

Chapter V

RESERVATIONS TO TREATIES

A. Introduction

52. The Commission, at its forty-fifth session (1993), decided to include the topic “The law and practice relating to reservations to treaties”³⁴⁶ in its programme of work and, at its forty-sixth session (1994), appointed Mr. Alain Pellet Special Rapporteur for the topic.³⁴⁷

53. At the forty-seventh session (1995), following the Commission’s consideration of his first report,³⁴⁸ the Special Rapporteur summarized the conclusions drawn, including a change of the title of the topic to “Reservations to treaties”; the form of the results of the study to be undertaken, which should be a guide to practice in respect of reservations; the flexible way in which the Commission’s work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, 1978 Vienna Convention on Succession of States in respect of Treaties and 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.³⁴⁹ In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. The Guide to Practice would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; the guidelines would, if necessary, be accompanied by model clauses. At the same session (1995), the Commission, in accordance with its earlier practice,³⁵⁰ 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.³⁵¹ 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.³⁵²

³⁴⁶ The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission.

³⁴⁷ See *Yearbook ... 1994*, vol. II (Part Two), para. 381.

³⁴⁸ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470.

³⁴⁹ *Ibid.*, vol. II (Part Two), para. 487.

³⁵⁰ See *Yearbook ... 1993*, vol. II (Part Two), para. 286.

³⁵¹ See *Yearbook ... 1995*, vol. II (Part Two), para. 489. The questionnaires addressed to Member States and international organizations are reproduced in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annexes II and III.

³⁵² As of 31 July 2009, 33 States and 26 international organizations had answered the questionnaire.

54. At its forty-eighth (1996) and its forty-ninth (1997) sessions, the Commission had before it the Special Rapporteur’s second report,³⁵³ to which was annexed a draft resolution 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.³⁵⁴ At the latter session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.³⁵⁵ 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.

55. From its fiftieth session (1998) to its sixtieth session (2008), the Commission considered 11 more reports³⁵⁶ and a note³⁵⁷ by the Special Rapporteur and provisionally adopted 108 draft guidelines and the commentaries thereto.

B. Consideration of the topic at the present session

56. At the present session, the Commission had before it the fourteenth report of the Special Rapporteur (A/CN.4/614 and Add.1–2), which it considered at its 3010th to its 3012th meetings on 26, 27 and 29 May 2009, and at its 3020th to 3025th meetings from 14 to 17 July and on 21 and 22 July 2009. The Commission also had before it a memorandum by the Secretariat on reservations to treaties in the context of succession of States (A/CN.4/616), submitted in response to a request made by the Commission at its 3012th meeting on 29 May 2009.

³⁵³ *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478.

³⁵⁴ *Ibid.*, vol. II (Part Two), para. 136 and footnote 238.

³⁵⁵ *Yearbook ... 1997*, vol. II (Part Two), pp. 57–58, para. 157.

³⁵⁶ 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; ninth report: *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/544; tenth report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2; eleventh report: *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574; twelfth report: *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584; and thirteenth report: *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600. See a detailed historical presentation of the third to ninth reports in *Yearbook ... 2004*, vol. II (Part Two), paras. 257–269.

³⁵⁷ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/586.

57. At its 3007th meeting on 19 May 2009, the Commission considered and provisionally adopted the following draft guidelines, of which it had taken note at its sixtieth session:³⁵⁸ 2.8.1 (Tacit acceptance of reservations), 2.8.2 (Unanimous acceptance of reservations), 2.8.3 (Express acceptance of a reservation), 2.8.4 (Written form of express acceptance), 2.8.5 (Procedure for formulating express acceptance), 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation), 2.8.7 (Acceptance of a reservation to the constituent instrument of an international organization), 2.8.8 (Organ competent to accept a reservation to a constituent instrument), 2.8.9 (Modalities of the acceptance of a reservation to a constituent instrument), 2.8.10 (Acceptance of a reservation to a constituent instrument that has not yet entered into force), 2.8.11 (Reaction by a member of an international organization to a reservation to its constituent instrument) and 2.8.12 (Final nature of acceptance of a reservation).

58. At its 3012th meeting on 29 May 2009, the Commission decided to refer draft guidelines 2.4.0 and 2.4.3 *bis* to the Drafting Committee. At that same meeting, the Commission, following an indicative vote at the request of the Special Rapporteur, decided not to include in the Guide to Practice a draft guideline on the statement of reasons for interpretative declarations.

59. At its 3014th meeting on 5 June 2009, the Commission considered and provisionally adopted draft guidelines 2.4.0 (Form of interpretative declarations), 2.4.3 *bis* (Communication of interpretative declarations), 2.9.1 (Approval of an interpretative declaration), 2.9.2 (Opposition to an interpretative declaration), 2.9.3 (Recharacterization of an interpretative declaration), 2.9.4 (Freedom to formulate approval, opposition or recharacterization), 2.9.5 (Form of approval, opposition and recharacterization), 2.9.6 (Statement of reasons for approval, opposition and recharacterization), 2.9.7 (Formulation and communication of approval, opposition or recharacterization), 2.9.8 (Non-presumption of approval or opposition), 2.9.9 (Silence with respect to an interpretative declaration), 2.9.10 (Reactions to conditional interpretative declarations), 3.2 (Assessment of the permissibility of reservations), 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations), 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations), 3.2.3 (Cooperation of States and international organizations with treaty monitoring bodies), 3.2.4 (Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body) and 3.2.5 (Competence of dispute settlement bodies to assess the permissibility of reservations). At the same meeting, the Commission also provisionally adopted the titles of sections 2.8 (Formulation of acceptances of reservations) and 2.9 (Formulation of reactions to interpretative declarations).

60. At its 3025th meeting on 22 July 2009, the Commission decided to refer draft guidelines 3.4.1, 3.4.2, 3.5, 3.5.1, 3.5.2, 3.5.3 and 3.6 to the Drafting Committee

in the revised version (except for draft guidelines 3.5.2 and 3.5.3) submitted by the Special Rapporteur following the debate in the plenary Commission.³⁵⁹ At the same meeting, the Commission, following an indicative vote, decided not to include in draft guideline 3.4.2 a provision concerning *jus cogens* in relation to the permissibility of objections to reservations.

61. At that same meeting, the Commission considered and provisionally adopted draft guidelines 3.3 (Consequences of the non-permissibility of a reservation) and 3.3.1 (Non-permissibility of reservations and international responsibility).

62. At its 3030th, 3031st, 3032nd and 3034th meetings on 3 to 6 August 2009, the Commission adopted the commentaries to the above-mentioned draft guidelines.

63. The texts of the draft guidelines and commentaries thereto are reproduced in section C.2 below.

1. INTRODUCTION BY THE SPECIAL RAPPOREUR OF HIS FOURTEENTH REPORT

64. The fourteenth report contained, first, a brief discussion of the reception accorded earlier reports of the Special Rapporteur in the Commission and in the Sixth Committee—including the reactions of States, which should be taken into account during the second reading of the draft guidelines—and also a summary of some of the recent developments relating to reservations and interpretative declarations. The report also completed the examination of the procedure for the formulation of interpretative declarations. In response to the desire expressed by the Commission at its sixtieth session, the Special Rapporteur had submitted two additional draft guidelines setting out recommendations as to the form of interpretative declarations (draft guideline 2.4.0)³⁶⁰ and the modalities of their communication (draft guideline 2.4.3 *bis*).³⁶¹ Although interpretative declarations could be made at any time and in any form, it could be in the interest of their authors, in order to ensure that their declarations were widely known, to formulate them in writing and to follow, *mutatis mutandis*, the same procedure applicable to reservations. On the other hand, it did not seem appropriate to include in the Guide to Practice a draft guideline on the statement of reasons for interpretative declarations, since they usually already contained a statement of reasons.

65. The fourteenth report also addressed the question of the permissibility of reactions to reservations, of interpretative declarations and of reactions to interpretative declarations.

³⁵⁹ See footnotes 371 to 375 below.

³⁶⁰ Draft guideline 2.4.0 read as follows:

“Written form of interpretative declarations

“Whenever possible, an interpretative declaration should be formulated in writing.”

³⁶¹ Draft guideline 2.4.3 *bis* read as follows:

“Communication of interpretative declarations

“Whenever possible, an interpretative declaration should be communicated, *mutatis mutandis*, in accordance with the procedure established in draft guidelines 2.1.5, 2.1.6 and 2.1.7.”

³⁵⁸ Yearbook ... 2008, vol. II (Part Two), para. 77.

66. In the view of the Special Rapporteur, it would be unwise to speak of the “substantive validity”³⁶² of reactions to reservations, regardless of whether the reservation in question was permissible or not. Draft guideline 3.4 therefore stated that acceptance of a reservation and objection to a reservation were not subject to any conditions of “substantive validity”.³⁶³ In contrast to the 1951 advisory opinion of the ICJ, which aligned the treatment of the permissibility of objections with that of reservations by referring to the criterion of compatibility with the object and purpose of the treaty,³⁶⁴ the Commission, in its 1966 draft articles on the law of treaties,³⁶⁵ had decided not to establish conditions for the permissibility of objections, and this solution had been carried over into the 1969 Vienna Convention. The absence of conditions for the permissibility of an objection applied even to objections with “intermediate effect” (purporting to exclude the application of provisions of the treaty to which the reservation itself did not relate) and objections with “super-maximum effect” (purporting to hold the reserving State bound by the treaty without the benefit of the reservation), independently of the question of whether such objections could in fact produce their purported effects. Nor was it obvious that the acceptance of an impermissible reservation was itself impermissible and without effect. Moreover, it would seem odd to consider silence constituting tacit acceptance of an impermissible reservation as being itself impermissible.

67. The question of the permissibility of interpretative declarations arose only if an interpretative declaration was expressly or implicitly prohibited by the treaty; that point was reflected in draft guideline 3.5.³⁶⁶ Whether the interpretation proposed in an interpretative declaration was correct or incorrect had nothing to do with the permissibility of the declaration as such. Moreover, it would be difficult to transpose to interpretative declarations the condition of compatibility with the object and purpose of the treaty; an interpretative declaration contrary to the object and purpose of the treaty might be considered to

be, in fact, a reservation. Lastly, there was no reason to set temporal limits, since an interpretative declaration could be formulated at any time.

68. Draft guideline 3.5.1 stated that the “validity” of a unilateral declaration purporting to be an interpretative declaration but actually constituting a reservation was subject to the same conditions of “validity” as a reservation.³⁶⁷ The same held for conditional interpretative declarations, covered by draft guideline 3.5.2,³⁶⁸ which had been put forward provisionally, but it was understood that no question of permissibility arose if the proposed interpretation was not contested or was proved correct. Draft guideline 3.5.3, which had also been put forward provisionally, stated that the draft guidelines relating to competence to assess the “validity” of reservations were applicable, *mutatis mutandis*, to conditional interpretative declarations.³⁶⁹

69. Draft guideline 3.6 stated that reactions to interpretative declarations (approval, opposition or reclassification) were not subject to any conditions for “substantive validity”.³⁷⁰

70. The fourteenth report also comprised an annex containing a report by the Special Rapporteur, prepared on his sole responsibility, of the meeting that had taken place on 15 and 16 May 2007 at Geneva between the Commission and representatives of the United Nations human rights treaty bodies and regional human rights bodies.

2. SUMMARY OF THE DEBATE

71. It was suggested that, once consideration of the effects of reservations, interpretative declarations and reactions to them had been completed, the possibility of simplifying the structure of the set of draft guidelines and reducing its length to make it more approachable could be explored.

72. Several members supported the inclusion of draft guidelines on the permissibility of reactions to reservations, of interpretative declarations and of reactions to interpretative declarations. The view was expressed that

³⁶² It should be recalled that the Commission retained the term “permissibility” (in French “validité substantielle”) “to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions” (see *Yearbook ... 2006*, vol. II (Part Two), p. 144, para. (7) of the general commentary to section 3 of the Guide to Practice). Nevertheless, the terms “validity” and “substantive validity” were used in the English translation of the draft guidelines presented by the Special Rapporteur at the present session, and referred by the Commission to the Drafting Committee—draft guidelines concerning the permissibility of reactions to reservations, of interpretative declarations and of reactions to interpretative declarations. Accordingly, such terms still appear in those draft guidelines. Throughout this chapter, the terms “permissibility” or “permissible” are employed, except where express reference is made to the text of above-mentioned draft guidelines.

³⁶³ Draft guideline 3.4. read as follows:

“*Substantive validity of acceptances and objections*

“Acceptances of reservations and objections to reservations are not subject to any condition of substantive validity.”

³⁶⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 15, at p. 24.

³⁶⁵ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 177 *et seq.*

³⁶⁶ Draft guideline 3.5 read as follows:

“*Substantive validity of interpretative declarations*

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

³⁶⁷ Draft guideline 3.5.1 read as follows:

“*Conditions of validity applicable to unilateral statements which constitute reservations*

“The validity of a unilateral statement which purports to be an interpretative declaration but which constitutes a reservation must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.15.”

³⁶⁸ Draft guideline 3.5.2 read as follows:

“*Conditions for the substantive validity of a conditional interpretative declaration*

“The validity of a conditional interpretative declaration must be assessed in accordance with the provisions of draft guidelines 3.1 to 3.1.15.”

³⁶⁹ Draft guideline 3.5.3 read as follows:

“*Competence to assess the validity of conditional interpretative declarations*

“Guidelines 3.2, 3.2.1, 3.2.2, 3.2.3 and 3.2.4 apply, *mutatis mutandis*, to conditional interpretative declarations.”

³⁷⁰ Draft guideline 3.6 read as follows:

“*Substantive validity of an approval, opposition or reclassification*

“Approval of an interpretative declaration, opposition to an interpretative declaration and reclassification of an interpretative declaration shall not be subject to any conditions for substantive validity.”

draft guidelines on those subjects might be useful, if only in order to note that no conditions for permissibility applied. According to another view, it was perhaps unwise to devote draft guidelines to those questions if no problem arose with respect to permissibility *stricto sensu*. The comment was made that, from a practical standpoint, the real question was less whether an act was permissible, than whether it could produce the desired effects. Therefore, the need for draft guidelines addressing the issue of permissibility was questioned. Attention was likewise drawn to the fact that the Commission had decided to use the term “permissibility” (in French, “*validité substantielle*”) when referring to reservations fulfilling the conditions of article 19 of the 1969 Vienna Convention and that this terminology should be retained in the draft guidelines under consideration.

73. Some members supported draft guideline 3.4, which stated that reactions to reservations were not subject to conditions for “substantive validity”. It was noted, however, that this conclusion was without prejudice to the question of whether and to what extent such reactions could produce the desired effects.

74. While some members endorsed the Special Rapporteur’s position that the acceptance of an impermissible reservation was not *ipso facto* impermissible, others considered that acceptance of an impermissible reservation was itself impermissible. The suggestion was also made that in draft guideline 3.4, or the commentary thereto, it should be stated that acceptance of an impermissible reservation did not produce any legal effects. It was said that even general acceptance of an impermissible reservation would not make it permissible. In addition, it was observed that the fairly common practice of disputing the permissibility of a reservation after the expiry of the 12-month time period laid down in article 20, paragraph 5, of the 1969 Vienna Convention seemed to indicate that tacit acceptance took effect only with respect to permissible reservations.

75. Some members were of the opinion that the formulation of an objection to a reservation was a State’s genuine right deriving from its sovereignty and not a mere freedom. The point was underscored that a State was entitled to object to any reservation, irrespective of whether it was permissible. While some members shared the Special Rapporteur’s conclusion that objections to reservations were not subject to conditions for permissibility, the opinion was expressed that a partial objection to a permissible reservation might itself pose problems of permissibility if it introduced elements that could render the combination of the reservation and the objection impermissible.

76. Support was expressed for the Special Rapporteur’s position that, while the 1969 Vienna Convention did not expressly authorize objections with “intermediate effect”, neither did it prohibit them. It was noted, however, that the example given of reservations and objections to part V of the 1969 Vienna Convention was highly specific. Moreover, it might be that the problem of objections with “intermediate effect” revolved around the interpretation of the wording of article 21, paragraph 3, of the Convention (“the provisions to which the reservation relates”). Some members questioned the Special Rapporteur’s

conclusion that objections with “intermediate effect” could not pose problems of permissibility. In particular, doubts were expressed as to the freedom of a State to formulate an objection that had the result of undermining the object and purpose of the treaty. Some members thought, moreover, that an objection would be prohibited if it had the effect of rendering the treaty incompatible with a *jus cogens* norm. It was therefore necessary either to set out the conditions for the permissibility of an objection with “intermediate effect” (including the requirement that it should not be contrary to *jus cogens*) or to stipulate that an objection could not produce such an effect. It was also suggested that the consent, at least the tacit consent, of the author of the reservation could be necessary in order for an objection with “intermediate effect” to produce its purported effects, and that the absence of such consent could prevent the establishment of treaty relations between the author of the objection and the author of the reservation. Doubts were also expressed concerning the permissibility of objections with “super-maximum effect” purporting to hold the reserving State bound by the treaty without the benefit of the reservation.

77. Some members supported the Special Rapporteur’s conclusion that, apart from the case in which an interpretative declaration was prohibited by a treaty, it was not possible to identify other criteria for the permissibility of an interpretative declaration. It was suggested that the commentary to draft guideline 3.5 should include specific examples of treaties that implicitly prohibited the formulation of interpretative declarations. According to another view, the question of a treaty prohibiting interpretative declarations was problematic because of a lack of actual practice. Support was also expressed for distinguishing between the correctness or otherwise of an interpretation and the permissibility of the declaration setting forth the interpretation. The view was expressed, however, that an interpretative declaration could be impermissible if the interpretation it formulated was contrary to the object and purpose of the treaty or if it violated article 31 of the 1969 Vienna Convention. It was also suggested that a draft guideline should be included, stating that a declaration that purported to be an interpretative declaration but was contrary to the object and purpose of the treaty should be treated as a reservation. It was also proposed that an interpretative declaration contrary to a peremptory norm of general international law should be considered impermissible.

78. Some members shared the view of the Special Rapporteur that a conditional interpretative declaration potentially constituted a reservation and was therefore subject to the same conditions for permissibility as reservations. According to one view, a conditional interpretative declaration should be treated as a reservation, without regard to the question of whether the interpretation put forward was correct, because its author was making its consent to be bound by the treaty conditional on a certain interpretation of it, thereby excluding all other interpretations insofar as it was concerned. However, the point was made that if the conditional interpretative declaration was accepted by all the contracting parties or by an entity authorized to provide binding interpretations of the treaty, then that declaration should be treated as an interpretative declaration, not as a reservation, for permissibility purposes. The view was also expressed that draft guideline 3.5.1 was

sufficient to cover conditional interpretative declarations, since they were equivalent to reservations. However, doubts were expressed about aligning the regime of conditional interpretative declarations too closely with that of reservations. In particular, it was pointed out that there could be differences between the two regimes in terms of the temporal limits for formulation, conditions of form and subsequent reactions (acceptance or objection).

79. Some members expressed support for draft guideline 3.6, whereby reactions to interpretative declarations were not subject to conditions for permissibility. According to a different view, approval of or opposition to an interpretative declaration could be permissible or impermissible, like the declaration itself. It was proposed that it should be spelled out that if a treaty prohibited the formulation of interpretative declarations, that prohibition would also apply to the formulation of an interpretation in reaction to an interpretative declaration, whether the reaction took the form of an acceptance of the interpretation in question or of an opposition in which another interpretation was proposed.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

80. In response to comments by some members concerning the scarcity of practice to support certain draft guidelines, the Special Rapporteur emphasized that the Guide to Practice was not necessarily based on past practice, but was primarily intended to guide future practice in the matter of reservations. Moreover, the sometimes complicated nature of the Guide was explained by the fact that its purpose was to settle complex problems that had not been resolved in articles 19 to 23 of the 1969 Vienna Convention and on which practice was sometimes difficult to grasp. That said, the Special Rapporteur was not opposed to the elaboration of a separate document that would set out the main principles on which the Guide was based.

81. With regard to objections with “intermediate effect”, some members had questioned the Special Rapporteur’s conclusion that such objections did not give rise to problems of permissibility. However, the Special Rapporteur continued to think that an objection with “intermediate effect” could not have the result of rendering the treaty incompatible with a peremptory norm of general international law, since the effect of an objection was merely to “deconventionalize” relations between the author of the reservation and the author of the objection, which would then be governed by general international law, including its peremptory norms. Moreover, the Special Rapporteur did not believe that acceptance by the reserving State was necessary in order for an objection with “intermediate effect” to produce its effects.

82. However, in the light of some of the comments made during the debate, the Special Rapporteur had decided to revise certain aspects of the draft guidelines introduced in his fourteenth report. He had decided to divide draft guideline 3.4 into two separate provisions. A new draft guideline 3.4.1³⁷¹ provided that an express acceptance of

a “non-valid” reservation was also invalid. On the other hand, the Special Rapporteur continued to have doubts about the wisdom of stating that a tacit acceptance of an impermissible reservation was impermissible, but if the Commission so decided he could accept that decision. A new draft guideline 3.4.2³⁷² was intended to set some conditions for the permissibility of objections with “intermediate effect”. First, there must be a sufficient link between the provision covered by the reservation and the additional provisions that the objection purported to exclude; second, the objection should not have the effect of depriving the treaty of its object and purpose in the relations between the author of the reservation and the author of the objection. The revised wording of draft guideline 3.5³⁷³ introduced an additional condition for the permissibility of an interpretative declaration, namely, that it must not be incompatible with a peremptory norm of general international law. On the other hand, the Special Rapporteur was not convinced by the arguments that an interpretative declaration could violate article 31 of the 1969 Vienna Convention or deprive the treaty of its object and purpose; in both cases, what was at issue was not the permissibility of the declaration but, at most, the incorrectness of the interpretation proposed. The Special Rapporteur had also decided to propose a change in the title of draft guideline 3.5.1 by referring explicitly to the recharacterization of an interpretative declaration as a reservation.³⁷⁴ Lastly, the revised version of draft guideline 3.6 provided for the impermissibility of approval of an interpretative declaration which was expressly or implicitly prohibited by the treaty.³⁷⁵ However, the Special Rapporteur had decided not to change draft guidelines 3.5.2 and 3.5.3 relating to conditional interpretative declarations, since it seemed to him that their regime should be patterned on that of reservations, even with regard to permissibility.

³⁷² Draft guideline 3.4.2 read as follows:

“Substantive validity of an objection to a reservation

“An objection to a reservation by which the objecting State or international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty not affected by the reservation is not valid unless:

“(1) the additional provisions thus excluded have a sufficient link with the provisions in respect of which the reservation was formulated [affected by the reservation];

“(2) the objection does not result in depriving the treaty of its object and purpose in the relations between the author of the reservation and the author of the objection.”

³⁷³ Draft guideline 3.5, as revised, read as follows:

“Substantive validity of interpretative declarations

“A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is expressly or implicitly prohibited by the treaty or is incompatible with a peremptory norm of general international law.”

³⁷⁴ Draft guideline 3.5.1, as revised, read as follows:

“Conditions of validity applicable to interpretative declarations recharacterized as reservations

“The validity of a unilateral statement which purports to be an interpretative declaration but which constitutes a reservation must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.15.”

³⁷⁵ Draft guideline 3.6, as revised, read as follows:

“Substantive validity of an approval, opposition or recharacterization

“1. A State or an international organization may not approve an interpretative declaration which is expressly or implicitly prohibited by the treaty.

“2. The opposition to, or the recharacterization of, an interpretative declaration shall not be subject to any condition for substantive validity.”

³⁷¹ Draft guideline 3.4.1 read as follows:

“Substantive validity of the acceptance of a reservation

“The explicit acceptance of a non-valid reservation is not valid either.”

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

1. TEXT OF THE DRAFT GUIDELINES

83. The text of the draft guidelines³⁷⁶ provisionally adopted so far by the Commission is reproduced below.

RESERVATIONS TO TREATIES

GUIDE TO PRACTICE

Explanatory note³⁷⁷

Some 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 reservations³⁷⁸

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

1.1.1. [1.1.4]³⁷⁹ *Object of reservations*³⁸⁰

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*³⁸¹

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*³⁸²

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*³⁸³

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*³⁸⁴

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*³⁸⁵

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*³⁸⁶

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*³⁸⁷

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 declarations³⁸⁸

“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*³⁸⁹

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*³⁹⁰

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

³⁷⁶ At its 2991st meeting, on 5 August 2008, the Commission decided that, while the expression “draft guidelines” would continue to be used in the title, the text of the report would simply refer to “guidelines”. This decision is purely editorial and is without prejudice to the legal status of the draft guidelines adopted by the Commission.

³⁷⁷ For the commentary, see *Yearbook ... 2003*, vol. II (Part Two), p. 70.

³⁷⁸ For the commentary to this guideline, see *Yearbook ... 1998*, vol. II (Part Two), pp. 99–100.

³⁷⁹ The number between square brackets indicates the number of this guideline in the report of the Special Rapporteur or, as the case may be, the original number of a guideline in the report of the Special Rapporteur which has been merged with the final guideline.

³⁸⁰ For the commentary to this guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 93–95.

³⁸¹ For the commentary to this guideline, see *Yearbook ... 1998*, vol. II (Part Two), pp. 103–104.

³⁸² For the commentary to this guideline, see *ibid.*, pp. 104–105.

³⁸³ For the commentary to this guideline, see *ibid.*, pp. 105–106.

³⁸⁴ For the commentary to this guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 95–97.

³⁸⁵ For the commentary to this guideline, see *ibid.*, p. 97.

³⁸⁶ For the commentary to this guideline, see *Yearbook ... 1998*, vol. II (Part Two), pp. 106–107.

³⁸⁷ For the commentary to this guideline, see *Yearbook ... 2000*, vol. II (Part Two), pp. 108–112.

³⁸⁸ For the commentary to this guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 97–103.

³⁸⁹ For the commentary to this guideline, see *ibid.*, pp. 103–106.

³⁹⁰ For the commentary to this guideline, see *ibid.*, pp. 106–107.

1.3 *Distinction between reservations and interpretative declarations*³⁹¹

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*³⁹²

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*³⁹³

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*³⁹⁴

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*³⁹⁵

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*³⁹⁶

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*³⁹⁷

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

1.4.3 [1.1.7] *Statements of non-recognition*³⁹⁸

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*³⁹⁹

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*⁴⁰⁰

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*⁴⁰¹

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*⁴⁰²

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*⁴⁰³

1.5.1 [1.1.9] *“Reservations” to bilateral treaties*⁴⁰⁴

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*⁴⁰⁵

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*⁴⁰⁶

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.

³⁹¹ For the commentary to this guideline, see *ibid.*, p. 107.

