Chapter X

RESERVATIONS TO TREATIES

A. Introduction

333. 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".

334. At its forty-sixth session (1994), the Commission appointed Mr. Alain Pellet as Special Rapporteur for the topic.[224]

335. At its forty-seventh session (1995), the Commission received and discussed the first report of the Special Rapporteur.[225]

336. 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, 1978 and 1986 Vienna Conventions.[226] In the view of the Commission, these 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 was concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

337. Also at its forty-seventh session, in accordance with its earlier practice,[227] the Commission 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.[228] 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.[229]

338. At its forty-eighth session (1996), the Commission had before it the Special Rapporteur's second report on the topic.[230] 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.[231]

339. At its forty-ninth session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[232]

340. 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.

341. From 1998 up to its fifty-sixth session in 2004, the Commission considered seven more reports[233] by the Special Rapporteur, provisionally adopting 69 draft guidelines and the commentaries thereto.

342. At its fifty-sixth session the Commission, at its 2822nd meeting, on 23 July 2004, after having considered the ninth report of the Special Rapporteur,[234] decided to refer draft guidelines 2.6.1 (Definition of objections to reservations) and 2.6.2 (Objection to the late formulation

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

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

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

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

[228] 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–III.

[229] As at 31 July 2003, 33 States and 25 international organizations had answered the questionnaire.

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

[231] *Ibid*., vol. II (Part Two), p. 83, para. 136 and footnote 238.

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

[233] Third report, *Yearbook ... 1998* (vol. II (Part One), document A/CN.4/491 and Add.1–6; fourth report, *Yearbook ... 1999*, vol. II (Part One), documents A/CN.4/499 and A/CN.4/478/Rev.1; fifth report, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4; sixth report, *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3); seventh report, *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3); eighth report, *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1; and ninth report, *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/544. For a detailed historical presentation, see *Yearbook ... 2004*, vol. II (Part Two), pp. 97–98, paras. 257–269.

[234] See the above footnote.

of widening of the scope of a reservation) to the Drafting Committee.

B. Consideration of the topic at the present session

343. At the current session, the Commission had before it the tenth report of the Special Rapporteur (A/CN.4/558 and Add.1–2) on the validity of reservations and the concept of the object and purpose of the treaty.

344. The Commission considered part of the tenth report of the Special Rapporteur at its 2854th and 2856th–2859th meetings, on 20 and 22–28 July 2005.

345. At its 2859th meeting, the Commission decided to send draft guidelines 3.1 (Freedom to formulate reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2 (Definition of specified reservations), 3.1.3 (Reservations implicitly permitted by the treaty) and 3.1.4 (Non-specified reservations authorized by the treaty) to the Drafting Committee. The Commission also decided to send draft guidelines 1.6 and 2.1.8, which had already been provisionally adopted,[235] to the Drafting Committee with a view to their revision in the light of the terms selected. The Commission also decided to continue its consideration of the tenth report during its fifty-eighth session (2006).

346. At its 2842nd meeting, on 20 May 2005, the Commission considered and provisionally adopted draft guidelines 2.6.1 (Definition of objections to treaties) and 2.6.2 (Definition of objections to the late formulation or widening of the scope of a reservation).

347. These draft guidelines had already been sent to the Drafting Committee at the fifty-sixth session (2004).

348. At its 2865th meeting, on 4 August 2005, the Commission adopted the commentary relating to the aforementioned draft guidelines.

349. The text of the draft guidelines and the commentary thereto are reproduced in section C.2 below.

1. Introduction by the Special Rapporteur of his tenth report

350. The Special Rapporteur introduced his tenth report by explaining that he had initially planned to include an introduction summing up developments since the ninth report:[236] a first part which would have dispatched once and for all the problem of formulation and the procedure for objections and reservations to treaties, and a second part on the validity of reservations. For lack of time, and having already begun work on the latter question, to which he had given priority, it had not been possible to adhere to that plan. Accordingly, the report had begun *in medias res*, with the section on the validity of reservations.

351. The Special Rapporteur had first sought to defend the expression "validity of reservations" before addressing, in the first part of his report, the principle derived from the *chapeau* of article 19 of the 1969 Vienna Convention and the problems raised by express or implicit prohibitions of reservations, covered in subparagraphs (*a*) and (*b*) of that article of the Convention. The other questions addressed in the report related to the compatibility of reservations with the object and purpose of the treaty, stipulated in article 19 (*c*) (validity or invalidity of reservations relating to the application of internal law, customary rules or the rules of *jus cogens*).

352. The last part of the report addressed the determination of the validity of reservations and the consequences thereof.

353. Returning to the phrase "validity of reservations" used in his report, the Special Rapporteur recalled that the replies from States in the Sixth Committee to the question that the Commission had put to them concerning that expression had been inconclusive, having been split between those States which had doubts about the expression and those that accepted it.

354. The Special Rapporteur clearly preferred the words "validity/invalidity", which were entirely neutral, to the other terms proposed, such as "admissibility/inadmissibility", "permissibility/impermissibility" or "opposability/non-opposability", which had strong doctrinal connotations.

355. The doctrinal battle pitted the proponents of permissibility, who thought that a reservation could be intrinsically invalid by being contrary to the object and purpose of the treaty, against the advocates of opposability, for whom the reservations regime was governed in its entirety by the reactions of other States. In using one or the other of these expressions, the Commission would be taking a position in favour of one of these schools, which did not do justice to the complex reality of the regime of reservations.

356. Although Mr. Derek Bowett had urged the Commission to use the terms "permissible/impermissible"[237] and the Commission had initially followed his lead, the Special Rapporteur thought that a reservation could be valid or invalid on grounds other than "permissibility".

357. Furthermore, the French terms "*licéité/illicéité*" which are translated in English as "permissibility/impermissibility" could be misleading, given their relationship to the topic of State responsibility. It was unreasonable to affirm that a reservation not valid for reasons of form or substance entailed the responsibility of the State or international organization that had formulated it, and no precedent to that effect existed in State practice. Such a reservation would simply be null and void.

358. The Commission should therefore revert to the neutral terms "validity/invalidity", including in the draft guidelines that had already been adopted (1.6 and 2.1.8), in which the words "permissible/impermissible" had been left in square brackets.

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[235] See *Yearbook ... 1999*, vol. II (Part Two), p. 126, and *Yearbook ... 2002*, vol. II (Part Two), p. 27.

[236] See footnote 233 above.

[237] See D. W. Bowett, "Reservations to non-restricted multilateral treaties", *British Year Book of International Law, 1976–1977*, pp. 67–92.

359. The section of the report entitled "The presumption of validity of reservations" was based on the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions, which established the general principle that the formulation of reservations was permitted. However, the freedom to formulate a reservation was not unlimited. In the first place, it was limited in time (signature of the treaty or expression of consent to be bound by it). In addition, by its nature a treaty could require that a reservation should be unanimously accepted. Moreover, States could themselves limit the power to formulate reservations to a treaty, as envisaged in article 19, subparagraphs (*a*) and (*b*).

360. Consequently, the right to formulate reservations was not an absolute right. That was suggested by the very title of article 19, since the fact that a reservation was formulated did not mean that it was "made", that is, that it would actually produce effects. This was suggested by the wording of article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions ("a reservation established with regard to another party in accordance with articles 19, 20 and 23"). Compliance with article 19 was *one* of the conditions for the validity of a reservation, but it was not the sole condition, and it seemed therefore that neither the permissibility school (which focused on article 19 to the exclusion of all other considerations) nor the opposability school (which was interested solely in article 20) provided an account of the legal regime of reservations in all its enormous complexity.

361. The freedom to formulate reservations being the basic principle, the Special Rapporteur had considered whether it might be useful to make the presumption of validity of reservations the subject of a separate draft guideline. However, he had decided not to in order to keep the Guide to Practice user-friendly. He had chosen to reproduce article 19 of the 1986 Vienna Convention (because it included international organizations) in its entirety in draft guideline 3.1.[238]

362. Although that solution was not ideal, given that article 19 was poorly drafted, he had thought it better to reproduce the article as it stood than to "correct" it.

363. Section B of the report dealt with reservations prohibited, either expressly or implicitly, by the treaty, which corresponded to article 19, subparagraphs (*a*) and (*b*), of the 1969 and 1986 Vienna Conventions. It appeared from the *travaux préparatoires* for those Conventions that a treaty could prohibit *all* reservations or only certain reservations. The first case appeared simpler, although it was still necessary to decide whether or not a unilateral declaration constituted a reservation. However, that was a problem of the definition of reservations and not of validity.

