the one hand, however, such acceptance does not alter the nature of the reservation—it gives effect to it, but the reservation is still a distinct unilateral act—and, on the other hand and above all, such an argument involves extremely formalistic reasoning that takes no account of the benefit of limiting the number and the scope of reservations in order to preserve the integrity of the treaty. As has been rightly observed,²⁹⁶ the signatories to a multilateral treaty expect, in principle, that it will be accepted as a whole and there is at least a presumption that, if a necessary evil, reservations are regretted by the other parties. It is worth pointing out, moreover, that the withdrawal of reservations, while sometimes regulated,²⁹⁷ is never forbidden under a treaty.²⁹⁸

(12) Furthermore, to the best of the Commission's knowledge, the unilateral withdrawal of reservations has never given rise to any particular difficulty and none of the States or international organizations which replied to the Commission's questionnaire on reservations²⁹⁹ has noted any problem in that regard. The recognition of such a right of withdrawal is also in accordance with the letter or the spirit of treaty clauses expressly relating to the withdrawal of reservations, which are either worded in terms similar to those in article 22, paragraph 1,³⁰⁰ or aim to encourage withdrawal by urging States to withdraw them "as soon as circumstances permit".³⁰¹ In the same spirit, international organizations and the human rights treaty monitoring bodies constantly issue recommendations urging States to withdraw reservations that they made when ratifying or acceding to treaties.³⁰²

(13) Such objectives also justify the fact that the withdrawal of a reservation may take place "at any time",³⁰³ which could even mean before the entry into force of a treaty by a State which withdraws a previous

reservation,³⁰⁴ although the Special Rapporteur knows of no case in which this has occurred.³⁰⁵

(14) The now customary nature of the rules contained in articles 22, paragraph 1, and 23, paragraph 4, of the 1969 and 1986 Vienna Conventions and reproduced in draft guideline 2.5.1 seems not to be in question³⁰⁶ and is in line with current practice.³⁰⁷

(15) The wording chosen does not call for any particular criticism, although some fault could be found with the first phrase ("Unless the treaty provides otherwise ..."), which some members of the Commission have suggested should be deleted. This explanatory phrase, which appeared in the Commission's final draft, but not in that of 1962,³⁰⁸ was added by the Special Rapporteur, Sir Humphrey Waldock, following comments by Governments³⁰⁹ and endorsed by the Drafting Committee at the seventeenth session in 1965.³¹⁰ It goes without saying that most of the provisions of the 1969 and 1986 Vienna Conventions and all the rules of a procedural nature contained in them are of a residual, voluntary nature and must be understood to apply "unless the treaty otherwise provides". The same must therefore be true, *a fortiori*, of the Guide to Practice. The explanatory phrase that introduces article 22, paragraph 1, may seem superfluous, but most members of the

²⁹⁶ See paragraph (5) of the commentary to draft guideline 2.5.1 above.

²⁹⁷ See the commentary to draft guidelines 2.5.7 [2.5.7, 2.5.8] and 2.5.8 [2.5.9] below.

²⁹⁸ See L. Miglioni, "La revoca di reserve e di obiezioni a riserve", *Rivista di diritto internazionale*, vol. LXXV (1992), p. 319.

²⁹⁹ See footnote 227 above. See particularly, in the questionnaire addressed to States, questions 1.6, 1.6.1, 1.6.2 and 1.6.2.1 relating to withdrawal of reservations.

³⁰⁰ See the examples given by Imbert, *op. cit.*, p. 287, footnote (19), and by Horn, *op. cit.*, p. 437, note 1 (footnote 291 above). See also, for example, the Convention relating to the Status of Refugees, art. 42, para. 2; the Convention on the Continental Shelf, art. 12, para. 2; the European Convention on Establishment, art. 26, para. 3; and the text of the model adopted in 1962 by the Council of Europe, which appears in "Model final clauses", Secretariat memorandum prepared by the Directorate of Legal Affairs (CM (77) 222 of 16 November 1977), annex I, pp. 9–14.

³⁰¹ Convention on the Grant of European Patents, art. 167, para. (4); see also other examples cited by Imbert, *op. cit.*, p. 287, footnote (20), and by Horn, p. 437, note 2 (footnote 291 above).

³⁰² See the examples cited in the commentary to draft guideline 2.5.3 (footnote 337 below).

³⁰³ One favoured occasion for the withdrawal of reservations is at the time of the succession of States, for on that date the newly independent State can express its intention of not maintaining the reservations of the predecessor State (see the 1978 Vienna Convention, art. 20, para. 1). This situation will be examined during the general consideration of the fate of reservations and interpretative declarations in the case of succession of States.

³⁰⁴ This eventuality is expressly provided for by the final clauses of the Convention concerning Customs Facilities for Touring, its Additional Protocol, relating to the importation of tourist publicity documents and material, and the Customs Convention on the Temporary Importation of Private Road Vehicles (see *Yearbook ... 1965*, vol. II, document A/5687, annex II, p. 105, para. 2). There are a considerable number of cases in which a State has made a reservation on signing a treaty, but subsequently renounced it because of representations made either by other signatories or by the depositary (see the examples given by Horn, *op. cit.* (footnote 291), pp. 345–346); but these are not strictly speaking withdrawals: see paragraphs (7)–(8) of the commentary to draft guideline 2.5.2 below.

³⁰⁵ On the other hand, several cases of withdrawal of a reservation fairly soon after it had been made can be cited. See, for example, Estonia's reply to question 1.6.2.1 of the Commission's questionnaire (footnote 227 above): the restrictions on its acceptance of annexes III–V of the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), to which it had acceded on 16 December 1991, were lifted on 18 August 1992, when Estonia was considered to be in a position to observe the conditions laid down in these instruments. The United Kingdom states that it withdrew, retrospectively from the date of ratification and three months after formulating it, a reservation to the Agreement establishing the Inter-American Development Bank.

³⁰⁶ See Miglioni, *loc. cit.* (footnote 298 above), pp. 320–321, and R. Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, vol. III (1970), p. 313.

³⁰⁷ See the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, prepared by the Treaty Section of the Office of Legal Affairs (United Nations publication, Sales No. E.94.V.15), p. 64, para. 216. The few States which made any comment on this subject in their replies to the questionnaire on reservations (see footnote 227 above) (question 1.6.2.1) said that any withdrawals of reservations had followed a change in their domestic law (Colombia, Denmark, Israel, Sweden, Switzerland, United Kingdom, United States) or a reassessment of their interests (Israel). On reasons for withdrawal, see J.-F. Flauss, "Note sur le retrait par la France des réserves aux traités internationaux", *Annuaire français de droit international*, vol. XXXII (1986), pp. 860–861.

³⁰⁸ See paragraphs (3) and (5) of the commentary to draft guideline 2.5.1 above.

³⁰⁹ See the fourth report on the law of treaties (footnote 272 above), pp. 55–56; see also *Yearbook ... 1965*, vol. I, 800th meeting, p. 174, para. 45.

³¹⁰ *Yearbook ... 1965*, vol. I, 814th meeting, p. 272, para. 22.

Commission take the view that this is not sufficient cause for modifying the wording chosen in 1969 and retained in 1986.

(16) This phrase, with its reference to treaty provisions, seems to suggest that model clauses should be included in the Guide to Practice. The issue is, however, less to do with procedure as such so much as with the effect of a withdrawal; the allusion to any conflict with treaty provisions is really just a muted echo of the concerns raised by some members of the Commission and some Governments about the difficulties that might arise from the sudden withdrawal of a reservation.³¹¹ To meet those concerns, it might be wise to incorporate limitations on the right to withdraw reservations at any time in a specific provision of the treaty.³¹²

2.5.2 Form of withdrawal

The withdrawal of a reservation must be formulated in writing.

Commentary

(1) The draft guideline reproduces the wording of article 23, paragraph 4, which is worded in the same way in both the 1969 and the 1986 Vienna Conventions.

(2) Whereas draft article 17, paragraph 6, adopted on first reading by the Commission in 1962, required that the withdrawal of a reservation should be effected “by written notification”,³¹³ the 1966 draft³¹⁴ was silent regarding the form of withdrawal. Several States made proposals to restore the requirement of written withdrawal³¹⁵ with a view to bringing the provision “into line with article 18 [23 in the definitive text of the Convention], where it was stated that a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing”.³¹⁶ Although Mr. Yasseen, Chairman of the Drafting Committee, considered that “an unnecessary additional condition [was thereby introduced] into a procedure which should be facilitated as much as possible”,³¹⁷ the principle was unanimously adopted³¹⁸ and it was decided to include this provision not in article 20 itself, but in article 23, which dealt with “Procedure regarding reservations” in general and was, as a result of the inclusion of this new paragraph 4, placed at the end of the section.³¹⁹

³¹¹ See paragraph (4) of the commentary to draft guideline 2.5.8 below.

³¹² See the model clauses proposed by the Commission following draft guideline 2.5.8.

³¹³ *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 61; see also paragraph (5) of the commentary to draft guideline 2.5.1 above.

³¹⁴ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 180.

³¹⁵ See the amendments proposed by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1), Hungary (A/CONF.39/C.1/L.178 and A/CONF.39/L.17) and the United States (A/CONF.39/C.1/L.171), reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and second sessions* (footnote 282 above), pp. 141 and 267.

³¹⁶ *Ibid.*, *Second session* (see footnote 283 above), statement by Mrs. Bokor-Szegó (Hungary), p. 36, para. 13.

³¹⁷ *Ibid.*, p. 38, para. 39.

³¹⁸ *Ibid.*, para. 41.

³¹⁹ *Ibid.*, twenty-ninth plenary meeting, pp. 159–160, paras. 10–13.

(3) Although Mr. Yasseen had been right, at the 1969 United Nations Conference on the Law of Treaties, to emphasize that the withdrawal procedure “should be facilitated as much as possible”,³²⁰ the burden imposed on a State by the requirement of written withdrawal should not be exaggerated. Moreover, although the rule of parallelism of forms is not an absolute principle in international law,³²¹ it would be incongruous if a reservation, about which there can surely be no doubt that it should be in writing,³²² could be withdrawn simply through an oral statement. It would result in considerable uncertainty for the other Contracting Parties, which would have received the written text of the reservation, but would not necessarily have been made aware of its withdrawal.³²³

(4) The Commission has nevertheless considered whether the withdrawal of a reservation may not be implicit, arising from circumstances other than formal withdrawal.

(5) Certainly, as Ruda points out, “[t]he withdrawal of a reservation ... is not to be presumed”.³²⁴ Yet the question still arises as to whether certain acts or conduct on the part of a State or an international organization should not be characterized as the withdrawal of a reservation.

(6) It is, for example, certainly the case that the conclusion between the same parties of a subsequent treaty containing provisions identical to those to which one of the parties had made a reservation, whereas it did not do so in connection with the second treaty, has, in practice, the same effect as a withdrawal of the initial reservation.³²⁵ The fact remains that it is a separate instrument and that a State which made a reservation to the first treaty is bound by the second and not the first. If, for example, a third State, by acceding to the second treaty, accedes also to the first, the impact of the reservation would be fully felt in that State’s relations with the reserving State.

(7) Likewise, the non-confirmation of a reservation upon signature, when a State expresses its consent to be bound,³²⁶ cannot be interpreted as being a withdrawal of the reservation, which may well have been “formulated” but, for lack of formal confirmation, has not been “made” or “established”.³²⁷ The reserving State has simply

See J. M. Ruda, “Reservations to treaties”, *Collected Courses of The Hague Academy of International Law, 1975–III* (Leiden, Sijthoff, 1977), vol. 146, p. 194.

³²⁰ See footnote 317 above.

³²¹ See paragraph (6) of the commentary to draft guideline 2.5.4 below.

³²² See draft guideline 2.1.1.

³²³ In this connection, see Ruda, *loc. cit.* (footnote 319 above), pp. 195–196.

³²⁴ *Ibid.*, p. 196.

³²⁵ In this connection, see Flauss, “Note sur le retrait par la France ...” (footnote 307 above), pp. 857–858, but see also F. Tiberghien, *La protection des réfugiés en France* (Paris, Economica, 1984), pp. 34–35 (quoted by Flauss, “Note sur le retrait par la France ...”, p. 858, footnote (8)).

³²⁶ See the 1969 and 1986 Vienna Conventions, art. 23, para. 2, draft guideline 2.2.1 and the commentary to it in the report of the Commission to the General Assembly on the work of its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two), pp. 180–183.

³²⁷ Non-confirmation is, however, sometimes (wrongly) called “withdrawal”; see United Nations, *Multilateral Treaties Deposited with*

renounced it after the time for reflection has elapsed between the date of signing and the date of ratification, act of formal confirmation, acceptance or approval.

(8) The reasoning has been disputed, basically on the grounds that the reservation exists even before it has been confirmed: it has to be taken into account when assessing the extent of the obligations incumbent on the signatory State (or international organization) under article 18 of the 1969 and 1986 Vienna Conventions; and, under article 23, paragraph 3, “an express acceptance, or an objection does not need to be renewed if made before confirmation of the reservation”.³²⁸ Nevertheless, as the same writer says: “Where a reservation is not renewed [confirmed], whether expressly or not, no change occurs, either for the reserving State itself or in its relations with the other parties, since until that time the State was not bound by the treaty. Conversely, if the reservation is withdrawn after the deposit of the instrument of ratification or accession, the obligations of the reserving State are increased by virtue of the reservation and it may be bound for the first time by the treaty with parties which had objected to its reservation. A withdrawal thus affects the application of the treaty, whereas non-confirmation has no effect at all, from this point of view.”³²⁹ The effects of non-confirmation and of withdrawal are thus too different for it to be possible to class the two institutions together.