³⁹² For the commentary to this guideline, see *ibid.*, pp. 107–109.

³⁹³ For the commentary to this guideline, see *ibid.*, pp. 109–111.

³⁹⁴ For the commentary to this guideline, see *ibid.*, pp. 111–112.

³⁹⁵ For the commentary to this guideline, see *ibid.*, pp. 112–113.

³⁹⁶ For the commentary to this guideline, see *ibid.*, pp. 113–114.

³⁹⁷ For the commentary to this guideline, see *ibid.*, p. 114.

³⁹⁸ For the commentary to this guideline, see *ibid.*, pp. 114–116.

³⁹⁹ For the commentary to this guideline, see *ibid.*, pp. 116–118.

⁴⁰⁰ For the commentary to this guideline, see *ibid.*, pp. 118–119.

⁴⁰¹ For the commentary to this guideline, see *Yearbook ... 2000*, vol. II (Part Two), pp. 112–114.

⁴⁰² For the commentary to this guideline, see *ibid.*, pp. 114–116.

⁴⁰³ For the commentary, see *Yearbook ... 1999*, vol. II (Part Two), pp. 119–120.

⁴⁰⁴ For the commentary to this guideline, see *ibid.*, pp. 120–124.

⁴⁰⁵ For the commentary to this guideline, see *ibid.*, pp. 124–125.

⁴⁰⁶ For the commentary to this guideline, see *ibid.*, pp. 125–126.

1.6 *Scope of definitions*⁴⁰⁷

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

1.7 *Alternatives to reservations and interpretative declarations*⁴⁰⁸

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] *Alternatives to reservations*⁴⁰⁹

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*⁴¹⁰

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*⁴¹¹

A reservation must be formulated in writing.

2.1.2 *Form of formal confirmation*⁴¹²

Formal confirmation of a reservation must be made in writing.

2.1.3 *Formulation of a reservation at the international level*⁴¹³

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*⁴¹⁴

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*⁴¹⁵

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*⁴¹⁶

1. Unless otherwise provided in the treaty or agreed by the contracting States and international 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 international organizations for which it is intended as soon as possible.

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

3. 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*⁴¹⁷

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.

⁴⁰⁷ This guideline was reconsidered and modified during the fifty-eighth session of the Commission (2006). For the new commentary, see *Yearbook ... 2006*, vol. II (Part Two), pp. 156–157.

⁴⁰⁸ For the commentary to this guideline, see *Yearbook ... 2000*, vol. II (Part Two), pp. 116–177.

⁴⁰⁹ For the commentary to this guideline, see *ibid.*, pp. 117–122.

⁴¹⁰ For the commentary to this guideline, see *ibid.*, pp. 122–123.

⁴¹¹ For the commentary to this guideline, see *Yearbook ... 2002*, vol. II (Part Two), pp. 28–29.

⁴¹² For the commentary to this guideline, see *ibid.*, pp. 29–30.

⁴¹³ For the commentary to this guideline, see *ibid.*, pp. 30–32.

⁴¹⁴ For the commentary to this guideline, see *ibid.*, pp. 32–34.

⁴¹⁵ For the commentary to this guideline, see *ibid.*, pp. 34–38.

⁴¹⁶ For the commentary to this guideline, see *Yearbook ... 2008*, vol. II (Part Two), pp. 77–80.

⁴¹⁷ For the commentary to this guideline, see *Yearbook ... 2002*, vol. II (Part Two), pp. 42–45.

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*⁴¹⁸

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 the grounds for the impermissibility of the reservation.

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.

2.1.9 *Statement of reasons*⁴¹⁹

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

2.2 *Confirmation of reservations*

2.2.1 *Formal confirmation of reservations formulated when signing a treaty*⁴²⁰

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*⁴²¹

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*⁴²²

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.

2.3 *Late reservations*

2.3.1 *Late formulation of a reservation*⁴²³

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*⁴²⁴

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 by 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*⁴²⁵

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*⁴²⁶

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*⁴²⁷

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*⁴²⁸

2.4.0 *Form of interpretative declarations*⁴²⁹

An interpretative declaration should preferably be formulated in writing.

2.4.1 *Formulation of interpretative declarations*⁴³⁰

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

[2.4.2 [2.4.1 bis] *Formulation of an interpretative declaration at the internal level*⁴³¹

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

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

⁴¹⁸ This guideline was reconsidered and modified during the fifty-eighth session of the Commission (2006). For the new commentary, see *Yearbook ... 2006*, vol. II (Part Two), pp. 157–158.

⁴¹⁹ For the commentary to this guideline, see *Yearbook ... 2008*, vol. II (Part Two), pp. 80–82.

⁴²⁰ For the commentary to this guideline, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 180–183.

⁴²¹ For the commentary to this guideline, see *ibid.*, p. 183.

⁴²² For the commentary to this guideline, see *ibid.*, pp. 183–184.

⁴²³ For the commentary to this guideline, see *ibid.*, pp. 185–189.

⁴²⁴ For the commentary to this guideline, see *ibid.*, pp. 189–190.

⁴²⁵ For the commentary to this guideline, see *ibid.*, pp. 190–191.

⁴²⁶ For the commentary to this guideline, see *ibid.*, pp. 191–192.

⁴²⁷ For the commentary to this guideline, see *Yearbook ... 2004*, vol. II (Part Two), pp. 106–108.

⁴²⁸ For the commentary to this guideline, see *Yearbook ... 2002*, vol. II (Part Two), p. 115.

⁴²⁹ For the commentary to this guideline, see section C.2 below.

⁴³⁰ For the commentary to this guideline, see *Yearbook ... 2002*, vol. II (Part Two), pp. 46–47.

⁴³¹ For the commentary to this guideline, see *ibid.*, p. 47.

2.4.3 *Time at which an interpretative declaration may be formulated*⁴³²

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.

2.4.3 bis *Communication of interpretative declarations*⁴³³

The communication of a written interpretative declaration should be made, *mutatis mutandis*, in accordance with the procedure established in guidelines 2.1.5, 2.1.6 and 2.1.7.

2.4.4 [2.4.5] *Non-requirement of confirmation of interpretative declarations made when signing a treaty*⁴³⁴

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*⁴³⁵

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*⁴³⁶

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*⁴³⁷

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*⁴³⁸

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.]

⁴³² For the commentary to this guideline, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 192–193.

⁴³³ For the commentary to this guideline, see section C.2 below.

⁴³⁴ For the commentary to this guideline, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 193–194.

⁴³⁵ For the commentary to this guideline, see *ibid.*, p. 194.

⁴³⁶ For the commentary to this guideline, see *ibid.*, pp. 194–195.

⁴³⁷ For the commentary to this guideline, see *Yearbook ... 2002*, vol. II (Part Two), pp. 47–48.

⁴³⁸ For the commentary to this guideline, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 195. This guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new guidelines at the fifty-fourth session of the Commission.

2.4.9 *Modification of an interpretative declaration*⁴³⁹

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*⁴⁴⁰

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*⁴⁴¹

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*⁴⁴²

The withdrawal of a reservation must be formulated in writing.

2.5.3 *Periodic review of the usefulness of reservations*⁴⁴³

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*⁴⁴⁴

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.

⁴³⁹ For the commentary to this guideline, see *Yearbook ... 2004*, vol. II (Part Two), pp. 108–109.

⁴⁴⁰ For the commentary to this guideline, see *ibid.*, p. 109.

⁴⁴¹ For the commentary to this guideline, see *Yearbook ... 2003*, vol. II (Part Two), pp. 70–74.

⁴⁴² For the commentary to this guideline, see *ibid.*, pp. 74–76.

⁴⁴³ For the commentary to this guideline, see *ibid.*, p. 76.

⁴⁴⁴ For the commentary to this guideline, see *ibid.*, pp. 76–79.

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 reservations⁴⁴⁵

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 reservation⁴⁴⁶

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 reservation⁴⁴⁷

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 reservation⁴⁴⁸

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 reservation⁴⁴⁹

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 reservation⁴⁵⁰

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 reservation⁴⁵¹

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 reservation⁴⁵²

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 reservation⁴⁵³

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 reservation⁴⁵⁴

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 declaration⁴⁵⁵

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 declaration⁴⁵⁶

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

2.6 Formulation of objections

2.6.1 Definition of objections to reservations⁴⁵⁷

“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 reservation⁴⁵⁸

“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.

⁴⁴⁵ For the commentary to this guideline, see *ibid.*, pp. 79–80.

⁴⁴⁶ For the commentary to this guideline, see *ibid.*, pp. 80–81.

⁴⁴⁷ For the commentary to this guideline, see *ibid.*, pp. 81–83.

⁴⁴⁸ For the commentary to this guideline, see *ibid.*, pp. 83–86.

⁴⁴⁹ For the commentary to this model clause, see *ibid.*, p. 86.

⁴⁵⁰ For the commentary to this model clause, see *ibid.*

⁴⁵¹ For the commentary to this model clause, see *ibid.*

⁴⁵² For the commentary to this guideline, see *ibid.*, pp. 86–87.

⁴⁵³ For the commentary to this guideline, see *ibid.*, pp. 87–91.

⁴⁵⁴ For the commentary to this guideline, see *ibid.*, pp. 91–92.

⁴⁵⁵ For the commentary to this guideline, see *Yearbook ... 2004*, vol. II (Part Two), pp. 109–110.

⁴⁵⁶ For the commentary to this guideline, see *ibid.*, p. 110.

⁴⁵⁷ For the commentary to this guideline, see *Yearbook ... 2005*, vol. II (Part Two), pp. 77–82.

⁴⁵⁸ For the commentary to this guideline, see *ibid.*, p. 82.

2.6.3, 2.6.4⁴⁵⁹2.6.5 *Author*⁴⁶⁰

An objection to a reservation may be formulated by:

(a) any contracting State and any contracting international organization; and

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

2.6.6 *Joint formulation*⁴⁶¹

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

2.6.7 *Written form*⁴⁶²

An objection must be formulated in writing.

2.6.8 *Expression of intention to preclude the entry into force of the treaty*⁴⁶³

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

2.6.9 *Procedure for the formulation of objections*⁴⁶⁴

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

2.6.10 *Statement of reasons*⁴⁶⁵

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

2.6.11 *Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation*⁴⁶⁶

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

2.6.12 *Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty*⁴⁶⁷

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

2.6.13 *Time period for formulating an objection*⁴⁶⁸

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation

or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.6.14 *Conditional objections*⁴⁶⁹

An objection to a specific potential or future reservation does not produce the legal effects of an objection.

2.6.15 *Late objections*⁴⁷⁰

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.13 does not produce the legal effects of an objection made within that time period.

2.7 *Withdrawal and modification of objections to reservations*⁴⁷¹2.7.1 *Withdrawal of objections to reservations*⁴⁷²

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

2.7.2 *Form of withdrawal of objections to reservations*⁴⁷³

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

2.7.3 *Formulation and communication of the withdrawal of objections to reservations*⁴⁷⁴

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

2.7.4 *Effect on reservation of withdrawal of an objection*⁴⁷⁵

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

2.7.5 *Effective date of withdrawal of an objection*⁴⁷⁶

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

2.7.6 *Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation*⁴⁷⁷

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

2.7.7 *Partial withdrawal of an objection*⁴⁷⁸

Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal of an objection is subject to the same formal and procedural rules as a complete withdrawal and becomes operative on the same conditions.

2.7.8 *Effect of a partial withdrawal of an objection*⁴⁷⁹

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

⁴⁵⁹ The Drafting Committee decided to defer consideration of these two guidelines.

⁴⁶⁰ For the commentary to this guideline, see *Yearbook ... 2008*, vol. II (Part Two), pp. 82–84.

⁴⁶¹ For the commentary to this guideline, see *ibid.*, pp. 84–85.

⁴⁶² For the commentary to this guideline, see *ibid.*, p. 85.

⁴⁶³ For the commentary to this guideline, see *ibid.*, pp. 85–87.

⁴⁶⁴ For the commentary to this guideline, see *ibid.*, pp. 87–88.

⁴⁶⁵ For the commentary to this guideline, see *ibid.*, pp. 88–89.

⁴⁶⁶ For the commentary to this guideline, see *ibid.*, pp. 89–90.

⁴⁶⁷ For the commentary to this guideline, see *ibid.*, pp. 90–92.

⁴⁶⁸ For the commentary to this guideline, see *ibid.*, pp. 92–94.

⁴⁶⁹ For the commentary to this guideline, see *ibid.*, pp. 94–95.

⁴⁷⁰ For the commentary to this guideline, see *ibid.*, pp. 95–96.

⁴⁷¹ For the commentary to this guideline, see *ibid.*, pp. 96–98.

⁴⁷² For the commentary to this guideline, see *ibid.*, p. 98.

⁴⁷³ For the commentary to this guideline, see *ibid.*, p. 98.

⁴⁷⁴ For the commentary to this guideline, see *ibid.*, pp. 98–99.

⁴⁷⁵ For the commentary to this guideline, see *ibid.*, p. 99.

⁴⁷⁶ For the commentary to this guideline, see *ibid.*, pp. 100–101.

⁴⁷⁷ For the commentary to this guideline, see *ibid.*, p. 101.

⁴⁷⁸ For the commentary to this guideline, see *ibid.*, pp. 101–102.

⁴⁷⁹ For the commentary to this guideline, see *ibid.*, p. 102.

2.7.9 Widening of the scope of an objection to a reservation⁴⁸⁰

A State or international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.13 provided that the widening does not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection.

2.8 Formulation of acceptances of reservations

2.8.0 [2.8] Forms of acceptance of reservations⁴⁸¹

The acceptance of a reservation may arise from a unilateral statement in this respect or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13.

2.8.1 Tacit acceptance of reservations⁴⁸²

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.13.

2.8.2 Unanimous acceptance of reservations⁴⁸³

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

2.8.3 Express acceptance of a reservation⁴⁸⁴

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

2.8.4 Written form of express acceptance⁴⁸⁵

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

2.8.5 Procedure for formulating express acceptance⁴⁸⁶

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

2.8.6 Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation⁴⁸⁷

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

2.8.7 Acceptance of a reservation to the constituent instrument of an international organization⁴⁸⁸

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

2.8.8 Organ competent to accept a reservation to a constituent instrument⁴⁸⁹

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

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

2.8.9 Modalities of the acceptance of a reservation to a constituent instrument⁴⁹⁰

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

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

2.8.10 Acceptance of a reservation to a constituent instrument that has not yet entered into force⁴⁹¹

In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation by the end of a period of 12 months after they were notified of that reservation. Such a unanimous acceptance once obtained is final.

2.8.11 Reaction by a member of an international organization to a reservation to its constituent instrument⁴⁹²

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

2.8.12 Final nature of acceptance of a reservation⁴⁹³

Acceptance of a reservation cannot be withdrawn or amended.

2.9 Formulation of reactions to interpretative declarations

2.9.1 Approval of an interpretative declaration⁴⁹⁴

“Approval” of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation formulated in that declaration.

2.9.2 Opposition to an interpretative declaration⁴⁹⁵

“Opposition” to an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

2.9.3 Recharacterization of an interpretative declaration⁴⁹⁶

1. “Recharacterization” of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect

⁴⁸⁰ For the commentary to this guideline, see *ibid.*, pp. 102–103.

⁴⁸¹ For the commentary to this guideline, see *ibid.*, pp. 103–105.

⁴⁸² For the commentary to this guideline, see sect. C.2 below.

⁴⁸³ *Idem.*

⁴⁸⁴ *Idem.*

⁴⁸⁵ *Idem.*

⁴⁸⁶ *Idem.*

⁴⁸⁷ *Idem.*

⁴⁸⁸ *Idem.*

⁴⁸⁹ *Idem.*

⁴⁹⁰ *Idem.*

⁴⁹¹ *Idem.*

⁴⁹² *Idem.*

⁴⁹³ *Idem.*

⁴⁹⁴ *Idem.*

⁴⁹⁵ *Idem.*

⁴⁹⁶ *Idem.*

of a treaty formulated by another State or another international organization, whereby the former State or organization treats the declaration as a reservation.

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

2.9.4 Freedom to formulate approval, opposition or recharacterization⁴⁹⁷

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

2.9.5 Form of approval, opposition and recharacterization⁴⁹⁸

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

2.9.6 Statement of reasons for approval, opposition and recharacterization⁴⁹⁹

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

2.9.7 Formulation and communication of approval, opposition or recharacterization⁵⁰⁰

An approval, opposition or recharacterization in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

2.9.8 Non-presumption of approval or opposition⁵⁰¹

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

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

2.9.9 Silence with respect to an interpretative declaration⁵⁰²

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

2. In exceptional cases, the silence of a State or an international organization may be relevant to determining whether, through its conduct and taking account of the circumstances, it has approved an interpretative declaration.

[2.9.10 Reactions to conditional interpretative declarations⁵⁰³

Guidelines 2.6.1 to 2.8.12 shall apply, *mutatis mutandis*, to reactions of States and international organizations to conditional interpretative declarations.]

3. Validity of reservations and interpretative declarations

3.1 Permissible reservations⁵⁰⁴

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

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

3.1.1 Reservations expressly prohibited by the treaty⁵⁰⁵

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

- (a) prohibiting all reservations;
- (b) prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions; or
- (c) prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

3.1.2 Definition of specified reservations⁵⁰⁶

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

3.1.3 Permissibility of reservations not prohibited by the treaty⁵⁰⁷

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

3.1.4 Permissibility of specified reservations⁵⁰⁸

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

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty⁵⁰⁹

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

3.1.6 Determination of the object and purpose of the treaty⁵¹⁰

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

3.1.7 Vague or general reservations⁵¹¹

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

⁴⁹⁷ *Idem*.

⁴⁹⁸ *Idem*.

⁴⁹⁹ *Idem*.

⁵⁰⁰ *Idem*.

⁵⁰¹ *Idem*.

⁵⁰² *Idem*.

⁵⁰³ *Idem*.

⁵⁰⁴ For the commentary to this guideline, see *Yearbook ... 2006*, vol. II (Part Two), pp. 145–147.

⁵⁰⁵ For the commentary to this guideline, see *ibid.*, pp. 147–150.

⁵⁰⁶ For the commentary to this guideline, see *ibid.*, pp. 150–154.

⁵⁰⁷ For the commentary to this guideline, see *ibid.*, pp. 154–155.

⁵⁰⁸ For the commentary to this guideline, see *ibid.*, pp. 155–156.

⁵⁰⁹ For the commentary to this guideline, see *Yearbook ... 2007*, vol. II (Part Two), pp. 33–37.

⁵¹⁰ For the commentary to this guideline, see *ibid.*, pp. 37–39.

⁵¹¹ For the commentary to this guideline, see *ibid.*, pp. 39–42.

3.1.8 *Reservations to a provision reflecting a customary norm*⁵¹²

1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.

2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.

3.1.9 *Reservations contrary to a rule of jus cogens*⁵¹³

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

3.1.10 *Reservations to provisions relating to non-derogable rights*⁵¹⁴

A State or an international organization may not formulate a reservation to a treaty provision relating to non-derogable rights unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

3.1.11 *Reservations relating to internal law*⁵¹⁵

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific norms of the internal law of that State or rules of that organization may be formulated only insofar as it is compatible with the object and purpose of the treaty.

3.1.12 *Reservations to general human rights treaties*⁵¹⁶

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.

3.1.13 *Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty*⁵¹⁷

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

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

3.2 *Assessment of the permissibility of reservations*⁵¹⁸

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

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

3.2.1 *Competence of the treaty monitoring bodies to assess the permissibility of reservations*⁵¹⁹

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

2. The conclusions formulated by such a body in the exercise of this competence shall have the same legal effect as that deriving from the performance of its monitoring role.

3.2.2 *Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations*⁵²⁰

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations. For the existing monitoring bodies, measures could be adopted to the same ends.

3.2.3 *Cooperation of States and international organizations with treaty monitoring bodies*⁵²¹

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body are required to cooperate with that body and should give full consideration to that body's assessment of the permissibility of the reservations that they have formulated.

3.2.4 *Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body*⁵²²

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

3.2.5 *Competence of dispute settlement bodies to assess the permissibility of reservations*⁵²³

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

3.3 *Consequences of the non-permissibility of a reservation*⁵²⁴

A reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

3.3.1 *Non-permissibility of reservations and international responsibility*⁵²⁵

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

⁵¹² For the commentary to this guideline, see *ibid.*, pp. 42–46.

⁵¹³ For the commentary to this guideline, see *ibid.*, pp. 46–48.

⁵¹⁴ For the commentary to this guideline, see *ibid.*, pp. 48–50.

⁵¹⁵ For the commentary to this guideline, see *ibid.*, pp. 50–52.

⁵¹⁶ For the commentary to this guideline, see *ibid.*, pp. 52–53.

⁵¹⁷ For the commentary to this guideline, see *ibid.*, pp. 53–55.

⁵¹⁸ For the commentary to this guideline, see sect. C.2 below.

⁵¹⁹ *Idem.*

⁵²⁰ *Idem.*

⁵²¹ *Idem.*

⁵²² *Idem.*

⁵²³ *Idem.*

⁵²⁴ *Idem.*

⁵²⁵ *Idem.*

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTY-FIRST SESSION

84. The text of the draft guidelines, together with commentaries thereto, adopted by the Commission at its sixty-first session is reproduced below.

2.4.0⁵²⁶ *Form of interpretative declarations*

An interpretative declaration should preferably be formulated in writing.

Commentary

(1) There would be no justification for requiring a State or an international organization to follow a given procedure for giving, in a particular form, its interpretation of a convention to which it is a party or a signatory or to which it intends to become a party. Consequently, the formal validity of an interpretative declaration is in no way linked to observance of a specific form or procedure.⁵²⁷ The rules on the form and communication of reservations cannot therefore be purely and simply transposed to simple interpretative declarations, which may be formulated orally; it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations.

(2) Nevertheless, while there is no legal obligation in that regard, it seems appropriate to ensure, to the extent possible, that interpretative declarations are publicized widely. If no such communication exercise is undertaken, the author of the declaration runs the risk that the latter will not have the desired effect. Indeed, the influence of a declaration in practice depends to a great extent on its dissemination.

(3) Without discussing, at this stage,⁵²⁸ the legal implications of these declarations for the interpretation and application of the treaty in question, it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their *raison d'être* and the purpose for which they are formulated by States and international organizations. The ICJ has highlighted the importance of these statements in practice:

Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.⁵²⁹

⁵²⁶ The numbering of this guideline will need to be reviewed at the “polishing” stage of the guidelines on first reading, or at the second reading.

⁵²⁷ See also M. Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* (Unilateral Interpretative Declarations to Multilateral Treaties), Berlin, Duncker and Humblot, 2005, p. 117.

⁵²⁸ See Part IV, section 2, of the Guide to Practice below.

⁵²⁹ *International Status of South-West Africa, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950*, p. 128, at pp. 135–136. For what is clearly a narrower view of the possible influence of interpretative declarations, however, see *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *I.C.J. Reports 2009*, p. 61, at p. 78., para. 42.

Rosario Sapienza has also underlined the importance and the role of interpretative declarations and of reactions to them, as they:

forniranno utile contributo anche alla soluzione [of a dispute]. E ancor più le dichiarazioni aiuteranno l'interprete quando controversia non si dia, ma semplice problema interpretativo. [“will contribute usefully to the settlement [of a dispute]. Statements will be still more useful to the interpreter when there is no dispute, but only a problem of interpretation.”]⁵³⁰

In her study on unilateral interpretative declarations to multilateral treaties (*Einseitige Interpretationserklärungen zu multilateralen Verträgen*), Monika Heymann rightly stressed:

Dabei ist allerdings zu beachten, dass einer schriftlich fixierten einfachen Interpretationserklärung eine größere Bedeutung dadurch zukommen kann, dass die übrigen Vertragsparteien sie eher zur Kenntnis nehmen und ihr im Streitfall eine höhere Beweisfunktion zukommt. [“In that regard, it should be noted that a simple written interpretative declaration can take on greater importance because the other contracting parties take note of it and, in the event of a dispute, it has greater probative value.”]⁵³¹

(4) Moreover, in practice, States and international organizations endeavour to give their interpretative declarations the desired publicity. They transmit them to the depositary, and the Secretary-General of the United Nations, in turn, disseminates the text of such declarations⁵³² and publishes them in *Multilateral Treaties Deposited with the Secretary-General*.⁵³³ Clearly, this communication procedure, which ensures wide publicity, requires that declarations be made in writing.

(5) This requirement, however, is merely a practicality born of the need for efficacy. As the Commission has pointed out above,⁵³⁴ there is no legal obligation in this regard. This is why, unlike guideline 2.1.1 on the written form of reservations,⁵³⁵ guideline 2.4.0 takes the form of a simple recommendation, like the guidelines adopted in relation to, for example, the statement of reasons for reservations⁵³⁶ and for objections to reservations.⁵³⁷ The use of the auxiliary “should” and the inclusion of the word “preferably” reflect the desirable, but voluntary, nature of use of the written form.⁵³⁸

⁵³⁰ R. Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali*, Milan, Giuffrè, 1996, p. 275.

⁵³¹ Heymann, *op. cit.* (footnote 527 above), p. 118.

⁵³² *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, United Nations publication (Sales No. E/F.94.V.15), document ST/LEG/7/Rev.1, para. 218.

⁵³³ To give just one example, while article 319 of the United Nations Convention on the Law of the Sea does not explicitly require its depositary to communicate interpretative declarations made under article 311 of the Convention, the Secretary-General publishes them systematically in chapter XXI.6 of *Multilateral Treaties Deposited with the Secretary-General* (<http://treaties.un.org>).

⁵³⁴ Para. (1) of this commentary.

⁵³⁵ For the text of guideline 2.1.1, see sect. C.1 above, p. 86.

⁵³⁶ See guideline 2.1.9 (Statement of reasons [for reservations]) and the commentary thereto, *Yearbook ... 2008*, vol. II (Part Two), pp. 80–82.

⁵³⁷ See guideline 2.6.10 (Statement of reasons [for objections]) and the commentary thereto, *ibid.*, pp. 88–89.

⁵³⁸ This is why, whereas guideline 2.1.1, on the form of reservations, is entitled “Written form”, guideline 2.4.0 is entitled simply “Form of interpretative declarations”.

2.4.3 *bis*⁵³⁹ Communication of interpretative declarations

The communication of a written interpretative declaration should be made, *mutatis mutandis*, in accordance with the procedure established in guidelines 2.1.5, 2.1.6 and 2.1.7.

Commentary

(1) The considerations that led the Commission to adopt guideline 2.4.0, recommending that States and international organizations should preferably formulate their interpretative declarations in writing,⁵⁴⁰ apply equally to the dissemination of such declarations, which need to be in written form to be publicized.

