Chapter IX

RESERVATIONS TO TREATIES

A. Introduction

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

249. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.[517]

250. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[518]

251. 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 Vienna Convention on succession of States in respect of treaties (hereinafter "1978 Vienna Convention") and the 1986 Vienna Convention.[519] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to Practice is concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

252. Also at its forty-seventh session, the Commission, in accordance with its earlier practice,[520] 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.[521] 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.[522]

253. At its forty-eighth session, in 1996, the Commission had before it the Special Rapporteur's second report on the topic.[523] The Special Rapporteur had annexed to his report a draft resolution of the Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[524] 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 session.[525]

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

255. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[526]

256. 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.

257. At its fiftieth session, in 1998, the Commission had before it the Special Rapporteur's third report on the topic,[527] which dealt with the definition of reservations and interpretative declarations to treaties. At the same session, the Commission provisionally adopted six draft guidelines.[528]

258. At its fifty-first session, in 1999, the Commission again had before it the part of the Special Rapporteur's third report which it had not had time to consider at its

---

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

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

[519] *Ibid.*, vol. II (Part Two), p. 108, para. 487.

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

[521] See *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489. The questionnaires sent to States and international organizations are reproduced in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, Annexes II and III.

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

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

[524] *Ibid.*, vol. II (Part Two), para. 136 and footnote 238.

[525] A summary of the debate is in *ibid.*, chap. VI, sect. B, especially para. 137.

[526] *Yearbook ... 1997*, vol. II (Part Two), para. 157.

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

[528] *Ibid.*, vol. II (Part Two), para. 540.

fiftieth session and his fourth report.[529] Moreover, the revised bibliography on the topic, the first version of which the Special Rapporteur had submitted at the forty-eighth session as an annex to his second report, was annexed to the report. The fourth report also dealt with the definition of reservations and interpretative declarations. At the same session, the Commission provisionally adopted 17 draft guidelines.[530]

259. 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] and of the draft guideline without a title or number (which has become draft guideline 1.6 (Scope of definitions)).

260. At the fifty-second session, in 2000, the Commission had before it the Special Rapporteur's fifth report on the topic,[531] 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.[532] The Commission also deferred consideration of the second part of the fifth report of the Special Rapporteur to the following session.

261. 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 report[533] 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).

262. At the same session the Commission provisionally adopted 12 draft guidelines.[534]

263. At the fifty-fourth session, in 2002, the Commission had before it the Special Rapporteur's seventh report[535] relating to the formulation, modification and withdrawal of reservations and interpretative declarations. At the same session the Commission provisionally adopted 11 draft guidelines.[536]

264. 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).

265. At its fifty-fifth session, in 2003, the Commission had before it the Special Rapporteur's eighth report,[537] relating to withdrawal and modification of reservations and interpretative declarations as well as to the formulation of objections to reservations and interpretative declarations.

266. At its 2760th meeting on 21 May 2003, the Commission considered and provisionally adopted 11 draft guidelines referred to the Drafting Committee at the fifty-fourth session.[538]

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

268. At its 2783rd meeting on 31 July 2003, the Commission decided to refer draft guidelines 2.3.5 (Enlargement of the scope of a reservation),[539] 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.

B. Consideration of the topic at the present session

269. At the present session the Commission had before it the Special Rapporteur's ninth report (A/CN.4/544) relating to the object and definition of objections. In fact this report constituted a complementary section to the eighth report on the formulation of objections to reservations and interpretative declarations.

270. The Commission considered the Special Rapporteur's ninth report at its 2820th, 2821st and 2822nd meetings from 21 to 23 July 2004.

271. At its 2822nd meeting, the Commission decided to refer draft guidelines 2.6.1 (Definition of objections to reservations) and 2.6.2 (Objection to the late formulation or widening of the scope of a reservation) to the Drafting Committee.

---

[529] *Yearbook ... 1999*, vol. II (Part One), documents A/CN.4/499 and A/CN.4/478/Rev.1.

[530] *Ibid.*, vol. II (Part Two), pp. 91–126, para. 470.

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

[532] *Ibid.*, vol. II (Part Two), para. 663.

[533] *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3.

[534] *Ibid.*, vol. II (Part Two) and corrigendum, p. 172, para. 114.

[535] *Yearbook… 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3.

[536] *Ibid.*, vol. II (Part Two), p. 116, para. 50.

[537] *Yearbook… 2003*, vol. II (Part One), document A/CN.4/535 and Add.1.

[538] *Ibid.*, vol. II (Part Two), p. 60, para. 329.

[539] Draft guideline 2.3.5 was referred to the Drafting Committee after a vote.