364. The second case was more frequent: a treaty might prohibit reservations to specific provisions of the treaty or prohibit categories of reservations, which was much more complicated.

365. The three cases of prohibitions were covered by article 19 (*a*), and that was exactly what was stated in draft guideline 3.1.1.[239]

366. Moreover, all those cases concerned reservations that were expressly prohibited and not implicit prohibitions. The latter category referred in particular to treaties concluded between a limited number of parties and the constituent instruments of international organizations (art. 20).

367. The term "specified reservations" was not as simple as it appeared. It nevertheless followed that reservations formulated by virtue of a reservation clause that did not specify what reservations were permitted, were subject to the test of compatibility with the object and purpose of the treaty.

368. For all those reasons, it was very important that the Commission should define the term "specified reservations" in draft guideline 3.1.2.[240]

369. He had tried to provide a definition that was neither too lax nor excessively strict, which would be tantamount to likening the notion to "negotiated reservations".[241]

370. The Special Rapporteur recalled that the Commission had met with all the human rights treaty bodies with the exception of the Committee on the Elimination of Discrimination against Women, which was based in New York. He had proposed that a one- or two-day seminar should be organized in 2006 on the subject of reservations to human rights treaties, particularly so that the Commission could review its preliminary conclusions regarding reservations to the normative multilateral treaties, including the treaties with respect to human rights, which the Commission had adopted at its forty-ninth meeting in 1997.[242]

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[238] The draft guideline reads as follows:

"3.1 *Freedom to formulate reservations*

"A State or an international organization may, at the time of signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

"(*a*) The reservation is prohibited by the treaty;

"(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

"(*c*) In cases not falling under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty."

[239] The draft guideline reads as follows:

"3.1.1 *Reservations expressly prohibited by the treaty*

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

"(*a*) Prohibiting all reservations;

"(*b*) Prohibiting reservations to specified provisions;

"(*c*) Prohibiting certain categories of reservations."

[240] The draft guideline reads as follows:

"3.1.2 *Definition of specified reservations*

"For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly authorized by the treaty to specific provisions and which meet conditions specified by the treaty."

[241] See the fifth report of the Special Rapporteur, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4, p. 174, para. 164.

[242] See footnote 232 above.

371. Introducing the second part of his report, the Special Rapporteur explained that it dealt with reservations that were incompatible with the object and purpose of the treaty. That condition was an element of the flexible system stemming from the advisory opinion of ICJ in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[243] and of the 1969 Vienna Convention. By virtue of that clarification, the right of States to make reservations was balanced by the requirement to preserve the "core contents" or *raison d'être* of the treaty. The criterion of compatibility with the object and purpose of the treaty applied only to reservations, as States were not required to justify their objections under article 20 of the 1969 Vienna Convention, even though they often did so. The compatibility of a reservation with the object and purpose of the treaty was a customary norm, although it was not a peremptory norm of international law. A reservation expressly prohibited by a treaty could not be considered valid on the pretext that it was compatible with the object and purpose of the treaty. As expressly authorized by the treaty, specified reservations were automatically valid and were not subject to the test of compatibility with the object and purpose of the treaty.

372. The same did not hold for two other cases, namely reservations that were implicitly authorized and those that were expressly authorized but not specified. In both cases, it was clear that a State or an international organization could formulate reservations that were not contrary to the object and purpose of the treaty. The *travaux préparatoires* for the 1969 Vienna Convention and case law (the 1977 ruling of the Arbitral Tribunal in the *English Channel* case)[244] seemed to substantiate that argument, which had first been set out insofar as implicitly authorized reservations were concerned by the Special Rapporteur on the law of treaties, Sir Humphrey Waldock in his fourth report.[245] The two cases formed the subject of two separate draft guidelines, 3.1.3[246] and 3.1.4[247] respectively, which the Special Rapporteur preferred to the version consisting of a single draft guideline combining the two hypotheses.

373. The Special Rapporteur then took up the definition of the concept of the object and purpose of the treaty, which was one of the most sensitive issues of the law of treaties. That concept, which legal writers were virtually unanimous in qualifying as highly subjective, appeared not only in article 19 of the 1969 and 1986 Vienna Conventions but in several other provisions of those instruments; clearly it had the same meaning throughout the Conventions.

374. That was why the competence of the interpreter of the concept had assumed great significance. The subjectivity of the notion was not, however, sufficient reason for abstaining from an effort to define it; other legal notions ("public morals", "reasonable", "good faith") were equally subjective or changed over time and did not pose insurmountable problems in their application.

375. In order to guide the (necessarily subjective) interpretation of the notion of good faith, the Special Rapporteur had endeavoured to rely on case law and doctrine without hoping to achieve absolute certainty. He believed that the object and purpose were one and the same notion and not two separate concepts; draft guideline 3.1.5[248] merely sought to provide a useful definition of the notion. It was a very general guideline, but he did not believe it was possible to go much further.

376. Draft guideline 3.1.6[249] sought to offset the general character of guideline 3.1.5 by suggesting a method for determining the object and purpose of the treaty, which was prompted by the principles applicable to the interpretation of treaties set out in articles 31 and 32 of the 1969 and 1986 Vienna Conventions. In that connection, the Special Rapporteur believed that the object and purpose of the treaty were not fixed at the time the treaty was concluded, and that the subsequent practice of the parties should therefore be borne in mind, although he was aware that there were views to the contrary.

377. As another way of addressing concerns about the general character of draft guidelines 3.1.5 and 3.1.6, the Special Rapporteur had proposed a large number of guidelines in the section of his report on application of the criterion.

378. The Special Rapporteur admitted that he was not claiming to have covered all possible cases or hypotheses, which was not in fact the purpose of codification; he had endeavoured to include the most useful cases, but the draft guidelines could always be supplemented if members of the Commission had other examples.

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[243] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion*, *I. C. J. Reports 1951*, p. 15.

[244] *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 3.

[245] *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 6, para. 4.

[246] The draft guideline reads as follows:

"3.1.3 *Reservations implicitly permitted by the treaty*

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

[247] The draft guideline reads as follows:

"3.1.4 *Non-specified reservations authorized by the treaty*

"Where the treaty authorizes certain reservations without specifying them, a reservation may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty."

[248] The draft guideline reads as follows:

"3.1.5 *Definition of the object and purpose of the treaty*

"For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its *raison d'être*."

[249] The draft guideline reads as follows:

"3.1.6 *Determination of the object and purpose of the treaty*

"1. In order to determine the object and purpose of the treaty, the treaty as a whole must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.

"2. For that purpose, the context includes the preamble and annexes. Recourse may also be had in particular to the preparatory work of the treaty and the circumstances of its conclusion, and to the title of the treaty and, where appropriate, the articles that determine its basic structure [and the subsequent practice of the parties]."

379. The situations considered were fairly heterogeneous but offered a representative sample of reservations. He was also aware that reservations could fall into several of the categories envisaged, in which case it would be necessary to combine the rules included in the draft guidelines.

380. Turning to the different categories of reservations, the Special Rapporteur recalled that dispute settlement clauses had consistently been found to be not contrary to the object and purpose of the treaty according to the case law of ICJ. However, that view had not been shared by human rights treaty bodies,[250] which held that the rules for monitoring the implementation of the treaties constituted guarantees for securing the rights set forth in the treaties and were thus essential to their object and purpose.

381. Draft guideline 3.1.13[251] sought to reconcile the two apparently contrasting views.

382. As to the problems associated with reservations to general human rights treaties, guideline 3.1.12[252] was sufficiently flexible to allow interpreters a degree of leeway.

383. A question that frequently arose, particularly in the field of human rights, concerned reservations formulated to safeguard the application of internal law. The answer to that question was much more nuanced than the categorical views expressed by some would imply; it seemed to the Special Rapporteur that it was impossible to deny a State the right to formulate a reservation in order to preserve the integrity of its internal law if the State did not undermine the object and purpose of the treaty. That was spelled out in draft guideline 3.1.11.[253]

384. Reservations relating to the application of internal law must not be confused with vague and general reservations that by their very nature made it impossible for other States to understand or assess them. Indeed, such reservations were contrary to the object and purpose of the treaty, which was exactly what draft guideline 3.1.7[254] said.