(2) Here, too, it seemed to the Commission that it is in the interests of both the author of the interpretative declaration and the other contracting parties that the declaration should be disseminated as widely as possible. If the authors of interpretative declarations wish their position to be taken into account in the application of the treaty—particularly if there is any dispute—it is undoubtedly in their interest to have their position communicated to the other States and international organizations concerned. Moreover, only a procedure of this type seems to give the other contracting parties an opportunity to react to an interpretative declaration.

(3) The communication procedure could draw upon the procedure applicable to other types of declaration in respect of a treaty, such as the procedure for the communication of reservations, as set out in guidelines 2.1.5 to 2.1.7,⁵⁴¹ it being understood that only a recommendation is being made, since, unlike reservations, interpretative declarations are not required to be made in writing.⁵⁴²

(4) Some members of the Commission believe that the depositary should be able to initiate a consultation procedure in cases where an interpretative declaration is manifestly impermissible, in which case guideline 2.1.8⁵⁴³ should also be mentioned in guideline 2.4.3 *bis*. Since, on the one hand, guideline 2.1.8—which in any case concerns the progressive development of international law—has met with criticism⁵⁴⁴ and, on the other, an interpretative declaration can only be considered in exceptional cases, this suggestion has been rejected.

(5) Similarly, and notwithstanding the position expressed by some members of the Commission, statements of reasons for interpretative declarations do not appear to correspond to the practice of States and international

organizations or, in essence, to meet a need. In formulating interpretative declarations, States and international organizations generally wish to set forth their position concerning the meaning of one of the treaty's provisions or of a concept used in the text of the treaty and, in general, they explain the reasons for this position. It is hardly necessary, or even possible, to provide explanations for these explanations. Some members thought that the meaning of interpretative declarations was often ambiguous and that, therefore, statements of reasons would clarify it. Nevertheless, the majority view was that a recommendation to this effect, even in the form of a simple recommendation, was not needed.⁵⁴⁵

2.8.1 *Tacit acceptance of reservations*

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.13.

Commentary

(1) Guideline 2.8.1 supplements guideline 2.8⁵⁴⁶ by specifying the conditions under which one of the two forms of acceptance of reservations mentioned in the latter provision (silence of a contracting State or international organization) constitutes acceptance of a reservation. It reproduces—with a slight editorial adaptation—the rule expressed in article 20, paragraph 5, of the 1986 Vienna Convention.

(2) How a reservation's permissibility is related to the tacit or express acceptance of a reservation by States and international organizations does not require elucidation in the section of the Guide to Practice concerning procedure. It concerns the effects of reservations, acceptances and objections, which will be the subject of the fourth part of the Guide.

(3) In the advisory opinion of the ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court emphasized that the “very great allowance made for tacit assent to reservations”⁵⁴⁷ characterized international practice, which was becoming more flexible with respect to reservations to multilateral conventions. Although, traditionally, express acceptance alone had been considered as expressing consent by other contracting States to the reservation,⁵⁴⁸ this solution, already outdated in 1951, no longer seemed practicable owing to, as the Court stated, “the very wide degree of participation”⁵⁴⁹ in some of these conventions.

⁵³⁹ The numbering of this guideline will need to be reviewed at the “polishing” stage of the guidelines on first reading, or at the second reading.

⁵⁴⁰ See paragraphs (1)–(5) of the commentary to guideline 2.4.0 above, p. 94.

⁵⁴¹ For the texts of guidelines 2.1.5 to 2.1.7, see section C.1 above, pp. 86–87.

⁵⁴² See guideline 2.4.0 and the commentary thereto above, p. 94.

⁵⁴³ For the text of guideline 2.1.8, see section C.1 above, p. 87.

⁵⁴⁴ See *Yearbook ... 2006*, vol. II (Part Two), pp. 157–158 (paragraphs (2) and (3) of the commentary on guideline 2.1.8).

⁵⁴⁵ Reactions to interpretative declarations are a different matter; see guideline 2.9.6 below, p. 113.

⁵⁴⁶ For the text of this guideline and the commentary thereto, see *Yearbook ... 2008*, vol. II (Part Two), pp. 103–105.

⁵⁴⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 364 above), p. 21.

⁵⁴⁸ See P.-H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1978, p. 104. The author refers to the work of D. Kappeler, *Les réserves dans les traités internationaux*, Berlin, Verlag für Recht und Gesellschaft, 1958, pp. 40–41.

⁵⁴⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 364 above), p. 21.

(4) Despite the different opinions expressed by the members of the Commission during the discussion of article 10 of the draft convention on the law of treaties proposed by the Special Rapporteur J. L. Brierly in 1950,⁵⁵⁰ which asserted, to a limited degree,⁵⁵¹ the possibility of consent to reservations by tacit agreement,⁵⁵² H. Lauterpacht and G. G. Fitzmaurice also allowed for the principle of tacit acceptance in their drafts.⁵⁵³ This should come as no surprise. Under the traditional system of unanimity widely defended by the Commission's first three Special Rapporteurs on the law of treaties, the principle of tacit acceptance was necessary in order to avoid excessive periods of legal uncertainty: in the absence of a presumption of acceptance, the protracted silence of a State party to a treaty could tie up the fate of the reservation and leave in doubt the status of the reserving State in relation to the treaty for an indefinite period, or even prevent the treaty from entering into force for some time.

(5) In that light, although the principle of tacit consent is not as imperative under the "flexible" system ultimately adopted by the Commission's fourth Special Rapporteur on the law of treaties, it still has some merits and advantages. Even in his first report, Waldock incorporated the principle in the draft articles which he had submitted to the Commission.⁵⁵⁴ He put forward the following explanation for doing so:

It is ... true that, under the "flexible" system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State⁵⁵⁵

(6) The provision that would become the future article 20, paragraph 5, was ultimately adopted by the Commission without debate.⁵⁵⁶ During the United Nations Conference on the Law of Treaties of 1968–1969, article 20, paragraph 5, also raised no problem and was

adopted with only one change, inclusion of the words⁵⁵⁷ "unless the treaty otherwise provides".⁵⁵⁸

(7) The work of the Commission on the law of treaties between States and international organizations or between international organizations did not greatly change or challenge the principle of tacit consent. However, the Commission had decided to assimilate international organizations to States with regard to the issue of tacit acceptance.⁵⁵⁹ In view of criticisms from some States,⁵⁶⁰ the Commission decided to "refrain from saying anything in paragraph 5 of article 20 concerning the problems raised by the protracted absence of any objection by an international organization", but "without thereby rejecting the principle that even where treaties are concerned, obligations can arise for an organization from its conduct".⁵⁶¹ Draft article 20, paragraph 5, as adopted by the Commission, thus reproduced article 20, paragraph 5, of the 1969 Vienna Convention word for word.⁵⁶² During the Vienna Conference, however, the idea of assimilating international organizations to States was reintroduced on the basis of several amendments to that effect⁵⁶³ and thorough debate.⁵⁶⁴

(8) In line with the position it has taken since adopting guideline 1.1 (which reproduces the wording of article 2, paragraph 1 (d), of the 1986 Vienna Convention), the Commission has decided that it is necessary to include in the Guide to Practice a guideline reflecting article 20, paragraph 5, of the 1986 Vienna Convention. The latter

⁵⁵⁷ On the meaning of this part of the provision, see below, paragraph (11) of the present commentary.

⁵⁵⁸ United States amendment (A/CONF.39/C.1/L.127), *Official Records of the United Nations Conference on the Law of Treaties, first and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), p. 136. Two other amendments which would have deleted the reference to para. 4 (Australia) (A/CONF.39/C.1/L.166, *ibid.*, p. 136) and replaced article 17 with new wording limiting the period for the presumption to six months (Union of Soviet Socialist Republics) (A/CONF.39/C.1/L.115, *ibid.*, p. 133) were either not adopted or withdrawn.

⁵⁵⁹ See draft articles 20 and 20 *bis* adopted on first reading, *Yearbook ... 1977*, vol. II (Part Two), pp. 111–113.

⁵⁶⁰ See *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.2 (Byelorussian Soviet Socialist Republic), sect. A.12 (Ukrainian Soviet Socialist Republic), sect. A.13 (Union of Soviet Socialist Republics) and sect. C.1 (Council for Mutual Economic Assistance); see also the summary by the Special Rapporteur in his tenth report, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, p. 61, para. 75.

⁵⁶¹ *Yearbook ... 1982*, vol. II (Part Two), p. 36 (paras. (5)–(6) of the commentary on draft article 20).

⁵⁶² *Ibid.*, p. 35.

⁵⁶³ China (A/CONF.129/C.1/L.18, proposing a period of 18 months applicable to States and international organizations), Austria (A/CONF.129/C.1/L.33) and Cape Verde (A/CONF.129/C.1/L.35), *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986*, vol. II, *Documents of the Conference* (A/CONF.129/16/Add.1, United Nations publication, Sales No. E.94.V.5), p. 70, para. 70 (a), (c) and (d). See also the amendment by Australia (A/CONF.129/C.1/L.32), ultimately withdrawn, but which proposed a more nuanced solution (*ibid.*, para. 70 (b)).

⁵⁶⁴ See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.129/16, United Nations publication, Sales No. E.94.V.5), 12th to 14th meetings, 27 and 28 February 1986, pp. 99–119.

⁵⁵⁰ *Yearbook ... 1950*, vol. I, 53rd meeting, 23 June 1950, pp. 92–95, paras. 41–84. Mr. El-Khoury argued for the contrary view that the mere silence of a State should not be regarded as implying acceptance, but rather as a refusal to accept the reservation (*ibid.*, p. 94, para. 67); this view remained, however, an isolated one.

⁵⁵¹ Brierly's draft article 10 in fact envisaged only cases of implicit acceptance, that is, cases where a State accepted all existing reservations to a treaty of which it was aware when it acceded thereto. For the text of draft article 10, see his first report on the law of treaties, *Yearbook ... 1950*, vol. II, document A/CN.4/23, pp. 238–242.

⁵⁵² In fact, this was instead a matter of implicit acceptance; see paragraph (6) of the commentary to guideline 2.8 in *Yearbook ... 2008*, vol. II (Part Two), p. 104.

⁵⁵³ See the summary of the position of the Special Rapporteurs and of the Commission in the first report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 66–67, para. (14).

⁵⁵⁴ See draft article 18, paragraph 3, of his first report (*ibid.*, p. 61 and pp. 66–68, paras. (14)–(17)), reproduced in draft article 19, para. 4, in his fourth report (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 54).

⁵⁵⁵ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 67, para. (15).

⁵⁵⁶ *Yearbook ... 1965*, vol. I, 816th meeting, 2 July 1965, pp. 283–284, paras. 43–53; see also Imbert, *Les réserves...*, *op. cit.* (footnote 548 above), p. 105.

provision cannot be reproduced word for word, however, as it refers to other paragraphs in the same article that do not belong in the part of the Guide to Practice having to do with the formulation of reservations, acceptances and objections; the paragraphs 2 and 4 mentioned in paragraph 5 of article 20 relate, not to the procedure for formulating reservations, but to the conditions under which they produce their effects—in other words, the conditions necessary in order for them to be “established” in the sense of the opening phrase of paragraph 1 of article 21 of the Vienna Conventions. What is pertinent here is that article 20, paragraph 2, requires unanimous acceptance of reservations to certain treaties; that question is dealt with, from a purely procedural perspective, in guideline 2.8.2 below.

(9) In addition, the adoption of guideline 2.6.13 (Time period for formulating an objection)⁵⁶⁵ makes it redundant to repeat in guideline 2.8.1 the specific conditions *ratione temporis* contained in article 20, paragraph 5.⁵⁶⁶ It therefore seemed sufficient for guideline 2.8.1 simply to refer to guideline 2.6.13.

(10) In the Commission’s view, this wording also has the advantage of bringing out more clearly the dialectic between (tacit) acceptance and objection—objection excludes acceptance and vice versa.⁵⁶⁷ During the Vienna Conference of 1968, the representative of France expressed this idea in the following terms:

acceptance and objection are the obverse and reverse sides of the same idea. A State which accepts a reservation thereby surrenders the right to object to it; a State which raises an objection thereby expresses its refusal to accept a reservation.⁵⁶⁸

(11) The Commission did consider, however, whether the expression “unless the treaty provides otherwise”, to be found in article 20, paragraph 5, of the Vienna Conventions, should be retained in guideline 2.8.1. That proviso does not really need to be spelled out, since all the provisions of the Vienna Convention are of a residuary, voluntary nature.⁵⁶⁹ Moreover, it seems redundant, since the same phrase appears in guideline 2.6.13, where its inclusion is justified by the *travaux préparatoires* for article 20, paragraph 5, of the 1969 Vienna Convention.⁵⁷⁰

⁵⁶⁵ For the text of this guideline and commentary thereto, see *Yearbook ... 2008*, vol. II (Part Two), pp. 92–94.

⁵⁶⁶ “For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later*.”

⁵⁶⁷ See D. Müller, “Convention de Vienne de 1969: Article 20: acceptance des réserves et objections aux réserves”, in O. Corten and P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités: commentaire article par article*, Brussels, Bruylant, 2006, vol. I, pp. 822–823, para. 49.

⁵⁶⁸ *Official Records of the United Nations Conference on the Law of Treaties, first session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 22nd meeting, 11 April 1968, p. 116, para. 14.*

⁵⁶⁹ For similar comments on the same issue, see, for example, paragraphs (15) and (16) of the commentary to guideline 2.5.1 (Withdrawal of reservations), which reproduces the provisions of article 22, para. 1, of the 1986 Vienna Convention, in *Yearbook ... 2003*, vol. II (Part Two), pp. 73–74.

⁵⁷⁰ See paragraph (7) of the commentary to guideline 2.6.13 in *Yearbook ... 2008*, vol. II (Part Two), p. 93.

Although opinion was divided in the Commission, it nevertheless decided that it was useful to recall that the rule set out in guideline 2.8.1 applied only if the treaty did not provide otherwise.

2.8.2 Unanimous acceptance of reservations

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

Commentary

(1) The time period for tacit acceptance of a reservation by States or international organizations that are entitled to become parties to the treaty is subject to a further limitation when unanimous acceptance is necessary in order to establish a reservation. That limitation is set forth in guideline 2.8.2.

(2) *A priori*, article 20, paragraph 5, of the Vienna Conventions seems to mean that the general rule applies when unanimity is required: paragraph 5 explicitly refers to article 20, paragraph 2, which requires acceptance of a reservation by all parties to a treaty with limited participation. However, that interpretation would have unreasonable consequences. Allowing States and international organizations that are entitled to become parties to the treaty but have not yet expressed their consent to be bound by the treaty when the reservation is formulated to raise an objection on the date that they become parties to the treaty (even if this date is later than the date on which the objection is notified) would have extremely damaging consequences for the reserving State and, more generally, for the stability of treaty relations. The reason for this is that in such a scenario it could not be presumed, at the end of the 12-month period, that a State that was a signatory of, but not a party to, a treaty with limited participation, had agreed to the reservation and this situation would prevent unanimous acceptance, even if the State had not formally objected to the reservation. The application of the presumption implied by article 20, paragraph 5, would therefore have exactly the opposite effect to the one desired, i.e., the rapid stabilization of treaty relations and of the reserving State’s status *vis-à-vis* the treaty.

(3) This issue was addressed by Waldock in draft article 18 contained in his first report, which made a clear distinction between tacit acceptance and implicit acceptance in the case of multilateral treaties (subject to the “flexible” system), on the one hand, and plurilateral treaties (subject to the traditional system of unanimity), on the other. Indeed, paragraph 3 (c) of that draft article provided the following:

A State which acquires the right to become a party to a treaty after a reservation has already been formulated⁵⁷¹ shall be presumed to consent to the reservation:

⁵⁷¹ “Made” would undoubtedly be more appropriate: if the period within which an objection can be raised following the formulation of a reservation has not yet ended, there is no reason why the new contracting State could not object.

(i) In the case of a plurilateral treaty, if it executes the act or acts necessary to enable it to become a party to the treaty;

(ii) In the case of a multilateral treaty, if it executes the act or acts necessary to qualify it to become a party to the treaty without signifying its objection to the reservation.⁵⁷²

(4) Waldock also noted, with reference to the scenario envisaged in paragraph 3 (c) (i), in which unanimity remains the rule, that lessening the rigidity of the 12-month rule for States that are not already parties to the treaty:

is not possible in the case of plurilateral treaties because there the delay in taking a decision does place in suspense the status of the reserving State *vis-à-vis* all the States participating in the treaty.⁵⁷³

(5) It follows that, wherever unanimity remains the rule, a State or international organization that accedes to the treaty may not validly object to a reservation that has already been accepted by all the States and international organizations that are already parties to the treaty, once the 12-month period has elapsed from the time that it received notification of the reservation. This does not mean, however, that the State or international organization may never object to the reservation: it may do so within the stipulated time period as a State entitled to become a party to the treaty.⁵⁷⁴ If, however, it has not taken that step and subsequently accedes to the treaty, it has no choice but to consent to the reservation.

(6) Guideline 2.8.2 says nothing about situations in which a State or an international organization is prevented from objecting to a reservation at the time that it accedes to the treaty. It merely notes that, when the special conditions imposed by the treaty are fulfilled, the particular reservation is established and cannot be called into question through an objection.

(7) The reference to “some” States or international organizations is intended to cover the scenario in which the requirement of acceptance is limited to certain parties. That might be the case, for example, if a treaty establishing a nuclear-weapon-free zone stipulates that reservations are established only if all nuclear-weapons States that are parties to the treaty accept them; the subsequent accession of another nuclear Power would not call into question a reservation thus made.

2.8.3 Express acceptance of a reservation

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

Commentary

(1) It is certainly true that “the ... acceptance of a reservation is, in the case of multilateral treaties, almost

invariably implicit or tacit”.⁵⁷⁵ Nevertheless, it can be express, and there are situations in which a State expressly makes known the fact that it accepts the reservation.

(2) The presumption postulated in article 20, paragraph 5, of the Vienna Conventions in no way prevents States and international organizations from expressly stating their acceptance of reservations that have been formulated. That might seem to be debatable in cases where a reservation does not satisfy the conditions of permissibility laid down in article 19 of the Vienna Conventions.⁵⁷⁶

(3) Unlike the reservation itself and unlike an objection, an express acceptance can be declared at any time. That presents no problem for the reserving State, since a State or an international organization which does not expressly accept a reservation will nevertheless be deemed to have accepted it at the end of the 12-month period specified in article 20, paragraph 5, of the Vienna Conventions, from which guideline 2.8.1 derives the legal consequences.

(4) Even a State or an international organization which has previously raised an objection to a reservation remains free to accept it expressly (or implicitly, by withdrawing its objection) at any time.⁵⁷⁷ This amounts to a complete withdrawal of the objection, which produces the same effects as an acceptance.⁵⁷⁸

(5) In any case, despite these broad possibilities, State practice in the area of express acceptances is practically non-existent. There are only a few very isolated examples to be found, and some of those are not without problems.

(6) An example often cited in the literature⁵⁷⁹ is the acceptance by the Federal Republic of Germany of a reservation by France, communicated on 7 February 1979, to the 1931 Convention providing a Uniform Law for Cheques. It should be noted that this reservation on the part of the French Republic had been formulated late, some 40 years after the accession by France to that Convention. The communication by Germany⁵⁸⁰ clearly states that the

⁵⁷⁵ D. W. Greig, “Reservations: equity as a balancing factor?”, *Australian Yearbook of International Law*, vol. 16 (1995), p. 120. In the same sense, see also F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T.M.C. Asser Institute, Swedish Institute of International Law, *Studies in International Law*, vol. 5 (1988), p. 124; L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?*, Dordrecht/Boston/London, Martinus Nijhoff, 1994, p. 46; R. Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del régimen de Viena*, Universidad de Murcia, 2004, pp. 211 *et seq.*; D. Müller, *loc. cit.* (footnote 567 above), pp. 812–813, para. 27.

⁵⁷⁶ See paragraph (2) of the commentary to guideline 2.8.1 above.

⁵⁷⁷ See guideline 2.7.1 (Withdrawal of objections to reservations) and the commentary thereto, *Yearbook ... 2008*, vol. II (Part Two), p. 98.

⁵⁷⁸ See guideline 2.7.4 (Effect on reservation of withdrawal of an objection) and the commentary thereto, *ibid.*, p. 99.

⁵⁷⁹ Horn, *Reservations and Interpretative Declarations...*, *op. cit.* (footnote 575 above), p. 124; Riquelme Cortado, *op. cit.* (footnote 575 above), p. 212.

⁵⁸⁰ This communication was issued on 20 February 1980, more than 12 months after the notification of the reservation by the Secretary-General of the United Nations, depositary of the Convention. At that time, in any case, the (new) reservation by France was “considered to have been accepted” by Germany on the basis of the principle set out in article 20, para. 5, of the Vienna Conventions. Furthermore,

⁵⁷² *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 61.

⁵⁷³ *Ibid.*, p. 67 (para. (16) of the commentary).

⁵⁷⁴ As to the limited effect of such an objection, see guideline 2.6.5, subparagraph (a), and the commentary thereto in *Yearbook ... 2008*, vol. II (Part Two), pp. 82–84.

Federal Republic “raises no objections”⁵⁸¹ to it and thus clearly constitutes an acceptance.⁵⁸² The text of the communication from the Federal Republic of Germany does not make it clear, however, whether it is accepting the deposit of the reservation despite its late formulation⁵⁸³ or the content of the reservation itself, or both.⁵⁸⁴

(7) There are other, less ambiguous examples as well, such as the declarations and communications of the United States of America in response to the reservations formulated by Bulgaria,⁵⁸⁵ the Union of Soviet Socialist Republics and Romania to article 21, paragraphs 2 and 3, of the 1954 Convention concerning Customs Facilities for Touring, in which it made it clear that it had no objection to these reservations. The United States also stated that it would apply the reservation reciprocally with respect to each of the States making reservations,⁵⁸⁶ which, in any case, it was entitled to do by virtue of article 21, paragraph 1 (b), of the Vienna Conventions.⁵⁸⁷ A declaration by Yugoslavia concerning a reservation by the Soviet Union was similar in intent⁵⁸⁸ but expressly referred to article 20, paragraph 7, of the Convention, relating to the reciprocal application of reservations.⁵⁸⁹ That being said, and even if the declarations by the United States and Yugoslavia were motivated by a concern to emphasize the reciprocal application of the reservation and thus refer to article 20, paragraph 7, of the 1954 Convention, the fact remains that they indisputably constitute express acceptances. The same is true in the case of the declarations by the United States regarding the reservations of Romania and the Soviet Union to the 1949 Convention on Road Traffic,⁵⁹⁰ which are virtually identical to the declarations by the United States in relation to the Convention

concerning Customs Facilities for Touring, despite the fact that the 1949 Convention does not include a provision comparable to article 20, paragraph 7, of the 1954 Convention.⁵⁹¹

(8) In the absence of significant practice in the area of express acceptances, one is forced to rely almost exclusively on the provisions of the Vienna Conventions and their *travaux préparatoires* to work out the principles and rules for formulating express acceptances and the procedures applicable to them.

2.8.4 Written form of express acceptance

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

Commentary

(1) Article 23, paragraph 1, of the 1986 Vienna Convention states:

A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

(2) The *travaux préparatoires* for this provision were analysed in connection with guidelines 2.1.1 and 2.1.5.⁵⁹² It is thus unnecessary to duplicate that general presentation, except to recall that the question of form and procedure for acceptance of reservations was touched upon only incidentally during the elaboration of the 1969 Vienna Convention.

(3) As in the case of objections,⁵⁹³ this provision places express acceptances on the same level as reservations themselves in matters concerning written form and communication with the States and international organizations involved. For the same reasons as those given for objections, it is therefore sufficient, in the context of the Guide to Practice, to take note of this convergence of procedures and to stipulate in a separate guideline, for the sake of clarity, that an express acceptance, by definition,⁵⁹⁴ must be in written form.

(4) Despite appearances, guideline 2.8.4 can in no way be considered superfluous. The mere fact that an acceptance is express does not necessarily imply that it is in writing. The written form is not only called for by article 23, paragraph 1, of the Vienna Conventions, from which the wording of guideline 2.8.4 is taken, but is also necessitated by the importance of acceptances to the legal regime of reservations to treaties, in particular

the Secretary-General had already considered the reservation by France as having been accepted as of 11 May 1979, three months after its deposit.

⁵⁸¹ *Multilateral Treaties...* (footnote 533 above), (under “League of Nations Treaties”, chap. 11), note 5.

⁵⁸² Indeed, provided that no objection has been raised, the State is considered to have accepted the reservation; see article 20, paragraph 5, of the Vienna Conventions.

⁵⁸³ On this point, see guideline 2.3.1 (Late formulation of a reservation) and the commentary thereto in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 185–189.

⁵⁸⁴ The disadvantage of using the same terminology for both hypotheses was pointed out in paragraph (2) of the commentary to guideline 2.6.2 in *Yearbook ... 2005*, vol. II (Part Two), p. 82, and in paragraph (23) of the commentary to guideline 2.3.1 in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 189.

⁵⁸⁵ Bulgaria ultimately withdrew this reservation. See *Multilateral Treaties ...* (footnote 533 above), chap. XI.A.6 (note 16).

⁵⁸⁶ See *ibid.* (notes 16, 19 and 20).

⁵⁸⁷ On the question of reciprocity of reservations, see Müller, *loc. cit.* (footnote 567 above), pp. 901–907, paras. 30–38.

⁵⁸⁸ See *Multilateral Treaties...* (footnote 533 above), chap. XI.A.6 (note 20).

⁵⁸⁹ Article 20, para. 7, of the Convention concerning Customs Facilities for Touring provides that “[n]o Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies” and that “[a]ny State availing itself of this right shall notify the Secretary-General accordingly”.

⁵⁹⁰ *Multilateral Treaties...* (footnote 533 above), chap. XI.B.1 (notes 14 and 18). The declarations by Greece and the Netherlands concerning the Russian reservation are considerably less clear in that they limit themselves to stating that the two Governments “do not consider themselves bound by the provisions to which the reservation is made, as far as the Soviet Union is concerned” (*ibid.*, note 18). Nevertheless, this effect might be produced by an acceptance as well as by an objection.

⁵⁹¹ Article 54, para. 1, of the 1968 Convention on Road Traffic simply provides for the reciprocity of a reservation concerning article 52 on settlement of disputes, without requiring a declaration to that effect on the part of States accepting the reservation.

⁵⁹² *Yearbook ... 2002*, vol. II (Part Two), pp. 28–29 (paras. (2) to (7) of the commentary to guideline 2.1.1), and pp. 34–35 (paras. (5) to (11) of the commentary to guideline 2.1.5), as well as p. 39 (paras. (3) and (4) of the commentary to guideline 2.1.6). See also *Yearbook ... 2008*, vol. II (Part Two), pp. 87–88 (commentary to guideline 2.6.9).