272. At its 2810th meeting held on 4 June 2004, the Commission considered and provisionally adopted draft guidelines 2.3.5 (Widening of the scope of a reservation), 2.4.9 (Modification of an interpretative declaration), 2.4.10 (Limitation and widening of the scope of a conditional interpretative declaration), 2.5.12 (Withdrawal of an interpretative declaration) and 2.5.13 (Withdrawal of a conditional interpretative declaration). These guidelines had already been referred to the Drafting Committee at the fifty-fifth session.

273. At its 2829th meeting, held on 5 August 2004, the Commission adopted the commentaries to the aforementioned draft guidelines.

274. The text of these draft guidelines and the commentaries thereto are reproduced in section C.2 below.

1. Introduction by the Special Rapporteur of his ninth report

275. The Special Rapporteur introduced his ninth report, explaining that it was in fact a "corrigendum" to the second part of the eighth report, which dealt with the definition of objections (draft guidelines 2.6.1, 2.6.1 *bis* and 2.6.1 *ter*).

276. Although some of the criticism to which the draft guidelines had given rise in the Commission seemed well founded, he was convinced that the Guide to Practice had to define what was meant by "objections". As that term was not defined in the 1969 and 1986 Vienna Conventions, its definition was a matter for the progressive development of international law. The Special Rapporteur had originally taken the view that the definition of "objections" should be modelled on the definition of "reservations"; draft guideline 2.6.1 thus focused on the intention of the objecting State or international organization. During the debates in the Commission in 2003, some members indicated that that starting point was artificial because the effects of article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions on objections are often ambiguous and States may want their objections to produce effects different from those provided for by those texts. Thus, objections by which States claim to have a binding relationship with the author of the reservation under the treaty as a whole, including the provisions to which the reservation relates (objections with "super maximum effect"), were, in the Special Rapporteur's opinion, open to question because the entire law of reservations is dominated by the treaty principle and the idea that States cannot be bound against their will; the fact remains that such objections are still objections. Other types of objections included those by which a State indicates that it intends not to have a binding relationship with the author of the reservation not only under the provisions of the reservation, but also under a set of provisions which are not expressly referred to by the reservation (objections with "intermediate effect").

277. In addition, the original definition proposed by the Special Rapporteur might give the impression that it prejudged the validity of objections and their effects. In order to take account of that criticism, the Special Rapporteur had "suggested" that the draft guideline in question should not be referred to the Drafting Committee. The Commission had also asked States a question on that point and, on the basis of the discussions held in 2003, the comments made in the Sixth Committee and his own thoughts on the matter, the Special Rapporteur had proposed a new definition of "objections".[540]

278. That new definition was neutral, since it did not prejudge the effects an objection may have and left open the question whether objections which purport to have effects other than those provided for by the 1969 and 1986 Vienna Conventions are or are not permissible. Since it was also based on the intention of the author of the objection, it was nevertheless not contrary to the provisions of articles 20 to 23 of the Conventions. It did not, however, indicate which category of States or international organizations could formulate objections or on which date the objections must or could be formulated; those were sensitive issues on which it would be better to draft separate guidelines.

279. The eighth report also contained two other draft guidelines, 2.6.1 *bis* (Objection to late formulation of a reservation) and 2.6.1 *ter* (Object of objections). In the light of the proposed new definition, draft guideline 2.6.1 was no longer necessary, whereas draft guideline 2.6.1 *bis* was essential because it defined another meaning of the term "objection", which, as a result of the terminology used in draft guidelines 2.3.1 to 2.3.3, refers both to an objection to a reservation and to opposition to the late formulation or widening of the scope of the reservation, which is a different institution. This draft guideline was now numbered as 2.6.2.[541] The Special Rapporteur proposed that draft guidelines 2.6.1 and 2.6.2 should be referred to the Drafting Committee.

2. Summary of the debate

280. Several members commended the Special Rapporteur on his flexibility and willingness to reconsider draft guidelines which had given rise to comments and criticism. The new definition of "objections" contained in the ninth report took account of the criticism that had been levelled against the previous definition and the practice of States in respect of objections purporting to have effects other than those provided for by the 1969 and 1986 Vienna Conventions.

281. It was nevertheless pointed out that the result of an objection is usually not "to modify the effects expected of the reservation". As a general rule, no modification of these effects takes place. It would therefore be preferable not to base the definition on the intention of the objecting State, but to say that that State purports to indicate that it

[540] "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 modify the effects expected of the reservation [by the author of the reservation]."

[541] "2.6.2 *Objection to the late formulation or widening of the scope of a reservation*

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

does not accept the reservation or considers it as invalid. Such a definition would distinguish between objections and mere "comments" on a reservation.

282. It was also considered preferable that the definition of objections should specify which States may formulate an objection and when they may do so, in accordance with article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions.

283. Several members expressed the opinion that the definition of objections must also include the objective of *preventing* a reservation from producing its effects. That term should therefore be added to the term "modify" in the definition.