(9) It would even seem impossible to consider that an expired reservation has been withdrawn. It sometimes happens that a clause in a treaty places a limit on the period of validity of reservations.³³⁰ But expiration is the consequence of the juridical event constituted by the lapse of a fixed period of time, whereas withdrawal is a unilateral juridical act expressing the will of its author.

(10) The same applies when, as sometimes occurs, the reservation itself sets a time limit to its validity. Thus, in

its reply to the questionnaire on reservations,³³¹ Estonia stated that it had limited its reservation to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) to one year, since one year was considered to be a sufficient period to amend the laws in question.³³² In this case, the reservation ceases to be in force not because it has been withdrawn, but because of the time limit set by the text of the reservation itself.

(11) What have been termed “forgotten” reservations³³³ must also be mentioned. A reservation is “forgotten”, in particular, when it forms part of a provision of domestic law which has subsequently been amended by a new text that renders it obsolete. This situation, which is not uncommon,³³⁴ although a full assessment is difficult, and which is probably usually the result of negligence by the relevant authorities or insufficient consultation between the relevant services, has its drawbacks. Indeed, it can lead to legal chaos, particularly in States with a tradition of legal monism.³³⁵ Moreover, since “municipal laws are merely facts” from the standpoint of international law,³³⁶ whether the legal system of the State in question is monist or dualist, an unwithdrawn reservation, having been made at the international level, will continue, in principle, to be fully effective and the reserving State will continue to avail itself of the reservation with regard to the other parties, although such an attitude could be questionable in terms of the principle of good faith.

(12) According to most members of the Commission, these examples, taken together, show that the withdrawal of a reservation may never be implicit: a withdrawal occurs only if the author of the reservation declares formally and in writing, in accordance with the rule embodied in article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions and reproduced in draft guideline 2.5.2, that he intends to revoke it. While sharing that viewpoint, some

the Secretary-General: Status as at 31 December 2000 (United Nations publication, Sales No. E.01.V.5), vol. I, p. 376, note 16), relating to the non-confirmation by the Government of Indonesia of reservations formulated when it signed the Single Convention on Narcotic Drugs, 1961.

³²⁸ Imbert, *op. cit.* (see footnote 291 above), p. 286.

³²⁹ *Ibid.*

³³⁰ See for example, article 12 of the Convention on the unification of certain points of substantive law on patents for invention, which provides for the possibility of non-renewable reservations to some of its provisions for maximum periods of 5 or 10 years, while an annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles allows Belgium to make a reservation for a three-year period starting from the date of entry into force of the Convention. See also the examples given by S. Spiliopoulou Åkermærk, “Reservation clauses in treaties concluded within the Council of Europe”, *International and Comparative Law Quarterly*, vol. 48, part 3 (July 1999), pp. 499–500, and Imbert, *op. cit.* (footnote 291 above), p. 287, footnote (21); also article 124 of the Rome Statute of the International Criminal Court, which sets a seven-year time limit on the possibility of non-acceptance of the Court’s competence in respect of war crimes. Other Council of Europe conventions such as the European Conventions on the adoption of children and on the legal status of children born out of wedlock likewise authorize only temporary, but renewable reservations; as a result of difficulties with the implementation of these provisions (see J. Polakiewicz, *Treaty-Making in the Council of Europe* (Strasbourg, Council of Europe, 1999), pp. 101–102), the new reservation clauses in Council of Europe conventions state that failure to renew a reservation would cause it to lapse (see the Criminal Law Convention on Corruption, art. 38, para. 2).

³³¹ Replies to questions 1.6 and 1.6.1 (see footnote 227 above).

³³² See also the examples given by Polakiewicz, *op. cit.* (footnote 330 above), pp. 102–104. It can also happen that a State, when formulating a reservation, indicates that it will withdraw it as soon as possible (see the reservation by Malta to articles 13, 15 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women (United Nations, *Multilateral Treaties ...* (footnote 327 above), p. 234); see also the reservations by Barbados to the International Covenant on Economic, Social and Cultural Rights (*ibid.*, p. 162) and to the International Covenant on Civil and Political Rights (*ibid.*, p. 175).

³³³ Flauss, “Note sur le retrait par la France ...” (see footnote 307 above), p. 861; see also Horn, *op. cit.* (footnote 291 above), p. 223.

³³⁴ See Flauss, “Note sur le retrait par la France ...” (footnote 307 above), p. 861; and the examples concerning France given by this author (pp. 861–862).

³³⁵ In these States, judges are expected to apply duly ratified treaties (although not reservations) and these generally take precedence over domestic laws, even if the latter were adopted later. See article 55 of the French Constitution of 1958 and the many constitutional provisions which either use the same wording or are inspired by it in French-speaking African countries. The paradoxical situation can thus arise that, in a State that has aligned its internal legislation with a treaty, it is nonetheless the treaty as ratified (and thus stripped of the provision or provisions to which reservations were made) which prevails, unless the reservation is formally withdrawn. The problem is less acute in States with a dualist system: international treaties are not applied as such, although, in all cases, national judges will apply the most recent domestic law.

³³⁶ *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19.

members of the Commission nevertheless considered that the expression by a State or an international organization of its intention to withdraw a reservation entailed immediate legal consequences, mirroring the obligations incumbent upon a State signatory to a treaty under article 18 of the Conventions.

2.5.3 Periodic review of the usefulness of reservations

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

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

Commentary

(1) The treaty monitoring bodies, particularly but not exclusively in the field of human rights, are calling increasingly frequently on States to reconsider their reservations and, if possible, to withdraw them. These appeals are often relayed by the general policymaking bodies of international organizations such as the General Assembly of the United Nations and the Committee of Ministers of the Council of Europe.³³⁷ Draft guideline 2.5.3 reflects these concerns.

(2) The Commission is aware that such a provision would have no place in a draft convention, since it could not be of much normative value. The Guide to Practice, however, does not aim to be a convention; it is, rather, “a code of recommended practices”.³³⁸ It would therefore not be out of place to draw its users’ attention to the drawbacks of these “forgotten”, obsolete or superfluous reservations³³⁹ and the benefits of reconsidering them periodically with a view to withdrawing them totally or partially.

(3) It goes without saying that it is no more than a recommendation, as emphasized by the use of the conditional tense in draft guideline 2.5.3 and of the word “consider” in the first paragraph and the words “where relevant” in the second, and that the parties to a treaty that have accompanied their consent to be bound by reservations remain absolutely free to withdraw their reservations or not. This is why the Commission has not thought it necessary to determine precisely the frequency with which reservations should be reconsidered.

(4) Similarly, in the second paragraph, the elements to be taken into consideration are cited merely by way of example, as shown by the use of the words “in particular”. The reference to the integrity of multilateral treaties is an allusion to the drawbacks of reservations, that may undermine the unity of the treaty regime. The reference to careful consideration of internal law and developments in it since the reservations were formulated may be explained by the fact that the divergence from the treaty provisions of the provisions in force in the State party is often used to justify the formulation of a reservation. Domestic provisions are not immutable, however (and participation in a treaty should in fact be an incentive to modify them), so that it may happen—and often does³⁴⁰—that a reservation becomes obsolete because internal law has been brought into line with treaty requirements.

(5) While endorsing draft guideline 2.5.3, some members of the Commission indicated that the words “internal law” were suitable for States, but not for international organizations. In this connection, it may be noted that article 46 of the 1986 Vienna Convention is entitled “Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties”.³⁴¹ The Commission nevertheless considered that the words “rules of an international organization” were not very widely used and were imprecise, owing to the lack of any definition of them. Moreover, the phrase “internal law of an international organization” is commonly used as a way of referring to the “proper law”³⁴² of international organizations.³⁴³

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

³³⁷ For recent examples, see, amongst others, the following General Assembly resolutions: 55/79 of 4 December 2000 on the rights of the child (sect. I, para. 3); 54/157 of 17 December 1999 on the International Covenants on Human Rights (para. 7); 54/137 of 17 December 1999 (para. 5) and 55/70 of 4 December 2000 on the Convention on the Elimination of All Forms of Discrimination against Women (para. 6); and 47/112 of 16 December 1992 on the implementation of the Convention on the Rights of the Child (para. 7). See also resolution 2000/26 of the Sub-Commission on the Promotion and Protection of Human Rights of 18 August 2000 (para. 1), the Declaration of the Council of Europe Committee of Ministers adopted on 10 December 1998 on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights, and more generally (in that it is not limited to human rights treaties), Parliamentary Assembly of the Council of Europe recommendation 1223 (1993) of 1 October 1993 (para. 7).

³³⁸ This expression was used by Sweden in its comments on the Commission’s 1962 draft on the law of treaties; see the fourth report on the law of treaties by Sir Humphrey Waldock (footnote 272 above), p. 47.

³³⁹ In this connection, see paragraphs (9)–(11) of the commentary to draft guideline 2.5.2 above.

³⁴⁰ See paragraph (11) of the commentary to draft guideline 2.5.2 above.

³⁴¹ See paragraph (2) of the commentary to the corresponding draft article, adopted by the Commission in *Yearbook ... 1982*, vol. II (Part Two), p. 52.

³⁴² See C. W. Jenks, *The Proper Law of International Organisations* (London, Stevens, 1962).

³⁴³ See L. Focsaneanu, “Le droit interne de l’Organisation des Nations Unies”, *Annuaire français de droit international*, 1957, vol. III, pp. 315–349; P. Cahier, “Le droit interne des organisations internationales”, *RGDIP* (1963), pp. 563–602; G. Ballardore Pallieri, “Le droit interne des organisations internationales”, *Collected Courses of The Hague Academy of International Law, 1969–II* (Leiden, Sijthoff, 1970), vol. 127, pp. 1–37; and P. Daillier and A. Pellet, *Droit international public*, 7th ed. (Paris, LGDJ, 2002), pp. 576–577.

(a) That person produces appropriate full powers for the purposes of that withdrawal; 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 withdraw a reservation at the international level on behalf of a State:

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

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

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

Commentary

(1) The two Vienna Conventions of 1969 and 1986, while reticent on the procedure for the formulation of reservations,³⁴⁴ are entirely silent as to the procedure for their withdrawal. The aim of draft guideline 2.5.4 is to repair that omission.

(2) The question has not, however, been completely overlooked by several of the Commission's special rapporteurs on the law of treaties. Thus, in 1956, Sir Gerald Fitzmaurice proposed a provision under which the withdrawal of a reservation would be the subject of "formal notice",³⁴⁵ but did not specify who should notify whom or how notice should be given. Later, in 1962, Sir Humphrey Waldock, in his first report, went into more detail in draft article 17, paragraph 6, the adoption of which he recommended:

Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.³⁴⁶

(3) Although the proposal was not discussed in plenary, the Drafting Committee simply deleted it³⁴⁷ and it was not restored by the Commission. During the brief discussion of the Drafting Committee's draft, however, Sir Humphrey Waldock pointed out that "[n]otification of

the withdrawal of a reservation would normally be made through a depositary".³⁴⁸ This approach was approved by Israel, the only State to provide comments on the draft adopted on first reading on that topic³⁴⁹ and the Special Rapporteur proposed an amendment to the draft whereby the "withdrawal becomes operative when notice of it has been received by the other States concerned from the depositary".³⁵⁰

(4) During the discussion in the Commission, Sir Humphrey Waldock explained that the omission of a reference to the depositary on first reading had been due solely to "inadvertence"³⁵¹ and his suggestion for remedying it was not disputed in principle. Mr. Rosenne, however, believed that it "was not as clear as it appeared"³⁵² and suggested the adoption of a single text grouping together all notifications made by the depositary.³⁵³ Although the Drafting Committee did not immediately adopt this idea, this probably explains why its draft again omitted any reference to the depositary,³⁵⁴ who is also not mentioned in the Commission's final draft³⁵⁵ or in the text of the 1986 Vienna Convention itself.³⁵⁶

(5) To rectify the omissions in the 1969 and 1986 Vienna Conventions regarding the procedure for the withdrawal of reservations, the Commission might contemplate transposing the rules relating to the formulation of reservations. This is not, however, self-evident.

(6) On the one hand, it is by no means clear that the rule of parallelism of forms has been accepted in international law. In its commentary in 1966 on draft article 51 on the law of treaties relating to the termination of or withdrawal from a treaty by consent of the parties, the Commission concluded that "this theory reflects the constitutional practice of particular States and not a rule of international law. In its opinion, international law does not accept the theory of the '*acte contraire*'".³⁵⁷ As Reuter pointed out, however, the "Commission stated that any form could in general be resorted to. A treaty may be modified by another written treaty emanating from lower-ranking organs or by an agreement in a less solemn form. According to the Commission, a written treaty may even be modified by a treaty based on oral or tacit consent".³⁵⁸ This nuanced

³⁴⁸ *Ibid.*, para. 71.