⁵⁹³ *Yearbook ... 2008*, vol. II (Part Two), pp. 87–88 (commentary to guideline 2.6.9).

⁵⁹⁴ See guideline 2.8 and commentary thereto, in particular paragraphs (2) and (3), *ibid.*, pp. 103–105.

their permissibility and effects. Although the various proposals of the Special Rapporteurs on the law of treaties never required, in so many words, that express acceptances should be in writing, it can be seen from their work that they always leaned towards the maintenance of a certain formality. Waldock's various proposals and drafts require that an express acceptance should be made in the instrument, or by any other appropriate formal procedure, at the time of ratification or approval by the State concerned, or, in other cases, by formal notification; hence a written version would be required in every case. Following the simplification and reworking of the articles concerning the form and procedure for reservations, express acceptances and objections, the Commission decided to include the matter of written form in draft article 20, paragraph 1 (which became article 23, paragraph 1). The harmonization of provisions applicable to the written form and to the procedure for formulating reservations, objections and express acceptances did not give rise to debate in the Commission or at the Vienna Conference.

2.8.5 Procedure for formulating express acceptance

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

Commentary

(1) Guideline 2.8.5 is, in a sense, the counterpart of guideline 2.6.9 on objection procedure, and is based on the same rationale.⁵⁹⁵ It is clear from the work of the Commission that culminated in the wording of article 23 of the Vienna Convention that reservations, express acceptances and objections are all subject to the same rules of notification and communication.⁵⁹⁶

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

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

Commentary

(1) Even though the practice of States with regard to the confirmation of express acceptances made prior to the confirmation of reservations appears to be non-existent, article 23, paragraph 3, of the Vienna Conventions⁵⁹⁷ clearly states:

⁵⁹⁵ See the commentary to guideline 2.6.9, *ibid.*, pp. 87–88.

⁵⁹⁶ See, in particular, the proposal of Mr. Rosenne, *Yearbook ... 1965*, vol. II, p. 73, and *ibid.*, vol. I, 803rd meeting, 16 June 1965, pp. 197–199, paras. 30–56. See also *Yearbook ... 1966*, vol. II, p. 270, paragraph (1) of the commentary to draft article 73. For a summary of the work of the International Law Commission, see A. Pellet and W. Schabas, "Convention de Vienne de 1969: Article 23: procédure relative aux réserves", *Commentary to article 23 (1969)*, in Corten and Klein (eds.), *Les Conventions de Vienne...*, *op. cit.* (footnote 567 above), p. 974, para. 5.

⁵⁹⁷ On the *travaux préparatoires* to this provision, see *Yearbook ... 2008*, vol. II (Part Two), pp. 89–90 (commentary to guideline 2.6.11).

An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

(2) As the Commission already noted with regard to the confirmation of objections,⁵⁹⁸ this is a common-sense rule, which has been reproduced in guideline 2.8.6 in a form adapted to the logic of the Guide to Practice:

—It is limited to the confirmation of acceptances and does not refer to objections;⁵⁹⁹ and

—Instead of containing the formulation "made previously to confirmation of the reservation", it refers to guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty).⁶⁰⁰

(3) On the other hand, it would seem inappropriate to include in the Guide to Practice a guideline on express acceptance of reservations that was analogous to guideline 2.6.12 (Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by the treaty).⁶⁰¹ Not only is the idea of formulating an acceptance prior to the expression of consent to be bound by the treaty excluded by the very wording of article 20, paragraph 5, of the Vienna Conventions, which allows the formulation of acceptances only by contracting States or international organizations,⁶⁰² but also, in practice, it is difficult to imagine a State or international organization actually proceeding to such an acceptance. In any case, such a practice (which would be tantamount to soliciting reservations) should surely be discouraged, and would not serve the purpose of "preventive objections": the "warning" made in advance to States and international organizations seeking to formulate reservations unacceptable to the objecting State.

2.8.7 Acceptance of a reservation to the constituent instrument of an international organization

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

Commentary

(1) Article 20, paragraph 3, of the Vienna Conventions has the same wording:

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

⁵⁹⁸ *Ibid.*, p. 90, para. (3).

⁵⁹⁹ On the question of the (non-)confirmation of objections, see guideline 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation) and the commentary thereto, *ibid.*, pp. 89–90.

⁶⁰⁰ "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." For the commentary to this guideline, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 180–183.

⁶⁰¹ See guideline 2.6.12 and the commentary thereto, *Yearbook ... 2008*, vol. II (Part Two), pp. 90–92.

⁶⁰² See paragraph (10) of the commentary to guideline 2.8, *ibid.*, p. 105.

(2) This provision originated in the first report of Special Rapporteur Waldock, who proposed a draft article 18, paragraph 4 (c), which read as follows:

In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument and to constitute the reserving State a party to the instrument.⁶⁰³

The same idea was taken up in the fourth report of the Special Rapporteur, but the wording of draft article 19, paragraph 3, was simpler and more concise:

Subject to article 3 (*bis*) [the origin of the current article 5], when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization.⁶⁰⁴

(3) The very principle of recourse to the competent organ of an international organization for a ruling on the acceptance of a reservation made regarding its constituent instrument was severely criticized at the 1969 Vienna Conference, in particular by the Soviet Union, which said:

Paragraph 3 of the Commission's article 17 should also be deleted, since the sovereign right of States to formulate reservations could not be made dependent on the decisions of international organizations.⁶⁰⁵

(4) Other delegations, while less hostile to the principle of intervention by an organization's competent organ in accepting a reservation to its constituent instrument, were of the view that this particular regime was already covered by what would become article 5 of the 1969 Vienna Convention. Article 5 does, in fact, make the 1969 Vienna Convention applicable to the constituent instruments of international organizations "without prejudice to any relevant rules of the organization", including provisions concerning the admission of new members or the assessment of reservations that may arise.⁶⁰⁶ Nevertheless, the provision was adopted by the Vienna Conference in 1986.⁶⁰⁷

⁶⁰³ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 61. See also draft article 20, paragraph 4, as adopted by the Commission on first reading, which restated the principle of intervention of the competent organ of an organization but which appeared to subsume it under cases in which an objection had effectively been raised against the reservation concerned, *ibid.*, document A/5209, p. 176. See also paragraph (25) of the commentary to draft article 20, *ibid.*, p. 181.

⁶⁰⁴ *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 50.

⁶⁰⁵ See *Official Records of the United Nations Conference on the Law of Treaties, first session...* (footnote 568 above), 21st meeting, 10 April 1968, p. 107, para. 6.

⁶⁰⁶ See the Swiss amendment (A/CONF.39/C.1/L.97), *Official Records of the United Nations Conference on the Law of Treaties, first and second sessions...* (footnote 558 above), p. 135, and the joint amendment by France and Tunisia (A/CONF.39/C.1/L.113), *ibid.* See also interventions by France (*Official Records of the United Nations Conference on the Law of Treaties, first session...* (footnote 568 above), 22nd meeting, 11 April 1968, p. 116, para. 16); by Switzerland (*ibid.*, 21st meeting, 10 April 1968, p. 111, para. 40), by Tunisia (*ibid.*, para. 45), and by Italy (*ibid.*, 22nd meeting, 11 April 1968, p. 120, para. 77). In the same sense, see P.-H. Imbert, *Les réserves...*, *op. cit.* (footnote 548 above), p. 122; and M. H. Mendelson, "Reservations to the constitutions of international organizations", BYBIL 1971, pp. 137 *et seq.*, at p. 151.

⁶⁰⁷ *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations...* (see footnote 564 above), vol. I, 27th meeting, 12 March 1986, p. 187, para. 14.

(5) The commentaries to the draft articles on the law of treaties between States and international organizations or between international organizations also clearly show that article 5 of the Convention and paragraph 3 of article 20 are neither mutually exclusive nor redundant. In fact, it was after the reintroduction, following much hesitation, of a provision corresponding to article 5 of the 1969 Vienna Convention, which had been initially omitted, that it appeared necessary to the Commission to also reintroduce paragraph 3 of article 20 in the draft which led to the 1986 Convention.⁶⁰⁸

(6) In principle, recourse to the competent organ of an organization for acceptance of reservations formulated with regard to the constituent instrument of that organization is perfectly logical. The constituent instruments of international organizations are not of a nature to be subject to the "flexible" system.⁶⁰⁹ Their main objective is the establishment of a new juridical person, and in that context a diversity of bilateral relations between member States or organizations is essentially inconceivable. There cannot be numerous types of "membership"; even less can there be numerous decision-making procedures. The practical value of the principle is particularly obvious if one tries to imagine a situation where a reserving State is considered a "member" of the organization by some of the other States members and, at the same time, as a third party in relation to the organization and its constituent instrument by other States who have made a qualified objection opposing the entry into force of the treaty in their bilateral relations with the reserving State.⁶¹⁰ A solution of this sort, creating a hierarchy among or a bilateralization of the membership of the organization, would paralyse the work of the international organization in question and would thus be inadmissible. The Commission, basing itself largely on the practice of the Secretary-General in the matter, therefore rightly noted in its commentary to draft article 20, paragraph 4, adopted on first reading:

in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and ... it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable.⁶¹¹

(7) Furthermore, it is only logical that States or member organizations should take a collective decision concerning acceptance of a reservation, given that they take part, through the competent organ of the organization, in the admissions procedure for all new members and must assess at that time the terms and extent of commitment of the State or organization applying for membership. It is thus up to the organization, and to it alone, and more

⁶⁰⁸ *Yearbook ... 1982*, vol. II (Part Two), p. 36, para. (3) of the commentary to draft article 20. See also the debate within the Commission, *Yearbook ... 1982*, vol. I, 1727th meeting, 15 June 1982, pp. 177–178.

⁶⁰⁹ M. H. Mendelson has demonstrated that "[t]he charter of an international organization differs from other treaty regimes in bringing into being, as it were, a living organism, whose decisions, resolutions, regulations, appropriations and the like constantly create new rights and obligations for the members" (Mendelson, *loc. cit.* (footnote 606 above), p. 148).

⁶¹⁰ See Müller, *loc. cit.* (footnote 567 above), p. 854, para. 106; and Mendelson, *loc. cit.* (footnote 606 above), pp. 149–151.

⁶¹¹ *Yearbook ... 1962*, vol. II, p. 181, para. (25) of the commentary to draft article 20.

particularly to the competent organ, to interpret its own constituent instrument and to decide on the acceptance of a reservation formulated by a candidate for admission.

(8) This principle is confirmed, moreover, by practice in the matter. Despite some variation in the practice of depositaries other than the Secretary-General of the United Nations,⁶¹² the latter clearly sets out his position in the case of the reservation by India to the Convention on the Inter-Governmental Maritime Consultative Organization.⁶¹³ On that occasion, it was specifically stated that the Secretary-General “has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question”.⁶¹⁴ However, there are very few examples of acceptances by the competent organ of the organization concerned to be found in the collection *Multilateral Treaties Deposited with the Secretary-General*, particularly as the depositary does not generally communicate acceptances. It is nonetheless worth noting that the reservations formulated by the Federal Republic of Germany and the United Kingdom to the Agreement establishing the African Development Bank, as amended in 1979, were expressly accepted by the Bank.⁶¹⁵ Similarly, the reservation by France to the 1977 Agreement establishing the Asia-Pacific Institute for Broadcasting Development was expressly accepted by the Institute’s Governing Council.⁶¹⁶ The instrument of ratification by Chile of the 1983 Statutes of the International Centre for Genetic Engineering and Biotechnology also took effect on the date that the reservations formulated in respect of that instrument were accepted by the Centre’s Board of Governors.⁶¹⁷

(9) In keeping with its usual practice, the Commission therefore considered it necessary to reproduce article 20, paragraph 3, of the Vienna Conventions in draft guideline 2.8.7 in order to stress the special nature of the rules applicable to the constituent instruments of international organizations with regard to the acceptance of reservations.

2.8.8 Organ competent to accept a reservation to a constituent instrument

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

(a) the organ competent to decide on the admission of a member to the organization;

(b) the organ competent to amend the constituent instrument; or

(c) the organ competent to interpret this instrument.

Commentary

(1) The question of determining which organ is competent to decide on the acceptance of a reservation is not answered either in the Vienna Conventions themselves or in the *travaux préparatoires* thereto. It was therefore thought helpful to indicate in the Guide to Practice what is meant by the “competent organ” of an organization for purposes of applying article 20, paragraph 3, of the Vienna Conventions, the wording of which is reproduced in draft guideline 2.8.7.

(2) The silence of the Vienna Conventions on this point is easily explained: it is impossible to determine in a general and abstract way which organ of an international organization is competent to decide on the acceptance of a reservation. This question is covered by the “without prejudice” clause in article 5, according to which the provisions of the Conventions apply to constituent instruments of international organizations “without prejudice to any relevant rules of the organization”.

(3) Thus, the rules of the organization determine the organ competent to accept the reservation, as well as the applicable voting procedure and required majorities. If the rules are silent on that point, in view of the circumstances in which a reservation can be formulated it can be assumed that “competent organ” means the organ that decides on the reserving State’s application for admission or the organ competent to amend the constituent instrument of the organization or to interpret it. It does not seem to be possible for the Commission to determine a hierarchy among those different organs.

(4) The wide diversity of practice has not been of great assistance in resolving this point. Thus, the “reservation” by India to the Constitution of the Inter-Governmental Maritime Consultative Organization (IMCO)—once the controversy over the procedure to be followed was resolved⁶¹⁸—was accepted by the IMCO Council under article 27 of the Convention,⁶¹⁹ whereas the reservation by Turkey to the same Convention was (implicitly) accepted by the Assembly. With regard to the reservation by the United States to the Constitution of the World Health Organization, the Secretary-General referred the matter to the World Health Assembly, which was, by virtue of article 75 of the Constitution, competent to decide on any disputes with regard to the interpretation of that instrument. In the end, the World Health Assembly unanimously accepted the reservation by the United States.⁶²⁰

⁶¹² Thus, the United States has always applied the principle of unanimity for reservations to constituent instruments of international organizations (see the examples given by Mendelson, *loc. cit.* (footnote 606 above), p. 149, and pp. 158–160, and Imbert, *Les réserves...*, *op. cit.* (footnote 548 above), pp. 122–123 (note 186), while the United Kingdom has embraced the Secretary-General’s practice of referring the question back to the competent organ of the organization concerned (*ibid.*, p. 121).

⁶¹³ See Mendelson, *loc. cit.* (footnote 606 above), pp. 162–169, and Imbert, *Les réserves...*, *op. cit.* (footnote 548 above), pp. 123–125.

⁶¹⁴ See *Official Records of the General Assembly, Fourteenth Session, Annexes*, document A/4235, para. 21. See also *Yearbook ... 1965*, vol. II, document A/5687, p. 102, para. 22, and *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (footnote 532 above), paras. 197–198.

⁶¹⁵ *Multilateral Treaties...* (footnote 533 above), chap. X.2.b (note 7).

⁶¹⁶ *Ibid.*, chap. XXV.3 (note 4).

⁶¹⁷ *Ibid.*, chap. XIV.7 (note 6).

⁶¹⁸ See Mendelson, *loc. cit.* (footnote 606 above), pp. 162–169, and Imbert, *Les réserves...*, *op. cit.* (footnote 548 above), pp. 123–125.

⁶¹⁹ By virtue of this provision, the Council assumes the functions of the organization if the Assembly does not meet.

⁶²⁰ On this case, see, in particular, Mendelson, *loc. cit.* (footnote 606 above), pp. 161–162. For other examples, see para. (8) of the commentary to guideline 2.8.7 above.

2.8.9 Modalities of the acceptance of a reservation to a constituent instrument

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

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

Commentary

(1) Guideline 2.8.9 sets out, in a single provision, the consequences of the principle laid down in article 20, paragraph 3, of the Vienna Conventions and reproduced in guideline 2.8.7:

—the principle that, apart from one nuance, the acceptance of a reservation by the competent organ of the organization must be express; and

—the fact that this acceptance is necessary but sufficient and that, consequently, individual acceptance of the reservation by the member States is not required.

(2) Article 20, paragraph 3, of the Vienna Conventions is scarcely more than a “safeguard clause”⁶²¹ that excludes the case of constituent instruments of international organizations, from the scope of the flexible system, including the principle of tacit acceptance,⁶²² while specifying that acceptance by the competent organ is necessary to “establish” the reservation within the meaning of article 21, paragraph 1, of the Vienna Conventions. Moreover, as guidelines 2.8.7 and 2.8.8 show, article 20, paragraph 3, is far from resolving all the problems which can arise with regard to the legal regime applicable to reservations to constituent instruments: not only does it not define either the notion of a constituent instrument or the competent organ which has to decide, but it also fails to give any indication of the modalities of the organ’s acceptance of reservations.

(3) One thing, however, is certain: the acceptance by the competent organ of an international organization of a reservation to its constituent instrument cannot be presumed. Under article 20, paragraph 5, of the Vienna Conventions, the presumption that a reservation is accepted at the end of a 12-month period applies only to the cases described in paragraphs 2 and 4 of that article. Thus, the case set out in article 20, paragraph 3, is excluded and this is tantamount to saying that, unless the treaty (in this case, the constituent instrument of the organization) otherwise provides, acceptance must necessarily be express.

(4) In practice, even leaving aside the problem of the 12-month period stipulated in article 20, paragraph 5, of the Vienna Conventions, which would be difficult, if not impossible, to respect in some organizations where the organs competent to decide on the admission of new members meet only at intervals of more than 12 months,⁶²³ the failure by the competent organ of the organization concerned to take a position is scarcely conceivable in view of the very special nature of constituent instruments. In any case, at one point or another, an organ of the organization must take a position on the admission of a new member that wishes to accompany its accession to the constituent instrument with a reservation; without such a decision, the State cannot be considered a member of the organization. Even if the admission of the State in question is not subject to a formal act of the organization, but is simply reflected in accession to the constituent instrument, article 20, paragraph 3, of the Vienna Conventions requires the competent organ to rule on the question.

(5) It is possible, however, to imagine cases in which the organ competent to decide on the admission of a State implicitly accepts the reservation by allowing the candidate State to participate in the work of the organization without formally ruling on the reservation.⁶²⁴ The phrase “[s]ubject to the rules of the organization” at the beginning of the first paragraph of the guideline is designed to introduce some additional flexibility into the principle stated in the guideline.

(6) The fact remains that there is one exception to the rule of tacit acceptance prescribed in article 20, paragraph 5, of the Vienna Conventions and reproduced in guideline 2.8.1. It therefore seems useful to recall in a separate guideline that the presumption of acceptance does not apply with regard to the constituent instruments of international organizations, as least as far as acceptance expressed by the competent organ of the organization is concerned.

(7) The unavoidable logical consequence of the principle established in article 20, paragraph 3, of the Vienna Conventions and the exception it introduces to the general principle of tacit acceptance is that acceptance of the reservation by contracting States or international organizations is not a prerequisite for the establishment of the reservation. This is the idea expressed in the second paragraph of guideline 2.8.9. It does not mean that contracting States or international organizations are precluded from formally accepting the reservation in question if they so wish. As guideline 2.8.11 explains, that acceptance will simply not produce the effects normally attendant upon such a declaration.

⁶²³ One example is the case of the General Assembly of the World Tourism Organization which, under article 10 of its Statutes, meets every two years.

⁶²⁴ See the example of the reservation formulated by Turkey to the Convention on the Inter-Governmental Maritime Consultative Organization. This reservation was not officially accepted by the Assembly. Nonetheless, the Assembly allowed the delegation from Turkey to participate in its work. This implied acceptance of the instrument of ratification and the reservation (W. W. Bishop, “Reservations to treaties”, *Recueil des cours de l’Académie de droit international de La Haye*, vol. 103 (1961-II), pp. 297–298; and Mendelson, *loc. cit.* (footnote 606 above), p. 163). Technically, this is not, however, a “tacit” acceptance as Mendelson seems to think (*ibid.*), but rather an “implicit” acceptance (on the distinction see *Yearbook ... 2008*, vol. II (Part Two), p. 104 (paragraph 6) of the commentary to guideline 2.8).

⁶²¹ Müller, *loc. cit.* (footnote 567 above), p. 858, para. 114.

⁶²² Article 20, para. 5, of the Vienna Conventions excludes from its scope the case of reservations to constituent instruments of international organizations, specifying that it applies solely to the situations referred to in paras. 2 and 4 of article 20.

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

In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation by the end of a period of 12 months after they were notified of that reservation. Such a unanimous acceptance once obtained is final.

Commentary

(1) A particular problem arises with regard to reservations to the constituent instrument of an organization in cases where the competent organ does not yet exist because the treaty may not yet have entered into force or the organization may not yet have been established. In this respect, guideline 2.8.10 clarifies article 20, paragraph 3, of the Vienna Conventions on a matter which may seem to be of minor importance, but which has posed some fairly substantial difficulties in some cases in the past.

(2) This situation occurred with respect to the Convention on the International Maritime Organization—at the time still IMCO—to which some States had formulated reservations or declarations in their instruments of ratification⁶²⁵ and with respect to the Constitution of the International Refugee Organization, which France, Guatemala and the United States intended to ratify with reservations,⁶²⁶ before the respective constituent instruments of these two organizations had entered into force. The Secretary-General of the United Nations, in his capacity as depositary of these Conventions and unable to submit the question of declarations and/or reservations to the International Refugee Organization (as it did not yet exist), decided to consult the States most immediately concerned, in other words, the States that were already parties to the Convention and, if there was no objection, to admit the reserving States as members of the organization.⁶²⁷

(3) It should also be noted that, while article 20, paragraph 3, of the Vienna Conventions excludes the application of the “flexible” system for reservations to a constituent instrument of an international organization, it does not place it under the traditional system of unanimity. The Secretary-General’s practice, however—which is to consult all the States that are already parties to the

constituent instrument—leans in that direction. Had it been adopted, an amendment by Austria to this provision, submitted at the Vienna Conference, would have led to a different solution:

When the reservation is formulated while the treaty is not yet in force, the expression of the consent of the State which has formulated the reservation takes effect only when such competent organ is properly constituted and has accepted the reservation.⁶²⁸

This approach, which was not followed by the Drafting Committee at the time of the Conference,⁶²⁹ is supported by M. H. Mendelson, who considers, moreover, that “[t]he fact that ... the instrument containing the reservations should not count towards bringing the treaty into force, is a small price to pay for ensuring the organization’s control over reservations”.⁶³⁰

(4) The organization’s control over the question of reservations is certainly one advantage of the solution advocated by the amendment by Austria, which was also supported by some members of the Commission who considered that acceptance of the reservation could wait until the organization had actually been established. Nonetheless, the undeniable disadvantage of this solution—which was rejected by the Vienna Conference—is that it leaves the reserving State in what can be a very prolonged undetermined status with respect to the organization, until such time as the treaty enters into force. Thus, one might well wonder whether the practice of the Secretary-General is not a more reasonable solution. Indeed, asking States that are already parties to the constituent instrument to assess the reservation with a view to obtaining unanimous acceptance (no protest or objection) places the reserving State in a more comfortable situation. Its status with respect to the constituent instrument of the organization and with respect to the organization itself is determined much more rapidly.⁶³¹ What is more, it should be borne in mind that the organization’s consent is nothing more than the sum total of acceptances of the States members of the organization. Requiring unanimity before the competent organ comes into being can, of course, be a disadvantage to the reserving State, since in most cases—at least in the case of international organizations with a global mandate—a decision will probably be taken by majority vote. Nonetheless, if there is no unanimity among the contracting States or international organizations, there is nothing to

⁶²⁵ See, in particular, the declarations of Ecuador, Mexico, Switzerland and the United States of America (*Multilateral Treaties ...* (footnote 533 above), chap. XII.1).

⁶²⁶ These declarations are cited in Imbert, *Les réserves...*, *op. cit.* (footnote 548 above), p. 40 (note 6).

⁶²⁷ See Mendelson, *loc. cit.* (footnote 606 above), pp. 162–163. In this same spirit, the United States of America, during the Vienna Conference, proposed replacing article 20, para. 3, with the following text: “When a treaty is a constituent instrument of an international organization, it shall be deemed to be of such a character that, pending its entry into force, and the functioning of the organization, a reservation may be established if none of the signatory States objects, unless the treaty otherwise provides.” (*Official Records of the United Nations Conference on the Law of Treaties, first session...* (see footnote 568 above), pp. 130–131, para. 54). This amendment, which was not adopted, would have considerably enlarged the circle of States entitled to decide.

⁶²⁸ A/CONF.39/C.1/L.3, *Official Records of the United Nations Conference on the Law of Treaties, first and second sessions...* (footnote 558 above), p. 135. An amendment by China was very much along these lines, but could have meant that the reserving State becomes a party to the instrument even so. It provided that “[w]hen the reservation is made before the entry into force of the treaty, the reservation shall be subject to subsequent acceptance by the competent organ after such competent organ has been properly instituted”. (A/CONF.39/C.1/L.162, *ibid.*).

⁶²⁹ Mendelson, *loc. cit.* (footnote 606 above), pp. 152–153. See *Official Records of the United Nations Conference on the Law of Treaties, first and second sessions...* (footnote 558 above), pp. 137–138 and 240.

⁶³⁰ Mendelson, *loc. cit.* (footnote 606 above), p. 153.

⁶³¹ The example of the reservation by Argentina to the Statute of the International Atomic Energy Agency shows that the status of the reserving State can be determined very rapidly and depends essentially on the depositary (the United States in this case). The Argentine reservation was accepted after a period of only three months. See Mendelson, *loc. cit.* (footnote 606 above), p. 160.

prevent the author of the reservation from resubmitting its instrument of ratification and accompanying reservation to the competent organ of the organization once it is established.

(5) Both solutions seem to have an identical result. The difference, however—and it is not negligible—is that the reserving State is spared an intermediate and uncertain status until such time as the organization is established and its reservation can be examined by the competent organ. That is a major advantage in terms of legal certainty.

(6) The Commission has pondered the question of which States and international organizations should be called upon to decide on the fate of a reservation in such circumstances. Most members apparently incline to the view that allowing only contracting States and international organizations to do so could, in some cases, unduly facilitate the establishment of a reservation since, ultimately, just one contracting State could seal its fate. For this reason, the Commission has finally decided to refer to the States and international organizations that are signatories of the constituent instrument. It is understood that the term “signatory” means those that are signatories at the time when the reservation is formulated.

(7) The purpose of the clarification in the last sentence of the guideline that “[s]uch a unanimous acceptance once obtained is final” is to ensure the stability of the legal situation resulting from the acceptance. It is predicated on the same rationale as that underlying guideline 2.8.2. Generally speaking, the other rules on acceptance continue to apply here, and the reservation must be deemed to have been accepted if no signatory State or signatory international organization has objected to it within the 12-month period stipulated in guideline 2.6.13.