284. It was also pointed out that the word "expected" was far too subjective and that a more precise term such as "intended" should be used instead. It must also be emphasized that the only relationship to be taken into account was that between the reserving State and the objecting State.

285. The view was expressed that the words "however phrased or named" did not belong in the definition of "objections". According to another point of view, the words "purports to modify the effects expected of the reservation" introduced elements that went beyond the effects provided for by the 1969 and 1986 Vienna Conventions: the objecting State excluded provisions of the treaty other than those to which the reservation related, in a spirit of "reprisals", thus departing from the Conventions.

286. It was also asked whether it was not too early to try to establish a definition of "objections" before having considered the effects of objections. It was even asked whether a definition of "objections" was necessary.

287. In any case the definition should exclude reactions that were not true objections, but rather political declarations. The two reformulations of the initial proposal constituted steps in the right direction.

288. It was also pointed out that the provisions of the 1969 and 1986 Vienna Conventions concerning objections were vague and needed to be clarified.

289. The treaty-based and voluntary character of the regime of objections should be preserved. An intention on the part of the objecting State to consider the treaty as binding in its entirety on the reserving State was contrary to that principle.

290. Only signatory States to the treaty could be entitled to formulate objections. That possibility accorded to them was a *quid pro quo* for their obligation not to defeat the object and purpose of a treaty prior to its entry into force. That question, however, could be dealt with in a separate guideline. Other members considered that the definition of "objections" could be considered before turning to the question of their legal effects, even though it would then have to be reconsidered subsequently in the light of the latter question. However, in the context of normative treaties (such as human rights treaties), certain objections might be without effect unless the objecting State refused to enter into a treaty relationship with the reserving State.

291. Several members endorsed draft guideline 2.6.2, stressing its usefulness. However, the view was expressed that the guideline should not be seen as encouraging the late formulation or widening of the scope of a reservation.

3. Special Rapporteur's concluding remarks

292. At the end of the debate, the Special Rapporteur noted that it had been of great interest. Although it concerned only a point of detail, it formed an integral part of his overall approach, which, he recognized, was slow, but which enabled questions to be considered in greater depth, allowing time for reflection. It was to be hoped that the guidelines in the Guide to Practice would be richer, more carefully pondered and more useful as a result of such an approach.

293. The Special Rapporteur stressed the following points:

(*a*) He had no doubts as to the usefulness of defining "objections" at the current stage. That request exactly paralleled the one adopted with regard to the definition of "reservations" prior to any examination of their effects or lawfulness. In that regard, States that had commented on the question in the Sixth Committee had stressed the great value and practical importance of a definition of "objections".

(*b*) Although the 1969 and 1986 Vienna Conventions describe the "objective" effects of objections, none of the successive versions he had proposed did so, because the constant that had emerged from the debate at the previous and current sessions was that the definition of "objections" must be centred on the effects *intended by their author*.

(*c*) Regarding the questions of the time of formulation and the categories of States and international organizations able to formulate an objection, these were highly complex and sensitive matters which should be treated in separate guidelines.

(*d*) In the light of the debate, he envisaged some drafting changes to draft guideline 2.6.1, the most important of which would be the addition of the term "prevent" before the word "modify". On the other hand, he did not think it wise to use only the term "prevent", as a practice had developed whereby States objecting to a reservation excluded, in their relations with the reserving State, provisions of the treaty other than those to which the reservation related. Such an attitude does not prevent the reservation from producing effects, but those effects go beyond what the author of the reservation had wished. In other words, the objecting State accepts the reservation, but draws consequences from it that go beyond what the author of the reservation would have wanted. It was in that sense that he had used the term "modification". Without taking a position on the question whether such objections were or were not valid, he thought that, *prima facie*, they fell within the consensual framework on which the Vienna regime was based, unlike reservations with super maximum effect, which diverged from it.

(*e*) Another version of draft guideline 2.6.1, *to take account of the various comments made during the debate, could read as follows:*

"*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] [which opposes] a reservation to a treaty [made] [formulated] by another State or international organization, whereby the objecting State or organization purports to exclude or modify the effects of the reservation in relations between the author of the reservation and the author of the objection."

(*f*) Lastly, draft guideline 2.6.2*, which distinguished between the two meanings of the term "objection", had met with almost unanimous approval.*

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

1. Text of draft guidelines

294. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.[542]

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.