385. The Special Rapporteur had begun his consideration of reservations relating to provisions embodying customary norms with the judgment of ICJ in the *North Sea Continental Shelf* case.[255] States made reservations to such provisions in order to avoid the consequences of "conventionalization" of the customary rule. In addition, as practice showed, States also made reservations to codification treaties. Draft guideline 3.1.8[256] sought to enunciate the fundamental principles deriving from case law and practice in that regard.

386. The situation was different with reservations to provisions setting forth norms of *jus cogens* or non-derogable rules. The Special Rapporteur was convinced that such reservations were prohibited only if one acknowledged that *jus cogens* produced its effect outside the confines of articles 53 and 64 of the 1969 and 1986 Vienna Conventions.

387. Consequently the invalidity of such reservations derived *mutatis mutandis* from the principle set forth in article 53 of the 1969 Vienna Convention. That was the sense of draft guideline 3.1.9.[257]

388. As to reservations to non-derogable rules, while such rules often set out principles of *jus cogens*, the Special Rapporteur proposed draft guideline 3.1.10,[258] which had been inspired by the practice of the human rights treaty

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[250] See General Comment No. 24, Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V, p. 122; and Communication No. 845/1999, *Rawle Kennedy* v. *Trinidad and Tobago*, *ibid*., *Fifty-Fifth Session, Supplement No. 40* (A/55/40), vol. II, annex XI, p. 260; and *Loizidou* v. *Turkey*, ECHR, Application No. 15318/89, Judgment of 18 December 1996, *Reports of Judgments and Decisions, 1996–VI*.

[251] The draft guideline reads as follows:

"3.1.13 *Reservations to treaty clauses concerning dispute settlement or the monitoring of implementation of the treaty*

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

"(*a*) The provision to which the reservation relates constitutes the *raison d'être* of the treaty; or

"(*b*) The reservation has the effect of excluding its author from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that the author has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect."

[252] The draft guideline reads as follows:

"3.1.12 *Reservations to general human rights treaties*

"To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account should be taken of the indivisibility of the rights set out therein, the importance that the right which is the subject of the reservation has within the general architecture of the treaty, and the seriousness of the impact the reservation has upon it."

[253] The draft guideline reads as follows:

"3.1.11 *Reservations relating to the application of domestic law*

"A reservation by which a State or an international organization purports to exclude or to modify the application of a provision of a treaty in order to preserve the integrity of its domestic law may be formulated only if it is not incompatible with the object and purpose of the treaty."

[254] The draft guideline reads as follows:

"3.1.7 *Vague, general reservations*

"A reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty."

[255] *North Sea Continental Shelf, Judgment*, *I.C.J. Reports 1969*, p. 3.

[256] The draft guideline reads as follows:

"3.1.8 *Reservations to a provision that sets forth a customary norm*

"1. The customary nature of a norm set forth in a treaty provision does not in itself constitute an obstacle to the formulation of a reservation to that provision.

"2. A reservation to a treaty provision which sets forth a customary norm does not affect the binding nature of the customary norm in question in relations between the reserving State or international organization and other States or international organizations which are bound by that norm."

[257] The draft guideline reads as follows:

"3.1.9 *Reservations to provisions setting forth a rule of* jus cogens

"A State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law."

[258] The draft guideline reads as follows:

"3.1.10 *Reservations to provisions relating to non-derogable rights*

"A State or an international organization may formulate a reservation to a treaty provision relating to non-derogable rights provided that the reservation in question is not incompatible with the essential rights and obligations arising out of that provision. In assessing the compatibility of the reservation with the object and purpose of the provision in question, account must be taken of the

(*Continued on next page.*)

bodies and the case law of the Inter-American Court of Human Rights.[259]

2. Summary of the debate

389. Several members praised the theoretical and practical importance of the tenth report, which was extremely detailed, analytical and rich.

390. It was noted that invalid reservations could not by definition achieve the result desired by the State that made them. At the same time, the invalidity of a reservation generally invalidated ratification of the treaty itself.

391. It was also noted that the problems with terminology were not solely linguistic, given that the terms used had different meanings in different languages. In addition, some members were opposed to the use of the terms "permissible/impermissible", which were associated with the notion of responsibility. The term "validity" did not appear to be as neutral as it was claimed to be, but reflected a subjective value judgement that operated *a posteriori* and had to do with the existence or absence of legal consequences of the act in question and not with the process of completion or formulation. It was recalled in that connection that in the Sixth Committee several arguments had been put forward in opposition to the use of the term "validity" to qualify reservations. The terms "permissible/impermissible", meanwhile, managed to convey the sense the Commission wished to give to reservations at the current stage and were neutral, notwithstanding their association with a particular school of thought.

392. The view was also expressed that the question of validity was essential in the regime of reservations and constituted its basis in principle. However, the very definition of validity posed problems, especially with regard to what determined it. Since validity was a quality that determined compliance with the reference norm, namely the Vienna regime, it was obvious that the determination of validity occurred after the reservation was formulated, by other States or, where appropriate, by a judicial body. The variables inherent in validity also comprised the reference norm (the Vienna regime), the *de facto* situation (formulation of the reservation) and the possible reaction to the reservation, expressed either in the form of an objection or through a third body, judge or arbitrator. The question of validity was linked to a substantive problem, which was the limitations *ratione materiae* of the freedom to formulate reservations under article 19 of the 1969 and 1986 Vienna Conventions.

393. It was also pointed out that the very concept of the validity of an act was one of the requirements for its "legality" or its "permissibility" and that it retained the necessary neutrality. Nevertheless, some members wondered whether, given the significance of objections in assessing validity, it might be possible to contemplate including the draft guidelines on objections in the section of the Guide to Practice dealing with the validity of reservations.

394. The view was also expressed that the question of the validity of reservations should be considered together with the question of the legal consequences of invalid reservations. The question of the separability or inseparability of invalid reservations from the act expressing a State's consent to be bound to a treaty remained fundamental.

395. It was pointed out that as the term "validity" was essentially related to requisite conditions, the term "admissibility" might be more acceptable and less restrictive, because a reservation that was permitted or accepted was not necessarily valid.

396. Several members nevertheless expressed a preference for the terms "validity/invalidity".

397. It was pointed out that the meaning of the term "validity" included the quality of the elements of a legal order that had to meet all conditions as to form and substance required by that order for legal effects to be produced by an act. It was the conformity of the act with those conditions that made it possible to determine whether it was valid. That was why the Commission should not lose sight of those conditions and should deal only with the legal effects of the act. From that standpoint the mere formulation of a reservation had nothing to do with its validity, which was determined after the prerequisite conditions had been met. Consequently, the words "and effects" should be deleted from draft guideline 1.6 with a view to its revision, given that validity was simply the ability of the reservation to produce effects.

398. Another point of view held that it was premature to take a decision on the question of validity at the current stage, before consideration of the effects of reservations, which could have an impact on the international responsibility of States.

399. Other members, however, expressed doubts as to the use of the term "validity" in draft guidelines that had already been adopted.

400. With regard to draft guideline 3.1, it was noted that the title did not accurately reflect its content. It would seem justified to use the text of article 19 of the 1986 Vienna Convention in order to indicate the conditions of validity. The fact, however, that this provision reiterated the conditions *ratione temporis* which the formulation of a reservation must meet, and did so immediately after the section of the draft guidelines on procedure, might seem somewhat strange. The concept of the presumption of validity of reservations seemed to some members neither convincing nor useful. It was pointed out that article 19 of the 1969 and 1986 Vienna Conventions established, at the most, the presumption of freedom to formulate reservations, which was substantially different from the presumption of validity of reservations.

401. Other members observed that the title of the draft guideline ought to read "The right to formulate reservations" for both linguistic and substantive reasons,

(*Footnote 258 continued.*)

importance which the parties have conferred upon the rights at issue by making them non-derogable."

[259] *Restrictions to the Death Penalty* (arts. 4.2 and 4.4 of the American Convention on Human Rights), Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3.

since it sought to define a right that was nevertheless dependent on certain conditions established by the Vienna regime. According to another view, the title that might best correspond to the content of article 19 was "limits to the freedom to formulate reservations".

402. With regard to draft guideline 3.1.1, it was noted that the term "expressly" in the title did not appear in the wording of article 19. It was rare, but not impossible, for treaties not to permit reservations by implication, as was the case, for example, with the Charter of the United Nations. The wording of the draft guideline should also be revised because the *chapeau* did not entirely correspond to the provisions that followed. Furthermore, if a treaty permitted only certain reservations, it was clear that other reservations were prohibited. It should also be made clear that if a treaty prohibited reservations to specific provisions or certain types of reservations, only those reservations were expressly prohibited. In order not to introduce a high degree of subjectivity, the Commission should limit itself to implicit prohibitions or authorizations that could logically and reasonably be deduced from the intention of the parties at the time they concluded the treaty. Others took the view that this guideline should be limited to express prohibitions.