³⁴⁹ *Yearbook ... 1965* (see footnote 272 above), p. 55.

³⁵⁰ *Ibid.*, p. 56, para. 5. See paragraph 4 of the commentary to draft guideline 2.5.1 above.

³⁵¹ *Yearbook ... 1965*, vol. I, 800th meeting, p. 174, para. 45.

³⁵² *Ibid.*, p. 176, para. 65.

³⁵³ *Ibid.*, 803rd meeting, pp. 197–199, paras. 30–56; for the text of the proposal, see *Yearbook ... 1965*, vol. II, document A/CN.4/L.108, p. 73.

³⁵⁴ *Ibid.*, vol. I, 814th meeting, p. 272, para. 22; see also the comments by Mr. Rosenne and Sir Humphrey Waldock (*ibid.*, p. 273, paras. 26–28).

³⁵⁵ Art. 20, para. 2; see the text of this provision in paragraph (5) of the commentary to draft guideline 2.5.1 above.

³⁵⁶ See articles 22–23 of the 1969 and 1986 Vienna Conventions.

³⁵⁷ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 249, para. (3) of the commentary to draft article 51; see also the commentary to article 35, *ibid.*, pp. 232–233.

³⁵⁸ P. Reuter, *Introduction to the Law of Treaties* (London, Kegan Paul International, 1995), p. 137, para. 211. See also Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester

(Continued on next page.)

³⁴⁴ See paragraph (7) of the commentary to draft guideline 2.5.4 below.

³⁴⁵ See paragraph (2) of the commentary to draft guideline 2.5.1 above.

³⁴⁶ *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 61, para. 6. The Special Rapporteur on the law of treaties did not accompany this part of his draft with any commentary (*ibid.*, p. 66, para. (12)). See also paragraph (3) of the commentary to draft guideline 2.5.1 above.

³⁴⁷ *Yearbook ... 1962*, vol. I, 664th meeting, p. 234, para. 67.

position surely can and should be applied to the issue of reservations: it is not essential that the procedure followed in withdrawing a reservation should be identical with that used for formulating it, particularly since a withdrawal is generally welcome. The withdrawal should, however, leave all the Contracting Parties in no doubt as to the will of the State or the international organization which takes that step to renounce its reservation. It therefore seems reasonable to proceed on the basis of the idea that the procedure for withdrawing reservations should be modelled on the procedure for formulating them, although that may involve some adjustment and fine-tuning where appropriate.

(7) On the other hand, it has to be said that the 1969 and 1986 Vienna Conventions contain few rules specifically relating to the procedure for formulating reservations, apart from article 23, paragraph 1, which merely states that they must be “communicated to the contracting States [and contracting organizations] and other States [and other international organizations] entitled to become parties to the treaty”.³⁵⁹

(8) Since there is no treaty provision directly concerning the procedure for withdrawing reservations and in view of the inadequacy even of those relating to the formulation of reservations, the Commission considered draft guidelines 2.1.3–2.1.8 [2.1.7 *bis*] relating to the communication of reservations in the light of the current practice and the (rare) discussions of theory and discussed the possibility and the appropriateness of transposing them to the withdrawal of reservations.

(9) With regard to the formulation of reservations proper, draft guideline 2.1.3 (see paragraph 367 above) is taken directly from article 7 of the 1969 and 1986 Vienna Conventions entitled “Full powers”. There seems no reason why these rules should not also apply to the withdrawal of reservations. The grounds on which they are justified in relation to the formulation of reservations³⁶⁰ also apply to withdrawal: the reservation has altered the respective obligations of the reserving State and the other Contracting Parties and should therefore be issued by the same individuals or bodies with competence to bind the State or international organization at the international level. This must therefore apply *a fortiori* to its withdrawal, which puts the seal on the reserving State’s commitment.

(10) The United Nations Secretariat firmly adopted that position in a letter dated 11 July 1974 to the Legal Adviser of the Permanent Mission of a Member State who had inquired about the “form in which the notifications of withdrawal”³⁶¹ of some reservations made in respect of

(Footnote 358 continued.)

University Press, 1984), p. 183. For a flexible position on the denunciation of a treaty, see the ICJ judgment of 21 June 2000 (*Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction, Judgment*, I.C.J. Reports 2000, p. 25, para. 28).

³⁵⁹ Draft guideline 2.1.5, paragraph 1, reproduces this provision, while paragraph 2 details the procedure to be followed when the reservation relates to the constituent instrument of an international organization.

³⁶⁰ See paragraphs (8)–(12) of the commentary to draft guideline 2.1.3, *Yearbook ... 2002*, vol. II (Part Two), pp. 30–31, para. 103.

³⁶¹ *United Nations Juridical Yearbook, 1974* (United Nations publication, Sales No. E.76.V.1), p. 190.

the Convention on the Political Rights of Women and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages should be made. After noting that the 1969 Vienna Convention makes no reference to the subject and recalling the definition of “full powers” given in article 2, paragraph 1 (c),³⁶² the author of the letter adds:

Clearly the withdrawal of a reservation constitutes an important treaty action and one of those for which the production of full powers should certainly be contemplated. It would appear only logical to apply to a notification of withdrawal of reservations the same standard as to the formulation of reservations since the withdrawal would entail as much change in the application of the treaty concerned as the original reservations.

And in conclusion:

Our views, therefore, are that the withdrawal of reservations should *in principle* be notified to the Secretary-General either by the Head of State or Government or the Minister for Foreign Affairs, or by an official authorized by one of those authorities. While such a high level of procedure may prove somewhat burdensome, the fundamental safeguard which it provides to all concerned in regard to the validity of the notification more than make up for the resulting inconvenience.³⁶³

(11) Firm though this conclusion is, the words “in principle”, which appear in italics in the text of the Secretariat’s legal advice, testify to a certain unease. This is explained by the fact that, as the writer of the letter acknowledges,

[O]n several occasions, there has been a tendency in the Secretary-General’s depositary practice, with a view to a broader application of treaties, to receive in deposit withdrawals of reservations made in the form of notes verbales or letters from the Permanent Representative to the United Nations. It was considered that the Permanent Representative duly accredited with the United Nations and acting upon instructions from his Government, by virtue of his functions and without having to produce full powers, had been authorized to do so.³⁶⁴

(12) This raises a question that the Commission has already considered in relation to the formulation of reservations:³⁶⁵ would it not be legitimate to assume that the representative of a State to an international organization that is the depositary of a treaty (or the ambassador of a State accredited to a depositary State) has been recognized as being competent to give notice of reservations? And the question arises with all the more force in relation to the withdrawal of reservations, since there may be a hope of facilitating such a step, which would have

³⁶² The Convention defines “full powers” as “a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty”.

³⁶³ *United Nations Juridical Yearbook, 1974* (see footnote 361 above), p. 191. A memorandum by the Secretariat dated 1 July 1976 confirms this conclusion: “A reservation must be formulated in writing (article 23, paragraph 1, of the [Vienna] Convention), and both reservations and withdrawals* of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally (article 7 of the Convention)” (*ibid.*, 1976 (United Nations publication, Sales No. E.78.V.5), p. 211).

³⁶⁴ *United Nations Juridical Yearbook, 1974* (see footnote 361 above), pp. 190–191. This is confirmed by the memorandum of 1 July 1976: “On this point, the Secretary-General’s practice in some cases has been to accept the withdrawal of reservations simply by notification from the representative of the State concerned to the United Nations”, *ibid.*, 1976 (see footnote 363 above), footnote 121.

³⁶⁵ See paragraphs (13)–(17) of the commentary to draft guideline 2.1.3, *Yearbook ... 2002*, vol. II (Part Two), pp. 31–32.

the effect of making the treaty more fully applicable and thus be instrumental in preserving, or re-establishing, its integrity.

(13) After thorough consideration, however, the Commission did not adopt this progressive development, since it was anxious to depart as little as possible from the provisions of article 7 of the 1969 and 1986 Vienna Conventions. On the one hand, it would be strange to depart, without a compelling reason, from the principle of the *acte contraire*,³⁶⁶ so long as it is understood that a non-formalist conception³⁶⁷ of it is advisable. That means, in this case, that any of the authorities competent to formulate a reservation on behalf of a State may also withdraw it and the withdrawal need not necessarily be issued by the same body as the one which formulated the reservation. On the other hand, while it is true that there may well be a desire to facilitate the withdrawal of reservations, it is also the case that withdrawal resembles more closely than the formulation of reservations the expression of consent to be bound by a treaty. This constitutes a further argument for not departing from the rules contained in article 7 of the Conventions.

(14) Moreover, it seems that the United Nations Secretary-General has since adopted a harder line and no longer accepts notification or withdrawal of reservations from permanent representatives accredited to the Organization.³⁶⁸ And, in the latest edition of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the Treaty Section of the Office of Legal Affairs states: "Withdrawal must be made in writing and under the signature of one of the three recognized authorities, since such withdrawal shall normally result, in substance, in a modification of the scope of the application of the treaty."³⁶⁹ There is no mention of any possible exceptions.

(15) The Secretary-General of the United Nations is not, however, the only depositary of multilateral treaties and the practice followed by other depositaries in this regard could usefully be considered. Unfortunately, the replies by States to the questionnaire on reservations give no information of any practical benefit in that direction. On the other hand, publications of the Council of Europe indicate that it accepts the formulation³⁷⁰ and withdrawal³⁷¹ of reservations by letters from the permanent representatives of the Council.

(16) It would be regrettable if such practices, which are perfectly acceptable and do not seem to give rise to any

particular difficulties, were to be called into question by the inclusion of over-rigid rules in the Guide to Practice. That pitfall is avoided in the text adopted for draft guideline 2.5.4 [2.5.5], which transposes to the withdrawal of reservations the wording of guideline 2.1.3 and takes care to maintain the "customary practices in international organizations which are depositaries of treaties".

(17) Even apart from the replacement of the word "formulate" by the word "withdraw", however, the transposition is not entirely word for word:

(a) Since the withdrawal procedure is, by definition, distinct both from that used in adopting or authenticating the text of a treaty and from the expression of consent to be bound and may take place many years later, it is necessary that the person applying the procedure should produce specific full powers (para. 1 (a));

(b) For the same reason, paragraph 2 (b) of draft guideline 2.1.3 cannot apply to the withdrawal of reservations: when a State or an international organization comes to withdraw a reservation, the international conference which adopted the text is obviously no longer in session.

2.5.5 [2.5.5 bis, 2.5.5 ter] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations

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

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

Commentary

(1) Draft guideline 2.5.5 [2.5.5 bis, 2.5.5 ter] is, in relation to the withdrawal of reservations, the equivalent of draft guideline 2.1.4 [2.1.3 bis, 2.1.4] relating to the absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations (see paragraph 367 above).

(2) The competent authority to formulate the withdrawal of a reservation at the international level is not necessarily the same as the one with competence to decide the issue at the internal level. Here, too, *mutatis mutandis*,³⁷² the problem is the same as that relating to the formulation of reservations.³⁷³

(3) The replies by States and international organizations to the questionnaire on reservations do not give any

³⁶⁶ See paragraph (6) of the commentary to draft guideline 2.5.4 above.

³⁶⁷ *Ibid.*, Reuter's phrase.

³⁶⁸ Flauss mentions, however, a case in which a reservation by France (to article 7 of the Convention on the Elimination of All Forms of Discrimination against Women) was withdrawn on 22 March 1984 by the Permanent Mission of France to the United Nations ("Note sur le retrait par la France ..." (see footnote 307 above), p. 860).

³⁶⁹ See footnote 307 above.

³⁷⁰ See paragraph (14) of the commentary to draft guideline 2.1.3, *Yearbook ... 2002*, vol. II (Part Two), p. 31.

³⁷¹ See European Committee on Legal Co-operation, *CDCJ Conventions and reservations to the said Conventions*, secretariat memorandum prepared by the Directorate of Legal Affairs (CDCJ (99) 36 of 30 March 1999).

³⁷² A reservation "removed" from the treaty; its withdrawal serves as the culmination of its acceptance.

³⁷³ See the commentary to draft guideline 2.1.4, *Yearbook ... 2002*, vol. II (Part Two), pp. 32–34, para. 103.

utilizable information regarding competence to decide on the withdrawal of a reservation at the internal level. Legal theory, however, provides certain indications in that respect.³⁷⁴ A more exhaustive study would very probably reveal the same diversity in relation to internal competence to withdraw reservations as has been noted with regard to their formulation.³⁷⁵ There seems to be no reason, therefore, why the wording of draft guidelines 2.1.4 [2.1.3 *bis*, 2.1.4] should not be transposed to the withdrawal of reservations.

(4) It would, in particular, seem essential to indicate in the Guide to Practice whether and to what extent a State can claim that a reservation is not valid because it violates the rules of its internal law; this situation could very well arise in practice, although the Commission does not know of any specific example.