(8) Although it seemed unnecessary to spell out such details in the guideline itself, the Commission considers that if the constituent act enters into force during the 12-month period in question, guideline 2.8.10 is no longer applicable and it is the general rule laid down in guideline 2.8.7 that applies.

(9) In any event, it seems desirable that, during the negotiations, States or international organizations come to an agreement on a *modus vivendi* for the period of uncertainty between the time of signature and the entry into force of the constituent instrument, for example, by transferring the competence necessary to accept or reject reservations to the interim committee responsible for setting up the new international organization.⁶³²

⁶³² This solution was envisaged by the Secretary-General of the United Nations in a document prepared for the third *United Nations Conference on the Law of the Sea*. In his report, the Secretary-General stated that “before entry into force of the [Convention on the Law of the Sea], it would of course be possible to consult a preparatory commission or some organ of the United Nations” (A/CONF.62/L.13, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. VI (United Nations publication, Sales No. E.77.V.2), p. 128, footnote 26). For a brief discussion of the difficulty, in certain circumstances, of determining the “organ qualified to accept a reservation”, see the second paragraph of guideline 2.1.5 (Communication of reservations) and the commentary thereto, *Yearbook ... 2002*, vol. II (Part Two), pp. 37–38, (paras. (28) and (29) of the commentary).

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

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

Commentary

(1) According to the terms of guideline 2.8.9, “[f]or the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required”. But, as explained in the commentary to that provision,⁶³³ this principle does not mean that “contracting States or international organizations are precluded from formally accepting the reservation in question if they so wish”. Guideline 2.8.11 confirms the point.

(2) The reply to the question of whether the competence of the organ of the organization to decide on whether to accept a reservation to the constituent instrument precludes individual reactions by other members of the organization may seem obvious. Why allow States to express their individual views if they must make a collective decision on acceptance of the reservation within the competent organ of the organization? Would it not give the green light to reopening the debate on the reservation, particularly for States that were not able to “impose” their point of view within the competent organ, and thereby create a dual or parallel system of acceptance of such reservations that would in all likelihood create an impasse if the two processes had different outcomes?

(3) During the Vienna Conference, the United States introduced an amendment to article 17, paragraph 3 (which became paragraph 3 of article 20), specifying that “such acceptance shall not preclude any contracting State from objecting to the reservation”.⁶³⁴ Adopted by a slim majority at the 25th meeting of the Committee of the Whole⁶³⁵ and incorporated by the Drafting Committee in the provisional text of article 17, this passage was ultimately deleted from the final text of the Convention by the Committee of the Whole “on the understanding that the question of objections to reservations to constituent instruments of international organizations formed part of a topic already before the International Law Commission [the question of relations between international organizations and States], and that meanwhile the question would continue to be regulated by general international law”.⁶³⁶ It became apparent in the work of the Drafting Committee

⁶³³ Para. (7).

⁶³⁴ A/CONF.39/C.1/L.127, *Official Records of the United Nations Conference on the Law of Treaties, first and second sessions...* (footnote 558 above), p. 135, para. 179 (iv) (d).

⁶³⁵ By 33 votes to 22, with 29 abstentions. *Official Records of the United Nations Conference on the Law of Treaties, first session...* (see footnote 568 above), 25th meeting, 16 April 1968, p. 135, para. 32.

⁶³⁶ *Official Records of the United Nations Conference on the Law of Treaties, first and second sessions...* (footnote 558 above), pp. 137–138, para. 186.

that the formulation of the amendment by the United States was not very clear and left open the question of the legal effects of such an objection.⁶³⁷

(4) In actual fact, it is hard to understand why member States or international organizations could not take individual positions on a reservation outside the framework of the international organization and communicate their views to interested parties, including to the organization. In all likelihood, taking such a position would probably have no concrete legal effect; however, it has happened more than once, and the absence of a legal effect *stricto sensu* of such declarations does not rob them of their importance⁶³⁸—they provide an opportunity for the reserving State, in the first instance, and, afterward, for other interested States, to become aware of, and assess, the position of the State that is the author of the unilaterally formulated acceptance or objection, and this, in the end, could make a useful contribution to the debate within the competent organ of the organization and could also form the basis for launching a “reservations dialogue” among the protagonists. Such a position might also be taken into consideration, where appropriate, by a third party who might have to decide on the permissibility or scope of the reservation.

(5) In the Commission’s opinion, guideline 2.8.11, which does not question the necessary and sufficient nature of the acceptance of a reservation by the competent organ of the international organization,⁶³⁹ is in no way contrary to the Vienna Conventions, which take no position on this matter.

2.8.12 *Final nature of acceptance of a reservation*

Acceptance of a reservation cannot be withdrawn or amended.

Commentary

(1) Although they deal with objections, neither the 1969 nor the 1986 Vienna Convention contains provisions concerning the withdrawal of the acceptance of a reservation. They neither authorize it nor prohibit it.

(2) The fact remains that article 20, paragraph 5, of the Vienna Conventions and its *ratio legis* logically exclude calling into question a tacit (or implicit) acceptance through an objection formulated after the end of the 12-month time period stipulated in that paragraph (or of any other time period specified by the treaty in question): to allow a “change of heart” that would call into question the treaty relations between the States or international organizations concerned to be expressed several years after the intervention of an acceptance that came about because a contracting State or an international organization remained silent until one of the

“critical dates” had passed would pose a serious threat to legal certainty. While States parties are completely free to express their disagreement with a reservation after the end of the 12-month period (or of any other time period specified by the treaty in question), their late “objections” can no longer have the normal effects of an objection, as provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions. A comparable conclusion must be drawn with regard to the question of widening the scope of an objection to a reservation.

(3) There is no reason to approach express acceptances any differently. Without there being any need for an in-depth analysis of the effects of an express acceptance—which are no different from those of a tacit acceptance—suffice it to say that, like tacit acceptances, the effect of such an acceptance would in theory be the entry into force of the treaty between the reserving State or international organization and the State or international organization that has accepted the reservation and even, in certain circumstances, among all States or international organizations that are parties to the treaty. It goes without saying that to call the legal consequences into question *a posteriori* would seriously undermine legal certainty and the status of the treaty in the bilateral relations between the author of the reservation and the author of the acceptance. This is certainly true where acceptance has been made expressly: even if there is no doubt that a State’s silence in a situation where it should have expressed its view has legal effects by virtue of the principle of good faith (and, here, the express provisions of the Vienna Conventions), it is even more obvious when the State’s position takes the form of a unilateral declaration; the reserving State, as well as the other States parties, can count on the manifestation of the will of the State author of the express acceptance.

(4) The dialectical relationship between objection and acceptance, established and affirmed by article 20, paragraph 5, of the Vienna Conventions, and the placement of controls on the objection mechanism with the aim of stabilizing the treaty relations disturbed, in a sense, by the reservation, necessarily imply that acceptance (whether tacit or express) is final. This is the principle firmly stated in guideline 2.8.12 in the interests of the certainty of treaty-based legal relations, even though some members of the Commission contended that it would have been preferable for a State to be able to go back on a previous acceptance, provided that the 12-month period set in guideline 2.6.13 had not expired.

2.9 *Formulation of reactions to interpretative declarations*

2.9.1 *Approval of an interpretative declaration*

“Approval” of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation proposed in that declaration.

⁶³⁷ *Official Records of the United Nations Conference on the Law of Treaties, first session...* (see footnote 568 above), 72nd meeting, 15 May 1968, pp. 425–426, paras. 4–14.

⁶³⁸ See also *Yearbook ... 2008*, vol. II (Part Two), pp. 94–95, on “pre-emptive objections” (commentary to guideline 2.6.14).

⁶³⁹ See article 20, paragraph 3, of the Vienna Conventions and guideline 2.8.7.

Commentary

(1) It appears that practice with respect to positive reactions to interpretative declarations is virtually non-existent, as if States considered it prudent not to expressly approve an interpretation given by another party. This may be due to the fact that article 31, paragraph 3 (a), of the Vienna Conventions provides that, for the interpretation of a treaty:

There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

(2) The few instances of express reactions that can be found combine elements of approval and disapproval or have a conditional character, subordinating approval of the initial interpretation to the interpretation given to it by the reacting State.

(3) For example, *Multilateral Treaties Deposited with the Secretary-General* includes a text submitted by Israel reacting positively to a declaration submitted by Egypt⁶⁴⁰ concerning the United Nations Convention on the Law of the Sea:

The concerns of the Government of Israel, with regard to the law of the sea, relate principally to ensuring maximum freedom of navigation and overflight everywhere and particularly through straits used for international navigation.

In this regard, the Government of Israel states that the regime of navigation and overflight, confirmed by the 1979 Treaty of Peace between Israel and Egypt, in which the Strait of Tiran and the Gulf of Aqaba are considered by the Parties to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight, is applicable to the said areas. Moreover, being fully compatible with the United Nations Convention on the Law of the Sea, the regime of the Peace Treaty will continue to prevail and to be applicable to the said areas.

It is the understanding of the Government of Israel that the declaration of the Arab Republic of Egypt in this regard, upon its ratification of the [said] Convention, is consonant with the above declaration.⁶⁴¹

It appears from this declaration that the interpretation put forward by Egypt is regarded by Israel as correctly reflecting the meaning of chapter III of the United Nations Convention on the Law of the Sea, assuming that it is itself compatible with the interpretation by Israel. The interpretation by Egypt is, in a manner of speaking, confirmed by the reasoned “approbatory declaration” made by Israel.

⁶⁴⁰ “The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general regime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general regime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait” (*Multilateral Treaties ...* (footnote 533 above), chap. XXI.6). The Peace Treaty was signed at Washington, D.C. on 26 March 1979 (United Nations, *Treaty Series*, vol. 1136, No. 17813, p. 100).

⁶⁴¹ *Multilateral Treaties ...* (footnote 533 above), chap. XXI.6. In fact, this statement expresses approval of both the classification and the substance of the declaration by Egypt; given the formulation of these declarations, one might wonder whether they might have been made as a result of a diplomatic agreement.

(4) Another example that could be cited is the reaction of the Government of Norway to a declaration made by France concerning the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (“MARPOL Convention”), published by the Secretary-General of the International Maritime Organization:

the Government of Norway has taken due note of the communication, which is understood to be a declaration on the part of the Government of France and not a reservation to the provisions of the Convention with the legal consequence such a formal reservation would have had, if reservations to Annex I had been admissible.⁶⁴²

It appears that this statement could be interpreted to mean that Norway accepts the declaration by France insofar as (and on the condition that) it does not constitute a reservation.

(5) Even though examples are lacking, it is clear that a situation may arise in which a State or an international organization simply expresses its agreement with a specific interpretation proposed by another State or international organization in an interpretative declaration. Such agreement between the respective interpretations of two or more parties corresponds to the situation contemplated in article 31, paragraph 3 (a), of the Vienna Conventions,⁶⁴³ it being unnecessary at this stage to specify the weight that should be given to this “subsequent agreement between the parties regarding the interpretation of the treaty”.⁶⁴⁴

(6) It is sufficient to note that such agreement with an interpretative declaration is not comparable to acceptance of a reservation, if only because, under article 20, paragraph 4, of the Vienna Conventions, such acceptance entails the entry into force of the treaty for the reserving State—which is evidently not the case of a positive reaction to an interpretative declaration. To underscore the differences between the two, the Commission thought it would be wise to use different terms. The term “approval”, which expresses the idea of agreement or acquiescence without prejudging the legal effect actually produced,⁶⁴⁵ could be used to denote a positive reaction to an interpretative declaration.

2.9.2 Opposition to an interpretative declaration

“Opposition” to an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

⁶⁴² United Nations, *Treaty Series*, vol. 1341, No. 22484, p. 330; *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 2007)*, p. 108 (note 1).

⁶⁴³ See paragraph (1) of the present commentary above.

⁶⁴⁴ See the fourth part of the Guide to Practice, on the effects of reservations, interpretative declarations and related statements.

⁶⁴⁵ See J. Salmon (ed.), *Dictionnaire de droit international public*, Brussels, Bruylant/AUF, 2001, pp. 74–75 (Approbation, 1).

Commentary

(1) Examples of negative reactions to an interpretative declaration, in other words, of a State or an international organization disagreeing with the interpretation given in an interpretative declaration, while not quite as exceptional as positive reactions, are nonetheless sporadic. The reaction of the United Kingdom to the interpretative declaration of the Syrian Arab Republic⁶⁴⁶ in respect of article 52 of the 1969 Vienna Convention is an illustration of this:

The United Kingdom does not accept that the interpretation of Article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act.⁶⁴⁷

(2) The various conventions on the law of the sea also generated negative reactions to the interpretative declarations made in connection with them. Upon ratification of the Convention on the Continental Shelf, concluded in Geneva in 1958, Canada declared that “it does not find acceptable the declaration made by the Federal Republic of Germany with respect to article 5, paragraph 1”.⁶⁴⁸

(3) The United Nations Convention on the Law of the Sea, by virtue of its articles 309 and 310, which prohibit reservations but authorize interpretative declarations, gave rise to a considerable number of “interpretative declarations”, which also prompted an onslaught of negative reactions by other contracting States. Tunisia, in its communication of 22 February 1994, made it known, for example, that:

in [the declaration of Malta], articles 74 and 83 of the Convention are interpreted to mean that, in the absence of any agreement on delimitation of the exclusive economic zone, the continental shelf or other maritime zones, the search for an equitable solution assumes that the boundary is the median line, in other words, a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters is measured.

“The Tunisian Government believes that such an interpretation is not in the least consistent with the spirit and letter of the provisions of these articles, which do not provide for automatic application of the median line with regard to delimitation of the exclusive economic zone or the continental shelf.”⁶⁴⁹

⁶⁴⁶ This declaration reads as follows: “The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

“The expression ‘the threat or use of force’ used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests”

(*Multilateral Treaties ...* (footnote 533 above), chap. XXIII.1)

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.*, chap. XXI.4. The interpretative declaration by Germany reads as follows: “The Federal Republic of Germany declares with reference to article 5, paragraph 1, of the Convention on the Continental Shelf that in the opinion of the Federal Government article 5, para. 1, guarantees the exercise of fishing rights (*Fischerei*) in the waters above the continental shelf in the manner hitherto generally in practice” (*ibid.*).

⁶⁴⁹ *Ibid.*, chap. XXI.6 (note 21). The relevant part of the declaration by Malta reads as follows:

“The Government of Malta interprets article 74 and article 83 to the effect that in the absence of agreement on the delimitation of the exclusive economic zone or the continental shelf or other maritime zones, for an equitable solution to be achieved, the boundary shall be the median line, namely a line every point of which is equidistant

Another very clear-cut example can be found in the statement of Italy regarding the interpretative declaration of India in respect of the Montego Bay Convention:

Italy wishes to reiterate the declaration it made upon signature and confirmed upon ratification according to which ‘the rights of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them’. According to the declaration made by Italy upon ratification this declaration applies as a reply to all past and future declarations by other States concerning the matters covered by it.⁶⁵⁰

(4) Examples can also be found in the practice relating to conventions adopted within the Council of Europe. Thus, the Russian Federation, referring to numerous declarations by other States parties in respect of the 1995 Framework Convention for the protection of national minorities in which they specified the meaning to be ascribed to the term “national minority”, declared that it:

considers that none is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the Protection of National Minorities, a definition of the term ‘national minority’, which is not contained in the Framework Convention. In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States parties to the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities.⁶⁵¹

(5) Furthermore, the example of the statement of Italy regarding the interpretative declaration of India⁶⁵² shows that, in practice, States that react negatively to an interpretative declaration formulated by another State or another international organization often propose in the same breath another interpretation that they believe is “more accurate”. This practice of “constructive” refusal was also followed by Italy in its statement in reaction to the interpretative declarations of several other States parties to the March 1989 Basel Convention on the control of transboundary movements of hazardous wastes and their disposal:

The Government of Italy, in expressing its objection *vis-à-vis* the declarations made, upon signature, by the Governments of Colombia, Ecuador, Mexico, Uruguay and Venezuela, as well as other declarations of similar tenor that might be made in the future, considers that no provision of this Convention should be interpreted as restricting navigational rights recognized by international law. Consequently, a State party is not obliged to notify any other State or obtain authorization from it for simple passage through the territorial sea or the exercise of freedom of navigation in the exclusive economic zone by a vessel showing its flag and carrying a cargo of hazardous wastes.⁶⁵³

Germany and Singapore, which had made an interpretative declaration comparable to that of Italy, remained silent in respect of declarations interpreting the Convention differently, without deeming it necessary to react in the same way as the Government of Italy.⁶⁵⁴

from the nearest points of the baselines from which the breadth of the territorial waters of Malta and of such other States is measured” (*ibid.*, chap. XXI.6).

⁶⁵⁰ *Ibid.*

⁶⁵¹ United Nations, *Treaty Series*, vol. 2152, p. 297; *European Treaty Series*, No. 157 (<http://conventions.coe.int>).

⁶⁵² See paragraph (3) of the present commentary, above.

⁶⁵³ *Multilateral Treaties ...* (footnote 533 above), chap. XXVII.3.

⁶⁵⁴ On the question of “silence”, see guideline 2.9.9 and the commentary thereto, below.

(6) The practice also evoked reactions that, *prima facie*, were not outright rejections. In some cases, States seemed to accept the proposed interpretation on the condition that it was consistent with a supplementary interpretation.⁶⁵⁵ The conditions set by Austria, Germany and Turkey for consenting to the interpretative declaration of Poland in respect of the European Convention on Extradition of 13 December 1957⁶⁵⁶ are a good example of this. Hence, Germany considered:

the placing of persons granted asylum in Poland on an equal standing with Polish nationals in Poland's declaration with respect to Article 6, paragraph 1 (a), of the Convention to be compatible with the object and purpose of the Convention only with the proviso that it does not exclude extradition of such persons to a state other than that in respect of which asylum has been granted.⁶⁵⁷

(7) A number of States had a comparable reaction to the declaration made by Egypt upon ratification of the 1997 International Convention for the Suppression of Terrorist Bombings.⁶⁵⁸ Considering that the declaration by the Arab Republic of Egypt "aims ... to extend the scope of the Convention"—which excludes assigning the status of "reservation"—the Government of Germany declared that it:

is of the opinion that the Government of the Arab Republic of Egypt is only entitled to make such a declaration unilaterally for its own armed forces, and it interprets the declaration as having binding effect only on armed forces of the Arab Republic of Egypt. In the view of the Government of the Federal Republic of Germany, such a unilateral declaration cannot apply to the armed forces of other States Parties without their express consent. The Government of the Federal Republic of Germany therefore declares that it does not consent to the Egyptian declaration as so interpreted with regard to any armed forces other than those of the Arab Republic of Egypt, and in particular does not recognize any applicability of the Convention to the armed forces of the Federal Republic of Germany.⁶⁵⁹

(8) In the context of the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, a declaration by Canada concerning Arctic waters also triggered conditional reactions.⁶⁶⁰ France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and the United Kingdom declared that they:

⁶⁵⁵ This practice coincides with the practice described above of partial or conditional approval (see paragraph (3)–(5) of the commentary to guideline 2.9.1).

⁶⁵⁶ Declaration of 15 June 1993: "The Republic of Poland declares, in accordance with para. 1 (a) of Article 6, that it will under no circumstances extradite its own nationals. The Republic of Poland declares that, for the purposes of this Convention, in accordance with paragraph 1 (b) of Article 6, persons granted asylum in Poland will be treated as Polish nationals" (United Nations, *Treaty Series*, vol. 5146, p. 469; *European Treaty Series*, No. 24 (<http://conventions.coe.int>)).

⁶⁵⁷ United Nations, *Treaty Series*, vol. 5146, p. 470; *European Treaty Series*, No. 24 (<http://conventions.coe.int>). See also the identical reaction of Austria to the interpretative declaration of Romania, United Nations, *Treaty Series*, vol. 2045, pp. 198–202; *European Treaty Series*, No. 24 (<http://conventions.coe.int>).

⁶⁵⁸ The "reservation" by Egypt is formulated as follows: "The Government of the Arab Republic of Egypt declares that it shall be bound by article 19, paragraph 2, of the Convention to the extent that the armed forces of a State, in the exercise of their duties, do not violate the norms and principles of international law" (*Multilateral Treaties ...* (footnote 533 above), chap. XVIII.9).

⁶⁵⁹ *Ibid.* See also comparable declarations by the United States (*ibid.*), the Netherlands (*ibid.*), the United Kingdom (*ibid.*) and Canada (*ibid.* (note 8)).

⁶⁶⁰ For the text of the declaration by Canada, see *Status of Multilateral Conventions and Instruments in respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions* (as of 31 December 2007).

[take] note of this declaration by Canada and [consider] that it should be read in conformity with Articles 57, 234 and 236 of the United Nations Convention on the Law of the Sea. In particular, the ... Government recalls that Article 234 of that Convention applies within the limits of the exclusive economic zone or of a similar zone delimited in conformity with Article 57 of the Convention and that the laws and regulations contemplated in Article 234 shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.⁶⁶¹

(9) The declaration by the Czech Republic made further to the interpretative declaration by Germany⁶⁶² in respect of Part X of the United Nations Convention on the Law of the Sea should be viewed from a slightly different perspective in that it is difficult to determine whether it is opposing the interpretation upheld by Germany or recharacterizing the declaration as a reservation:

The Government of the Czech Republic having considered the declaration of the Federal Republic of Germany of 14 October 1994 pertaining to the interpretation of the provisions of Part X of the [said Convention], which deals with the right of access of land-locked States to and from the sea and freedom of transit, states that the [said] declaration of the Federal Republic of Germany cannot be interpreted with regard to the Czech Republic in contradiction with the provisions of Part X of the Convention.⁶⁶³

(10) Such "conditional acceptances" do not constitute "approvals" within the meaning of guideline 2.9.1 and should be regarded as negative reactions. In fact, the authors of such declarations are not approving the proposed interpretation but rather are putting forward another which, in their view, is the only one in conformity with the treaty.

(11) All these examples show that a negative reaction to an interpretative declaration can take varying forms: it can be a refusal, purely and simply, of the interpretation formulated in the declaration, a counter-proposal of an interpretation of the contested provision(s), or an attempt to limit the scope of the initial declaration, which was, in turn, interpreted. In any case, reacting States or international organizations are seeking to prevent or limit the scope of the interpretative declaration or its legal effect on the treaty, its application or its interpretation. In this connection, a negative reaction is therefore comparable, to some extent, to an objection to a reservation without, however, producing the same effect. Thus, a State or an international organization cannot oppose the entry into force of a treaty between itself and the author of the interpretative declaration on the pretext that it disagrees with the interpretation contained in the declaration. The author views its negative reaction as a safeguard measure, a protest against establishing an interpretation of the treaty that

⁶⁶¹ *Ibid.*

⁶⁶² The relevant part of the declaration by Germany reads as follows: "As to the regulation of the freedom of transit enjoyed by land-locked States, transit through the territory of transit States must not interfere with the sovereignty of these States. In accordance with article 125, paragraph 3, the rights and facilities provided for in Part X in no way infringe upon the sovereignty and legitimate interests of transit States. The precise content of the freedom of transit has in each single case to be agreed upon by the transit State and the landlocked State concerned. In the absence of such agreement concerning the terms and modalities for exercising the right of access of persons and goods to transit through the territory of the Federal Republic of Germany is only regulated by national law, in particular, with regard to means and ways of transport and the use of traffic infrastructure" (*Multilateral Treaties ...* (footnote 533 above), chap. XXI.6.)

⁶⁶³ *Ibid.* (note 17).

it might consider opposable, which it does not find appropriate, and about which it must speak out.⁶⁶⁴

(12) That is why, just as it preferred the term “approval” to “acceptance” to designate a positive reaction to an interpretative declaration,⁶⁶⁵ the Commission decided to use the term “opposition”,⁶⁶⁶ rather than “objection”, to refer to a negative reaction, even though this word has sometimes been used in practice.⁶⁶⁷

(13) The Commission considered how it could most appropriately qualify oppositions that reflected a different interpretation than the one contained in the initial interpretative declaration. It rejected the adjectives “incompatible” and “inconsistent”, choosing instead the word “alternative” in order not to constrict the definition to oppositions to interpretative declarations unduly.

(14) Adhering strictly to the subject matter of the second part, the definition selected avoids any reference to the possible effects of either interpretative declarations themselves or reactions to them. Guidelines will be formulated in respect of both of these in the fourth part of the Guide to Practice.

(15) The Commission also found that, contrary to the approach it had taken when drafting guideline 2.6.1 on the definition of objections to reservations,⁶⁶⁸ it was not advisable to include in the definition of oppositions to interpretative declarations a reference to the intention of the author of the reaction, which a majority of the members considered to be too subjective.

2.9.3 *Recharacterization of an interpretative declaration*

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

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

⁶⁶⁴ In this connection, see A. McNair, *The Law of Treaties*, Oxford, Clarendon, 1961, pp. 430–431.

⁶⁶⁵ See guideline 2.9.1.

⁶⁶⁶ The definition of “opposition” so understood is very similar to the definition of the term “protestation” as provided in the *Dictionnaire de droit international public*: “Acte par lequel un ou plusieurs sujets de droit international manifestent leur volonté de ne pas reconnaître la validité ou l’opposabilité d’actes, de conduites ou de prétentions émanant de tiers” (“Act by which one or more subjects of international law express their intention not to recognize the validity or opposability of acts, conduct or claims issuing from third parties”) (footnote 645 above, p. 907).

⁶⁶⁷ See, for example, the reaction of Italy to the interpretative declarations of Colombia, Ecuador, Mexico, Uruguay and Venezuela to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (*Multilateral Treaties ...* (footnote 533 above), chap. XXVII.3). The reaction of Canada to the interpretative declaration of Germany to the Convention on the Continental Shelf (*ibid.*, chap. XXI.4) was also registered in the “objection” category by the Secretary-General.

⁶⁶⁸ See guideline 2.6.1 and the commentary thereto, *Yearbook ... 2005*, vol. II (Part Two), pp. 77–82.

Commentary

(1) Even though in certain respects the recharacterization of an interpretative declaration as a reservation resembles an opposition to the initial interpretation, the majority of the members of the Commission considered that it constituted a sufficiently distinct manifestation of a divergence of opinion to warrant devoting a separate guideline to it. This is the subject matter of guideline 2.9.3.