403. It was further noted that it was difficult to establish every type of prohibited reservation with certainty. The case was also mentioned of a treaty prohibiting any reservations except those expressly authorized by it; it was felt that such a situation should be covered by the draft guidelines.

404. With regard to draft guideline 3.1.2, it was suggested that according to article 19 (*b*) of the 1969 and 1986 Vienna Conventions, one needed to determine whether the treaty permitted only specific reservations and, if so, to determine whether or not a reservation that was formulated fell into that category. Questions were also raised as to the relevance of the term "authorized". The last part of the sentence in the English version, in any event, was not clear or seemed far too elliptic.

405. It was felt that the categories of prohibited reservations established by the Special Rapporteur were useful; however, in practice, which was rich and varied, it often proved difficult to distinguish among the different categories.

406. The view was expressed that in the case of a general authorization of reservations, the other parties could always object to them, and that expressly authorized reservations were also subject to the test of compatibility with the object and purpose of the treaty.

407. It would appear to be extremely difficult to distinguish implicitly prohibited reservations with certainty, as they were indeterminate by nature. They should be dealt with in a separate draft guideline.

408. Several members expressed their preference for two separate draft guidelines, 3.1.3 and 3.1.4.

409. With regard to draft guideline 3.1.4, the view was expressed that the Commission should opt for clearer wording affirming that reservations were subject to the criterion of compatibility with the object and purpose of the treaty if there was a general authorization or if the treaty did not contain any provisions on reservations.

410. Several members stressed the notion that the object and purpose of the treaty played a central role in the law of treaties as a whole. The 1969 and 1986 Vienna Conventions were silent on the meaning of that notion. States expected the Commission to address that problem. The Special Rapporteur was commended for his efforts to define that nebulous and elusive concept. The object appeared to be the content of the treaty, while the purpose had to do with the end the treaty sought to achieve. Any reservation contrary to those two notions was not permitted.

411. While draft guideline 3.1.5 represented an attempt at clarification, the term "*raison d'être*" in the text provided little clarification. This term was also seen by others as too restrictive, leading to the result that only very few reservations would be prohibited. It was suggested that in endeavouring to pinpoint the concept the terms "object" and "purpose" should not be separated. It was the object and purpose of the treaty that made it possible to say what the essential provisions of the treaty were, and not vice versa.

412. The view was also expressed in respect of both draft guidelines 3.1.5 and 3.1.13 that a reservation to a "secondary" provision that was linked to the *raison d'être* of the treaty could be equally risky. Distinguishing between the essential provisions of a treaty became a dangerous and random exercise.

413. Another point of view maintained that if determining the meaning of the notion of the object and purpose of the treaty was part of the interpretation of treaties, it could not be governed by pre-established definitions or rules. From that perspective it became very difficult to pinpoint notions such as "*raison d'être*" or "core content", which were equally vague, elusive or uncertain. Treaties expressed the intention of the States that had concluded them, and one could only conjecture as to the real meaning of that intention, as the advisory opinion of ICJ on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide had made clear.[260] The notion of the object and purpose of the treaty was determined subjectively by each State. Very often it was questionable as to whether a treaty had a specific object and purpose, since it was the outcome of a complex process of negotiations or exchanges. Accordingly, some members wondered whether a definition of that notion were possible or even necessary. In any event, it would be extremely difficult to define; there would always be a part that would remain a mystery.

414. As to the categories of examples of provisions cited by the Special Rapporteur, some members wondered what his criteria had been, given that the importance of such provisions varied from treaty to treaty, depending on the interests of the concluding States. Distinguishing human rights treaties was equally difficult, in part because

[260] See footnote 243 above.

of the difficulty in defining exactly what constituted such treaties and also because there were other categories of treaties that were also based on common interests.

415. It was pointed out that it might be useful to make express the *rationales* that the Special Rapporteur's examples sought to illustrate, namely cases where the reservation undermined either the legitimate expectations of the parties or the nature of the treaty as a common undertaking.

416. With regard to draft guideline 3.1.6, the view was expressed that articles 31 and 32 of the 1969 and 1986 Vienna Conventions mentioned therein gave an important role to the object and purpose in the interpretation of the treaty. It was also pointed out that agreements relating to the treaty (art. 31, para. 2) or subsequent practice could be included. The Commission should not attempt to find a general rule for determining the object and purpose of the treaty, as the two concepts varied in accordance with the great diversity of treaties as well as with the necessarily subjective idea that the parties had of them.

417. Other members questioned the usefulness of draft guidelines 3.1.5 and 3.1.6.

418. It was pointed out that the Commission ought to approach the question covered in draft guideline 3.1.7 from the standpoint of procedure and ask whether a reservation drafted in vague and general terms could be said to intend to exclude or modify the legal effect of certain provisions of the treaty in their application to the reserving State. Attention was also drawn to the importance of context and specific circumstances.

419. Several members stressed the usefulness of draft guideline 3.1.8.

420. With regard to draft guideline 3.1.9, the view was expressed that there might be cases in which a reservation to a provision setting forth a rule of *jus cogens* was possible and not necessarily incompatible with the object and purpose of the treaty, for reasons identical to those put forward in the case of customary rules (draft guideline 3.1.8). The prohibition of such reservations should be categorical only if the reserving State, by modifying the legal effect of such a provision, intended to introduce a rule that was contrary to *jus cogens*. The view was also expressed that the draft guideline was not really necessary because a reservation contrary to *jus cogens* would be automatically incompatible with the object and purpose of the treaty.

421. Several members stressed the usefulness of draft guideline 3.1.9.

422. Draft guideline 3.1.11 needed to be worded more precisely. The Commission should indicate that the reservation would be acceptable only if it were formulated in respect of a specific provision that was fundamental to internal law. It was even suggested that the draft guideline should be combined with draft guideline 3.1.7, given their similarity.

423. Several key provisions of draft guideline 3.1.12 were said to relate also to the exercise of protected rights. Moreover, the two criteria seemed to be too general to be really useful.

424. Draft guideline 3.1.13 was said to be more restrictive than article 19, subparagraph (*c*), of the 1969 and 1986 Vienna Conventions. It was also noted that the two cases mentioned (dispute settlement and monitoring of the implementation of the treaty) were sufficiently different and warranted two separate draft guidelines.

425. The proposal to hold a "seminar" was welcomed by several members. It was proposed that the seminar should focus in particular on the problem of the compatibility of reservations with the object and purpose of the treaty and, subsequently, on the role of human rights treaty bodies in determining compatibility.

426. Some members expressed a desire that the debate on the section of the report dealing with the compatibility of reservations with the object and purpose of the treaty be continued during the fifty-eighth session (2006) and in the meantime reserved their position with respect to the issues raised by this section of the report.

3. Special Rapporteur's concluding remarks

427. At the conclusion of the debate, the Special Rapporteur expressed his satisfaction that so many of his draft guidelines had been favourably received in such a constructive manner by most members of the Commission. Referring to a few negative views based on theoretical positions, he recalled that the function of the exercise that the Commission had undertaken was not to create a work of doctrine in the abstract, but rather to provide States with coherent answers to the whole range of questions they might raise with regard to reservations.

428. He observed that some of the criticisms that had been directed at him, however brilliant in theoretical terms, had not included concrete proposals for draft guidelines that could replace those that his critics would delete. The draft guidelines, together with the commentary thereto, still constituted the surest way to guide practitioners and States. In undertaking that useful pedagogical exercise, the Commission should not be guided by abstract considerations that had to do with the allegedly progressive or conservative character of proposals, but should instead adopt a pragmatic, moderate, "happy medium" attitude, while recalling that the 1969 and 1986 Vienna Conventions, within the framework of which the exercise was taking place, were extremely flexible even if they tended to reflect a high degree of tolerance where reservations were concerned.