(5) As the Commission indicated in relation to the formulation of reservations,³⁷⁶ there might be a case for applying to reservations the “defective ratification” rule of article 46 of the 1969 and 1986 Vienna Conventions, and still more to the withdrawal of reservations, given that the process of ratification or accession is thereby completed. Whether the formulation of reservations or, still more, their withdrawal is involved, the relevant rules are seldom spelled out in formal texts of a constitutional or even a legislative nature.³⁷⁷

(6) The Commission wondered whether it would not be more elegant simply to refer the reader to draft guideline 2.1.4 [2.1.3 *bis*, 2.1.4] of which draft guideline 2.5.5 [2.5.5 *bis*, 2.5.5 *ter*] is a word-for-word transposition, with the simple replacement of the words “formulation” and “formulate” by the words “withdrawal” and “withdraw”. Contrary to the position with regard to draft guideline 2.5.6, the Commission decided that it would be preferable, in this case, to opt for the reproduction of draft guideline 2.1.4 [2.1.3 *bis*, 2.1.4]: draft guideline 2.5.5 [2.5.5 *bis*, 2.5.5 *ter*] is inextricably linked with draft guideline 2.5.4 [2.5.5], for which a simple reference is impossible.³⁷⁸ It seems preferable to proceed in the same manner in both cases.

³⁷⁴ See, for example, G. Gaja, “Modalità singolari per la revoca di una riserva”, *Rivista di diritto internazionale*, vol. LXXII (1989), pp. 905–907; and Migliorino, *loc. cit.* (footnote 298 above), pp. 332–333, in relation to the withdrawal of a reservation by Italy to the Convention relating to the Status of Refugees or, for France, Flauss, “Note sur le retrait par la France ...” (footnote 307 above), p. 863.

³⁷⁵ See paragraphs (3)–(6) of the commentary to draft guideline 2.1.4, *Yearbook ... 2002*, vol. II (Part Two), pp. 32–33, para. 103.

³⁷⁶ See paragraph (10) of the commentary to draft guideline 2.1.4, *ibid.*, p. 33.

³⁷⁷ These uncertainties also explain the hesitation of the few authors who have tackled the question (see footnote 374 above). If a country’s own specialists in these matters are in disagreement among themselves or criticize the practices of their own Government, other States or international organizations cannot be expected to delve into the mysteries and subtleties of internal law.

³⁷⁸ See paragraph (17) of the commentary to draft guideline 2.5.4 [2.5.5] above.

2.5.6 Communication of withdrawal of a reservation

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

Commentary

(1) As the Commission noted elsewhere,³⁷⁹ the 1969 and 1986 Vienna Conventions are completely silent as to the procedure for the communication of withdrawal of reservations. Article 22, paragraph 3 (*a*), undoubtedly implies that the contracting States and international organizations should be notified of a withdrawal, but it does not specify either who should make this notification or the procedure to be followed. Draft guideline 2.5.6 serves to fill that gap.

(2) To that end, the Commission used the same method as for the formulation of the withdrawal *sensu stricto*³⁸⁰ and considered whether it might not be possible and appropriate to transpose draft guidelines 2.1.5–2.1.7 it had adopted on the communication of reservations themselves.

(3) The first remark that must be made is that, although the 1969 and 1986 Vienna Conventions do not specify the procedure to be followed for withdrawing a reservation, the *travaux préparatoires* of the 1969 Convention show that those who drafted the law of treaties were in no doubt about the fact that:

(a) Notification of withdrawal must be made by the depositary, if there is one; and

(b) The recipients of the notification must be “every State which is or is entitled to become a party to the treaty” and “interested States”.³⁸¹

(4) It is only because, at least partly at the instigation of Mr. Rosenne, it was decided to group together all the rules relating to depositaries and notification, which constitute articles 76–78 of the 1969 Vienna Convention,³⁸² that these proposals were abandoned.³⁸³ They are, however, entirely consistent with draft guidelines 2.1.5 and 2.1.6 [2.1.6, 2.1.8] (see paragraph 367 above).

(5) This approach is endorsed by the legal theory on the topic,³⁸⁴ meagre though it is, and is also in line with current practice. Thus,

³⁷⁹ See paragraph (1) of the commentary to draft guideline 2.5.4 [2.5.5] above.

³⁸⁰ See paragraph (8) of the commentary to draft guideline 2.5.4 [2.5.5] above.

³⁸¹ See paragraphs (2)–(3) of the commentary to draft guideline 2.5.4 [2.5.5] above.

³⁸² And articles 77–79 of the 1986 Vienna Convention.

³⁸³ See paragraph (4) of the commentary to draft guideline 2.5.4 [2.5.5] above.

³⁸⁴ See Migliorino, *loc. cit.* (footnote 298 above), p. 323; and A. Maresca, *Il diritto dei trattati* (Milan, Giuffrè, 1971), p. 302.

(a) Both the Secretary-General of the United Nations³⁸⁵ and the Secretary-General of the Council of Europe³⁸⁶ observe the same procedure on withdrawal as on the communication of reservations: they are the recipients of withdrawals of reservations made by States or international organizations to treaties of which they are depositaries and they communicate them to all the Contracting Parties and the States and international organizations entitled to become parties;

(b) Moreover, where treaty provisions expressly relate to the procedure to be followed in respect of withdrawal of reservations, they generally follow the model used for the formulation of reservations, in line with the rules given in draft guidelines 2.1.5 and 2.1.6 [2.1.6, 2.1.8], in that they specify that the depositary must be notified of a withdrawal³⁸⁷ and even that he should communicate it to the Contracting Parties³⁸⁸ or, more broadly, to “every State” entitled to become party or to “every State”, without specifying further.³⁸⁹

(6) As for the depositary, there is no reason to give him a role different from the extremely limited one assigned to him for the formulation of reservations (see footnote 367 above) in draft guidelines 2.1.6 [2.1.6, 2.1.8] (Communication of reservations) and 2.1.7 (Functions of depositaries), which are a combination of article 77, paragraph 1, and article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention³⁹⁰ and are in conformity with the principles on which the relevant Vienna rules are based:³⁹¹

³⁸⁵ See United Nations, *Multilateral Treaties ...*, vols. I and II (footnote 327 above), *passim* (see, among many other examples, the withdrawal of reservations to the Vienna Convention on Diplomatic Relations by China, Egypt and Mongolia, vol. I, p. 108, notes 13, 15 and 17; and to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Colombia, Jamaica and the Philippines, *ibid.*, p. 403, notes 8, 9 and 11).

³⁸⁶ See CDCJ *Conventions and reservations to the said Conventions* (footnote 371 above) (withdrawal of reservations by Germany and Italy to the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, pp. 11–12).

³⁸⁷ See, for example, the Convention on the Contract for the International Carriage of Goods by Road, art. 48, para. 2; the Convention on the limitation period in the international sale of goods, as amended by the Protocol amending the Convention on the limitation period in the international sale of goods, art. 40, para. 2; the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, art. 15, para. 2; and the Convention on cybercrime, art. 43, para. 1.

³⁸⁸ See, for example, the European Agreement on Road Markings, arts. 15, para. 2, and 17 (b); and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, arts. 18 and 34 (c).

³⁸⁹ See, for example, the Convention on psychotropic substances, arts. 25, para. 3, and 33; the Customs Convention on containers, 1972, arts. 26, para. 3, and 27; the International Convention on the harmonization of frontier control of goods, arts. 21 and 25; and article 63 of the Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (notification to be made to “States Members of the Hague Conference on Private International Law”).

³⁹⁰ These correspond to articles 77–78 of the 1969 Vienna Convention.

³⁹¹ See the commentary to draft guidelines 2.1.6 [2.1.6, 2.1.8] and 2.1.7, *Yearbook ... 2002*, vol. II (Part Two), pp. 39–45, para. 103.

(a) Under article 78, paragraph 1 (e), the depositary is given the function of “informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty”; notifications relating to reservations and their withdrawal are covered by this provision, which appears in modified form in draft guideline 2.1.6 [2.1.6, 2.1.8], para 1 (b);

(b) Draft guideline 2.1.7, paragraph 1, is based on the provision contained in article 78, paragraph 1 (d), under which the depositary should examine whether “notification or communication relating to the treaty is in due and proper form and, if need be, bring[...] the matter to the attention of the State or international organization in question”; this, too, applies equally well to the formulation of reservations and to their withdrawal (which could cause a problem with regard to, for example, the person making the communication);³⁹²

(c) Paragraph 2 of the same draft guideline carries through the logic of the “letter-box depositary” theory endorsed by the 1969 and 1986 Vienna Conventions in cases where a difference arises. It reproduces word for word the text of article 78, paragraph 2, of the 1986 Convention and, again, there seems no need to make a distinction between formulation and withdrawal.

(7) Since the rules contained in draft guidelines 2.1.5–2.1.7 are in every respect transposable to the withdrawal of reservations, should they be merely referred to or reproduced in their entirety? In relation to the formulation of reservations, the Commission preferred to reproduce and adapt draft guidelines 2.1.3 and 2.1.4 [2.1.3 *bis*, 2.1.4] in draft guidelines 2.5.4 [2.5.5] and 2.5.5 [2.5.5 *bis*, 2.5.5 *ter*]. That position was, however, primarily dictated by the consideration that simply transposing the rules governing competence to formulate a reservation to competence to withdraw it was impossible.³⁹³ The same does not apply to the communication of withdrawal of reservations or the role of the depositary in that regard: the text of draft guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7 fits perfectly, with the simple replacement of the word “formulation” by the word “withdrawal”. The use of a reference has fewer disadvantages and, although several members did not agree, the Commission considered that it was enough merely to refer to those provisions.

2.5.7 [2.5.7, 2.5.8] *Effect of withdrawal of a reservation*

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

³⁹² See paragraphs (10)–(11) of the commentary to draft guideline 2.5.4 [2.5.5] above.

³⁹³ See paragraph (17) of the commentary to draft guideline 2.5.4 [2.5.5], and paragraph (6) of the commentary to draft guideline 2.5.5 [2.5.5 *bis*, 2.5.5. *ter*] above.

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

Commentary

(1) In the abstract, it is not very logical to insert draft guidelines relating to the effect of the withdrawal of a reservation in a chapter of the Guide to Practice dealing with the procedure for reservations, particularly since it is scarcely possible to dissociate the effect of the withdrawal from that of the reservation itself: the one cancels out the other. After some hesitation, however, the Special Rapporteur has decided to do so, for two reasons:

(a) In the first place, article 22 of the 1969 and 1986 Vienna Conventions links the rules governing the form and procedure³⁹⁴ of a withdrawal closely with the question of its effect; and

(b) In the second place, the effect of a withdrawal may be viewed as being autonomous, thus precluding the need to go into the infinitely more complex effect of the reservation itself.

(2) Article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions is concerned with the effect of the withdrawal of a reservation only in relation to the particular question of the time at which the withdrawal “becomes operative”. During the *travaux préparatoires* of the 1969 Convention, however, the Commission occasionally considered the more substantial question of how it would be operative.

(3) In his first report on the law of treaties, Sir Gerald Fitzmaurice proposed a provision that, where a reservation is withdrawn, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related and is equally entitled to claim compliance with that provision by the other parties.³⁹⁵ Draft article 22, paragraph 2, adopted by the Commission on first reading in 1962, provided that “[u]pon withdrawal of a reservation the provisions of article 21 [relating to the application of reservations] cease to apply”;³⁹⁶ this sentence disappeared from the Commission’s final draft.³⁹⁷ In plenary, Sir Humphrey Waldock suggested that the Drafting Committee could discuss a further question, namely, “the possibility that the effect of the withdrawal of a reservation might be that the treaty entered into force in the relations between two States

between which it had not previously been in force”;³⁹⁸ and, during the United Nations Conference on the Law of Treaties, several amendments were made aiming to re-establish a provision to that effect in the text of the 1969 Vienna Convention.³⁹⁹

(4) The Conference Drafting Committee rejected the proposed amendments, on the grounds that they were superfluous and that the effect of the withdrawal of a reservation was self-evident.⁴⁰⁰ This is only partially true.

(5) There can be no doubt that “[t]he effect of withdrawal of a reservation is obviously to restore the original text of the treaty”.⁴⁰¹ A distinction should, however, be made between three possible situations.

(6) In the relations between the reserving and the accepting State (or international organization) (art. 20, para. 4, of the 1969 and 1986 Vienna Conventions), the reservation ceases to be operational (art. 21, para. 1): “In a situation of this kind, the withdrawal of a reservation will have the effect of re-establishing the original content of the treaty in the relations between the reserving and the accepting State. The withdrawal of the reservation produces the situation that would have existed if the reservation had not been made.”⁴⁰² Migliorino gives the example of the withdrawal by Hungary, in 1989, of its reservation to the Single Convention on Narcotic Drugs, 1961, article 48, paragraph 2, of which provides for the competence of ICJ;⁴⁰³ there had been no objection to this reservation and, as a result of the withdrawal, the Court’s competence to interpret and apply the Convention was established from the effective date of the withdrawal.⁴⁰⁴

(7) The same applies to the relations between the State (or international organization) which withdraws a reservation and a State (or international organization) which has objected to, but not opposed the entry into force of the treaty between itself and the reserving State. In this situation, under article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, the provisions to which the reservation related did not apply in the relations between the two parties: “In a situation of this kind, the withdrawal of a reservation has the effect of extending, in the relations between the reserving and the objecting State, the

³⁹⁸ *Yearbook ... 1965*, vol. I, 800th meeting, p. 178, para. 86; in that context, see the statement by Mr. Rosenne, *ibid.*, para. 87.