[542] See the commentary to guidelines 1.1, 1.1.1 [1.1.4], 1.1.2, 1.1.3 [1.1.8], 1.1.4 [1.1.3] and 1.1.7 [1.1.1] in *Yearbook ... 1998*, vol. II (Part Two), pp. 99–108; 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 in *Yearbook ... 1999*, vol. II (Part Two), pp. 93–126; 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] in *Yearbook … 2000*, vol. II (Part Two), pp. 108–123; 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] in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 180–195; 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] in *Yearbook … 2002*, vol. II (Part Two), pp. 28–48; and 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] and 2.5.8 [2.5.9], to model clauses A, B and C, and to guidelines 2.5.9 [2.5.10], 2.5.10 [2.5.11] and 2.5.11 [2.5.12] in *Yearbook … 2003*, vol. II (Part Two), pp. 70–92. The commentary to guidelines 2.3.5, 2.4.9, 2.4.10, 2.5.12 and 2.5.13 is in section 2 below.

1.1.1 [1.1.4][543] ***Object of reservations***

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

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

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

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

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

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

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

1.1.5 [1.1.6] ***Statements purporting to limit the obligations of their author***

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

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

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

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

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

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.

[543] 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.

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

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

1.2.2 [1.2.1] ***Interpretative declarations formulated jointly***

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

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

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

1.3.1 ***Method of implementation of the distinction between reservations and interpretative declarations***

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

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

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

1.3.3 [1.2.3] ***Formulation of a unilateral statement when a reservation is prohibited***

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 ***Unilateral statements other than reservations and interpretative declarations***

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

1.4.2 [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 a 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 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, if need be, bring the matter to the attention of the State or international organization concerned.

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

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

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

2.1.8 [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.

…[544]

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.

2.3.5 *Widening of the scope of a reservation*

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

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.]

[544] Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

2.4.8 ***Late formulation of a conditional interpretative declaration***[545]

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.

2.4.9 ***Modification of an interpretative declaration***

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.

2.4.10 ***Limitation and widening of the scope of a conditional interpretative declaration***

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

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 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.

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.

[545] 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.

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.

2.5.12 ***Withdrawal of an interpretative declaration***

An interpretative declaration may be withdrawn at any time by the authorities competent for that purpose, following the same procedure applicable to its formulation.

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 reservations.

2. Text of the draft guidelines on reservations to treaties and the commentaries thereto provisionally adopted by the Commission at its fifty-sixth session

295. The text of the draft guidelines together with commentaries thereto provisionally adopted by the Commission at its fifty-sixth session are reproduced below.

2.3.5 *Widening of the scope of a reservation*

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

Commentary

(1) The question of the modification of reservations should be posed in connection with the questions of the withdrawal and late formulation of reservations. Insofar as a modification is intended to lessen the scope of a reservation, what is involved is a partial withdrawal of the initial reservation, which poses no problem in principle, being subject to the general rules concerning withdrawals; the provisions of draft guidelines 2.5.10 [2.5.11] and 2.5.11 [2.5.12] apply.[546] However, if the effect of the modification is to widen an existing reservation, it would seem logical to start from the notion that what is involved is the late formulation of a reservation and to apply to it the rules which are applicable in this regard and which are stated in draft guidelines 2.3.1 to 2.3.3.[547]

(2) This is the reasoning forming the basis for draft guideline 2.3.5, which refers to the rules on the late formulation of reservations and also makes it clear that, if a State makes an "objection" to the widening of the reservation, the initial reservation applies.

(3) These assumptions were contested by a minority of the members of the Commission, who took the view that these rules run counter to the 1969 Vienna Convention and it risked unduly weakening the treaty rights of States. In addition, the established practice of the Council of Europe seems to be to prohibit any "widening" modification.

(4) Within the Council framework, "[t]here have been instances where States have approached the Secretariat requesting information as to whether and how existing reservations could be modified. In its replies the Secretariat has always stressed that modifications which would result in an extension of the scope of existing reservations are not acceptable. Here the same reasoning applies as in the case of belated reservations […]. Allowing such modifications would create a dangerous precedent which would jeopardise legal certainty and impair the uniform implementation of European treaties".[548]

(5) The same author questions whether a State may denounce a treaty to which it has made reservations in order to ratify it subsequently with widened reservations. He feels that such a procedure may constitute an abuse of rights, while admittedly basing his arguments on grounds specific to the Council of Europe conventions.[549]

(6) The majority of the members of the Commission nevertheless considered that a regional practice (which is, moreover, absolutely not settled[550]) should not be transposed to the universal level and that, as far as the widen-

[546] See these draft guidelines and the commentaries thereto in *Yearbook… 2003*, vol. II (Part Two), pp. 87–92.

[547] For the text of these provisions and the commentaries thereto, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 185–192.

[548] J. Polakiewicz, *Treaty-making in the Council of Europe*, Strasbourg, Council of Europe Publishing, 1999, p. 96. This is comparable to the position taken by the European Commission of Human Rights in the case of *Chrysostomos* et al. v. *Turkey*, European Court of Human Rights, applications Nos. 15299/89, 15300/89 and 15318/89, decision of 4 March 1991, *Revue universelle des droits de l'homme*, vol. 3, No. 5 (July 1991), p. 193.