429. It was in that spirit that he had prepared the tenth report and proposed the 14 draft guidelines.

430. With regard to the question of validity, he was of the view that the Commission was dealing not only with a purely terminological question or a problem posed by differences in the French and English languages. Having

noted the relatively varied positions of members on that subject, he remained convinced that the Commission should not wait until it considered the effects of reservations to define their validity; he also believed that validity could not be assimilated into permissibility. In addition, given that validity was a question not only of substance but also of form, either the third section of the Guide to Practice should be preceded by a very general guideline that would specify that a reservation was considered to be valid if it fulfilled the conditions of substance and form established in the 1969 and 1986 Vienna Conventions[261] and spelled out in the Guide to Practice, or else the title of the third part of the Guide should be modified. In his view, the French term "*validité*" applied both to conditions of form (dealt with in the second chapter of the Guide to Practice) and to those of substance, whereas draft guideline 3.1 as currently worded dealt only with the conditions of substance covered by article 19. Conversely, the English term "permissibility" (and not "admissibility") adequately defined the content of article 19. He therefore proposed that "Validity of reservations" should be retained as the title of the third part of the Guide to Practice, on condition that the expression was understood to cover both conditions of form and conditions of substance, and that only the latter would be dealt with in that part of the Guide (with conditions of form dealt with in the second part); meanwhile, draft guideline 3.1 could be entitled "Permissibility of reservations" in English and "*Validité substantielle des réserves*" in French.

431. With regard to draft guidelines 1.6 and 2.1.8 (already adopted), the Commission could replace the word "permissibility" with "validity" in the former and the word "impermissible" with the word "invalid" in the latter. In the first paragraph of draft guideline 2.1.8, the first sentence would begin "When, in the opinion of the depositary, a reservation is manifestly invalid …", subject to an appropriate modification of the commentary.

432. Concerning draft guideline 3.1 and the observations made regarding its title, the Special Rapporteur agreed that it should be worded more clearly; that, however, was a drafting problem which the Drafting Committee could address.

433. He also thought that the wording of draft guideline 3.1.1 could be improved. However, he was not convinced that the possibility of implicitly prohibited reservations should be included, as such reservations had more to do with article 19, subparagraph (*c*); in other words, they were invalid because they were incompatible with the object and purpose of the treaty, and not because they were implicitly prohibited.

434. He noted that draft guidelines 3.1.2, 3.1.3 and 3.1.4 had been generally endorsed, even though they would benefit from editorial improvements.

435. Accordingly, the Special Rapporteur proposed that the Commission should send draft guidelines 3.1, 3.1.1, 3.1.2, 3.1.3 and 3.1.4 to the Drafting Committee, together with draft guidelines 2.1.8 and 1.6 (already adopted), the latter two with a view to their amendment in the light of the terms selected.

436. The Special Rapporteur thought that the other draft guidelines contained in the tenth report should be considered again at the fifty-eighth session, given that the Commission had not been able to discuss them in depth due to lack of time. He was nevertheless of the view that the Commission must absolutely define the notion of the "object and purpose" of the treaty (draft guidelines 3.1.5 and 3.1.6). The Special Rapporteur reiterated his desire to organize a meeting with the human rights treaty bodies during the fifty-eighth session, although he was aware of certain practical difficulties (not all bodies met at the same time) and budgetary constraints.

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

1. Text of the draft guidelines

437. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.[262]

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.

[261] Arts. 21 (establishment), 19 (substance), 20 (opposition) and 23 (form) of the 1969 and 1986 Vienna Conventions.

[262] 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) and corrigendum, pp. 180–195; 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. 28–47; the commentary to the explanatory note and to 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], *Yearbook ... 2003*, vol. II (Part Two), pp. 70–92; and the commentary to guidelines 2.3.5, 2.4.9, 2.4.10, 2.5.12 and 2.5.13, *Yearbook ... 2004*, vol. II (Part Two). The commentaries to guidelines 2.6, 2.6.1 and 2.6.2 appear in section 2 below.

1.1.1 [1.1.4][263] *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.

1.2.1 [1.2.4] *Conditional interpretative declarations*

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

1.2.2 [1.2.1] *Interpretative declarations formulated jointly*

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

1.3 *Distinction between reservations and interpretative declarations*

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

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

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

1.3.2 [1.2.2] *Phrasing and name*

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

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

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

1.4 *Unilateral statements other than reservations and interpretative declarations*

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

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

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

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

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

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[263] 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.

1.4.3 [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, 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 …[264]

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

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

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*

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.

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 declaration*[265]

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.

[265] 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.

2.4.9 *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.

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.

2.6.1 ***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 former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

2.6.2 ***Definition of objections to the late formulation or widening of the scope of a reservation***

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

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

438. The texts of the draft guidelines with commentaries thereto adopted by the Commission at its fifty-seventh session are reproduced below.

2.6 *Formulation of objections to reservations*

Commentary

(1) Five provisions of the 1969 and 1986 Vienna Conventions are relevant to the formulation of objections to treaty reservations:

— Article 20, paragraph 4 (*b*), mentions "in passing" the potential authors of an objection;

— Article 20, paragraph 5, gives ambiguous indications as to the period during which an objection may be formulated;

— Article 21, paragraph 3, confirms the obligation imposed by article 20, paragraph 4 (*b*), on the author of an objection to state whether the latter therefore opposes the entry into force of the treaty between the author of the objection and the author of the reservation;

—Article 23, paragraph 1, requires that, like reservations themselves, objections be formulated in writing and communicated to the same States and international organizations as reservations; and

—Article 23, paragraph 3, states that an objection made previously to confirmation of a reservation does not itself require confirmation.

(2) Each of these provisions should be retained and, where necessary, clarified and supplemented in this section of the Guide to Practice, which should nevertheless give a preliminary definition of the word "objection", which is not defined in the 1969 and 1986 Vienna Conventions—a gap that needs to be filled. This is the aim of draft guidelines 2.6.1–2.6.x.[266]

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 former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

Commentary

(1) The aim of draft guideline 2.6.1 is to provide a generic definition applicable to all the categories of objections to reservations provided for in the 1969 and 1986 Vienna Conventions. For this purpose, the Commission has taken as a model the definition of reservations provided in article 2, paragraph 1 (*d*), of the Conventions and reproduced in guideline 1.1 of the Guide to Practice, adapting it to objections.

(2) This definition contains five elements:

—The first concerns the nature of the act ("a unilateral statement");

—The second concerns its name ("however phrased or named");

—The third concerns its author ("made by a State or an international organization");

—The fourth concerns when it should be made (when expressing consent to be bound[267]); and

—The fifth concerns its content or object, defined in relation to the objective pursued by the author of the reservation ("whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or international organization"[268]).

(3) However, the Commission considered that the definition of objections should not necessarily include all these elements, of which some are specific to reservations and some deserve to be further clarified for the purpose of the definition of objections.

(4) It appeared, in particular, that it would be better not to mention the moment when an objection can be formulated; the matter is not clearly resolved in the 1969 and 1986 Vienna Conventions, and it would be preferable to examine it separately and seek to respond to it in a separate draft guideline.[269]

(5) Conversely, two of the elements in the definition of reservations should certainly be reproduced in the definition of objections which, like reservations, are unilateral statements whose wording or designation is unimportant if their object makes it possible to characterize them as objections.

(6) With regard to the first element, the provisions of the 1969 and 1986 Vienna Conventions leave not the slightest doubt: an objection emanates from a State or an international organization and can be withdrawn at any time.[270] However, this does not resolve the very sensitive question as to which categories of States or international organizations can formulate an objection.

(7) At this stage, the Commission does not consider it necessary to include in the definition the detail found in article 20, paragraph 4 (*b*), of the 1986 Vienna Convention, which refers to a "*contracting* State"* and a "*contracting* organization"*.[271] There are two reasons for this:

(*a*) On the one hand, article 20, paragraph 4 (*b*), settles the question of whether an objection has *effects* on the entry into force of the treaty between the author of the reservation and the author of the objection; however, it leaves open the question of whether it is possible for a State or an international organization that is not a contracting party in the meaning of article 2 (*f*) of the Convention to make an objection; the possibility that such a State or organization might formulate an objection cannot be ruled out, its being understood that the objection would not produce the effect provided for in article 20, paragraph 4 (*b*), until the State or organization has become a "contracting party". Moreover, article 21, paragraph 3, does not reproduce this detail and refers only to "a State or an international organization objecting to

[266] The Commission reserves the right to move these draft guidelines to chapter 1 (Definitions) when it puts the "finishing touches" to the Guide to Practice.

[267] See also draft guideline 1.1.2.

[268] 1986 Vienna Convention, art. 2, para. 1 (*d*); see also draft guideline 1.1.1 [1.1.4].