³⁹⁹ Amendment by Austria and Finland (see footnote 315 above); see also reports of the Committee of the Whole with a sub-amendment by the USSR (A/CONF.39/C.1/L.167), *Official Records of the United Nations Conference on the Law of Treaties, First and second sessions* (footnote 282 above), p. 141, para. 207.

⁴⁰⁰ *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March-24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), Committee of the Whole, 70th meeting, statement by Mr. Yasseen, Chairman of the Drafting Committee, p. 417, para. 37.

⁴⁰¹ D. W. Bowett, “Reservations to non-restricted multilateral treaties”, *BYBIL, 1976-1977*, vol. 48, p. 87. See also Szafarz, *loc. cit.* (footnote 306 above), p. 313.

⁴⁰² Migliorino, *loc. cit.* (see footnote 298 above), p. 325; in that connection, see Szafarz, *loc. cit.* (footnote 306 above), p. 314.

⁴⁰³ United Nations, *Multilateral Treaties ...* (see footnote 327 above), p. 376, note 15.

⁴⁰⁴ Migliorino, *loc. cit.* (see footnote 298 above), pp. 325-326.

³⁹⁴ Admittedly, only to the extent that paragraph 3 (a) refers to the “notice” of a withdrawal.

³⁹⁵ See paragraph (2) of the commentary to draft guideline 2.5.1 above.

³⁹⁶ *Yearbook ... 1962*, vol. II, document A/5209, p. 181.

³⁹⁷ It was discarded on second reading following consideration by the Drafting Committee of the new draft article proposed by Sir Humphrey Waldock, who retained it in part (see commentary to draft guideline 2.5.8 [2.5.9] below), without offering any comment (see *Yearbook ... 1965*, vol. I, 814th meeting, p. 272, para. 22).

application of the treaty to the provisions covered by the reservation.”⁴⁰⁵

(8) The most radical effect of the withdrawal of a reservation occurs where the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or organization. In that situation, the treaty enters into force⁴⁰⁶ on the date on which the withdrawal takes effect. “For a state ... which had previously expressed a maximum-effect objection, the withdrawal of the reservation will mean the establishment of full treaty relations with the reserving state.”⁴⁰⁷

(9) In other words, the withdrawal of a reservation entails the application of the treaty in its entirety (so long as there are no other reservations, of course) in the relations between the State or international organization which withdraws the reservation and all the other Contracting Parties, whether they had accepted or objected to the reservation, although, in the second case, if the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or international organization, the treaty enters into force from the effective date of the withdrawal.

(10) In the latter case, treaty relations between the reserving State or international organization and the objecting State or international organization are established even where other reservations remain, since the opposition of the State or international organization to the entry into force of the treaty was due to the objection to the withdrawn reservation. The other reservations become operational, in accordance with the provisions of article 21 of the 1969 and 1986 Vienna Conventions, as from the entry into force of the treaty in the relations between the two parties.

(11) It should also be noted that the wording of paragraph 1 of the draft guideline follows that of the 1969 and 1986 Vienna Conventions, in particular, article 2, paragraph 1 (*d*), and article 23, which assume that a reservation refers to treaty provisions (in the plural). It goes without saying that the reservation can be made to only one provision or, in the case of an “across-the-board” reservation, to “the treaty as a whole with respect to certain specific aspects”.⁴⁰⁸ Paragraph 1 of draft guideline 2.5.7 [2.5.9, 2.5.8] covers both of these cases.

⁴⁰⁵ *Ibid.*, pp. 326–327; the author gives the example of the withdrawal by Portugal, in 1972, of its reservation to the Vienna Convention on Diplomatic Relations, art. 37, para. 2, which gave rise to several objections by States which did not, nevertheless, oppose the entry into force of the Convention between them and Portugal (see United Nations, *Multilateral Treaties ...* (footnote 327 above), p. 108, note 18).

⁴⁰⁶ See article 24 of the 1969 and 1986 Vienna Conventions, especially paragraph 3.

⁴⁰⁷ Szafarz, *loc. cit.* (see footnote 306), pp. 313–314; in that connection, see Ruda, *loc. cit.* (footnote 319 above), p. 202; Bowett, *loc. cit.* (footnote 401 above), and Migliorino, *loc. cit.* (footnote 298 above), pp. 328–329. The latter gives the example of the withdrawal by Hungary, in 1989, of its reservation to article 66 of the 1969 Vienna Convention (see United Nations, *Multilateral Treaties ...*, vol. II (footnote 327 above), p. 273, note 13); this example is not really convincing, since the objecting States had not formally rejected the application of the Convention in the relations between themselves and Hungary.

⁴⁰⁸ Draft guideline 1.1.1 [1.1.4].

2.5.8 [2.5.9] *Effective date of withdrawal of a reservation*

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

Commentary

(1) Draft guideline 2.5.8 [2.5.4] reproduces the text of the *chapeau* and of article 22, paragraph 3 (*a*), of the 1986 Vienna Convention.

(2) This provision, which reproduces the 1969 text with the sole addition of the reference to international organizations, was not specifically discussed during the *travaux préparatoires* of the 1986 Vienna Convention⁴⁰⁹ or at the United Nations Conference on the Law of Treaties, which did no more than clarify the text adopted on second reading by the Commission.⁴¹⁰ Its adoption had, however, given rise to some discussion in the Commission in 1962 and 1965.

(3) Whereas Sir Gerald Fitzmaurice had, in his first report, in 1956, planned to spell out the effects of the withdrawal of a reservation,⁴¹¹ Sir Humphrey Waldock expressed no such intention in his first report, in 1962.⁴¹² It was, however, during the Commission’s discussions in that year that, for the first time, a provision was included, at the request of Mr. Bartoš, in draft article 22 on the withdrawal of reservations, that such withdrawal “takes effect when notice of it has been received by the other States concerned”.⁴¹³

⁴⁰⁹ See the fourth (footnote 285 above), p. 38, and fifth (footnote 287 above), p. 146, reports of Mr. Reuter on the question of treaties concluded between States and international organizations, or between two or more international organizations; for the (lack of) discussion by the Commission at its twenty-ninth session, see *Yearbook ... 1977*, vol. I, 1434th meeting, pp. 100–101, paras. 30–35, and 1435th meeting, p. 103, paras. 1–2; also 1451st meeting, pp. 194–195, paras. 12–16, and the Commission’s report to the General Assembly of the same year, *ibid.*, vol. II (Part Two), pp. 114–116; and, for the second reading, see the tenth report of Mr. Reuter (footnote 289 above), p. 63, para. 84; the (lack of) discussion at the thirtieth session of the Commission, *Yearbook ... 1981*, vol. I, 1652nd and 1692nd meetings, p. 54, paras. 27–28, and p. 265, para. 38, and the final text, *ibid.*, vol. II (Part Two), p. 140, and *Yearbook ... 1982*, vol. II (Part Two), pp. 36–37.

⁴¹⁰ See *Official Records of the United Nations Conference on the Law of Treaties, First and second sessions* (footnote 282 above), p. 142, para. 211 (text of the Drafting Committee). The plural (“when notice of it has been received by the other contracting States”, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 209) was changed to the singular, which had the advantage of underlining that the time of becoming operative was specific to each of the parties (see the exposition by Mr. Yasseen, Chairman of the Drafting Committee, *Official Records of the United Nations Conference on the Law of Treaties, Second session* (footnote 283 above), p. 36, para. 11). On the final adoption of draft article 22 by the Commission, see *Yearbook ... 1965*, vol. I, 816th meeting, p. 285, and *Yearbook ... 1966*, vol. I, part II, 892nd meeting, p. 327.

⁴¹¹ See paragraph (2) of the commentary to draft guideline 2.5.1 above.

⁴¹² See paragraph (3) of the commentary to draft guideline 2.5.1 above.

⁴¹³ See paragraph (5) of the commentary to draft guideline 2.5.1 above.

(4) Following the adoption of this provision on first reading, three States reacted:⁴¹⁴ the United States, which welcomed it; and Israel and the United Kingdom, which were concerned about the difficulties that might be encountered by other States parties as a result of the suddenness of the effect of a withdrawal. Their arguments led the Special Rapporteur to propose the addition to draft article 22 of a subparagraph (c) involving a complicated formula whereby the withdrawal became operative as soon as the other States had received notice of it, but they were given three months' grace to make any necessary changes.⁴¹⁵ In this way, Sir Humphrey Waldock intended to give the other parties the opportunity to take "the requisite legislative or administrative action ..., where necessary", so that their internal law could be brought into line with the situation arising out of the withdrawal of the reservation.⁴¹⁶

(5) As well as criticizing the overcomplicated formulation of the solution proposed by the Special Rapporteur, the members of the Commission were divided on the principle of the provision. Mr. Ruda, supported by Mr. Briggs, said that there was no reason to allow a period of grace in the case of withdrawal of reservations when no such provision existed in the case of the entry into force of a treaty as a result of the consent given by a State to be bound.⁴¹⁷ Other members, however, including Mr. Tunkin and Sir Humphrey Waldock himself, pointed out, with some reason, that the two situations were different: where ratification was concerned, "a State could obtain all the time it required by the simple process of delaying ratification until it had made the necessary adjustments to its municipal law"; in the case of the withdrawal of a reservation, by contrast, "the change in the situation did not depend on the will of the other States concerned, but on the will of the reserving State which decided to withdraw" it.⁴¹⁸

(6) The Commission considered, however, that "such a clause would unduly complicate the situation and that, in practice, any difficulty that might arise would be obviated during the consultations in which the States concerned would undoubtedly engage".⁴¹⁹ The Commission nevertheless showed some hesitation in once again stipulating that the date on which the withdrawal became operative was that on which the other Contracting Parties had been notified, because, in its final commentary, after explaining that it had concluded that to formulate as a general rule the granting of a short period of time within which States could "adapt their internal law to the new situation resulting from [the withdrawal of the reservation] ... would be going too far", the Commission "felt that the matter should be left to be regulated by a specific provision in the

treaty. It also considered that, even in the absence of such a provision, if a State required a short interval of time in which to bring its internal law into conformity with the situation resulting from the withdrawal of the reservation, good faith would debar the reserving State from complaining of the difficulty which its own reservation had occasioned".⁴²⁰

(7) This raises another problem: by proceeding in this manner, the Commission surreptitiously reintroduced in the commentary the exception that Sir Humphrey Waldock had tried to incorporate in the text itself of what became article 22 of the 1969 Vienna Convention. Not only was such a manner of proceeding questionable, but the reference to the principle of good faith did not provide any clear guidance.⁴²¹

(8) In the Commission's view the question is nevertheless whether the Guide to Practice should include the clarification contained in the commentary of 1965: it makes sense to be more specific in this code of recommended practices than in general conventions on the law of treaties. In this case, however, there are some serious objections to such inclusion: the "rule" set out in the commentary manifestly contradicts that appearing in the 1969 Vienna Convention and its inclusion in the Guide would therefore depart from that rule. That would be acceptable only if it was felt to meet a clear need, but this is not the case here. In 1965, Sir Humphrey Waldock "had heard of no actual difficulty arising in the application of a treaty from a State's withdrawal of its reservation";⁴²² this would still seem to be the case 38 years later. It does not therefore appear necessary or advisable to contradict or relax the rule stated in article 22, paragraph 3, of the 1969 and 1986 Vienna Conventions.

(9) It is nonetheless true that, in certain cases, the effect of the withdrawal of a reservation immediately after notification is given might give rise to difficulty. The 1965 commentary itself, however, gives the correct answer to the problem: in such a case, "the matter should ... be regulated by a specific provision in the treaty".⁴²³ In other words, whenever a treaty relates to an issue, such as personal status or certain aspects of private international law, with regard to which it might be thought that the unexpected withdrawal of a reservation could cause the other parties difficulty because they had not adjusted their internal legislation, a clause should be included in the treaty specifying the period of time required to deal with the situation created by the withdrawal.

(10) This is, moreover, what happens in practice. A considerable number of treaties set a time limit longer than

⁴¹⁴ See the fourth report by Sir Humphrey Waldock (footnote 272 above), pp. 55–56.

⁴¹⁵ *Ibid.*, p. 56, para. 5: "(c) on the date when the withdrawal becomes operative article 21 ceases to apply, provided that, during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice."

⁴¹⁶ *Yearbook ... 1965*, vol. I, 800th meeting, p. 175, para. 47.

⁴¹⁷ *Ibid.*, p. 176, para. 59 (Mr. Ruda), and p. 177, para. 76 (Mr. Briggs).

⁴¹⁸ *Ibid.*, p. 176, paras. 68–69 (Mr. Tunkin); see also pages 175, para. 54 (Mr. Tsuruoka), and 177, paras. 78–80 (Sir Humphrey Waldock).

⁴¹⁹ *Ibid.*, 814th meeting, explanations given by Sir Humphrey Waldock, p. 273, para. 24.

⁴²⁰ *Yearbook ... 1966*, vol. II, document (A/6309/Rev.1), p. 209, para. (2) of the commentary to draft article 20.

⁴²¹ As ICJ has observed, "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith", *Nuclear Tests* cases (footnote 219 above), p. 473, para. 49; "it is not in itself a source of obligation where none would otherwise exist", *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1988*, p. 105, para. 94.

⁴²² *Yearbook ... 1965*, vol. I, 814th meeting, p. 273, para. 24.