[549] See Polakiewicz, *op. cit.* (footnote 548 above). One can interpret in this sense the Swiss Federal Court decision of 17 December 1992 in the case of *F.* v. *R.and State Council of the Canton of Thurgau, Journal des Tribunaux*, 1995, pp. 523; see also the seventh report on reservations to treaties (footnote 535 above), paras. 199–200. On the same point, see 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, par. 1", *Revue universelle des droits de l'homme*, vol. 5, Nos. 9–10 (December 1993), p. 297, at p. 303. In this regard, it may be noted that, on 26 May 1998, Trinidad and Tobago denounced the Optional Protocol to the International Covenant on Civil and Political Rights and ratified it again the same day with a new reservation, see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. I (United Nations publication, Sales No. E.04.V.2), p. 222, note 3. After several objections and a decision by the Human Rights Committee (see *Official Records of the General Assembly, fifty-fifth session, Supplement No. 40* (A/55/40), vol. II, Annex XI, Communication No. 845/1999, *Rawle Kennedy* v. *Trinidad and Tobago*, p. 258 and the fifth report on reservations to treaties (footnote 531 above), para. 12), Trinidad and Tobago again denounced the Protocol on 27 March 2000 (see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. I, p. 222, note 3). What was involved, however, was not the modification of an existing reservation, but the formulation of an entirely new reservation.

[550] See the commentary to draft guideline 2.3.1 in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 185–189, especially at p. 187, para. 14, footnote 1064.

ing of existing reservations is concerned, it would not be logical to apply rules that differ from those applicable to the late formulation of reservations.

(7) If, after expressing its consent, together with a reservation, a State or an international organization wishes to "widen" the reservation, in other words, to modify in its favour the legal effect of the provisions of the treaty to which the reservation refers, such provisions will be fully applicable, for the same reasons:

– It is essential not to encourage the late formulation of limitations on the application of the treaty;

– On the other hand, there may be legitimate reasons why a State or an international organization would wish to modify an earlier reservation and, in some cases, it may be possible for the author of the reservation to denounce the treaty in order to ratify it again with a "widened reservation";

– It is always possible for the parties to a treaty to modify it at any time by unanimous agreement;[551] it follows that they may also, by unanimous agreement, authorize a party to modify, again at any time, the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to that party; and

– The requirement of the *unanimous* consent of the other parties to the widening of the scope of the reservation seems to constitute an adequate safeguard against abuses.

(8) At least at the universal level, moreover, the justified reluctance not to encourage the States parties to a treaty to widen the scope of their reservations after the expression of their consent to be bound has not prevented practice in respect of the widening of reservations from being based on practice in respect of the late formulation of reservations,[552] and this is entirely a matter of common sense.

(9) Depositaries treat "widening modifications" in the same way as late reservations. When they receive such a request by one of the parties, they consult all the other parties and accept the new wording of the reservation only if none of the parties opposes it by the deadline for replies.

(10) For example, when, on 1 April 1985, Finland acceded to the Protocol on road markings, additional to the European Agreement supplementing the Convention on road signs and signals opened for signature at Vienna on 8 November 1968, it formulated a reservation to a technical provision of the instrument.[553] Ten years later, on 5 September 1995, Finland declared that its reservation also applied to a situation other than that originally mentioned:[554]

> In keeping with the practice followed in similar cases, the Secretary-[General] proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged. [None] of the Contracting Parties to the Protocol having notified the Secretary-General of an objection within a period of 90 days from the date of its circulation (on 20 December 1995), the said modification was accepted for deposit upon the expiration of the above-stipulated 90-day period, that is on 19 March 1996.[555]

The procedure followed by the Secretary-General is the same as the one currently followed in the case of late formulation of reservations.[556, 557]

(11) As another example, the Government of Maldives notified the United Nations Secretary-General on 29 January 1999 that it wished to modify the reservations it had formulated upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women in 1993.[558] Germany, which had objected to the original reservations, also opposed their modification, arguing, among other things, that:

> … reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty (article 19 of the Vienna Convention on the Law of Treaties). After a State has bound itself to a treaty under international law, it can no longer submit new reservations or extend or add to old reservations. It is only possible to totally or partially withdraw original reservations, something unfortunately not done by the Government of the Republic of the Maldives with its modification.[559]

(12) However, just as it had not objected to the formulation of the original reservation by Maldives by opposing its entry into force as between the two States, so Germany did not formally oppose the modification as such. This reinforces the doubts of some members of the Commission as to whether the term "objection" should be used to refer to the opposition of States to late modification of reservations. A State might well find the modification *procedure* acceptable while objecting to the *content* of

---

[551] See article 39 of the 1969 and 1986 Vienna Conventions.