[269] The Commission proposes to examine this question at its next session.

[270] See articles 20, paragraph 4 (*b*), 21, paragraph 3, and 22, paragraphs 2–3 (*b*) of the 1969 and 1986 Vienna Conventions. On this subject, see: R. Baratta, *Gli effetti delle riserve ai trattati* (Milan, Giuffrè, 1999), p. 341, and R. Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, vol. 3 (1970), p. 293 at p. 313. It does not follow, however, that, like a reservation, an objection cannot be formulated jointly by several States or international organizations. This possibility will be considered at a later date.

[271] Article 20, paragraph 4 (*b*), of the 1969 Vienna Convention speaks only of the "contracting State".

a reservation" without further elaboration; this aspect deserves to be studied separately;

(*b*) On the other hand, the definition of reservations itself gives no information about the status of a State or an international organization that is empowered to formulate a reservation; it would not seem helpful to make the definition of objections more cumbersome by proceeding differently.

(8) With regard to the second element, it is sufficient to recall that the law of treaties, as enshrined in the 1969 Vienna Convention, is wholly permeated by the notion that the intentions of States take precedence over the terminology which they use to express them. This is apparent from the definition given in the Convention of the term "treaty",[272] which "means an international agreement ... whatever its particular designation".[273] Likewise, a reservation is defined therein as "a unilateral statement, however phrased or named",[274] and the Commission used the same term to define interpretative declarations.[275] The same should apply to objections; here again, "it is the intention that counts". The question remains, however, as to what this intention is; this problem is at the heart of the definition proposed in draft guideline 2.6.1.

(9) At first sight, the word "objection" has nothing mysterious about it. In its common meaning, it designates a "reason which one opposes to a statement in order to counter it".[276] From a legal perspective, it means, according to the *Dictionnaire de droit international public*, the "opposition expressed by a subject of law to an act or a claim by another subject of law in order to prevent its entry into force or its opposability to the first subject".[277] The same work defines "objection to a reservation" as follows: "Expression of rejection by a State of a reservation to a treaty formulated by another State, where the aim of the reservation is to oppose the applicability between the two States of the provision or provisions covered by the reservation, or, if such is the intention stated by the author of the objection, to prevent the entry into force of the treaty as between those two States".[278]

(10) This latter clarification has its basis in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, which envisages that the author of the objection may indicate whether it opposes the entry into force of the treaty between it and the author of the reservation. This possibility is reflected in the last phrase of the definition in draft guideline 2.6.1, according to which, in making an objection, the author may seek "to exclude the application of the treaty as a whole, in relations with the reserving State or organization". In such a case, the intention of the author of the unilateral statement to object to the reservation is in no doubt.

(11) This might not be true of all categories of reactions to a reservation, which might show misgivings on the part of their authors without amounting to an objection as such.

(12) As the court of arbitration which settled the dispute between France and the United Kingdom of Great Britain and Northern Ireland concerning the delimitation of the continental shelf in the *English Channel* case stated in its decision of 30 June 1977:

> Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned.[279]

In this case, the court did not expressly take a position on the nature of the United Kingdom's "reaction", but it "acted as if it were an objection",[280] namely, by applying the rule laid down in article 21, paragraph 3, of the 1969 Vienna Convention, which, however, was not in force between the parties.

(13) The award has been criticized in that regard,[281] but it appears indisputable that the wording of the British statement in question clearly reflects the intention of the United Kingdom to object to the French reservation. The statement reads as follows: "The Government of the United Kingdom are unable to accept reservation (*b*)."[282] The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning.

(14) As the Franco–British court of arbitration noted, it can happen that a reaction to a reservation, even if critical of it, does not constitute an objection in the sense of articles 20–23 of the 1969 and 1986 Vienna Conventions. The reaction may simply consist of observations, in which a State or an international organization announces its (restrictive) interpretation of the reservation or the conditions under which it considers it to be valid. For example:

> In 1979, the United Kingdom, Germany and France reacted to the reservation made by Portugal to the protection of property rights contained in Article 1 of the Protocol to ECHR. By making this reservation, Portugal intended to exclude the sweeping expropriation and

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[272] The appropriateness of describing a single word as a "term" may be questionable, but as this terminological inflection is enshrined in custom it does not seem advisable to question it.

[273] Art. 2, para. 1 (*a*), of the 1969 Vienna Convention. See also, for example, the Judgment of 1 July 1994 of ICJ in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, I.C.J. Reports 1994*, p. 112 at p. 120, para. 23: "[I]nternational agreements may take a number of forms and be given a diversity of names."

[274] Art. 2, para. 1 (*d*) of the 1969 Vienna Convention.

[275] See draft guideline 1.2 and the commentary thereon in *Yearbook ... 1999*, vol. II (Part Two), pp. 97–103 (in particular, paras. (14)–(15) of the commentary); see also the examples of "renaming" in this commentary and in the commentary on draft guideline 1.3.2 [1.2.2] (Phrasing and name), *ibid*., pp. 109–111.

[276] *Grand Larousse encyclopédique,* vol. 7 (Paris, Larousse, 1963).

[277] J. Salmon, ed., *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), p. 763.

[278] *Ibid*., p. 764. It need hardly be stated that this definition applies also to an objection formulated by an international organization.

[279] *English Channel* (see footnote 244 above), p. 66, para. 39.

[280] P. H. Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire français de droit international*, vol. 24 (1978), p. 29 at p. 45.

[281] *Ibid*.

[282] *English Channel* (see footnote 244 above), p. 33, para. 40.

nationalisation measures, which had been adopted in the wake of the Carnations Revolution, from any challenge before the European Commission and Court of Human Rights. The reacting states did not formally object to the reservation made by Portugal, but rather made declarations to the effect that it could not affect the general principles of international law which required the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property. Following constitutional and legislative amendments, Portugal withdrew this reservation in 1987.[283]

(15) The following examples can be interpreted in the same way:

— The communications whereby a number of States indicated that they did not regard "the statements[284] concerning paragraph (1) of article 11 [of the Vienna Convention on Diplomatic Relations] made by the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and the Mongolian People's Republic as modifying any rights or obligations under that paragraph";[285] the communications could be seen as interpretations of the statements in question (or of the provision to which they relate) rather than as true objections, particularly in contrast with other statements formally presented as objections;[286]

— The communication of the United States of America regarding the first reservation of Colombia to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, in which the United States Government says that it understands the reservation "to exempt Colombia from the obligations imposed by article 3, paragraphs 6 and 9, and article 6 of the Convention only insofar as compliance with such obligations would prevent Colombia from abiding by article 35 of its Political Constitution (regarding the extradition of Colombian nationals by birth); *to the extent that the reservation is intended to apply** other than to the extradition of Colombian nationals by birth, the Government of the United States *objects to the reservation**";[287] this is an example of a "conditional acceptance" rather than an objection strictly speaking; or

— The communications of Greece, Norway and the United Kingdom concerning the declaration of Cambodia on the Convention on the International Maritime Organization.[288]

(16) Such "quasi-objections" have tended to proliferate in recent years with the growth of the practice of the "reservations dialogue". What the dialogue entails is that States (for the most part European States) inform the reserving State of the reasons why they think the reservation should be withdrawn, clarified or modified. Such communications may be true objections, but they may—and often do—open a dialogue that might indeed lead to an objection, although it might also result in the modification or withdrawal of the reservation. The reaction of Finland to the reservations made by Malaysia on its accession to the Convention on the Rights of the Child clearly falls into the first category and undoubtedly constitutes an objection:

> In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation.** The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.[289]

(17) Whether or not the reaction of Austria to the same reservations, a reaction also thoroughly reasoned and directed toward the same purpose, can be considered

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[283] J. Polakiewicz, *Treaty-Making in the Council of Europe* (Strasbourg, Council of Europe Publishing, 1999), p. 106; footnotes omitted.

[284] These statements, in which the parties concerned explained that they considered "that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State", they expressly termed "reservations" (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2004,* vol. I (United Nations publication, Sales No. E.05.V.3), pp. 90–92).

[285] *Ibid*., p. 93 (Australia); see also pp. 93–94 (Canada), p. 94 (Denmark, France), p. 95 (Malta), p. 96 (New Zealand) and p. 97 (Thailand, United Kingdom).