⁴²³ See paragraph (6) of the commentary to draft guideline 2.5.8 [2.5.9] above.

that given, in accordance with general law, in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, for the withdrawal of a reservation to take effect. This time limit generally ranges from one to three months, starting, in most cases, from the notification of the withdrawal to the depositary rather than to the other contracting States.⁴²⁴ Conversely, the treaty may set a shorter period than that contained in the Vienna Conventions. Thus, under the European Convention on Transfrontier Television, article 32, paragraph 3,

Any Contracting State which has made a reservation under paragraph 1 may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.*

and not on the date of receipt by the other Contracting Parties of the notification by the depositary.⁴²⁵ And sometimes a treaty provides that it is for the State which withdraws its reservation to specify the effective date of the withdrawal.⁴²⁶

(11) The purpose of these express clauses is to overcome the disadvantages of the principle established in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, which is not above criticism. Apart from the problems considered above⁴²⁷ arising, in some cases, from the fact that a withdrawal takes effect on receipt of its notification by the other parties, it has been pointed out that the paragraph “does not really resolve the question of the time factor”,⁴²⁸ although, thanks to the specific provision introduced at the United Nations Conference on the Law of Treaties in 1969,⁴²⁹ the partners of a State or international organization which withdraws a reservation know exactly on what date the withdrawal has taken effect in their respect, the withdrawing State or international organization itself remains in uncertainty, for the notification may be received at completely different times by the other parties. This has the unfortunate effect of leaving the author of the withdrawal uncertain as to the date on which its new obligations will become

operational.⁴³⁰ Short of amending the text of article 22, paragraph 3 (a), itself, however, there is no way of overcoming this difficulty, which seems too insignificant in practice⁴³¹ to justify “revising” the Vienna text.

(12) It should, however, be noted in this connection that the Vienna text departs from ordinary law: normally, an action under a treaty takes effect from the date of its notification to the depositary. That is what articles 16 (b), 24, paragraph 3, and 78 (b)⁴³² of the 1969 Vienna Convention provide. And that is how ICJ ruled concerning optional declarations of acceptance of its compulsory jurisdiction, following a line of reasoning that may, by analogy, be applied to the law of treaties.⁴³³ The exception established by the provisions of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions is explained by the concern to avoid a situation in which the other Contracting Parties to a treaty to which a State withdraws its reservation find themselves held responsible for not having observed the treaty provisions with regard to that State, even though they were unaware of the withdrawal.⁴³⁴ This concern must be commended.

(13) The Commission has sometimes criticized the inclusion of the phrase “unless the treaty otherwise provides”⁴³⁵ in some provisions of the 1969 and 1986 Vienna Conventions. In some circumstances, however, it is valuable in that it draws attention to the advisability of possibly incorporating specific reservation clauses in the actual treaty in order to obviate the disadvantages connected with the application of the general rule or the ambiguity resulting from silence.⁴³⁶ That is certainly the case with regard to the time at which the withdrawal of a reservation becomes operative, which it is certainly preferable to specify whenever the application of the principle set forth in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions and also contained in draft guideline 2.5.8 [2.5.9] might give rise to difficulties, either because the relative suddenness with which the withdrawal takes effect might put the other parties in an awkward position or, on the contrary, because there is a desire to neutralize the length of time elapsing before notification of withdrawal is received by them.

⁴²⁴ See the examples given by Imbert, *op. cit.*, p. 290, and Horn, *op. cit.*, p. 438 (footnote 291 above). See also, for example, the United Nations Convention on contracts for the international sale of goods, art. 97, para. (4) (six months); the Convention on the conservation of migratory species of wild animals, art. XIV, para. 2 (90 days from the transmission of the withdrawal to the parties by the depositary; and the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, art. 24, para. (3) (three months after notification of the withdrawal).

⁴²⁵ Council of Europe conventions containing clauses on the withdrawal of reservations generally follow this formula: see the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality, art. 8, para. 2; the European Agreement on the transmission of applications for legal aid, art. 13, para. 2; and the European Convention on Nationality, art. 29, para. 3.

⁴²⁶ See the Protocol of Amendment to the International Convention on the simplification and harmonization of Customs procedures, annex I, appendix I, art. 12, para. 2: “Any Contracting Party which has entered reservations may withdraw them, in whole or in part, at any time by notification to the depositary specifying the date on which such withdrawal takes effect.”

⁴²⁷ See paragraphs (4)–(9) of the commentary to draft guideline 2.5.8 [2.5.9] above.

⁴²⁸ Imbert, *op. cit.* (see footnote 291 above), p. 290.

⁴²⁹ See footnote 410 above.

⁴³⁰ In this connection, see the comments by Mr. Briggs, *Yearbook ... 1965*, vol. I, 800th meeting, p. 177, para. 75, and 814th meeting, p. 273, para. 25.

⁴³¹ See paragraph (8) of the commentary to draft guideline 2.5.7 [2.5.8] above.

⁴³² Art. 79 (b) of the 1986 Vienna Convention.

⁴³³ “[B]y the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36 ... For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned.” (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146)

See also *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 291, para. 25, and p. 293, para. 30.

⁴³⁴ See the Commission’s commentary to draft article 22, adopted on first reading, *Yearbook ... 1962*, vol. II, document A/5209, pp. 181–182, and to that adopted on second reading, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 210.

⁴³⁵ See, for example, paragraph (15) of the commentary to draft guideline 2.5.1 above.

⁴³⁶ See, for example, draft guidelines 2.3.1 and 2.3.2.

(14) In order to assist the negotiators of treaties where this kind of problem arises, the Commission has decided to include in the Guide to Practice model clauses on which they could base themselves, if necessary. The scope of these model clauses and the “instructions for use” are clarified in an “Explanatory note” at the beginning of the Guide.

Model clause A. *Deferment of the effective date of the withdrawal of a reservation*

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

Commentary

(1) The purpose of model clause A is to extend the period of time required for the effective date of the withdrawal of a reservation and is recommended especially in cases when the other Contracting Parties might have to bring their own internal law into line with the new situation created by the withdrawal.⁴³⁷

(2) Although negotiators are obviously free to modify as they wish the length of time needed for the withdrawal of the reservation to take effect, it would seem desirable that, in the model clause proposed by the Commission, the period should be calculated as dating from receipt of notification of the withdrawal by the depositary, rather than by the other Contracting Parties, as article 22, paragraph 3 (a), of the Vienna Conventions provides. In the first place, the effective date established in that paragraph, which should certainly be retained in draft guideline 2.5.8 [2.5.9], is deficient in several respects.⁴³⁸ In the second place, in cases such as this, the parties are in possession of all the information indicating the probable timescale of communication of the withdrawal to the other States or international organizations concerned; they can thus set the effective date accordingly.

Model clause B. *Earlier effective date of withdrawal of a reservation*

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

Commentary

(1) Model clause B is designed to cover the opposite situation to the one dealt with in model A, since situations may arise in which the parties agree that they prefer a shorter timescale than that resulting from the application of the principle embodied in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions and also

contained in draft guideline 2.5.8 [2.5.9]. They may wish to avoid the slowness and uncertainty linked to the requirement that the other Contracting Parties must have received notification of withdrawal. This is especially when there would be no need to modify internal law as a consequence of the withdrawal of a reservation by another State or organization.

(2) There is no reason against this, so long as the treaty in question contains a provision derogating from the general principle contained in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions and shortening the period required for the withdrawal to take effect. The inclusion in the treaty of a provision reproducing the text of model clause B, whose wording is taken from article 32, paragraph 3, of the European Convention on Trans-frontier Television,⁴³⁹ would achieve that objective.

Model clause C. *Freedom to set the effective date of withdrawal of a reservation*

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

Commentary

(1) The Contracting Parties may also wish to leave it to the discretion of the reserving State or international organization to determine the date on which the withdrawal would take effect. Model clause C, whose wording follows that of article 12, paragraph 2, of the Protocol of Amendment to the International Convention on the simplification and harmonization of Customs procedures,⁴⁴⁰ applies to this situation.

(2) The insertion of such a clause in a treaty is pointless in the cases covered by draft guideline 2.5.9 and is of no real significance unless the intention is to permit the author of the reservation to give immediate effect to the withdrawal of the reservation or, in any event, to ensure that it becomes operative more rapidly than is provided for in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions. The purposes of model clause C are therefore similar to those of model clause B.

2.5.9 [2.5.10] *Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation*

The withdrawal of a reservation takes effect on the date set by the withdrawing State where:

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

⁴³⁷ See paragraph (4) of the commentary to draft guideline 2.5.8 [2.5.9] above.

⁴³⁸ See the commentary to draft guideline 2.5.8 [2.5.9] above.

⁴³⁹ See the complete text in paragraph (10) of the commentary to draft guideline 2.5.8 [2.5.9] above.

⁴⁴⁰ See footnote 426 above.

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

Commentary

(1) Draft guideline 2.5.9 [2.5.10] specifies the cases in which article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions does not apply, not because there is an exemption to it, but because it is not designed for that purpose. Regardless of the situations in which an express clause of the treaty rules out the application of the principle embodied in this provision, this applies in the two above-mentioned cases, where the author of the reservation can unilaterally set the effective date of its withdrawal.

(2) Subparagraph (a) of draft guideline 2.5.9 [2.5.10] considers the possibility of a reserving State or international organization setting that date at a time later than that resulting from the application of article 22, paragraph 3 (a), of the Conventions. This does not raise any particular difficulties: the period provided for therein is intended to enable the other parties not to be caught unawares and to be fully informed of the scope of their commitments in relation to the State (or international organization) renouncing its reservation. From such time as that information is effective and available, therefore, there is no reason why the reserving party should not set the effective date of the withdrawal of its reservation as it wishes, since, in any case, it could have deferred the date by notifying the depositary of the withdrawal at a later time.

(3) Subparagraph (a) of draft guideline 2.5.9 [2.5.10] deliberately uses the plural (“the other contracting States or international organizations”) where article 22, paragraph 3 (a), of the Conventions uses the singular (“that State or that organization”). For the withdrawal to take effect on the date specified by the withdrawing State, it is essential that *all* the other Contracting Parties should have received notification, otherwise neither the spirit nor the *raison d’être* of article 22, paragraph 3 (a), would have been respected.

(4) Subparagraph (b) concerns cases in which the date set by the author of the reservation is prior to the receipt of notification by the other Contracting Parties. In that situation, only the withdrawing State or international organization (and, where relevant, the depositary) knows that the reservation has been withdrawn. This applies all the more where the withdrawal is assumed to be retroactive, as sometimes occurs.⁴⁴¹

(5) In the absence of a specific treaty provision, an intention expressed unilaterally by the reserving State cannot, in theory, prevail over the clear provisions of article 22, paragraph 3 (a), of the Conventions if the other Contracting Parties object. The Commission believes, however,

that it is not worth making an exception of the category of treaties establishing “integral obligations”, especially in the field of human rights; in such a situation, there can be no objection—quite the contrary—to the fact that the withdrawal takes immediate, even retroactive effect, if the State making the original reservation so wishes, since the legislation of other States is, by definition, not affected.⁴⁴² In practice, this is the kind of situation in which retroactive withdrawals have occurred.⁴⁴³

(6) The Commission debated whether it was preferable to view the question from the angle of the withdrawing State or that of the other parties, in which case subparagraph (b) would have been worded “the withdrawal does not add to the obligations of the other contracting States or international organizations”. After lengthy discussion, the Commission agreed that there were two sides of the same coin and opted for the first solution, which seemed to be more consistent with the active role of the State that decides to withdraw its reservation.

(7) In the English text, the term “*auteur du retrait*” is translated by “withdrawing State or international organization”. It goes without saying that this refers not to a State or an international organization which withdraws from a treaty, but to one which withdraws its reservation.

2.5.10 [2.5.11] *Partial withdrawal of a reservation*

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

2. The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

Commentary

(1) In accordance with the prevailing doctrine, “[s]ince a reservation can be withdrawn, it may in certain circumstances be possible to modify or even replace a reservation, provided the result is to limit its effect”.⁴⁴⁴ While this principle is formulated in prudent terms, it is hardly questionable and can be stated more categorically: nothing prevents the modification of a reservation if the modification reduces the scope of the reservation and amounts to a partial withdrawal. This is the point of departure of draft guideline 2.5.10.

(2) Clearly, this does not raise the slightest problem when such a modification is expressly provided for by the treaty. While this is relatively rare, there are reservation clauses to this effect. Thus, for example, article 23, paragraph 2, of the Convention on the Contract for the Inter-

⁴⁴¹ See the example given by Imbert, *op. cit.* (footnote 291 above), p. 291, footnote (38) (withdrawal of reservations by Denmark, Norway and Sweden to the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons). See also United Nations, *Multilateral Treaties ...* (footnote 327 above), pp. 314 and 319–320.

⁴⁴² In this connection, see Imbert, *op. cit.* (footnote 291 above), pp. 290–291.

⁴⁴³ See footnote 441 above.

⁴⁴⁴ A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), p. 128. See also Imbert, *op. cit.* (footnote 291 above), p. 293; and Polakiewicz, *op. cit.* (footnote 330), p. 96.

national Carriage of Passengers and Luggage by Inland Waterway (CVN) provides that:

The declaration provided for in paragraph 1 of this article may be made, withdrawn or modified at any later date; in such case, the declaration, withdrawal or modification shall take effect as from the ninetieth day after receipt of the notice by the Secretary-General of the United Nations.