[552] Gaja gives the example of the "correction" by France on 11 August 1982 of the reservation formulated in its instrument of approval of the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL), which it deposited with the Secretary-General of the IMO on 25 September 1981, see G. Gaja, "Unruly treaty reservations", *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, Milan, Giuffrè, 1987, pp. 307–330, at pp. 311–312). This is a somewhat unusual case, since, at the time of the "correction", the Protocol had not yet entered into force with respect to France; in this instance, the depositary does not appear to have made acceptance of the new wording dependent on the unanimous agreement of the other parties, some of which did in fact object to the substance of the modified reservation, see *Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General Performs Depositary or other Functions as at 31 December 2002*, p. 81.

[553] In its original reservation with respect to paragraph 6 of the annex, Finland reserved "the right to use yellow colour for the continuous line between the opposite directions of traffic" (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. I (footnote 549 above), p. 830).

[554] "… the reservation made by Finland also applies to the barrier line" (*ibid.*, p. 831).

[555] *Ibid.*, note 3.

[556] See the commentary to draft guideline 2.3.1 in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 185–189.

[557] It should be noted that, at present, the period would be 12 months, not 90 days, see draft guideline 2.3.2 in *ibid.*, p. 189 and, in particular, paragraphs (5) to (10) of the commentary, pp. 189–190.

[558] See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. I (footnote 549 above), p. 263, note 42.

[559] *Ibid.* p. 264. For Germany's original objection, see p. 248. Finland also objected to the modified Maldivian reservation, *ibid.*, p. 245. The German and Finnish objections were made more than 90 days after the notification of the modification, the deadline set at that time by the Secretary-General.

the modified reservation.[560] Since, however, contrary to the opinion of the majority of its members, the Commission decided to retain the word "objection" to refer to the opposition of States to late formulation of reservations in draft guidelines 2.3.2 and 2.3.3,[561] it considered that the same terminology should be used here.

(13) Draft guideline 2.3.5 refers implicitly to draft guidelines 2.3.1, 2.3.2 and 2.3.3 on the late formulation of reservations. It did not seem necessary to say so expressly in the text because these guidelines immediately precede it in the Guide to Practice.

(14) It should, however, be noted that the transposition of the rules applicable to the late formulation of reservations, as contained in draft guideline 2.3.3, to the widening of an existing reservation cannot be unconditional. In both cases, the existing situation remains the same in the event of an "objection" by any of the contracting parties, but this situation is different: prior to the late formulation of a reservation, the treaty applied in its entirety as between the contracting parties to the extent that no other reservations were made; in the case of the late widening of the scope of a reservation, however, the reservation was already established and produced the effects recognized by the 1969 and 1986 Vienna Conventions. This is the difference of situation covered by the second sentence of draft guideline 2.3.5, which provides that, in this second case, the initial reservation remains unchanged in the event of an "objection" to the widening of its scope.

(15) The Commission did not consider it necessary for a draft guideline to define the "widening of the scope of a reservation" because its meaning is so obvious. Bearing in mind the definition of a reservation contained in draft guidelines 1.1 and 1.1.1, it is clear that this term applies to any modification designed to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole in respect of certain specific aspects in their application to the reserving State or international organization, in a broader manner than the initial reservation.

2.4.9 *Modification of an interpretative declaration*

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.

Commentary

(1) According to the definition given in draft guideline 1.2, "simple" interpretative declarations are merely clarifications of the meaning or scope of the provisions of the treaty. They may be made at any time[562] (unless the treaty otherwise provides[563]) and are not subject to the requirement of confirmation.[564] There is thus nothing to prevent them from being modified at any time in the absence of a treaty provision stating that the interpretation must be given at a specified time, as indicated in draft guideline 2.4.9, the text of which is a combination of the texts of draft guidelines 2.4.3 (Time at which an interpretative declaration may be formulated) and 2.4.6 [2.4.7] (Late formulation of an interpretative declaration).

(2) It follows that a "simple" interpretative declaration may be modified at any time, subject to provisions to the contrary contained in the treaty itself, which may limit the possibility of making such declarations in time, or in the case which is fairly unlikely, but which cannot be ruled out in principle, where the treaty expressly limits the possibility of modifying interpretative declarations.

(3) There are few clear examples illustrating this draft guideline. Mention may be made, however, of the modification by Mexico of the declaration concerning article 16 of the International Convention Against the Taking of Hostages, of 1979, made upon accession in 1987.[565]

(4) The modification by a State of unilateral statements made under an optional clause[566] or providing for a choice between the provisions of a treaty[567] also comes to mind, but such statements are "outside the scope of the […] Guide to Practice".[568] Also, on 7 March 2002, Bulgaria amended a declaration made upon signature and confirmed upon deposit of its instrument of ratification, in 1994, of the European Convention on Mutual Assistance in Criminal Matters;[569] however, strictly speaking, it might be considered that this was more a case of interpreting a reservation than modifying an interpretative declaration.[570]

(5) For all that, and despite the paucity of convincing examples, draft guideline 2.4.9 seems to flow logically from the very definition of interpretative declarations.