[286] *Ibid*., statements by Greece (p. 95), Luxembourg (p. 95) and the Netherlands (pp. 95–96), or the United Republic of Tanzania (p. 97) or the more ambiguous statement by Belgium (p. 93). See also, for example, the last paragraph of the communication of the United Kingdom concerning the reservations and declarations accompanying the instrument of ratification deposited by the Union of Soviet Socialist Republics to the 1969 Vienna Convention (*ibid*., vol. II (United Nations publication, Sales No. E.05.V.3), p. 360) or the reaction of Norway to the corrective "declaration" of France dated 11 August 1982 regarding the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention) (a declaration that clearly appears to be a reservation and to which Sweden and Italy had objected as such) stating that it considered it to be a declaration and not a reservation (*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 2000*, p. 81, footnote 1).

[287] *Multilateral Treaties ...* (see footnote 284 above), pp. 450–451. Colombia subsequently withdrew the reservation (*ibid*., p. 451, note 11).

[288] *Ibid*., vol. II (footnote 286 above), p. 9, note 12.

[289] *Ibid*., vol. I (footnote 284 above), p. 318. The full text of this objection reads as follows:

> "The reservation made by Malaysia covers several central provisions of the [said Convention]. The broad nature of the said reservation leaves open to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention. In the view of the Government of Finland reservations of such comprehensive nature may contribute to undermining the basis of international human rights treaties.
>
> "The Government of Finland also recalls that the said reservation is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations. It is in the common interest of the States that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfil the object and purpose of the treaty. Moreover, the internal legislation as well as the national policies are also subject to changes which might further expand the unknown effects of the reservation.
>
> "In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation*.* The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.
>
> "The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention]."

For even clearer objections to the reservations of Malaysia, see the statements of Germany, Ireland, the Netherlands, Norway, Portugal and Sweden, and the communications of Belgium and Denmark (*ibid*., pp. 317–322). Malaysia subsequently withdrew part of its reservations (p. 331, note 27)."

an objection is more debatable; Austria's statement of 18 June 1996 contains no language expressive of a definitive rejection of the reservations of Malaysia, and suggests instead a waiting stance:

> Under article 19 of the Vienna Convention on the Law of Treaties which is reflected in article 51 of the [Convention] a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with the object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.
>
> The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations a final assessment as to its admissibility under international law *cannot be made without further clarification.**
>
> Until the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].
>
> Austria, however, objects to the admissibility of the reservations in question *if** the application of this reservation negatively affects the compliance of Malaysia … with its obligations under the [Convention] essential for the fulfilment of its object and purpose.
>
> Austria could not consider the reservation made by Malaysia ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties *unless** Malaysia …, *by providing additional information or through subsequent practice**, ensure[s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention].[290]

Here again, rather than a straightforward objection, the statement can be considered to be a conditional acceptance (or conditional objection) with a clear intent (to induce the reserving State to withdraw or modify its reservation) but with uncertain legal status and effects, if only because the conditions for accepting or rejecting the reservation are not susceptible to an objective analysis and no particular time limit is set.

(18) Such statements pose problems comparable to those raised by communications in which a State or an international organization "reserves its position" regarding the validity of a reservation made by another party, particularly with regard to its validity *ratione temporis*. For example, there is some doubt as to the scope of the statement of the Netherlands to the effect that the Government of the Netherlands "reserve[s] all rights regarding the reservations made by the Government of Venezuela on ratifying [the Convention on the Territorial Sea and the Contiguous Zone] in respect of article 12 and article 24, paragraphs 2 and 3".[291] The same could be said of the statement of the United Kingdom to the effect that it was "not however able to take a position on [the] purported reservations [of the Republic of Korea to the International Covenant on Civil and Political Rights] in the absence of a sufficient indication of their intended effect, in accordance with the terms of the Vienna Convention on the Law of Treaties and the practice of the Parties to the Covenant. Pending receipt of such indication, the Government of the United Kingdom reserve their rights under the Covenant in their entirety".[292] Similarly, the nature of the reactions of several States[293] to the limitations that Turkey had set on its acceptance of the right of individual petition under former article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe is not easy to determine. These States, using a number of different formulas, communicated to the Secretary-General of the Council of Europe that they reserved their position pending a decision by the competent organs of the Convention, explaining that "the absence of a formal and official reaction on the merits of the problem should not … be interpreted as a tacit recognition … of the Turkish Government's reservations".[294] It is hard to see these as objections; rather, they are notifications of provisional "non-acceptance" associated with a waiting stance. In contrast, an objection involves taking a formal position seeking to prevent the reservation from having the effects intended by its author.

(19) It does not follow that reactions, of the type mentioned above,[295] which the other parties to the treaty may have with respect to the reservations formulated by a State or an international organization, are prohibited or even that they produce no legal effects. However, such reactions are not objections within the meaning of the 1969 and 1986 Vienna Conventions and their effects relate to the interpretation of the treaty or the unilateral acts constituted by the reservations, or else they form part of the "reservations dialogue" that the other parties to the treaty try to start up with the author of the reservation. These uncertainties clearly illustrate the value of using precise and unambiguous terminology in the description of reactions to a reservation, in the wording and in the definition of the scope which the author of an objection intends to give to it.[296]

(20) As to the first point—the description of the reaction—the most prudent solution is certainly to use the noun

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[290] *Ibid*., pp. 317–318. See also the reaction of Sweden to Canada's reservation to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, *ibid*., vol. II (footnote 286 above), p. 468.

[291] *Ibid.*, vol. II, pp. 268–269. See also the examples given by F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague, T.M.C. Asser Institute, Swedish Institute of Intenational Law, Studies in Internatinal Law, No. 5, 1988), p. 318 (Canada's reaction to France's reservations and declarations to the Convention on the Continental Shelf) and p. 336.

[292] *Multilateral Treaties ...,* vol. I (see footnote 284 above), p. 192. See also the communication of the Netherlands concerning the Australian reservations to article 10 of the Covenant (*ibid*., pp. 188–189); on the other hand, the reaction of the Netherlands to the Australian reservations to articles 2 and 50 of the Covenant has more the appearance of an interpretation of the reservations in question (*ibid*.).

[293] Belgium, Denmark, Luxembourg, Norway and Sweden. Such limitations do not constitute reservations within the meaning of the Guide to Practice (paragraph 2 of draft guideline 1.4.6 [1.4.6–1.4.7]), but the example given by Polakiewicz (see footnote 283 above, p. 107) is nonetheless striking by analogy.

[294] Statement of Luxembourg. The text of these different statements is reproduced in the judgment of 23 March 1995 of ECHR in the case of *Loizidou* v. *Turkey* (Preliminary Objections), Series A, vol. 310, pp. 12–13, paras. 18–24.

[295] Commentary to the present draft guideline, paras. (13)–(17) above.

[296] See in this respect the "Model response clauses to reservations" appended to recommendation No. R (99) 13, adopted on 18 May 1999 by the Committee of Ministers of the Council of Europe. It should be noted that all the alternative wordings proposed in that document expressly utilize the word "objection". On the disadvantages of vague and imprecise objections, see Horn, *op. cit*., (footnote 291 above), pp. 184–185; see also pages 191–197 and 221–222.

"objection" or the verb "to object". Other terms such as "opposition/to oppose",[297] "rejection/to reject",[298] and "refusal/to refuse" must also, however, be regarded as signifying objection. Unless a special context demands otherwise, the same is true of expressions such as "the Government of … does not accept the reservation … "[299] or "the reservation formulated by … is impermissible/unacceptable/inadmissible".[300] Such is also the case when a State or an international organization, without drawing any express inference, states that a reservation is "prohibited by the treaty",[301] "entirely void"[302] or simply "incompatible with the object and purpose"[303] of the treaty, which is extremely frequent. In these last cases, this conclusion is the only one possible given the provisions of article 19 of the 1969 and 1986 Vienna Conventions; in such cases, a reservation cannot be formulated, and when a contracting party expressly indicates that this is the situation, it would be inconceivable that it would not object to the reservation.

(21) The fact remains that in some cases States intend their objections to produce effects other than those expressly provided for in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions. The question that then arises is whether, strictly speaking, these can be called objections.