(2) As the definitions of reservations and interpretative declarations make clear, the naming or phrasing of a unilateral statement by its author as a “reservation” or an “interpretative declaration” is irrelevant for the purposes of characterizing such a unilateral statement,⁶⁶⁹ even if it provides a significant clue⁶⁷⁰ as to its nature. This is conveyed by the phrase “however phrased or named” in guidelines 1.1 (replicating article 2, paragraph 1 (d), of the Vienna Conventions) and 1.2 of the Guide to Practice.

(3) What frequently occurs in practice is that interested States do not hesitate to react to unilateral statements which their authors call interpretative, and to expressly regard them as reservations.⁶⁷¹ These reactions, which might be called “recharacterizations” to reflect their purpose, in no way resemble approval or opposition, since they do not (obviously) refer to the actual content of the unilateral statement in question but rather to its form and to the applicable legal regime.

(4) There are numerous examples of this phenomenon:

(a) The reaction of the Netherlands to interpretative declaration by Algeria in respect of article 13, paragraphs 3 and 4, of the 1966 International Covenant on Economic, Social and Cultural Rights:

In the opinion of the Government of the Kingdom of the Netherlands, the interpretative declaration concerning article 13, paragraphs 3 and 4 of the International Covenant on Economic, Social and Cultural Rights must be regarded as a reservation to the Covenant. From the text and history of the Covenant, it follows that the reservation with respect to article 13, paragraphs 3 and 4 made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government of the Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it.⁶⁷²

(b) The reactions of many States to the declaration made by Pakistan with respect to the same Covenant, which, after lengthy statements of reasons, conclude:

⁶⁶⁹ See also guidelines 1.1 (Definition of reservations) and 1.2 (Definition of interpretative declarations).

⁶⁷⁰ In this connection, guideline 1.3.2 (Phrasing and name) provides that: “The phrasing or name given to a unilateral declaration is an indication of the purported legal effect. This is the case in particular when a State or international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.” For commentary on this provision, see *Yearbook ... 1999*, vol. II, Part Two, pp. 109–111.

⁶⁷¹ Nor do the tribunals and treaty monitoring bodies hesitate to recharacterize an interpretative declaration as a reservation (see paragraph (5) to (7) of the commentary to guideline 1.3.2, *ibid.*, pp. 110–111). This does not, however, touch on the formulation of these reactions; it is therefore not useful to revisit it here.

⁶⁷² *Multilateral Treaties ...* (footnote 533 above), chap. IV.3. See also the objection of Portugal (*ibid.*) and the objection of the Netherlands to the declaration of Kuwait (*ibid.*).

The Government of ... therefore regards the above-mentioned declarations as reservations and as incompatible with the object and purpose of the Covenant.

The Government of ... therefore objects to the above-mentioned reservations made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and the Islamic Republic of Pakistan.⁶⁷³

(c) The reactions of many States to the declaration made by the Philippines with respect to the United Nations Convention on the Law of the Sea:

... considers that the statement which was made by the Government of the Philippines upon signing the United Nations Convention on the Law of the Sea and confirmed subsequently upon ratification of that Convention in essence contains reservations and exceptions to the said Convention, contrary to the provisions of article 309 thereof.⁶⁷⁴

(d) The recharacterization formulated by Mexico, which considered that:

the third declaration [formally classified as interpretative] submitted by the Government of the United States of America ... constitutes a unilateral claim to justification, not envisaged in [the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances], for denying legal assistance to a State that requests it, which runs counter to the purposes of the Convention.⁶⁷⁵

(e) The reaction of Germany to a declaration whereby the Government of Tunisia indicated that it would not, in implementing the Convention on the rights of the child of 20 November 1989, “adopt any legislative or statutory decision that conflicts with the Tunisian Constitution”:

The Federal Republic of Germany considers the first of the declarations deposited by the Republic of Tunisia to be a reservation. It restricts the application of the first sentence [sic] of article 4 ...⁶⁷⁶

(f) The reactions of 19 States to the declaration made by Pakistan with regard to the 1997 International Convention for the Suppression of Terrorist Bombings, whereby Pakistan specified that “nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination”:

The Government of Austria considers that the declaration made by the Government of the Islamic Republic of Pakistan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its objective and purpose⁶⁷⁷

(g) The reactions of Germany and the Netherlands to the declaration made by Malaysia upon accession

⁶⁷³ *Ibid.* See also the objections registered by Denmark (*ibid.*), Finland (*ibid.*), France (*ibid.*), Latvia (*ibid.*), the Netherlands (*ibid.*), Norway (*ibid.*), Spain (*ibid.*), Sweden (*ibid.*) and the United Kingdom (*ibid.*).

⁶⁷⁴ *Ibid.*, chap. XXI.6; see also the reactions similar in letter or in spirit from Australia, Bulgaria, the Russian Federation and Ukraine (*ibid.*).

⁶⁷⁵ *Ibid.*, chap. VI.19.

⁶⁷⁶ *Ibid.*, chap. IV.11.

⁶⁷⁷ *Ibid.*, chap. XVIII.9. See the reactions similar in letter or in spirit from Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, New Zealand, the Netherlands, Norway, Sweden, Spain, the United Kingdom and the United States (*ibid.*). See also the reactions of Germany and the Netherlands to the unilateral declaration made by Malaysia (*ibid.*).

to the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, whereby Malaysia made the implementation of article 7 of the Convention subject to its domestic legislation:

The Government of the Federal Republic of Germany considers that in making the interpretation and application of Article 7 of the Convention subject to the national legislation of Malaysia, the Government of Malaysia introduces a general and indefinite reservation that makes it impossible to clearly identify in which way the Government of Malaysia intends to change the obligations arising from the Convention. Therefore the Government of the Federal Republic of Germany hereby objects to this declaration which is considered to be a reservation that is incompatible with the object and purpose of the Convention. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and Malaysia.⁶⁷⁸

(h) The reaction of Sweden to the declaration by Bangladesh indicating that article 3 of the 1953 Convention on the Political Rights of Women could only be implemented in accordance with the Constitution of Bangladesh:

In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government of Sweden considers that the declarations made by the Government of Bangladesh, in the absence of further clarification, in substance constitute reservations to the Convention.

The Government of Sweden notes that the declaration relating to article III is of a general kind, stating that Bangladesh will apply the said article in consonance with the relevant provisions of its Constitution. The Government of Sweden is of the view that this declaration raises doubts as to the commitment of Bangladesh to the object and purpose of the Convention and would recall that, according to well-established international law, a reservation incompatible with the object and purpose of a treaty shall not be permitted.⁶⁷⁹

(5) These examples show that recharacterization consists of considering that a unilateral statement submitted as an “interpretative declaration” is in reality a “reservation”, with all the legal effects that this entails. Thus, recharacterization seeks to identify the legal status of the unilateral statement in the relationship between the State or organization having submitted the statement and the “recharacterizing” State or organization. As a general rule, such declarations, which are usually extensively reasoned,⁶⁸⁰ are based essentially on the criteria for distinguishing between reservations and interpretative declarations.⁶⁸¹

(6) These recharacterizations are “attempts”, proposals made with a view to qualifying as a reservation a unilateral statement which its author has submitted as an interpretative declaration and to imposing on it the legal status of a reservation. However, it should be understood that a “recharacterization” does not in and of itself determine the status of the unilateral statement in question. A divergence of views between the States or international organizations concerned can be resolved only through

⁶⁷⁸ *Ibid.*, chap. XVIII.7.

⁶⁷⁹ *Ibid.*, chap. XVI.1. See also the identical declaration of Norway (*ibid.*).

⁶⁸⁰ For a particularly striking example, see the reactions to the interpretative declaration of Pakistan in relation to the International Covenant on Economic, Social and Cultural Rights (para. (4) (b) above and *Multilateral Treaties* ... (footnote 533 above), chap. IV.3).

⁶⁸¹ For texts of guidelines 1.3 to 1.3.3, see section C.1. above.

the intervention of an impartial third party with decision-making authority. The last clause of the first paragraph of guideline 2.9.3 (“whereby the former State or organization treats the declaration as a reservation”) clearly establishes the subjective nature of such a position, which does not bind either the author of the initial declaration or the other contracting or concerned parties.

(7) The second paragraph of guideline 2.9.3 refers the reader to guidelines 1.3 to 1.3.3, which indicate the criteria for distinguishing between reservations and interpretative declarations and the method of implementing them.

(8) Even though contracting States and international organizations are free to react to the interpretative declarations of other parties, which is why this second paragraph is worded in the form of a recommendation, as evidenced by the conditional verb “should”, they are taking a risk if they fail to follow these guidelines, which should guide the position of any decision-making body competent to give an opinion on the matter.

2.9.4 Freedom to formulate approval, opposition or recharacterization

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

Commentary

(1) In keeping with the basic principle of consensualism, guideline 2.9.4 conveys the wide range of possibilities open to States and international organizations in reacting to an interpretative declaration; whether they accept it, oppose it or consider it to be actually a reservation.

(2) With respect to time frames, reactions to interpretative declarations may in principle be formulated at any time. Interpretation occurs throughout the life of the treaty, and there does not seem to be any reason why reactions to interpretative declarations should be confined to any specific time frame when the declarations themselves are not, as a general rule (and in the absence of any provision to the contrary in the treaty), subject to any particular time frame.⁶⁸²

(3) Moreover, and on this score reactions to interpretative declarations resemble acceptances of and objections to reservations, both contracting States and contracting international organizations and States and international organizations that are entitled to become parties to the treaty should be able to formulate an express reaction to an interpretative declaration at least from the time they become aware of it, on the understanding that the author of the declaration is responsible for disseminating it (or not)⁶⁸³ and that the reactions of non-contracting States or non-contracting international organizations will not necessarily produce the same legal effect as those formulated

by contracting parties (and probably no effect at all, for as long as the author State or international organization has not expressed consent to be bound). It is thus perfectly logical that the Secretary-General should have accepted the communication from Ethiopia of its opposition to the interpretative declaration formulated by Yemen with respect to the United Nations Convention on the Law of the Sea, even though Ethiopia had not ratified the Convention.⁶⁸⁴

2.9.5 Form of approval, opposition and recharacterization

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

Commentary

(1) While reactions to interpretative declarations differ considerably from acceptances of or objections to reservations, it seems appropriate to ensure, to the extent possible, that such reactions are publicized widely, on the understanding that States and international organizations have no legal obligation in this regard⁶⁸⁵ but that any legal effects which they may expect to arise from such reactions will depend in large part on how widely they disseminate those reactions.

(2) Although the legal effects of such reactions (combined with those of the initial declaration) on the interpretation and application of the treaty in question will not be discussed at this stage, it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their *raison d'être* and the purpose for which they are formulated by States and international organizations. The ICJ has highlighted the importance of these statements in practice:

Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.⁶⁸⁶

(3) In a study on unilateral statements, Rosario Sapienza also underlined the importance of reactions to interpretative declarations, which:

forniranno utile contributo anche alla soluzione. E ancor più le dichiarazioni aiuteranno l'interprete quando controversia non si dia, ma semplice problema interpretativo (contribute usefully to the settlement [of a dispute]. Statements will be still more useful to the interpreter when there is no dispute, but only a problem of interpretation).⁶⁸⁷

(4) Notwithstanding the undeniable usefulness of reactions to interpretative declarations, not only for the interpreter or judge but also for enabling the other States and international organizations concerned to determine their own position with respect to the declaration, the Vienna Convention does not require that such reactions be communicated. As has already been indicated in the commentary to guideline 2.4.1 on the formulation of interpretative declarations:

⁶⁸⁴ See *Multilateral Treaties ...* (footnote 533 above), chap. XXI.6.

⁶⁸⁵ See paragraph (4) of the present commentary, below.

⁶⁸⁶ *International Status of South-West Africa* (see footnote 529 above), pp. 135–136.

⁶⁸⁷ See Sapienza, *op. cit.* (footnote 530 above), p. 274.

⁶⁸² See the commentary to guideline 1.2, *Yearbook ... 1999*, vol. II (Part Two), pp. 101–103, paras. (21)–(32).

⁶⁸³ See paragraph (4) of the commentary to guideline 2.9.5 below.

[T]here seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally; it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations. By refraining from such communication, the author of the declaration runs the risk that the declaration may not have the intended effect, but this is a different problem altogether. There is no reason to transpose the corresponding parts of the provisions of draft guidelines 2.1.5 to 2.1.8 on the communication of reservations and it does not seem necessary to include a clarification of this point in the Guide to Practice.⁶⁸⁸

(5) There is no reason to take a different approach with respect to reactions to such interpretative declarations, and it would be inappropriate to impose more stringent formal requirements on them than on the interpretative declarations to which they respond. The same caveat applies, however: if States or international organizations do not adequately publicize their reactions to an interpretative declaration, they run the risk that the intended effects may not be produced. If the authors of such reactions want their position to be taken into account in the treaty's application, particularly when there is a dispute, it would probably be in their interest to formulate the reaction in writing to meet the requirements of legal security and to ensure notification of the reaction. The alternative whether to use the written form or not does not leave room for any intermediate solutions. Accordingly, a majority of the members of the Commission was of the view that the word "preferably" was more appropriate than the expression "to the extent possible", used in the text of guidelines 2.1.9 (Statement of reasons [for reservations]), 2.6.10 (Statement of reasons [for objections]) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization), which could convey the idea of the existence of such intermediate solutions.

(6) The Commission adopted guideline 2.9.5 in the form of a simple recommendation addressed to States and international organizations: it does not reflect a binding legal norm but conveys what the Commission considers to be, in most cases, the real interests of the contracting parties to a treaty or of any State or international organization that is entitled to become a party to a treaty in respect of which an interpretative declaration has been made.⁶⁸⁹ It goes without saying—as indicated by the use of the conditional ("should")—that such entities (States or international organizations) are still free simply to formulate an interpretative declaration, if that is what they prefer.

(7) Guideline 2.9.5 corresponds to guideline 2.4.0,⁶⁹⁰ which recommends that the authors of interpretative declarations should formulate them in writing.

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

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

⁶⁸⁸ *Yearbook ... 2002*, vol. II (Part Two), pp. 46–47 (para. (5) of the commentary).

⁶⁸⁹ Concerning the entities that may formulate an approval, opposition or recharacterization, see guideline 2.9.4 above.

⁶⁹⁰ See the text of this guideline and the commentary thereto above.

Commentary

(1) For the same reasons that, in its view, made it preferable to formulate interpretative declarations in writing,⁶⁹¹ the Commission adopted guideline 2.9.6, which recommends that States and international organizations entitled to react to an interpretative declaration state their reasons for an approval, opposition or recharacterization. This recommendation is modelled on those adopted, for example, with respect to statements of reasons for reservations⁶⁹² and objections to reservations.⁶⁹³

(2) Moreover, as may be seen from the practice described above,⁶⁹⁴ States generally take care to explain, sometimes in great detail, the reasons for their approval, opposition or recharacterization. These reasons are useful not only for the interpreter: they can also alert the State or the international organization that submitted the interpretative declaration to the points found to be problematic in the declaration and, potentially, induce the author to revise or withdraw the declaration. This constitutes, with respect to interpretative declarations, the equivalent of the "reservations dialogue".

(3) The Commission wondered, however, whether the recommendation regarding a statement of reasons should be extended to cover the approval of an interpretative declaration. Besides the fact that the practice is extremely rare,⁶⁹⁵ it may be assumed that approvals are formulated for the same reasons that prompted the declaration itself and generally even use the same wording.⁶⁹⁶ Although some members considered that stating the reasons for an approval might cause confusion (if, for example, reasons were given for the interpretative declaration itself and the two reasons differed), the majority of the Commission considered that there should be no distinction in that regard between the various categories of reaction to interpretative declarations, particularly in the present case, since guideline 2.9.6 is a simple recommendation that has no binding force for the author of the approval.

(4) The same applies to opposition or recharacterization. In all cases, incidentally, an explanation of the reasons for a reaction may be a useful element in the dialogue among the contracting parties and entities entitled to become so.

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

An approval, opposition or recharacterization in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

⁶⁹¹ See guideline 2.9.5 and the commentary thereto above.

⁶⁹² See guideline 2.1.9 and the commentary thereto, *Yearbook ... 2008*, vol. II (Part Two), pp. 80–82.

⁶⁹³ See guideline 2.6.10 and the commentary thereto, *ibid.*, pp. 88–89.

⁶⁹⁴ See paragraphs (1) to (9) of the commentary to guideline 2.9.2 and paragraph (4) of the commentary guideline 2.9.3 above.

⁶⁹⁵ See the commentary to guideline 2.9.1 above.

⁶⁹⁶ It is primarily for this reason that the Commission did not consider it useful to include in the Guide to Practice a recommendation that reasons should be given for interpretative declarations themselves (see paragraph (10) of the commentary to guideline 2.4.3 *bis* above).

Commentary

(1) The formulation in writing of a reaction to an interpretative declaration, whether approval, opposition or recharacterization,⁶⁹⁷ makes it easier to disseminate it to the other entities concerned, contracting parties or States or international organizations entitled to become so.

(2) Although there is no legal requirement to disseminate a reaction, the Commission strongly believes that it is in the interests of both the authors of a reaction to a unilateral declaration and all the entities concerned to do so and that the formulation and communication of a reaction could follow the procedure for other types of declarations relating to a treaty, which is actually very similar—namely, guidelines 2.1.3 to 2.1.7 in the case of reservations, 2.4.1 and 2.4.7 in the case of interpretative declarations and 2.6.9 and 2.8.5, in the case of, respectively, objections to reservations and their express acceptance. Given that all these guidelines are modelled on those relating to reservations, it seemed sufficient to refer the user to the rules on reservations, *mutatis mutandis*.

(3) Unlike the effect produced by the formulation of reservations, however, these rules on the formulation and communication of reactions to interpretative declarations are of an optional nature only, and guideline 2.9.7 is simply a recommendation, as the use of the conditional (“should”) indicates.

(4) The Commission wondered whether reference should be made in guideline 2.9.7 to guideline 2.1.7 concerning the functions of depositaries. It was decided that, since the provision is based on the idea that “[t]he depositary shall examine whether a reservation to a treaty ... is in due and proper form” and that interpretative declarations do not have to take any particular form, such a reference was unnecessary. Since there may be cases, however, in which an interpretative declaration is not permissible (where the treaty precludes such a declaration),⁶⁹⁸ the prevailing view was that a reference should be made to guideline 2.1.7, which sets out the course to take in the event of a divergence of views in cases of this kind.

2.9.8 *Non-presumption of approval or opposition*

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

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

Commentary

(1) Guideline 2.9.8 establishes a general framework and should be read in conjunction with guideline 2.9.9, which relates more specifically to the role that may be played by

⁶⁹⁷ See guideline 2.9.5 above.

⁶⁹⁸ See guideline 3.5 (Substantive validity of interpretative declarations), which is currently before the Drafting Committee and for which a commentary will be provided at the sixty-second session of the Commission.

the silence of a State or an international organization with regard to an interpretative declaration.

(2) As is clear from the definitions of an approval of and an opposition to an interpretative declaration contained in guidelines 2.9.1 and 2.9.2, both essentially take the form of a unilateral declaration made by a State or an international organization whereby the author expresses agreement or disagreement with the interpretation formulated in the interpretative declaration.

(3) In the case of reservations, silence, according to the presumption provided for in article 20, paragraph 5, of the Vienna Conventions, means consent. The ICJ, in its 1951 advisory opinion, noted the “very great allowance made for tacit assent to reservations”,⁶⁹⁹ and the work of the Commission has from the outset acknowledged the considerable part played by tacit acceptance.⁷⁰⁰ Waldock justified the principle of tacit acceptance by pointing out that:

It is ... true that, under the “flexible” system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State.⁷⁰¹

(4) In the case of simple interpretative declarations (as opposed to conditional interpretative declarations⁷⁰²), there is no rule comparable to that contained in article 20, paragraph 5, of the Vienna Conventions (the principle of which is reflected in guideline 2.8.1), so these concerns do not arise. By definition, an interpretative declaration purports only to “specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions”, and in no way imposes conditions on its author’s consent to be bound by the treaty.⁷⁰³ Whether other States or international organizations consent to the interpretation put forward in the declaration has no effect on the author’s legal status with respect to the treaty; the author becomes or remains a contracting party regardless. Continued silence on the part of the other parties has no effect on the status as a party of the State or organization that formulates an interpretative declaration: such silence cannot prevent the latter from becoming or remaining a party, in contrast to what could occur in the case of reservations under article 20, paragraph 4 (c), of the Vienna Conventions, were it not for the presumption provided for in paragraph 5 of that article.

(5) Thus, since it is not possible to proceed by analogy with reservations, the issue of whether, in the absence of an express reaction, there is a presumption of approval of or opposition to interpretative declarations remains unresolved. In truth, however, this question can only be

⁶⁹⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 364 above), p. 21.

⁷⁰⁰ See Müller, *loc. cit.* (footnote 567 above), pp. 814–815, paras. 31–32.

⁷⁰¹ First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 67, para. (15).

⁷⁰² See guideline 2.9.10 below.

⁷⁰³ The situation is evidently different with respect to conditional interpretative declarations. See guideline 2.9.10 below.

answered in the negative. It is indeed inconceivable that silence, in itself, could produce such a legal effect.

(6) Moreover, this appears to be the position most widely supported in the literature. Frank Horn states that:

Interpretative declarations must be treated as unilaterally advanced interpretations and should therefore be governed only by the principles of interpretation. The general rule is that a unilateral interpretation cannot be opposed to any other party in the treaty. Inaction on behalf of the confronted states does not result in automatic construction of acceptance. It will only be one of many cumulative factors which together may evidence acquiescence. The institution of estoppel may become relevant, though this requires more explicit proof of the readiness of the confronted states to accept the interpretation.⁷⁰⁴

(7) Although inaction cannot in itself be construed as either approval or opposition—neither of which can by any means be presumed (which is stated more specifically in guideline 2.9.9 on the silence of a State or an international organization with respect to an interpretative declaration)—the position taken by Horn indicates that silence can, under certain conditions, be taken to signify acquiescence in accordance with the principles of good faith and, more particularly in the context of interpreting treaties, through the operation of article 31, paragraph 3 (b), of the Vienna Conventions, which provides for the consideration, in interpreting a treaty, of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. Further, the concept of acquiescence itself is not unknown in treaty law: article 45 of the 1969 Vienna Convention provides that:

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) ...

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

Article 45 of the 1986 Vienna Convention reproduces this provision, adapting it to the specific case of international organizations.

(8) However, this provision does not define the “conduct” in question, and it would seem extremely difficult, if not impossible, to determine in advance the circumstances in which a State or an organization is bound to protest expressly in order to avoid being considered as having acquiesced to an interpretative declaration or to a practice that has been established on the basis of such a declaration.⁷⁰⁵ In other words, it is particularly difficult to determine when and in what specific circumstances inaction with respect to an interpretative declaration is tantamount to consent. As the Eritrea–Ethiopia Boundary Commission underscored:

The nature and extent of the conduct effective to produce a variation of the treaty is, of course, a matter of appreciation by the tribunal in each case. The decision of the International Court of Justice in the *Temple* case is generally pertinent in this connection. There, after

identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was stopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule—whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first.⁷⁰⁶

(9) It therefore seems impossible to provide, in the abstract, clear guidelines for determining when a silent State has, by its inaction, created an effect of acquiescence or estoppel. This can only be determined on a case-by-case basis in the light of the circumstances in question.

(10) For this reason, the first paragraph of guideline 2.9.8, which is the negative counterpart of guidelines 2.9.1 and 2.9.2, unequivocally states that the presumption provided for in article 20, paragraph 5, of the Vienna Conventions is not applicable. The second paragraph, however, acknowledges that, as an exception to the principle arising from these two guidelines, the conduct of the States or international organizations concerned may be considered, depending on the circumstances, as constituting approval of, or opposition to, the interpretative declaration.

(11) Given the wide range of “relevant circumstances” (a cursory sample of which is given in the preceding paragraphs), the Commission did not think it possible to describe them in greater detail.

2.9.9 Silence with respect to an interpretative declaration

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

2. In exceptional cases, the silence of a State or an international organization may be relevant to determining whether, through its conduct and taking account of the circumstances, it has approved an interpretative declaration.

Commentary

(1) The practice (or, more accurately, the absence of practice) described in the commentary to guidelines 2.9.2 and, in particular, 2.9.1, shows the considerable role that States ascribe to silence in the context of interpretative declarations. Express positive—and even negative—reactions are extremely rare. One wonders therefore whether it is possible to infer from such overwhelming silence consent to the interpretation proposed by the State or international organization making the interpretative declaration.

(2) As was noted in a study on silence in response to a violation of a rule of international law, which is fully applicable here: “*le silence en tant que tel ne dit rien*”

⁷⁰⁴ Horn, *Reservations and Interpretative Declarations...*, *op. cit.* (footnote 575 above), p. 244 (footnotes omitted); see also D. M. McRae, “The legal effect of interpretative declarations”, *BYBIL* 1978, p. 168.

⁷⁰⁵ See, among others, C. Rousseau, *Droit international public*, vol. I: *Introduction et sources*, Paris, Sirey, 1970, p. 430, No. 347.

⁷⁰⁶ Permanent Court of Arbitration, Eritrea–Ethiopia Claims Commission, Decision regarding delimitation of the border between Eritrea and Ethiopia, 13 April 2002, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), p. 111, para. 3.9; see also the well-known separate opinion of Judge Alfaro in *Temple of Preah Vihear, Merits*, *I.C.J. Reports* 1962, p. 40.

puisque'il est capable de 'dire' trop de choses à la fois" ("silence in itself says nothing because it is capable of 'saying' too many things at once").⁷⁰⁷ Silence can express either agreement or disagreement with the proposed interpretation. States may consider it unnecessary to respond to an interpretative declaration because it accurately reflects their own position, or they may feel that the interpretation is erroneous but that there is no point in proclaiming as much because, in any event, the interpretation would not, in their view, be upheld by an impartial third party in case of a dispute. It is impossible to decide which of these two hypotheses is correct.⁷⁰⁸

(3) The first paragraph of guideline 2.9.9 expresses this idea by applying the general principle established in the first paragraph of guideline 2.9.8 specifically to silence.

(4) The second paragraph of guideline 2.9.9—which is the counterpart of the second paragraph of guideline 2.9.8—signals to users of the Guide to Practice that although silence is not in principle equivalent to approval of or acquiescence to an interpretative declaration, in some circumstances the silent State may be considered as having acquiesced to the declaration by reason of its conduct, or lack of conduct in circumstances where conduct is required, in relation to the interpretative declaration.

(5) The expression "[i]n exceptional cases", which introduces the paragraph, highlights the fact that what follows is an inverse derogation from the general principle, the existence of which must not be affirmed lightly. The word "may" reinforces this idea by emphasizing the lack of any automatic construction and by referring instead to the general conduct of the State or international organization that has remained silent with respect to a unilateral declaration as well as to the circumstances of the case. Silence must therefore be considered as only one aspect of the general conduct of the State or international organization in question.