---

[560] See paragraph (23) of the commentary to draft guideline 2.3.1, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 189.

[561] See the text of these draft guidelines, *ibid.*, p. 189–190.

[562] See draft guideline 2.4.3 above.

[563] See draft guideline 2.4.6 [2.4.7] above.

[564] See draft guideline 2.4.4 [2.4.5] above.

[565] See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. II (United Nations publication, Sales No. E.04.V.2), p. 109.

[566] See, for example, the modification by Australia and New Zealand of the declarations made under article 24.2 (ii) of the Agreement establishing the Asian Development Bank upon ratification of that Agreement, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. I (footnote 549 above), pp. 509–512.

[567] See, for example, the note by the Ambassador of Mexico to the Hague dated 24 January 2002 informing the depositary of the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters of the modification of Mexico's requirements with respect to the application of article 5 of the Convention, www.hcch.net.

[568] Draft guidelines 1.4.6 [1.4.6, 1.4.7] and 1.4.7 [1.4.8].

[569] United Nations, *Treaty Series*, vol. 6841, p. 185. See also www.conventions.coe.int.

[570] See also the modification, in 1988, of the Swiss "interpretative declaration" of 1974 concerning article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) following the decision of the European Court of Human Rights in the *Case of Belilos* v. *Switzerland*, of 29 April 1988 (United Nations, *Treaty Series*, vol. 1496, p. 234–235, vol. 1525, p. 213, and vol. 1561, p. 386–387); the *Belilos* judgment is available in European Court of Human Rights, *Series A: Decrees and decisions*, vol. 132 . However, the Court had classed this "declaration" as a reservation and Switzerland simply withdrew its declaration retroactively (*ibid.*, vol. 2123, p. 141) following the decision of the Swiss Federal Court of 17 December 1992 in the case of *F.* v. *R.and State Council of the Canton of Thurgau* (see footnote 549 above).

(6) It is obvious that, if a treaty provides that an interpretative declaration can be made only at specified times, it follows *a fortiori* that such a declaration cannot be modified at other times. In the case where the treaty limits the possibility of making or modifying an interpretative declaration in time, the rules applicable to the late formulation of such a declaration, as stated in draft guideline 2.4.6 [2.4.7], should be applicable *mutatis mutandis* if, notwithstanding that limitation, a State or an international organization intended to modify an earlier interpretative declaration: such a modification would be possible only in the absence of an objection by any one of the other contracting parties.

2.4.10 *Limitation and widening of the scope of a conditional interpretative declaration*

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

Commentary

(1) Unlike the modification of "simple" interpretative declarations, the modification of conditional interpretative declarations cannot be done at will: such declarations can, in principle, be formulated (or confirmed) only at the time of the expression by the State or the international organization of its consent to be bound[571] and any late formulation is excluded "except if none of the other contracting parties objects".[572] Any modification is thus similar to a late formulation that can be "established" only if it does not encounter the opposition of any one of the other contracting parties. This is what is stated in draft guideline 2.4.10.

(2) Although it may be difficult in some cases to determine whether the purpose of a modification is to limit or widen the scope of a conditional interpretative declaration, the majority of the members of the Commission were of the opinion that there was no reason to depart in this regard from the rules relating to the modification of reservations and that reference should therefore be made to the rules applicable respectively to the partial withdrawal[573] and to the widening of the scope of reservations.[574]

(3) In this second case, the applicable rules are thus also the same as the ones contained in draft guideline 2.4.8 (Late formulation of a conditional interpretative declaration), which reads:

> 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.[575]

(4) The Commission is aware of the fact that it is also possible that a party to the treaty might decide not to make an interpretative declaration a condition of its participation in the treaty while maintaining it "simply" as an interpretation. This is, however, an academic question of which there does not appear to be any example.[576] There is accordingly probably no need to devote a draft guideline to this case, particularly as this would, in reality, amount to the withdrawal of the declaration in question as a *conditional* interpretative declaration and would thus be a case of a simple withdrawal to which the rules contained in draft guideline 2.5.13 would apply, with the result that this could be done at any time.

2.5.12 *Withdrawal of an interpretative declaration*

An interpretative declaration may be withdrawn at any time, following the same procedure applicable to its formulation, by the authorities competent for that purpose.