(22) This provision envisages only two possibilities:

(*a*) Either "the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation", which is the "minimum" effect of an objection;

(*b*) Or, if the State or international organization formulating an objection to a reservation clearly states that such is its intention, in accordance with the provisions of article 20, paragraph 4 (*b*), the treaty does not enter into force between itself and the reserving State or organization; this is generally known as the "maximum" effect of an objection.[304]

(23) However, there is in practice an intermediate stage between the "minimum" and "maximum" effects of the objection, as envisaged by this provision, since there are situations in which a State wishes to enter into treaty relations with the author of the reservation while at the same time considering that the effect of the objection should go beyond what is provided for in article 21, paragraph 3.[305]

(24) Similarly, the objecting State may intend to produce what is described as a "super-maximum" effect,[306] consisting in the determination not only that the reservation objected to is not valid but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States. This was the case, for example, with Sweden's objection of 27 November 2002 to the reservation which Qatar made when acceding to the Optional Protocol to the Convention on the Rights of the Child with regard to the sale of children, child prostitution and the use of children in pornography:

> This objection shall not preclude the entry into force of the Convention between Qatar and Sweden. The Convention enters into force in its entirety between the two States, without Qatar benefiting from its reservation.[307]

(25) The Commission is aware that the validity of such objections has been questioned.[308] However, it sees no need to take a position on this point for the purpose of defining objections; the fact is that the authors intend their objection to produce such effects, intermediate or "super-maximum", and this is all that matters at this stage. Just as the definition of reservations does not

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[297] See the objection of Finland to the reservation by Malaysia to the Convention on the Rights of the Child (footnote 289 above).

[298] See, for example, the objection of Guatemala to the reservations of Cuba to the Vienna Convention on Diplomatic Relations (*Multilateral Treaties …*, vol. I (footnote 284 above), p. 95).

[299] See, for example, the objections of the Australian Government to various reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, p. 129) and of the Government of the Netherlands to numerous reservations to the Convention on the High Seas (*ibid*., vol. II (footnote 286 above), p. 275). See also the British objection to French reservation (*b*) to article 6 of the Convention on the Continental Shelf (footnote 282 above).

[300] See, for example, the reaction of Japan to reservations made to the Convention on the High Seas (*Multilateral Treaties …,* vol. II (footnote 286 above), p. 275), or that of Germany to the Guatemalan reservation to the Convention relating to the Status of Refugees (*ibid*., vol. I (footnote 284 above), pp. 368–369).

[301] See, for example, all the communications relating to the declarations made under article 310 of the United Nations Convention on the Law of the Sea (*ibid*., vol. II (footnote 286 above), pp. 312–314).

[302] See, for example, the reactions of the European Community to the declarations of Bulgaria and the German Democratic Republic regarding the Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) (*ibid*., vol. I (footnote 284 above), p. 598).

[303] See, for example, the statement by Portugal concerning the reservations of Maldives to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid*., p. 263), and that by Belgium concerning the reservations of Singapore to the Convention on the Rights of the Child (*ibid*., p. 318).

[304] See R. Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del Régimen de Viena* (University of Murcia, 2004), pp. 279–280; and Horn, *op. cit*. (footnote 291 above), pp. 170–172.

[305] See, for example, Canada's objection to Syria's reservation to the 1969 Vienna Convention: "Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable" (*Multilateral Treaties …*, vol. II (footnote 286 above), p. 356). For other examples and for a discussion of the permissibility of this practice, see below. See also R. W. Edwards Jr., "Reservations to treaties", *Michigan Journal of International Law*, vol. 10, No. 2 (1989), p. 400.

[306] See B. Simma, "Reservations to human rights treaties: some recent developments", *in* G. Hafner, ed., *Liber Amicorum—Professor Ignaz Seidl-Hohenveldern*: *in honour of his 80th birthday* (The Hague, Kluwer, 1998), p. 659 at pp. 667–668; and Riquelme Cortado, *op. cit*. (footnote 304 above), pp. 300–305.

[307] *Multilateral Treaties …*, vol. I (footnote 284 above), p. 348; see also Norway's objection of 30 December 2002 (*ibid*.).

[308] The argument for their validity can be based on the position adopted by the organs of the European Convention on Human Rights and General Comment No. 24 of the Human Rights Committee (see footnote 250 above), but is hardly compatible with paragraph 10 of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights, adopted in 1997 (see footnote 232 above) or with the principle *par in parem non habet juridictionem*. "To attribute such an effect to the rejection of the reservations is not easy to reconcile with the principle of mutuality of consent in the conclusion of treaties" (*English Channel* case (see footnote 244 above), p. 42, para. 60).

prejudge their validity,[309] so, in stating in draft guideline 2.6.1 that, by objecting, "the ... State or the ... organization purports to exclude or to modify the legal effects of the reservation", the Commission has endeavoured to take a completely neutral position with regard to the validity of the effects that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections.

(26) This being so, despite the contrary opinion of some writers,[310] no rule of international law requires a State or an international organization to state its reasons for an objection to a reservation. Except where a specific reservation is expressly authorized by a treaty,[311] the other contracting parties are always free to reject it and even not to enter into treaty relations with its author. A statement drafted as follows: "The Government … intends to formulate an objection to the reservation made by … ",[312] is as valid and legally sound as a statement setting forth a lengthy argument.[313] There is, however, a recent but unmistakable tendency to specify and explain the reasons justifying the objection in the eyes of the author, and the Commission envisages adopting a guideline that encourages States to do so.

(27) The Commission should also point out that it is aware that the word "made", in the proposed definition in draft guideline 2.6.1 ("a unilateral statement ... *made** by a State or an international organization") is open to discussion: taken literally, it might be understood as meaning that the objection produces effects *per se* without any other condition having to be met; yet objections, like reservations, must be permissible. The word "made" was chosen for reasons of symmetry, because it appears in the definition of reservations. On the other hand, it seemed preferable to the Commission to indicate that the objection was made "in response to a reservation to a treaty formulated by another State or international organization", as a reservation only produces effects if it is "established with regard to another party in accordance with articles 19, 20 and 23".[314]

2.6.2 *Definition of objections to the late formulation or widening of the scope of a reservation*

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

Commentary

(1) Under draft guidelines 2.3.1–2.3.3, the Contracting Parties may also "object" not only to the reservation itself but also to the late formulation of a reservation.

(2) In its commentary on draft guideline 2.3.1, the Commission wondered whether it was appropriate to use the word "objects" to reflect the second hypothesis and noted that, given the possibility for a State to accept the late formulation of a reservation but object to its content, some members "wondered whether it was appropriate to use the word 'objects' in draft guideline 2.3.1 to refer to the opposition of a State not to the planned reservation, but to its very formulation. Nevertheless, most members took the view that it was inadvisable to introduce the distinction formally, since in practice the two operations are indistinguishable".[315]

(3) However, while it is true that there appears to be no precedent in which a State or an international organization, without objecting to the late formulation of a reservation, nevertheless objected to it, this hypothesis cannot be excluded. Guideline 2.6.2 draws attention to this distinction.

(4) The members of the Commission who had expressed their opposition to the inclusion of the practice of the late formulation of reservations in the Guide to Practice[316] reiterated their opposition to its inclusion.

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[309] See draft guideline 1.6 (Scope of definitions) above: "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."

[310] Liesbeth Lijnzaad (*Reservations to UN–Human Rights Treaties*: *Ratify and Ruin?* (Dordrecht, Martinus Nijhoff, 1995), p. 45) cites in this respect Rolf Kühner, *Vorbehalte zu multilateralen völkerrechtlichen Verträgen* (Berlin, Springer-Verlag, 1986), p. 183) and Renata Szafarz, *loc. cit*. (footnote 270 above), p. 309; where the last-mentioned author is concerned, this does not, however, appear to be her true position. Practice demonstrates that States do not feel bound to state the reasons on which their objections are based; see, *inter alia*, Horn, *op. cit*. (footnote 291 above), p. 131 at pp. 209–219.

[311] See in this respect the arbitral award of 30 June 1977 in the *English Channel* case (footnote 244 above): "Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance" (p. 32, para. 39). Imbert even thinks that an expressly authorized reservation can be objected to (*Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), pp. 151–152).

[312] Among the many examples, see the statement by Australia concerning the reservation of Mexico to the Convention on the High Seas (*Multilateral Treaties* ..., vol. II (footnote 286 above, p. 274) and those by Belgium, Finland, Italy, Norway and the United Kingdom with respect to the International Convention on the Elimination of All Forms of Racial Discrimination (*ibid*., vol. I (footnote 284 above), pp. 144–149).

[313] For an example, see the objection by Finland to the reservation of Malaysia to the Convention on the Rights of the Child (footnote 289 above).

[314] Art. 21, para. 1, of the 1969 and 1986 Vienna Conventions.

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

[316] *Ibid*., p. 185, (para. (2) of the commentary to draft guideline 2.3.1).