[2.9.10 Reactions to conditional interpretative declarations]

Guidelines 2.6.1 to 2.8.12 shall apply, *mutatis mutandis*, to reactions of States and international organizations to conditional interpretative declarations.]

[Commentary]

(1) Conditional interpretative declarations differ from "simple" interpretative declarations in their

potential effect on the treaty's entry into force. The key feature of conditional interpretative declarations is that the author makes its consent to be bound by the treaty subject to the proposed interpretation. If this condition is not met, i.e. if the other States and international organizations parties to the treaty do not consent to this interpretation, the author of the interpretative declaration is considered not to be bound by the treaty, at least with regard to the parties to the treaty that contest the declaration.⁷⁰⁹ The declaration made by France upon signing⁷¹⁰ Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America ("Treaty of Tlatelolco") provides a particularly clear example of this:⁷¹¹

In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States.⁷¹²

(2) This feature brings conditional interpretative declarations infinitely closer to reservations than "simple" interpretative declarations. The commentary to guideline 1.2. (Conditional interpretative declarations) states in this connection:

Consequently, it seems highly probable that the legal regime of conditional interpretative declarations would be infinitely closer to that of reservations, *especially with regard to the anticipated reactions of the other contracting parties to the treaty*,* than would the rules applicable to simple interpretative declarations.⁷¹³

(3) Given the conditionality of such an interpretative declaration, the regime governing reactions to it must be more orderly and definite than the one applicable to "simple" interpretative declarations. There is a need to know with certainty and within a reasonable time period the position of the other States parties concerning the proposed interpretation so that the State or organization that submitted the conditional interpretative declaration will be able to make a decision on its legal status with respect to the treaty—is it or is it not a party to the treaty? These questions arise in the same conditions as those pertaining to reservations to treaties, the reactions to which (acceptance and objection) are governed by a very formal, rigid legal regime aimed principally at determining, as soon as possible, the legal status of the reserving State or organization. This aim is reflected, not only by the relative formality of the rules, but also by the establishment of a presumption of acceptance after a certain period of time has elapsed in which another State or another international organization has not expressed its objection to the reservation.⁷¹⁴

⁷⁰⁷ G. P. Buzzini, "Abstention, silence et droit international général", *Rivista di Diritto internazionale*, vol. 88/2 (2005), p. 382.

⁷⁰⁸ In this connection, H. Drost, "Grundfragen der Lehre vom internationalen Rechtsgeschäft", in D. S. Constantopoulos and H. Wehberg (eds.), *Gegenwartsprobleme des internationalen Rechts und der Rechtsphilosophie, Festschrift für Rudolf Laun zu seinem siebenzigsten Geburtstag*, Hamburg, Girardet, 1953, p. 218: "Wann ein Schweigen als eine Anerkennung angesehen werden kann, ist eine Tatfrage. Diese ist nur dann zu bejahen, wenn nach der Sachlage – etwa nach vorhergegangener Notifikation – Schweigen nicht nur als ein objektiver Umstand, sondern als schlüssiger Ausdruck des dahinterstehenden Willens aufgefaßt werden kann" ("The question as to when silence can be construed as acceptance is a question of circumstances. The answer cannot be affirmative unless, given the factual circumstances—following prior notification, for example—silence cannot be understood simply as an objective situation, but as a conclusive expression of the underlying will").

⁷⁰⁹ Concerning all these points, see the commentary to guideline 1.2.1 (Conditional interpretative declarations) in *Yearbook ... 1999*, vol. II (Part Two), pp. 103–106.

⁷¹⁰ The declaration was confirmed upon ratification, on 22 March 1974.

⁷¹¹ See also *Yearbook ... 1999*, vol. II (Part Two), p. 103, para. (3) of the commentary to guideline 1.2.1.

⁷¹² United Nations, *Treaty Series*, vol. 936, p. 419.

⁷¹³ Para. (14) of the commentary to guideline 1.2.1, *Yearbook ... 1999*, vol. II (Part Two), p. 105.

⁷¹⁴ See guideline 2.4.8 (Late formulation of a conditional interpretative declaration), sect. C.1 above.

(4) Thus, the procedure for reactions to conditional interpretative declarations should follow the same rules as those applicable to acceptance of and objection to reservations, including the rule on the presumption of acceptance. There was a view, however, that the time period for reactions to reservations should not be applicable to conditional interpretative declarations.

(5) There may be doubts about the length of the period set out in article 20, paragraph 5, of the Vienna Conventions.⁷¹⁵ Nonetheless, the reasons that led Sir Humphrey Waldock to propose this solution seem valid and transposable *mutatis mutandis* to the case of conditional interpretative declarations. As he explained:

But there are, it is thought, good reasons for proposing the adoption of the longer period [of 12 months]. First, it is one thing to agree upon a short period [of three or six months] for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed.⁷¹⁶

(6) A problem of terminology arises, however. The relative parallelism noted up to this point between conditional interpretative declarations and reservations implies that reactions to such declarations could borrow the same vocabulary and be termed “acceptances” and “objections”. However, the definition of objections to reservations does not seem to be at all suited to the case of a reaction expressing the disagreement of a State or an international organization with a conditional interpretative declaration made by another State or another international organization. Guideline 2.6.1 lays down a definition of objections to reservations that is based essentially on the effect intended by their author: according to this definition, an objection means a unilateral statement “whereby the ... 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”.⁷¹⁷

(7) Consequently, there may be serious doubts about the wisdom of using the same terminology to denote both negative reactions to conditional interpretative declarations and objections to reservations. By definition, such a reaction can neither modify nor exclude the legal effect of the conditional interpretative declaration as such (regardless of what that legal effect may be); all it can do is to exclude the State or international organization from the circle of parties to the treaty. Refusal to accept the conditional interpretation proposed creates a situation in which the condition for consent to be bound is absent. What is more, it is not the author of the negative reaction, but the author of the conditional interpretative declaration, that has the responsibility to take the action that follows from the refusal.

(8) Regardless of these uncertainties, the version of guideline 2.9.10 retained by the Commission is neutral in

this respect and does not require the taking of a position on this point, which has no practical impact.]

3.2 Assessment of the permissibility of reservations

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

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

Commentary

(1) Guideline 3.2 introduces the section of the Guide to Practice on assessment of the permissibility of reservations. It is a general provision whose purpose is to recall that there are various modalities for assessing such permissibility which, far from being mutually exclusive, are mutually reinforcing—in particular and including when the treaty establishes a body to monitor its implementation. This statement corresponds to the one found in a different form in paragraph 6 of the Commission’s 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.⁷¹⁸ Of course, these generally applicable modalities for the permissibility of reservations may be supplemented or replaced⁷¹⁹ by specific modalities of assessment established by the treaty itself.

(2) Indeed, it goes without saying that any treaty can include a special provision establishing particular procedures for assessing the permissibility of a reservation, either by a certain percentage of the States parties, or by a body with competence to do so. One of the most well-known and discussed clauses⁷²⁰ of this kind is article 20, paragraph 2, of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination:

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. *A reservation shall be considered*

⁷¹⁸ “The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties” (*Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157).

⁷¹⁹ Depending on what is envisaged by the relevant provision.

⁷²⁰ See, for example, A. Cassese, “A new reservations clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)”, *Recueil d’études de droit international en hommage à Paul Guggenheim*, Geneva, Faculté de droit de l’Université de Genève et Institut universitaire de hautes études internationales, 1968, pp. 266–304; C. Redgwell, “The law of reservations in respect of multilateral conventions”, in J. P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions*, London, The British Institute of International and Comparative Law, 1997, pp. 13–14; or Riquelme Cortado, *op. cit.* (footnote 575 above), pp. 317–322.

⁷¹⁵ See paragraphs (4) to (6) of the commentary to guideline 2.6.13, *Yearbook ... 2008*, vol. II (Part Two), pp. 92–93.

⁷¹⁶ First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 67, para. (16).

⁷¹⁷ For text of this guideline, see section C.1 above.

incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it.^{*721}

(3) This reservations clause no doubt draws its inspiration from the unsuccessful attempts made to include in the Vienna Convention itself a mechanism enabling a majority to assess the permissibility of reservations.⁷²²

—two of the four proposals submitted as rules *de lege veranda* in 1953 by Lauterpacht made the acceptance of a reservation conditional upon the consent of two thirds of the States concerned;⁷²³

—Fitzmaurice made no express proposal on this matter because he held to a strict interpretation of the principle of unanimity,⁷²⁴ yet on several occasions he let it be known that he believed that a collective assessment of the permissibility of reservations was the “ideal” system;⁷²⁵

—although Waldock had also not proposed such a mechanism in his first report in 1962,⁷²⁶ several members of the Commission took up its defence;⁷²⁷

—during the Vienna Conference, an amendment to this effect proposed by Japan, the Philippines and the Republic

⁷²¹ Other examples are article 20 of the Convention concerning Customs Facilities for Touring of 4 June 1954, which authorizes reservations if they have been “accepted by a majority of the members of the Conference and recorded in the Final Act” (para. 1) or made after the signing of the Final Act without any objection having been expressed by one third of the Contracting States within 90 days from the date of circulation of the reservation by the Secretary-General (paras. 2 and 3); the similar clauses in article 14 of the Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material and in article 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles; or article 50, para. 3, of the Single Convention on Narcotic Drugs, 1961 and article 32, para. 3, of the 1971 Convention on psychotropic substances, which make the admissibility of the reservation subject to the absence of objections by one third of the contracting States.

⁷²² For a summary of the discussions on the matter by the Commission and during the Vienna Conference, see Riquelme Cortado, *op. cit.* (footnote 575 above), pp. 314–315.

⁷²³ Variants A and B, in the first report on the law of treaties by Hersch Lauterpacht (A/CN.4/63), pp. 8–9 (see also *Yearbook ... 1953*, vol. II, pp. 91–92). Variants C and D, respectively, assigned the task of assessing the admissibility of reservations to a commission set up by the States parties and to a Chamber of Summary Procedure of the ICJ (A/CN.4/63, pp. 9–10 or *Yearbook ... 1953*, vol. II, p. 92); see also the proposals submitted during the drafting of the Covenant of Human Rights reproduced in Lauterpacht’s second report (A/CN.4/87 [and Corr.1], pp. 30–31; see also *Yearbook ... 1954*, vol. II, pp. 123 *et seq.*, at p. 132).

⁷²⁴ First report on the law of treaties by Gerald G. Fitzmaurice, *Yearbook ... 1956*, vol. II, document A/CN.4/101, pp. 118 *et seq.*

⁷²⁵ See especially G. G. Fitzmaurice, “Reservations to multilateral conventions”, *The International and Comparative Law Quarterly*, vol. 2 (1953), pp. 23–26.

⁷²⁶ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1.

⁷²⁷ See especially Briggs in *Yearbook ... 1962*, vol. I, 651st meeting, of 25 May 1952, para. 28, and the 652nd meeting, 28 May 1962, paras. 73–74; Gros, 654th meeting, 30 May 1962, para. 43; Bartoš, 654th meeting, para. 56; *contra*: Rosenne, 651st meeting, para. 83; Tunkin, 653rd meeting, 29 May 1962, paras. 24–25 and 654th meeting, para. 31; Jiménez de Aréchaga, 653rd meeting, para. 47; and Amado, 654th meeting, para. 34. Waldock proposed a variant reflecting these views (see 654th meeting, para. 16), and although they were rejected by the Commission, they appear in the commentary to draft article 18 (*Yearbook ... 1962*, vol. II, p. 179, para. (11)) and in the commentaries to draft articles 16 and 17 adopted by the Commission in 1966 (*Yearbook ... 1966*, vol. II, p. 205, para. (11)). See also Waldock’s fourth report, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 50, para. 3.

of Korea⁷²⁸ was rejected by a large majority⁷²⁹ despite the support of several delegations;⁷³⁰ the Expert Consultant Waldock⁷³¹ and some other delegations⁷³² were very doubtful about this kind of collective monitoring system.

(4) One is, however, compelled to recognize that such clauses—however attractive they may seem intellectually⁷³³—in any event fall short of resolving all the problems: in practice they do not encourage States parties to maintain the special vigilance that is to be expected of them⁷³⁴ and they leave important questions unanswered:

⁷²⁸ The amendment to article 16, paragraph 2, stipulated that, if objections “have been raised ... by a majority of the contracting States as of the time of expiry of the 12-month period, the signature, ratification, acceptance, approval or accession accompanied by such a reservation shall be without legal effect” (A/CONF.39/C.1/L.133/Rev.1), *Official Records of the United Nations Conference on the Law of Treaties, first and second sessions...* (footnote 558 above), p. 133, para. 177 (i) (a). The original amendment (A/CONF.39/C.1/L.133) had set a time limit of 3 months instead of 12 months. See also the statement by Japan at the Conference (*Official Records of the United Nations Conference on the Law of Treaties, first session...* (see footnote 568 above), Committee of the Whole, 21st meeting, 10 April 1968, p. 100, para. 29, and 24th meeting, 16 April 1968, p. 131, paras. 62–63); and another amendment along the same lines introduced by Australia (A/CONF.39/C.1/L.166, *Official Records of the United Nations Conference on the Law of Treaties, first and second sessions...* (footnote 558 above), p. 136, para. 179), which subsequently withdrew it (see *ibid.*, para. 181). Without submitting a formal proposal, the United Kingdom indicated that “[t]here was an obvious need for some kind of machinery to ensure that the [compatibility] test was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with reservations which a large group of interested States considered to be incompatible with the object and purpose of the treaty” (*Official Records of the United Nations Conference on the Law of Treaties, first session...* (see footnote 568 above), Committee of the Whole, 21st meeting, p. 114, para. 76).

⁷²⁹ By 48 votes to 14, with 25 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, first and second sessions...* (footnote 558 above), p. 136, para. 182 (c)).

⁷³⁰ Viet Nam (*Official Records of the United Nations Conference on the Law of Treaties, first session...* (see footnote 568 above), Committee of the Whole, 21st meeting, 10 April 1968, p. 109, para. 22), Ghana (22nd meeting, 11 April 1968, p. 120, paras. 71–72), Italy (22nd meeting, p. 122, para. 79), China (23rd meeting, 11 April 1968, p. 121, para. 3), Singapore (23rd meeting, p. 122, para. 16), New Zealand (24th meeting, 16 April 1968, p. 127, para. 18), India (24th meeting, pp. 128–129, paras. 32 and 38), Zambia (24th meeting, p. 129, para. 41). The representative of Sweden, while supportive in principle of the idea of a monitoring mechanism, believed that the proposal by Japan was “no more than an attempt at solving the problem” (22nd meeting, p. 117, para. 32). See also the reservations expressed by the United States (24th meeting, p. 130, para. 49) and by Switzerland (25th meeting, 16 April 1968, pp. 133–134, para. 9).

⁷³¹ With regard to the amendment proposed by Japan and other delegations (see footnote 728 above), the view of the Expert Consultant was that “proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations” (*ibid.*, Committee of the Whole, 24th meeting, 16 April 1968, p. 126, para. 9).

⁷³² Thailand (*ibid.*, 21st meeting, 10 April 1968, pp. 111–112, para. 47), Argentina (24th meeting, 16 April 1968, p. 130, para. 45), Czechoslovakia (24th meeting, p. 132, para. 68) and Ethiopia (25th meeting, 16 April 1968, p. 134, para. 17).

⁷³³ It is possible, though, to question the value of a collegiate system when the very purpose of a reservation is precisely “to cover the position of a state which regarded as essential a point on which a two-thirds majority had not been obtained” (*Yearbook ... 1962*, vol. I, Jiménez de Aréchaga, 654th meeting, 30 May 1962, p. 164, para. 37). See also the sharp criticisms by Cassese (footnote 720 above), *passim* and, in particular, pp. 301–304.

⁷³⁴ On the question of State inertia in this regard, see the comments of the Expert Consultant during the Vienna Conference (footnote 731

—do such clauses make it impossible for States parties to avail themselves of the right to raise objections under article 20, paragraphs 4 and 5, of the Vienna Convention? Given the very broad latitude that States have in this regard, the answer must be in the negative; indeed, States objecting to reservations formulated under article 20 of the International Convention on the Elimination of All Forms of Racial Discrimination have maintained their objections⁷³⁵ even though their position did not receive the support of two thirds of the States parties, which is needed for an “objective” determination of incompatibility under article 20;

—on the other hand, the mechanism set up by article 20 dissuaded the Committee on the Elimination of Racial Discrimination established under the Convention from taking a position on the permissibility of reservations,⁷³⁶ which raises the issue of whether the Committee’s attitude is the result of a discretionary judgement or whether, in the absence of specific assessment mechanisms, the monitoring bodies have to refrain from taking a position. Actually, nothing obliges them to do so; once it is recognized that such mechanisms take precedence over the procedures provided for in the treaty for determining the permissibility of reservations, and that the human rights treaty bodies are called upon to rule on that point as part of their mandate,⁷³⁷ they can do so in every instance, just as States can.

(5) In reality, the controversy raging on this issue among the commentators can be ascribed to the conjunction of several factors:

—the issue really arises only in connection with the human rights treaties;

—this is the case because, to begin with, it is in this area, and only this area, that modern treaties almost invariably create mechanisms to monitor the implementation of the norms that they enact; however, while it has never been contested that a judge or an arbitrator is competent to assess the permissibility of a reservation,

above), and Imbert, *Les réserves...*, *op. cit.* (footnote 548 above), pp. 146–147, or Riquelme Cortado *op. cit.* (footnote 575 above), pp. 316–321.

⁷³⁵ See *Multilateral Treaties...* (footnote 533 above), chap. IV.2.

⁷³⁶ “The Committee must take the reservations made by States parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision—even a unanimous decision—by the Committee that a reservation is unacceptable could not have any legal effect” (*Official Records of the General Assembly, Thirty-third Session, Supplement No. 18 (A/33/18)*, para. 374 (a)). On this subject, see the comments of P.-H. Imbert, “Reservations and human rights conventions”, *The Human Rights Review*, vol. 6, No. 1 (Spring 1981), pp. 41–42. See also D. Shelton, “State practice on reservations to human rights treaties”, *Canadian Human Rights Yearbook*, Toronto, Carswell Company Limited, 1983, pp. 229–230. Recently, however, the Committee on the Elimination of Racial Discrimination has taken a somewhat more flexible position: for instance, in 2003, it stated with reference to a reservation made by Saudi Arabia that “[t]he broad and imprecise nature of the State party’s general reservation raises concern as to its compatibility with the object and purpose of the Convention. The Committee encourages the State party to review the reservation with a view to formally withdrawing it” (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 18 (A/58/18)*, para. 209).

⁷³⁷ See paragraph (8) of the present commentary below.

including its compatibility with the object and purpose of the treaty to which it refers,⁷³⁸ the human rights treaties endow the bodies which they establish with distinct powers (some—at the regional level—can issue binding decisions but others, including the Human Rights Committee, can address to States only general recommendations or recommendations related to an individual complaint);

—this is a relatively new phenomenon which was not taken into account by the drafters of the Vienna Convention;

—furthermore, the human rights treaty bodies have held to a particularly broad concept of their powers in this field: not only have they recognized their own competence to assess the compatibility of a reservation with the object and purpose of the treaty that established them, but they may have also seemed to consider that they had a decision-making power to that end, even when they are not otherwise so empowered⁷³⁹ and, applying the “divisibility” theory, they have declared that the States making the reservations they have judged to be invalid are bound by the treaty, including by the provision or provisions of the treaty to which the reservations applied;⁷⁴⁰

—in doing so, they have aroused the opposition of States, which do not expect to be bound by a treaty beyond the limits they accept; some States have even denied that the bodies in question have any jurisdiction in the matter;⁷⁴¹

—this is compounded by the reactions of human rights activists and the doctrine peculiar to this area, which has done nothing to calm a contentious debate that is nevertheless largely artificial.

(6) In reality, the issue is unquestionably less complicated than is generally presented by commentators—which does not mean that the situation is entirely satisfactory. In the first place, there can be no doubt that the human rights treaty bodies are competent to assess the permissibility of a reservation, when the issue comes before them in the exercise of their functions, including the compatibility of the reservation with the object and

⁷³⁸ See footnote 751 below.

⁷³⁹ See, in this connection, the comments of A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, pp. 122–123.

⁷⁴⁰ 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, para. 583; *Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, Decision adopted on 2 November 1999, *ibid.*, *Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. II, Annex XI.A, para. 6.7. This decision led the State party in question to denounce the Optional Protocol [to the International Covenant on Civil and Political Rights] (see *Multilateral Treaties...* (footnote 533 above), chap. IV.5 (note 1)), which did not prevent the Committee from declaring, in a subsequent decision of 26 March 2002, that it considered that Trinidad and Tobago had violated several provisions of the Covenant, including the provision to which the reservation related (*ibid.*, *Fifty-seventh Session, Supplement No. 40 (A/57/40)*, vol. II, annex IX.T).

⁷⁴¹ See, in particular, the very sharp criticisms expressed by the United States (*ibid.*, *Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, p. 127), the United Kingdom (*ibid.*, p. 132) and France (*ibid.*, *Fifty-first Session, Supplement No. 40 (A/51/40)*, vol. I, Annex VI, pp. 111–113).

purpose of the treaty.⁷⁴² Indeed, it must be acknowledged that the treaty bodies could not carry out their mandated functions if they could not be sure of the exact extent of their jurisdiction *vis-à-vis* the States concerned, whether in their consideration of claims by States or individuals or of periodic reports, or in their exercise of an advisory function; it is therefore part of their functions to assess the permissibility of reservations made by the States parties to the treaties establishing them.⁷⁴³ Secondly, in so doing, they have neither more nor less authority than in any other area: the Human Rights Committee and the other international human rights treaty bodies which do not have decision-making power do not acquire it in the area of reservations; the regional courts which have the authority to issue binding decisions do have that power, but within certain limits.⁷⁴⁴ Thus, thirdly and lastly, while all the human rights treaty bodies (or dispute settlement bodies) may assess the permissibility of a contested reservation, they may not substitute their own judgment for the State's consent to be bound by the treaty.⁷⁴⁵ It goes without saying that the powers of the treaty bodies do not affect the power of States to accept reservations or object to them, as established and regulated under articles 20, 21 and 23 of the Vienna Convention.⁷⁴⁶

(7) Similarly, although guideline 3.2 does not expressly mention the possibility that national courts might have competence in such matters, neither does it exclude it: domestic courts are, from the viewpoint of international

law, an integral part of the "State", and they may, if need be, engage its responsibility.⁷⁴⁷ Hence, nothing prevents national courts, when necessary, from assessing the permissibility of reservations made by a State on the occasion of a dispute brought before them,⁷⁴⁸ including their compatibility with the object and purpose of a treaty.

(8) It follows that the competence to assess the permissibility of a reservation can also belong to international jurisdictions or arbitrators. This would clearly be the case if a treaty expressly provided for the intervention of a jurisdictional body to settle a dispute regarding the permissibility of reservations, but no reservation clause of this type seems to exist, even though the question easily lends itself to a jurisdictional determination.⁷⁴⁹ Nevertheless, there is no doubt that such a dispute can be settled by any organ designated by the parties to rule on differences in interpretation or application of the treaty. It should therefore be understood that any general clause on settlement of disputes establishes the competence of the body designated by the parties in that respect.⁷⁵⁰ What is more, that was the position of the ICJ in its advisory opinion of 1951 on *Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide*:

[I]t may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention.⁷⁵¹

⁷⁴² See paragraph 5 of the Commission's 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties: "... where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them" (*Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157).

⁷⁴³ For an exhaustive presentation of the position of the human rights treaty bodies, see the second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478, paragraphs 193–210; see also Greig, *loc. cit.* (footnote 575 above), pp. 90–107; and Riquelme Cortado, *op. cit.* (footnote 575 above), pp. 345–353. And, with particular reference to the bodies established by the European Convention on Human Rights, see I. Cameron and F. Horn, "Reservations to the European Convention on Human Rights: the *Belilos* Case", *German Yearbook of International Law*, vol. 33 (1990), pp. 88–92.

⁷⁴⁴ See paragraph 8 of the Commission's preliminary conclusions on reservations to normative multilateral treaties including human rights treaties: "The Commission notes that the legal force of the findings made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role" (*Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157).

⁷⁴⁵ The Commission has stated in this connection, in paragraphs 6 and 10 of its preliminary conclusions, that the competence of the monitoring bodies to assess the validity of reservations "does not exclude or otherwise affect the traditional modalities of control by the contracting parties" and "that, in the event of inadmissibility of the reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty" (*ibid.*).

⁷⁴⁶ See, however, General Comment No. 24, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 740 above), para. 18: "it is an inappropriate task [the determination of the compatibility of a reservation with the object and purpose of the treaty] for States parties in relation to human rights treaties". This passage contradicts the preceding paragraph in which the Committee recognizes that "an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant".

⁷⁴⁷ See article 4 of the draft articles on the responsibility of States for internationally wrongful acts (Conduct of organs of a State) adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 and 40–42.

⁷⁴⁸ See the decision of the Swiss Federal Tribunal of 17 December 1991 in the case of *F. v. R. and the Council of State of Thurgau Canton*, Swiss Federal Supreme Court decision of 17 December 1992, *Journal des tribunaux* (1995), pp. 523–537, and the commentary by J.-F. Flauss, "Le contentieux des réserves à la CEDH devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6 § 1", *Revue universelle des droits de l'homme*, vol. 5, Nos. 9–10 (1993), pp. 297–303.

⁷⁴⁹ In this connection, see H. J. Bourguignon, "The *Belilos* case: new light on reservations to multilateral treaties", *Virginia Journal of International Law*, vol. 29, No. 2 (Winter 1989), p. 359, or D. W. Bowett, "Reservations to non-restricted multilateral treaties", *The British Yearbook of International Law*, vol. 48 (1976–1977), p. 81.

⁷⁵⁰ On the role that dispute settlement bodies can play in this area, see guideline 3.2.5 below.