(3) In addition, reservation clauses expressly contemplating the total or partial withdrawal of reservations are to be found more frequently. For example, article 8, paragraph 3, of the Convention on the nationality of married women, provides that:

Any State making a reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received.⁴⁴⁵

The same applies to article 17, paragraph 2, of the Convention on the Protection of the Environment through Criminal Law, which reads as follows:

Any State which has made a reservation ... may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.⁴⁴⁶

In addition, under article 15, paragraph 2, of the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union:

Any Member State which has entered a reservation may withdraw it at any time in whole or in part by notifying the depositary. Withdrawal shall take effect on the date on which the depositary receives the notification.

(4) The fact that partial or total withdrawal is mentioned simultaneously in numerous treaty clauses highlights the close relationship between them. This relationship, confirmed in practice, is, however, sometimes contested in the literature.

(5) During the preparation of the draft articles on the law of treaties by the Commission, Sir Humphrey Waldock suggested the adoption of a draft article placing the total and partial withdrawal of reservations on an equal footing.⁴⁴⁷ Following the consideration of this draft by the Drafting Committee, it returned to the plenary stripped of

any reference to the possibility of withdrawing a reservation “in part”,⁴⁴⁸ although no reason for this modification can be inferred from the summaries of the discussions. The most plausible explanation is that this seemed to be self-evident—“he who can do more can do less”—and the word “withdrawal” should very likely be interpreted, given the somewhat surprising silence of the commentary, as meaning “total or partial withdrawal”.

(6) The fact remains that this is not entirely self-evident and that practice and the literature⁴⁴⁹ appear to be somewhat undecided. In practice, one can cite a number of reservations to conventions concluded within the framework of the Council of Europe which were modified without arousing opposition.⁴⁵⁰ For its part, the European Commission of Human Rights showed a certain flexibility as to the time requirement set out in article 64 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights):⁴⁵¹

As internal law is subject to modification from time to time, the Commission considered that a modification of the law protected by the reservation, even if it entails a modification of the reservation, does not undermine the time requirement of article 64. According to the Commission, despite the explicit terms of article 64 ... to the extent that a law *then in force* in its territory is not in conformity ... the reservation signed by Austria on 3 September 1958 (1958–59) (2 *Yearbook* 88–91) covers ... the law of 5 July 1962, which did not have the result of enlarging, *a posteriori*, the area removed from the control of the Commission.⁴⁵²

(7) This latter clarification is essential and undoubtedly provides the key to this jurisprudence: it is *because* the new law *does not enlarge* the scope of the reservation that the Commission of Human Rights considered that it was covered by the law.⁴⁵³ Technically, what is at issue is not

⁴⁴⁸ *Ibid.*, art. 22, pp. 71–72; on the changes made by the Drafting Committee to the draft prepared by the Special Rapporteur, see paragraph (3) of the commentary to draft guideline 2.5.1 above.

⁴⁴⁹ See Imbert, *op. cit.* (footnote 291 above), p. 293.

⁴⁵⁰ See Polakiewicz, *op. cit.* (footnote 330 above), p. 96; admittedly, it seems to be more a matter of “[s]tatements concerning modalities of implementation of a treaty at the internal level” within the meaning of draft guideline 1.4.5 [1.2.6] adopted at the fifty-first session of the Commission (*Yearbook* ... 1999, vol. II (Part Two), p. 118) than of reservations as such.

⁴⁵¹ Article 57 since the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby:

“(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

(2) Any reservation made under this Article shall contain a brief statement of the law concerned.”

⁴⁵² W. A. Schabas, “Article 64”, *La Convention européenne des droits de l’homme: commentaire article par article*, L.-E. Pettiti, E. Decaux and P.-H. Imbert, eds. (Paris, Economica, 1995), p. 932. See the reports of the European Commission of Human Rights in the cases of *X v. Austria*, application No. 473/59, *Yearbook of the European Convention on Human Rights*, 1958–1959, p. 400, and *ibid.*, application No. 8180/78, Council of Europe, *Decisions and Reports*, vol. 20 (December 1980), pp. 23–25.

⁴⁵³ See the partly dissenting opinion of Judge Valticos in the *Chorherr v. Austria* case: “Where the law in question is amended, the discrepancy to which the reservation relates could no doubt, if a strict view is not taken, be retained in the new text, but it could not of course be widened” (European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 266 B, judgment of 25 August 1993, p. 40).

⁴⁴⁵ See also, for example, article 50, paragraph 4, of the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961: “A State which has made reservations may at any time by notification in writing withdraw all or part of its reservations.”

⁴⁴⁶ See also, for example, article 13, paragraph 2, of the European Convention on the suppression of terrorism: “Any State may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.” For other examples of conventions concluded under the auspices of the Council of Europe and containing a comparable clause, see the commentary to draft guideline 2.5.2 above.

⁴⁴⁷ See draft article 17, para. 6, in Sir Humphrey Waldock’s first report on the law of treaties, *Yearbook* ... 1962, vol. II, document A/CN.4/144, p. 61.

modification of the reservation itself, but the effect of the modification of the internal law; nevertheless, it seems legitimate to make the same argument. Moreover, in some cases, States formally modified their reservations to the European Convention on Human Rights (in the sense of diminishing their scope) without protest from the other Contracting Parties.⁴⁵⁴

(8) The jurisprudence of the European Court of Human Rights can be interpreted in the same way, in the sense that, while the Court refuses to extend to new, more restrictive laws the benefit of a reservation made upon ratification, it proceeds differently if, following ratification, the law “goes no further than a law in force at the time when the reservation was made”.⁴⁵⁵ The outcome of the *Belilos* case⁴⁵⁶ is, however, likely to raise doubts in this regard.

(9) Following the position taken by the European Court of Human Rights concerning the follow-up to its finding that the Swiss declaration made in 1974, relating to article 6, paragraph 1, of the European Convention on Human Rights, was invalid,⁴⁵⁷ Switzerland not without hesitation,⁴⁵⁸ first modified its declaration—equated by the Court with a reservation, at least insofar as the applicable rules were concerned—so as to render it compatible with the judgment of 29 April 1988.⁴⁵⁹ The “interpretative declaration” thus modified was notified by Switzerland to the Secretary General of the Council of Europe, the depositary of the Convention, and to the Committee of Ministers “acting as a monitoring body for the enforcement of judgements of the Court”.⁴⁶⁰ These notifications do not seem to have given rise to disputes or raised difficulties on the part of the Convention bodies or other States parties.⁴⁶¹ However, the situation in the Swiss courts was

different. In a decision dated 17 December 1992, *F. v. R. and the Council of State of Thurgau Canton*,⁴⁶² the Swiss Federal Tribunal decided, with regard to the grounds for the *Belilos* decision, that it was the entire “interpretative declaration” of 1974 which was invalid and thus that there was no validly formulated reservation to be amended 12 years later; if anything, it would have been a new reservation, which was incompatible with the *ratione temporis* condition for the formulation of reservations established in article 64 of the Convention⁴⁶³ and in article 19 of the 1969 Vienna Convention.⁴⁶⁴ On 29 August 2000, Switzerland officially withdrew its “interpretative declaration” concerning article 6 of the European Convention.⁴⁶⁵

(10) Despite appearances, however, it cannot be inferred from this important decision that the fact that a treaty body with a regulatory function (human rights or other) invalidates a reservation prohibits any change in the challenged reservation:

— The Swiss Federal Tribunal’s position is based on the idea that, in this case, the 1974 declaration was invalid in its entirety (even if it had not been explicitly invalidated by the European Court of Human Rights) and, above all

— In that same decision, the Tribunal stated that:

While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed. While neither article 64 of the European Convention on Human Rights nor the 1969 Vienna Convention on the Law of Treaties (RS 0.111) explicitly settles this issue, it would appear that, as a rule, the reformulation of an existing reservation should be possible if its purpose is to attenuate an existing reservation. This procedure does not limit the relevant State’s commitment vis-à-vis other States; rather, it increases it in accordance with the Convention.⁴⁶⁶

(11) This is an excellent presentation of both the applicable law and its basic underlying premise: there is no valid reason for preventing a State from *limiting* the scope of a previous reservation by withdrawing it, if only in part; the treaty’s integrity is better ensured thereby and it is not impossible that, as a consequence, some of the other parties may withdraw objections that they had made to the initial reservation.⁴⁶⁷ Furthermore, as has been pointed out, without this option, the equality between parties would be disrupted (at least in cases where a treaty monitoring body exists): “States which have long been parties to the Convention might consider themselves to be subject to unequal treatment by comparison with States which ratified the Convention [more recently] and, a

⁴⁵⁴ See the successive partial withdrawals by Finland of its reservation to article 6 in 1996, 1998, 1999 and 2001 (<http://conventions.coe.int>).

⁴⁵⁵ European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 48, case of *Campbell and Cosans*, judgment of 25 February 1982, p. 17, para. 37 (b).

⁴⁵⁶ *Ibid.*, vol. 132, *Belilos* case, judgment of 29 April 1988.

⁴⁵⁷ *Ibid.*, p. 28, para. 60: the Court held that “the declaration in question does not satisfy two of the requirements of Article 64 of the Convention (see footnote 451 above), with the result that it must be held to be invalid” and that, since “it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration”. The Convention should be applied to Switzerland irrespective of the declaration.

⁴⁵⁸ See I. Cameron and F. Horn, “Reservations to the European Convention on Human Rights: the *Belilos* case”, *German Yearbook of International Law*, vol. 33 (1990), pp. 69–129.

⁴⁵⁹ Believing that the Court’s rebuke dealt only with the “criminal aspect”, Switzerland had limited its declaration to civil proceedings.

⁴⁶⁰ 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 § 1”, *Revue universelle des droits de l’homme*, vol. 5, Nos. 9–10 (1993), p. 298, note 9; see also W. A. Schabas, “Reservations to human rights treaties: time for innovation and reform”, *The Canadian Yearbook of International Law*, vol. XXXII (1994), p. 49. For references to these notifications, see United Nations, *Treaty Series*, vol. 1496, No. 2889, annex A, pp. 234–235, vol. 1525, p. 213, vol. 1561, pp. 386–387, and resolution DH (89) 24 concerning the judgment of the European Court of Human Rights of 29 April 1988 in the *Belilos* case, *Yearbook of the European Convention on Human Rights*, vol. 32 (1989), p. 245.

⁴⁶¹ Some authors have, however, contested their validity; see 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.

XCIII (1989), p. 314, and the works cited in *F. v. R. and the Council of State of Thurgau Canton* (footnote 462 below), judgement of the Swiss Federal Tribunal (para. 6 (b)), and by Flauss, “Le contentieux de la validité ...” (footnote 460 above), p. 300.

⁴⁶² Swiss Federal Tribunal, *Journal des tribunaux* (1995), p. 523.

⁴⁶³ See footnote 451 above.

⁴⁶⁴ Extensive portions of the Swiss Federal Tribunal’s decision are cited in French translation in the *Journal des tribunaux* (see footnote 462 above), pp. 533–537; German text in *Europäische Grundrechte-Zeitschrift*, vol. 20 (1993). The relevant passages are to be found in paragraph 7 of the decision in the French text.

⁴⁶⁵ See United Nations, *Treaty Series*, vol. 2123, No. 2889, p. 141.

⁴⁶⁶ See the decision mentioned in *Journal des tribunaux* (footnote 462 above), p. 535.

⁴⁶⁷ See Horn, *op. cit.* (footnote 291 above), p. 223.

fortiori, with future Contracting Parties”⁴⁶⁸ that would have the advantage of knowing the treaty body’s position regarding the validity of reservations comparable to the one that they might be planning to formulate and of being able to modify it accordingly.

(12) Moreover, it was such considerations⁴⁶⁹ which led the Commission to state in 1997 in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties⁴⁷⁰ that, in taking action on the inadmissibility of a reservation, the State may, for example, modify its reservation so as to eliminate the inadmissibility;⁴⁷¹ obviously, this is possible only if it has the option of modifying the reservation by partially withdrawing it.

(13) In practice, partial withdrawals, while not very frequent, are far from non-existent; however, there are not many withdrawals of reservations in general. In 1988, Horn noted that, of 1,522 reservations or interpretative declarations made in respect of treaties of which the Secretary-General of the United Nations was the depositary, “47 have been withdrawn completely or partly.”⁴⁷² In the majority of cases, i.e., 30 statements, the withdrawals have been partial. Of these, 6 have experienced successive withdrawals leading in only two cases to a complete withdrawal.”⁴⁷³ This trend, while not precipitous, has continued in recent years as demonstrated by the following examples:

(a) On 11 November 1988, Sweden partially withdrew its reservation to article 9, paragraph 2, of the Convention on the Recovery Abroad of Maintenance;⁴⁷⁴

(b) On two occasions, in 1986 and 1995, Sweden also withdrew, in whole or in part, some of its reservations to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations;⁴⁷⁵ and

(c) On 5 July 1995, following several objections, the Libyan Arab Jamahiriya modified the general reservation that it had made upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women, making it more specific.⁴⁷⁶

In all these cases, which provide only a few examples, the Secretary-General, as depositary of the conventions in question, took note of the modification without any comment whatsoever.