Commentary

(1) It follows from draft guideline 2.4.3 that, except where a treaty provides otherwise,[577] a "simple" interpretative declaration "may be formulated at any time". It may, of course, be inferred therefrom that such a declaration may also be withdrawn at any time without any special procedure. It would, moreover, be paradoxical if the possibility of the withdrawal of an interpretative declaration was more limited than that of the withdrawal of a reservation, which could be done "at any time".[578]

(2) While States seldom withdraw their interpretative declarations, this does happen occasionally. On 1 March 1990, for instance, "the Government of Italy notified the Secretary-General that it had decided to withdraw the declaration by which the provisions of articles 17 and 18 [of the Convention relating to the Status of Refugees] were

---

[571] See above draft guidelines 1.2.1 [1.2.4] and 2.4.5 [2.4.4].

[572] Draft guideline 2.4.8.

[573] See above, draft guidelines 2.5.10 [2.5.11] and 2.5.11 [2.5.12].

[574] See draft guideline 2.3.5 above.

[575] For the commentary to this draft guideline, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 195.

[576] There are, however, examples of statements specifying that earlier interpretative declarations do not constitute reservations. See, for example, the "communication received subsequently" (the date is not given) by which the Government of France indicated that the first paragraph of the "declaration" made upon ratification of the International Convention on the Elimination of All Forms of Racial Discrimination "did not purport to limit the obligations under the Convention in respect of the French Government, but only to record the latter's interpretation of article 4 of the Convention" (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. I (footnote 549 above), p. 153, note 19). See also, for example, the statements by Indonesia and Malaysia concerning the declarations which accompanied their ratifications of the Convention on the International Maritime Organization, *ibid.*, vol. II (footnote 565 above), p. 9, notes 14 and 16; or India's position with respect to the same Convention, *ibid.*, note 13. See also O. Schachter, "The question of treaty reservations at the 1959 General Assembly", AJIL, vol. 54, No. 2 (April 1960), pp. 372–379.

[577] See draft guideline 2.4.6 [2.4.7] above.

[578] See article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions and draft guideline 2.5.1 above.

recognized by it as recommendations only".[579] Likewise, "[o]n 20 April 2001, the Government of Finland informed the Secretary-General [of the United Nations] that it had decided to withdraw its declaration in respect of article 7 (2) made upon ratification" of the 1969 Vienna Convention (ratified by that country in 1977).[580]

(3) This practice is compatible with the very informal nature of interpretative declarations.

(4) The withdrawal of an interpretative declaration must nevertheless be based on the few procedures provided for in draft guidelines 2.4.1 and 2.4.2 [2.4.1 *bis*] with regard to the authorities which are competent to formulate such a declaration (and which are the same as those which may represent a State or an international organization for the adoption or authentication of the text of the treaty or for expressing their consent to be bound). The wording used in draft guideline 2.5.12 implicitly refers to those provisions.

2.5.13 *Withdrawal of a conditional interpretative declaration*

The withdrawal of a conditional interpretative declaration is governed by the rules applicable to the withdrawal of reservations.

Commentary

(1) Unlike simple interpretative declarations, conditional interpretative declarations are governed insofar as their formulation is concerned by the legal regime of reservations: they must be formulated when the State or international organization expresses its consent to be bound,[581] except if none of the other contracting parties objects to their late formulation.

(2) It follows inevitably that the rules applicable to the withdrawal of conditional interpretative declarations are necessarily identical to those applying to reservations in this regard, and this can only strengthen the position that it is unnecessary to devote specific draft guidelines to such declarations. The Commission nevertheless believes that it would be premature to take a final decision in this regard as long as this "hunch" has not been verified in respect of the rules relating to the validity of both reservations and conditional interpretative declarations.

(3) Until a definite position has been taken on this problem of principle, the rules to which draft guideline 2.5.13 implicitly refers are those contained in draft guidelines 2.5.1 to 2.5.9 [2.5.10].

---

[579] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. I (footnote 549 above), p. 356, note 23. Doubts remain concerning the nature of this declaration. There are also withdrawals of "statements of non-recognition" (see, for example, the withdrawal of the Egyptian declarations in respect of Israel concerning the 1966 International Convention on the Elimination of All Forms of Racial Discrimination or the Single Convention on Narcotic Drugs, 1961, following the Framework for peace in the Middle East agreed at Camp David, signed at Washington on 17 September 1978 (United Nations, *Treaty Series*, vol. 1138, No. 17853, p. 39), *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. I, p. 136, and p. 409, note 18), but such statements are "outside the scope of the [...] Guide to Practice" (draft guideline 1.4.3 [1.1.7]).

[580] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, vol. II (footnote 565 above), p. 336, note 13. The declaration concerned the respective powers of the President of the Republic, the Head of Government and the Minister for Foreign Affairs to conclude treaties. See also the withdrawal by New Zealand of a declaration made upon ratification of the Agreement establishing the Asian Development Bank, *ibid.*, vol. I (footnote 549 above), p. 512, note 11.

[581] See draft guideline 1.2.1 [1.2.4] above.