(14) The Secretary-General’s practice is not absolutely consistent, however, and, in some cases, even those involving modifications which apparently reduce the scope of the reservations in question, he proceeds as in the case of late formulation of reservations⁴⁷⁷ and confines himself, “[i]n keeping with the ... practice followed in similar cases”, to receiving “the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged”.⁴⁷⁸ This practice is defended in the following words in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*: “[W]hen States have wished to substitute new reservations for initial reservations made at the time of deposit ... this has amounted to a withdrawal of the initial reservations—which raised no difficulty—and the making of (new) reservations.”⁴⁷⁹ This position seems to be confirmed by a note verbale dated 4 April 2000 from the Legal Counsel of the United Nations, which describes “the practice followed by the Secretary-General as depositary in respect of communications from States which seek to modify their existing reservations to multilateral treaties deposited with the Secretary-General or which may be understood to seek to do so”⁴⁸⁰ and extends the length of time during which parties may object from 90 days to 12 months.⁴⁸¹

(15) Not only is this position contrary to what appears to be the accepted practice when the proposed modification limits the scope of the modified reservation; it is more qualified than initially appears. The note verbale of 4 April 2000 must be read together with the Legal Counsel’s reply, of the same date, to a note verbale from Portugal reporting, on behalf of the European Union, problems associated with the 90-day time period. That note makes a distinction between a modification of an existing

⁴⁶⁸ Flauss, “Le contentieux de la validité ...” (footnote 460 above), p. 299.

⁴⁶⁹ See *Yearbook ... 1997*, vol. II (Part Two), p. 45, paras. 55–56; p. 49, para. 86; and p. 55, paras. 141–144.

⁴⁷⁰ See footnote 232 above.

⁴⁷¹ *Ibid.*, preliminary conclusion No. 10, p. 57.

⁴⁷² Of these 47 withdrawals, 11 occurred during a succession of States. There is no question that a successor State may withdraw reservations made by its predecessor, in whole or in part (see article 20 of the 1978 Vienna Convention); however, as the Commission has decided (see *Yearbook ... 1995*, vol. II (Part Two), p. 107, para. 477, and *Yearbook ... 1997*, vol. II (Part Two), p. 68, para. 221) all problems concerning reservations related to the succession of States will be studied *in fine* and will be the subject of a separate chapter of the Guide to Practice.

⁴⁷³ *Op. cit.* (see footnote 291 above), p. 226. These figures are an interesting indication, but should be viewed with caution.

⁴⁷⁴ See United Nations, *Multilateral Treaties ...* (footnote 327 above), vol. II, p. 185, note 9; see also Sweden’s 1966 “reformulation” of one of its reservations to the Convention relating to the Status of Refugees and its simultaneous withdrawal of several other reservations (*ibid.*, vol. I, p. 325, note 23) and the partial, then total (in 1963 and 1980, respectively) withdrawal of a reservation by Switzerland to that Convention (*ibid.*, note 24).

⁴⁷⁵ *Ibid.*, vol. II, p. 64, note 7; see also Finland’s modification of 10 February 1994 reducing the scope of a reservation to the same Convention (note 5).

⁴⁷⁶ *Ibid.*, vol. I, p. 247, note 28.

⁴⁷⁷ See paragraphs (10)–(12) of the commentary to draft guideline 2.3.1, adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two), pp. 186–187.

⁴⁷⁸ United Nations, *Multilateral Treaties ...*, vol. I (see footnote 327 above), p. 304, note 6. See, for example, the procedure followed in the case of Azerbaijan’s undeniably limiting modification of 28 September 2000 (in response to the comments of States which had objected to its initial reservation) of its reservation to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (*ibid.*).

⁴⁷⁹ *Summary of Practice of the Secretary-General ...* (see footnote 307 above), p. 62, para. 206.

⁴⁸⁰ Note verbale from the Legal Counsel (modification of reservations), 2000 (LA41TR/221 (23–1), *Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2, p. 42.

⁴⁸¹ For further information on this time period, see paragraphs (8)–(9) of the commentary to draft guideline 2.3.2, adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two), p. 190.

reservation and a partial withdrawal thereof. In the case of the second type of communication, the Legal Counsel shared the concerns expressed by Portugal that it was highly desirable that, as far as possible, communications which were no more than partial withdrawals of reservations should not be subjected to the procedure that was appropriate for modifications of reservations.

(16) The question is thus merely one of wording: the Secretary-General refers to withdrawals which enlarge the scope of reservations as “modifications” and to those which reduce that scope as “partial withdrawals”; the latter are not (or should not be, although this is not always translated into practice) subject to the cumbersome procedure required for the late formulation of reservations.⁴⁸² To require a one-year time period before the limitation of a reservation can produce effects, subjecting it to the risk of a “veto” by a single other party, would obviously be counterproductive and in violation of the principle that, to the extent possible, the treaty’s integrity should be preserved.

(17) Despite some elements of uncertainty, the result of the foregoing considerations is that the modification of a reservation whose effect is to reduce its scope must be subject to the same legal regime as a total withdrawal. In order to avoid any ambiguity, especially in view of the terminology used by the Secretary-General of the United Nations,⁴⁸³ it is better to refer here to a “partial withdrawal”.

(18) Paragraph 2 of draft guideline 2.5.10 [2.5.11] takes account of the alignment of the rules on partial withdrawal of reservations with those that apply in the case of a total withdrawal. Therefore, it implicitly refers to draft guidelines 2.5.1, 2.5.2, 2.5.5 [2.5.5. *bis*, 2.5.5. *ter*] 2.5.6 and 2.5.8 [2.5.9], which fully apply to partial withdrawals. The same is not true, however, regarding draft guideline 2.5.7 [2.5.7, 2.5.8], on the effect of a total withdrawal.⁴⁸⁴

(19) To avoid any confusion, the Commission also deemed it useful to set out in the first paragraph the definition of what constitutes a partial withdrawal. The definition draws on the actual definition of reservations that stems from article 2 (*d*) of the 1969 and 1986 Vienna Conventions and on draft guidelines 1.1 and 1.1.1 [1.1.4] (to which the phrase “achieves a more complete application ... of the treaty as a whole” refers).

(20) It is not, however, aligned with that guideline: whereas a reservation is defined “subjectively” by the objective pursued by the author (as reflected by the expression “purports to ...” in those provisions), partial withdrawal is defined “objectively” by the effects that it produces. The explanation for the difference lies in the fact that, while a reservation produces an effect only if it is accepted (expressly or implicitly),⁴⁸⁵ withdrawal, whether total or partial, produces its effects and “the consent of a State or of an international organization which

has accepted the reservation is not required”;⁴⁸⁶ nor indeed is any additional formality. This effect is mentioned in paragraph 1 of draft guideline 2.5.10 [2.5.11] (“partial withdrawal ... limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole”) and explained in draft guideline 2.5.11 [2.5.12].

2.5.11 [2.5.12] *Effect of a partial withdrawal of a reservation*

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

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

Commentary

(1) While the form and procedure of a partial withdrawal must definitely be aligned with those of a pure and simple withdrawal,⁴⁸⁷ the problem also arises of whether the provisions of draft guideline 2.5.7 [2.5.7, 2.5.8] (Effect of withdrawal of a reservation) can be transposed to partial withdrawals. In fact, there can be no hesitation: a partial withdrawal of a partial reservation cannot be compared to that of a total withdrawal nor can it be held that the *partial* “withdrawal of a reservation entails the application as a whole* of the provisions on which the reservation had been made in the relations between the State or international organization which” *partially* “withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it”.⁴⁸⁸ Of course, the treaty may be implemented more fully in the relations between the reserving State or international organization and the other Contracting Parties, but not “as a whole” since, hypothetically, the reservation (in a more limited form, admittedly) remains.

(2) However, while partial withdrawal of a reservation does not constitute a new reservation,⁴⁸⁹ it nonetheless leads to modification of the previous text. Thus, as the first sentence of draft guideline 2.5.11 [2.5.12] specifies, the legal effect of the reservation is modified “to the extent of the new formulation of the reservation”. This wording is based on the terminology used in article 21 of the 1969 and 1986 Vienna Conventions⁴⁹⁰ without entering into a

⁴⁸⁶ See draft guideline 2.5.1 above.

⁴⁸⁷ See paragraph (18) of the commentary to draft guideline 2.5.10 [2.5.11] above.

⁴⁸⁸ See draft guideline 2.5.7 [2.5.7, 2.5.8] above.

⁴⁸⁹ See paragraph (15) of the commentary to draft guideline 2.5.10 [2.5.11] above.

⁴⁹⁰ See article 21, paragraph 1, of the 1969 Vienna Convention:

“A reservation established with regard to another party in accordance with articles 19, 20 and 23:

“(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation.”

⁴⁸² See draft guidelines 2.3.1–2.3.3, adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two), pp. 185–191.

⁴⁸³ See paragraphs (14)–(16) of the commentary to draft guideline 2.5.10 [2.5.11] above.

⁴⁸⁴ See draft guideline 2.5.11 [2.5.12] and paragraph (1) of the commentary below.

⁴⁸⁵ See article 20 of the 1969 and 1986 Vienna Conventions.

substantive discussion of the effects of reservations and objections thereto.

(3) Another specific problem arises in the case of partial withdrawal. In the case of total withdrawal, the effect is to deprive of consequences the objections that had been made to the reservation as initially formulated,⁴⁹¹ even if those objections had been accompanied by opposition to the entry into force of the treaty with the reserving State or international organization.⁴⁹² There is no reason for this to be true in the case of a partial withdrawal. Admittedly, States or international organizations that had made objections would be well advised to reconsider them and withdraw them if the motive or motives that gave rise to them were eliminated by the modification of the reservation and they may certainly proceed to withdraw them,⁴⁹³ but they cannot be required to do so and they may perfectly well maintain their objections if they deem it appropriate, on the understanding that the objection has been expressly justified by the part of the reservation that has been withdrawn. In the latter case, the objection disappears, which is what is meant by the phrase “to the extent that the objection does not apply exclusively to the part of the reservation which has been withdrawn”. Two questions nonetheless arise in this connection.

(4) The first is to know whether the authors of an objection not of this nature must formally confirm it or whether it must be understood to apply to the reservation in its new formulation. In the light of practice, there is scarcely any doubt that this assumption of continuity is essential and the Secretary-General of the United Nations, as depositary, seems to consider that the continuity of the objection goes without saying.⁴⁹⁴ This seems fairly reasonable, for

⁴⁹¹ See paragraph 1 of draft guideline 2.5.7 [2.5.7, 2.5.8] above (“whether they had accepted the reservation or objected to it”).

⁴⁹² See paragraph 2 of draft guideline 2.5.7 [2.5.7, 2.5.8] above.

⁴⁹³ See paragraph (11) of the commentary to draft guideline 2.5.10 [2.5.11], and footnote 467 above.

⁴⁹⁴ The objections of Denmark, Finland, Mexico, the Netherlands, Norway and Sweden to the reservation formulated by the Libyan Arab Jamahiriya to the Convention on the Elimination of All Forms of Discrimination against Women (see the commentary to draft guideline 2.5.10 [2.5.11], and footnote 476 above) were not modified following

the partial withdrawal does not eliminate the initial reservation and does not constitute a new reservation; *a priori*, the objections that were made to it rightly continue to apply as long as their authors do not withdraw them. The second sentence of paragraph 1 of draft guideline 2.5.11 [2.5.12] draws the necessary consequences.

(5) The second question that arises is whether partial withdrawal of the reservation can, conversely, constitute a new opportunity to object to the reservation resulting from the partial withdrawal. Since it is not a new reservation, but an attenuated form of the existing reservation, reformulated so as to bring the reserving State’s commitments more fully into line with those provided for in the treaty, it might seem, *prima facie*, very doubtful that the other Contracting Parties can object to the new formulation:⁴⁹⁵ if they have adapted to the initial reservation, it is difficult to see how they can go against the new one, which, in theory, has attenuated effects. In principle, therefore, a State cannot object to a partial withdrawal any more than it can object to a pure and simple withdrawal.

(6) In the Commission’s view, there is nonetheless an exception to this principle. While there seems to be no example, a partial withdrawal might have a discriminatory effect. Such would be the case if, for instance, a State or an international organization renounced a previous reservation except *vis-à-vis* certain parties or categories of parties or certain categories of beneficiaries to the exclusion of others. In those cases, it would seem necessary for those parties to be able to object to the reservation even though they had not objected to the initial reservation when it applied to all of the Contracting Parties together. Paragraph 2 of draft guideline 2.5.11 [2.5.12] sets out both the principle that it is impossible to object to a reservation in the event of a partial withdrawal and the exception when the withdrawal is discriminatory.

the reformulation of the reservation and are still listed in *Multilateral Treaties* (footnote 327 above), vol. I, pp. 239–244.

⁴⁹⁵ Whereas they can certainly remove their initial objections, which, like reservations themselves, can be withdrawn at any time (see article 22, paragraph 2, of the 1969 and 1986 Vienna Conventions); see also paragraph (11) of the commentary to draft guideline 2.5.10 [2.5.11] above.