⁷⁵¹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (see footnote 364 above), p. 27. Likewise, in its decision of 30 June 1977, the arbitral tribunal constituted for the *English Channel* case was implicitly recognized as competent to rule on the permissibility of the French reservations "on the basis that the three reservations to article 6 [of the Convention on the Continental Shelf of 1958] are true reservations and admissible" (*Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, UNRIIA, vol. XVIII (Sales No. E/F.80.V.7), p. 40, para. 56). See also the position of the ICJ concerning the permissibility of "reservations" (of a specific nature, it is true, and different from those covered in the Guide to Practice—see guideline 1.4.6 (Unilateral statements made under an optional clause) and the commentary thereto (*Yearbook ... 2000*, vol. II (Part Two), pp. 112–114), included in optional declarations of acceptance of its obligatory jurisdiction (see, in particular, the judgment of 26 November 1957, *Right of passage over Indian Territory* (Preliminary Objections), *I.C.J. Reports* 1957, p. 125, at pp. 141–144; and the opinions of Judge Hersch Lauterpacht, individual in the case of *Certain Norwegian Loans*, Judgment of 6 July 1957, *ibid.*, p. 9, at pp. 43–45, and dissenting in the case of *Interhandel* (Switzerland v. United States of America), Preliminary Objections, Judgment

(9) It must therefore be concluded that the competence to assess the permissibility of a reservation belongs, more generally, to the various entities that are called on to apply and interpret treaties: States, and, within the limits of their competence, their domestic courts, bodies for the settlement of disputes and monitoring of the application of the treaty. However, the positions that these bodies may adopt in such matters have no greater legal value than that accorded by their status: the verb “assess” that the Commission has chosen to use in the introductory sentence of guideline 3.2 is neutral and does not prejudge the question of the authority underlying the assessment. Similarly, the phrase “within their respective competences” indicates that the competence of the dispute settlement and monitoring bodies to carry out such an assessment is not unlimited but corresponds to the competences accorded to these bodies by States.

(10) On the other hand, in accordance with the widely dominant principle of the “letterbox depositary”⁷⁵² endorsed by article 77 of the 1969 Vienna Convention,⁷⁵³ in principle the depositary can only take note of reservations of which it has been notified and transmit them to the contracting States⁷⁵⁴ without ruling on their permissibility.

(11) In adopting guideline 2.1.8, however, the Commission took the view that, from the perspective of the progressive development of international law, in the case of reservations that were in the depositary’s opinion manifestly impermissible, the depositary should “draw the attention of the author of the reservation to what, in the depositary’s view, constitutes such [impermissibility]”.⁷⁵⁵ It is worth noting that at that time, “the Commission did not consider it justified to make a distinction among the different types of invalidity listed in article 19” of the 1969 and 1986 Vienna Conventions.⁷⁵⁶

(12) The present situation regarding assessment of the permissibility of reservations to treaties, more particularly human rights treaties, is therefore one in which there is concurrence, or at least coexistence of several mechanisms for assessing the permissibility of reservations.⁷⁵⁷

of 21 November 1959, *I.C.J. Reports 1959*, p. 6, at pp. 103–106; see also the dissenting opinions of President Klaedstad and Judge Armand-Ugon, *ibid.*, pp. 75 and 93). See also the orders of 2 June 1999 on *Legality of Use of Force (Yugoslavia v. United States of America)*, *I.C.J. Reports 1999*, p. 916, at pp. 923–924, paras. 21–25; and (*Yugoslavia v. Spain*), *ibid.*, p. 772, paras. 29–33; and *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Request for the indication of provisional measures, Order of 10 July 2002, *I.C.J. Reports 2002*, p. 299, at pp. 245–246, para. 72.

⁷⁵² See paragraph (3) of the commentary to guideline 2.1.7 (Functions of depositaries), *Yearbook ... 2002*, vol. II (Part Two), p. 43; see also J. Combacau, “Logique de la validité contre logique de l’opposabilité dans la Convention de Vienne sur le droit des traités”, *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally*, Paris, Pedone, 1991, p. 199.

⁷⁵³ Which corresponds to article 78 of the 1986 Vienna Convention.

⁷⁵⁴ See guideline 2.1.7 (Functions of depositaries), section C.1 above. For the commentary thereto, see *Yearbook ... 2002*, vol. II (Part Two), pp. 42–45.

⁷⁵⁵ “Procedure in case of manifestly [impermissible] reservations”, *ibid.*, pp. 45–46. See also paragraph (4) of the commentary to guideline 2.1.8 (Procedure in case of manifestly impermissible reservations), *Yearbook ... 2006*, vol. II (Part Two), p. 158.

⁷⁵⁶ Commentary to guideline 2.1.8, *ibid.*, para. (5).

⁷⁵⁷ See the second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1

—one of these, which constitutes general law, is the purely inter-State mechanism provided for by the Vienna Conventions, which can be adapted by special reservation clauses contained in the treaties concerned;

—where the treaty establishes a body to monitor its implementation, it is accepted that this body can also assess the permissibility of reservations, the position taken thereby having no greater authority than that accorded by the status of the body in question;

—however, this still leaves open the possibility for the States and international organizations parties to have recourse, where appropriate, to the customary methods of peaceful settlement of disputes, including jurisdictional or arbitral methods, in the event of a dispute arising among them concerning the permissibility of a reservation;⁷⁵⁸

—it may well be, moreover, that national courts themselves, like those in Switzerland,⁷⁵⁹ also consider themselves entitled to determine the permissibility of a reservation in the light of international law.

(13) It is clear that the multiplicity of possibilities for assessment presents certain disadvantages, not least of which is the risk of conflict between the positions different parties might take on the same reservation (or on two identical reservations of different States).⁷⁶⁰ In fact, however, this risk is inherent in any assessment system—over time, any given body may make conflicting decisions—and it is perhaps better to have too much assessment than no assessment at all.

(14) A more serious danger is that constituted by the succession of assessments over time, in the absence of any limitation of the duration of the period during which the assessment may be carried out. In the case of the Vienna regime, article 20, paragraph 5, of the Convention, insofar as it is applicable, sets a time limit of 12 months following the date of receipt of notification of the reservation (or the expression by the objecting State of its consent to be bound) on the period during which a State may formulate an objection.⁷⁶¹ A real problem arises, however, in all

and A/CN.4/478, pp. 76–77, paras. 211–215. For a very clear position in favour of the complementarity of systems of monitoring, see Lijnzaad, *op. cit.* (footnote 575 above), pp. 97–98; see also G. Cohen-Jonathan, “Les réserves dans les traités institutionnels relatifs aux droits de l’homme: nouveaux aspects européens et internationaux”, *Revue générale de droit international public*, vol. 100 (1966), p. 944.

⁷⁵⁸ Subject, however, to the possible existence of “self-contained regimes”, among which those instituted by the European Convention on Human Rights, and the American Convention on Human Rights: (“Pact of San José, Costa Rica”) or the African Charter on Human and Peoples’ Rights should undoubtedly be included (cf. B. Simma, “Self-contained regimes”, *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 130 *et seq.*, or T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989, pp. 230 *et seq.*).

⁷⁵⁹ See footnote 748 above.

⁷⁶⁰ See, in particular, P.-H. Imbert, who refers to the risks of incompatibility within the system of the European Convention on Human Rights, in particular between the positions of the Court and the Committee of Ministers (“Reservations to the European Convention on Human Rights before the Strasbourg Commission: the *Temeltasch* case”, *International and Comparative Law Quarterly*, vol. 33 (1984), pp. 590–591).

⁷⁶¹ It should be noted that the problem nevertheless arises because ratifications and accessions are spread out over time.

cases of jurisdictional or quasi-jurisdictional verification, which are unpredictable and depend on referral of the question to the monitoring or settlement body. In order to overcome this problem, it has been proposed that the right of the monitoring bodies to give their opinion should also be limited to a 12-month period.⁷⁶² Apart from the fact that none of the relevant texts currently in force provides for such a limitation, the limitation seems scarcely compatible with the very basis for action by monitoring bodies, which is designed to ensure compliance with the treaty by parties, including the preservation of the object and purpose of the treaty. Furthermore, as has been pointed out, one of the reasons why States lodge few objections is precisely that the 12-month rule often allows them insufficient time;⁷⁶³ the same problem is liable to arise *a fortiori* in the monitoring bodies, as a result of which the latter may find themselves paralysed.

(15) It could be concluded that the possibilities of cross-assessment in fact strengthen the opportunity for the reservations regime, and in particular the principle of compatibility with the object and purpose of the treaty, to play its real role. The problem is not one of setting up one possibility against another or of affirming the monopoly of one mechanism,⁷⁶⁴ but of combining them so as to strengthen their overall effectiveness, for while their modalities differ, their end purpose is the same: the aim in all cases is to reconcile the two conflicting but fundamental requirements of integrity of the treaty and universality of participation. It is only natural that the States that wished to conclude the treaty should be able to express their point of view; it is also natural that the monitoring bodies should play fully the role of guardians of treaties entrusted to them by the parties.

(16) This situation does not exclude—in fact it implies—a degree of complementarity among the various methods of assessment, as well as cooperation among the bodies concerned. In particular, it is essential that, in assessing the permissibility of a reservation, monitoring bodies (as well as dispute settlement bodies) should take fully into account the positions taken by the contracting parties through acceptances or objections. Conversely, States, which are

required to abide by the decisions taken by monitoring bodies when they have given those bodies decision-making power, should pay serious attention to the well-thought-out and reasoned positions of those bodies, even when the bodies cannot take legally binding decisions.⁷⁶⁵

(17) The examination of competence to assess the permissibility of reservations, both from the viewpoint of the object and purpose of a treaty and from that of treaty clauses excluding or limiting the ability to formulate reservations, provided an opportunity to “revisit” some of the preliminary conclusions adopted by the Commission in 1997, in particular paragraphs 5, 6 and 8,⁷⁶⁶ without there being any decisive element that would lead to a change in their meaning. Accordingly, the Commission felt that the time had come to reformulate them in order to include them in the form of guidelines in the Guide to Practice, without specifically mentioning human rights treaties, even though in practice it is mainly in reference to such treaties that the intertwining of powers to assess the permissibility of reservations poses a problem.

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

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

2. The conclusions formulated by such a body in the exercise of this competence shall have the same legal effect as that deriving from the performance of its monitoring role.

Commentary

(1) Guideline 3.2.1, like those that follow, defines the scope of the general guideline 3.2.

(2) Guideline 3.2 implies that the monitoring bodies established by the treaty⁷⁶⁷ are competent to assess the

⁷⁶² See Imbert, *Les réserves...*, *op. cit.* (footnote 548 above), p. 146, or “Reservations and human rights conventions”, *loc. cit.* (footnote 736 above), pp. 36 and 44); *contra*, H. Golsong, statement to the Rome Colloquium, 5–8 November 1975, *Proceedings of the Fourth International Colloquy about the European Convention on Human Rights*, Council of Europe, 1976, pp. 271–272, and “Les réserves aux instruments internationaux pour la protection des droits de l’homme”, in Catholic University of Louvain, *Quatrième colloque du Département des droits de l’homme: Les clauses échappatoires en matière d’instruments internationaux relatifs aux droits de l’homme*, Brussels, Bruylant, 1982, p. 27, or R. W. Edwards, Jr., “Reservations to treaties”, *Michigan Journal of International Law*, vol. 10, No. 2 (1989), pp. 387–388.

⁷⁶³ Cf. B. Clark, “The Vienna Convention reservations regime and the Convention on Discrimination Against Women”, *AJIL*, vol. 85 (1991), pp. 312–314.

⁷⁶⁴ Meanwhile, it is the natural tendency of competent institutions to issue rulings; see the opposing points of view between the Human Rights Committee: this “is an inappropriate task for States parties in relation to human rights treaties” (General Comment No. 24, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (footnote 740 above), para. 18) and France (“it is [for States parties] and for them alone, unless the treaty states otherwise, to decide whether a reservation is incompatible with the object and purpose of the treaty” (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), vol. I, annex VI, p. 119, para. 7).

⁷⁶⁵ See, however, the extremely strong reaction to General Comment No. 24 found in the bill submitted to the United States Senate by Senator Helms on 9 June 1995 (*Foreign Relations Revitalization Act of 1995*, United States Senate, 104th Congress, 1st session, S.908 (report No. 104–95), title III, chap. 2, sect. 314), under which “no funds authorized to be appropriated by this Act nor any other Act, or otherwise made available may be obligated or expended for the conduct of any activity which has the purpose or effect of (A) reporting to the Human Rights Committee in accordance with Article 40 of the International Covenant on Civil and Political Rights; or (B) responding to any effort by the Human Rights Committee to use the procedures of Articles 41 and 42 of the International Covenant on Civil and Political Rights to resolve claims by other parties to the Covenant that the United States is not fulfilling its obligations under the Covenant, until the President has submitted to the Congress the certification described in paragraph (2).

“(2) *CERTIFICATION* – The certification referred to in paragraph (1) is a certification by the President to the Congress that the Human Rights Committee established under the International Covenant on Civil and Political Rights has: (A) revoked its General Comment No. 24 adopted on November 2, 1994; and (B) expressly recognized the validity as a matter of international law of the reservations, understandings, and declarations contained in the United States instrument of ratification of the International Covenant on Civil and Political Rights.”

⁷⁶⁶ *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157. See, in particular, paragraph (6) of the present commentary above.

⁷⁶⁷ In the rarest cases, after a treaty has been adopted, a monitoring body can also be set up by collective decision of the parties or of

permissibility of reservations formulated by the contracting parties but does not expressly state this, unlike paragraph 5 of the preliminary conclusions adopted by the Commission in 1997, whereby even if the treaty is silent on the subject, the monitoring bodies established by normative multilateral treaties “are competent to comment upon and express recommendations with regard to the admissibility of reservations by States, in order to carry out the functions assigned to them”.⁷⁶⁸

(3) The meaning of this last phrase is illuminated by paragraph 8 of the preliminary conclusions:

The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role.⁷⁶⁹

(4) Guideline 3.2.1 combines these two principles by recalling, in the first paragraph, that the treaty monitoring bodies are inevitably competent to assess the permissibility of reservations made to the treaty whose implementation they are responsible for overseeing and, in the second paragraph, that the legal force of the findings that they make in this respect cannot exceed that which is generally recognized for the instruments that they are competent to adopt.⁷⁷⁰

(5) However, guideline 3.2.1. deliberately refrains from addressing the consequences of the assessment of the permissibility of a reservation: such consequences cannot be determined without a thorough study of the effects of the acceptance of reservations and of the objections that might be made to them, a matter that falls within the purview of the fourth part of the Guide to Practice, on the effects of reservations and related statements.

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

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations. For the existing monitoring bodies, measures could be adopted to the same ends.

Commentary

(1) Guideline 3.2.2 reproduces the language of—and incorporates in the Guide to Practice, using slightly different wording—the recommendation set out in paragraph 7 of the preliminary conclusions of 1997. This read as follows:

The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer

an organ of an international organization—cf. the Committee on Economic, Social and Cultural Rights (Economic and Social Council resolution 1985/17 of 28 May 1985), *Official Records of the Economic and Social Council, 1985, Supplement No. 1* (E/1985/85), pp. 15–16.

⁷⁶⁸ *Yearbook ... 1997*, vol. II (Part Two), p. 57.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ For more information on this point, see the commentary to guideline 3.2 above, in particular paragraphs (6) and (7).

competence on the monitoring body to appreciate or determine the admissibility of a reservation.⁷⁷¹

(2) It would certainly not be appropriate to include a provision of this type in draft articles intended for adoption in the form of an international convention. Such is not the case, however, of the Guide to Practice, which is understood to constitute a “code of recommended practices” designed to “guide” the practice of States and international organizations with regard to reservations but without being legally binding.⁷⁷² Moreover, the Commission already decided to include in the Guide several guidelines clearly drafted in the form of a recommendation to States and international organizations.⁷⁷³

(3) In the same spirit, the Commission wished to recommend that States and international organizations should include in multilateral treaties that they conclude in the future and that provide for the establishment of a monitoring body, specific clauses conferring competence on that body to assess the permissibility of reservations and specifying the legal effect of such assessments.

(4) The Commission nevertheless wishes to point out that it does not purport in this guideline to take a position on the appropriateness of establishing such monitoring bodies. It merely considers that if such a body is established, it could be appropriate to specify the nature and limits of its competence to assess the permissibility of reservations in order to avoid any uncertainty and conflict in the matter.⁷⁷⁴ This is what is meant by the neutral wording that introduces the guideline: “When providing bodies with the competence to monitor the application of treaties ...”. In the same spirit, the expression “where appropriate” emphasizes the purely recommendatory nature of the guideline.

(5) This clarification obviously applies also to the second sentence of the guideline, which concerns existing monitoring bodies. Even though the Commission is aware of the practical difficulties that might arise from this recommendation, it considers such specifications to be advisable. They could be made by adopting protocols to be annexed to the existing treaty or by amending the treaty, or they could be contained in instruments of soft law adopted by the parties.

3.2.3 *Cooperation of States and international organizations with treaty monitoring bodies*

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body are required to cooperate with that body and should give full consideration to that body’s assessment of the permissibility of the reservations that they have formulated.

⁷⁷¹ *Yearbook ... 1997*, vol. II (Part Two), p. 57.

⁷⁷² On this subject, see paragraph (2) of the commentary to guideline 2.5.3, *Yearbook ... 2003*, vol. II (Part Two), p. 76.

⁷⁷³ See guideline 2.5.3 (Periodic review of the usefulness of reservations) and paragraph (5) of the commentary thereto, *ibid.*; see also guidelines 2.1.9 (Statement of reasons [for reservations]), 2.6.10 (Statement of reasons [for objections]), 2.9.5 (Form of approval, opposition and recharacterization) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization), sect. C.1 above.

⁷⁷⁴ See paragraph (1) of the present commentary above.

Commentary

(1) Guideline 3.2.3 reflects the spirit of the recommendation formulated in paragraph 9 of the preliminary conclusions of 1997, which states:

The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future.⁷⁷⁵

(2) This call to States and international organizations to cooperate with monitoring bodies is carried over into guideline 3.2.3, which has nonetheless been reformulated so as to remove the ambiguity in the wording adopted in 1997: the phrase “if such bodies were to be granted competence to that effect in the future” seems to imply that they do not have such competence at the present time. This is not so, since there is no question but that they may assess the permissibility of reservations to treaties whose observance they are required to monitor.⁷⁷⁶ On the other hand, they may not:

—compel reserving States and international organizations to accept their assessment, since they do not have general decision-making power;⁷⁷⁷ or

—in any case, take the place of the author of the reservation in determining the consequences of the impermissibility of a reservation.⁷⁷⁸

(3) Although paragraph 9 of the preliminary conclusions is drafted as a recommendation (“The Commission calls upon States ...”), it seemed possible to adopt firmer wording in guideline 3.2.3: there is no doubt that contracting parties have a general duty to cooperate with the treaty monitoring bodies that they have established—which is what is evoked by the expression “are required to cooperate” in the first part of the guideline. Of course, if these bodies have been vested with decision-making power, which is currently only the case of regional human rights courts, the parties must respect their decisions, but this is currently not the case in practice except in the case of the regional human rights courts.⁷⁷⁹ In contrast, the other monitoring bodies lack any legal decision-making power, both in the area of reservations and in other areas in which they possess declaratory powers.⁷⁸⁰ Consequently, their conclusions are not legally binding, which explains the use of the conditional tense in the second part of the guideline and the merely recommendatory nature of the provision.

⁷⁷⁵ *Yearbook ... 1997*, vol. II (Part Two), p. 57.

⁷⁷⁶ See paragraph (6) of the commentary to guideline 3.2 above; see also the second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478, p. 75, paras. 206–209.

⁷⁷⁷ See the second paragraph of guideline 3.2.1, section C.1 above; see also the second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478, pp. 79–80, paras. 234–240.

⁷⁷⁸ See paragraph 10 of the preliminary conclusions, *Yearbook ... 1997*, vol. II (Part Two), p. 57 and the second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478, pp. 77–79, paras. 218–230.

⁷⁷⁹ Given their very specific nature, these bodies—as is the case of all dispute settlement bodies—form the subject matter of a separate guideline; see guideline 3.2.5 below.

⁷⁸⁰ See the second paragraph of guideline 3.2.1, section C.1 above.

(4) Equally, treaty monitoring bodies should take into account the positions expressed by States and international organizations with respect to the reservation. This principle could be established in a future guideline 3.2.6 (Consideration of the positions of States by monitoring bodies)⁷⁸¹ and would constitute the indispensable counterpart to those set out in guideline 3.2.3.

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

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

Commentary

(1) Guideline 3.2.4 further develops, from a particular angle and in the form of a “without prejudice” clause, the principle established in guideline 3.2 of the plurality of bodies competent to assess the permissibility of reservations.

(2) It should also be noted that the wording of guideline 3.2 takes up only part of the substance of paragraph 6 of the preliminary conclusions of 1997:⁷⁸² it lists the persons or institutions competent to rule on the permissibility of reservations but does not specify that such powers are cumulative and not exclusive of each other. The Commission considered it useful that this be spelled out in a separate guideline.

(3) As in the case of guideline 3.2.3, the monitoring bodies in question are those established by a treaty,⁷⁸³ not dispute settlement bodies whose competence in this area forms the subject matter of guideline 3.2.5.

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

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

Commentary

(1) The Commission found it necessary to draw a distinction between monitoring bodies in the strict sense, which have no decision-making power and whose competence to assess the permissibility of reservations forms the subject matter of guideline 3.2.3, and dispute settlement bodies that have been vested with decision-making

⁷⁸¹ The Commission decided to retain the principle of this guideline.

⁷⁸² *Yearbook ... 1997*, vol. II (Part Two), p. 57.

⁷⁸³ See, however, footnote 767 above.

power. Even though the regional human rights courts may in a broader sense be considered monitoring bodies, they are included in the second category because their decisions constitute *res judicata*. Such bodies also include those which, like the ICJ, have general competence to settle disputes between States and which, in the event of a dispute involving a potentially broader subject matter, may be called upon to rule on the permissibility of a reservation.

(2) The statement that their assessment of the permissibility of a reservation “is, as an element of the decision, legally binding upon the parties” indicates that the principle established by the guideline applies, not only to cases in which the dispute has a direct bearing on this question, but also to those cases, much more frequent, in which the permissibility of the reservation constitutes a related problem that must be resolved first so that the broader dispute submitted to the competent body can be settled.

(3) It goes without saying that in any event the decision⁷⁸⁴ of the dispute settlement body is binding solely on the parties to the dispute in question, and only to the extent of the authority of the dispute settlement body to make such a decision.

3.3 Consequences of the non-permissibility of a reservation

A reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

Commentary

(1) Guideline 3.3 establishes the unity of the rules applicable to the consequences of the non-permissibility of a reservation, whatever the reason for such non-permissibility, among those set out in guideline 3.1.

(2) Just as it does not specify the consequences of the formulation of a reservation prohibited, either expressly (subparagraph (a)) or implicitly (subparagraph (b)), by the treaty to which it refers, so article 19 of the Vienna Convention makes no reference to the effects of the formulation of a reservation prohibited by subparagraph (c),⁷⁸⁵ and nothing in the text of the Vienna Convention indicates how these provisions relate to those of article 20, concerning acceptance of reservations and objections. The question has been raised as to whether this “normative gap”⁷⁸⁶ may not have been deliberately created by the authors of the Convention.⁷⁸⁷

⁷⁸⁴ Or “findings”, if it is assumed that a non-judicial body may, in the exercise of its competence, be called upon to assess the permissibility of a reservation.

⁷⁸⁵ Cf. Greig, *loc. cit.* (footnote 575 above), p. 83.

⁷⁸⁶ Horn, *Reservations and Interpretative Declarations...*, *op. cit.* (footnote 575 above), p. 131; see also Combacau, *loc. cit.* (footnote 752 above), p. 199.

⁷⁸⁷ See Imbert, *Les réserves...*, *op. cit.* (footnote 548 above), pp. 137–140.

(3) It must in any case be acknowledged that the *travaux préparatoires* for subparagraph (c) are confused and do not provide any clearer indications of the consequences that the drafters of the Convention intended to draw from the incompatibility of a reservation with the object and purpose of the Convention.⁷⁸⁸

—in draft article 17 proposed by Waldock in 1962, the object and purpose of the treaty appeared only as guidance for the reserving State itself;⁷⁸⁹

—the debates on that draft were particularly confused during the Commission’s plenary meetings⁷⁹⁰ and, more than anything else, revealed a split between members who advocated an individual assessment by States and those who were in favour of a collegial mechanism,⁷⁹¹ without the consequences of such assessment being really discussed;

—however, after the Drafting Committee had recast the draft along lines very close to the wording of the present article 19, the overriding feeling seems to have been that the object and purpose constituted a criterion by which the permissibility of the reservation should be assessed.⁷⁹² This is attested by the new amendment to article 18 *bis*, which entailed, on the one hand, the inclusion of the criterion of incompatibility and, on the other hand, and most importantly, the modification of the title of that provision, which became “The effect of reservations” instead of “The validity of reservations”,⁷⁹³ which shows that their permissibility is the subject of draft article 17 (which became article 19 of the Convention);

—the deft wording of the commentary to draft articles 18 and 20 (corresponding respectively to articles 19 and 21 of the Convention) adopted in 1962 leaves the question open: it affirms both that the compatibility of the reservation with the object and purpose of the treaty is the criterion governing the formulation of reservations and that, since this criterion “is to some extent a matter of subjective appreciation ... the only means of applying it in most cases will be through the individual State’s acceptance or rejection of the reservation”, but only “in the absence of a tribunal or an organ with standing competence”;⁷⁹⁴

⁷⁸⁸ It should be recalled that this criterion was included in the draft belatedly, going back only to Waldock’s first report in 1962 (*Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 65–66, para. (10); see also the oral presentation by the Special Rapporteur at the Commission’s fourteenth session, *ibid.*, vol. I, 651st meeting, 25 May 1962, p. 139, paras. 4–6.

⁷⁸⁹ *Ibid.*, vol. II, document A/CN.4/144 and Add.1 (art. 17, para. 2 (a)); see also the remarks by the Special Rapporteur at the Commission’s fourteenth session (*ibid.*, vol. I, 651st meeting, pp. 145–146, para. 85).

⁷⁹⁰ *Ibid.*, pp. 139–168 and pp. 172–175.

⁷⁹¹ See paragraph (3) of the commentary to guideline 3.2 above.

⁷⁹² See, in particular, *Yearbook ... 1962*, vol. I, 663rd and 664th meetings, 18 and 19 June 1962, pp. 225–234. During the discussion on new article 18 *bis*, entitled “The validity of reservations”, all the members referred to the criterion of compatibility with the object and purpose of the treaty, which was not mentioned, however, in the draft adopted by the Drafting Committee.

⁷⁹³ *Ibid.*, 667th meeting, 25 June 1962, pp. 252–253, paras. 55–70.

⁷⁹⁴ *Ibid.*, vol. II, document A/5209, p. 181, para. (22).

—in his 1965 report, the Special Rapporteur also noted, in connection with draft article 19 relating to treaties that are silent on the question of reservations (subsequently, article 20 of the Convention), that “[t]he Commission recognized that the ‘compatibility’ criterion is to some extent subjective and that views may differ as to the compatibility of a particular reservation with the object and purpose of a given treaty. In the absence of compulsory adjudication, on the other hand, it felt that the only means of applying the criterion is through the individual State’s acceptance or rejection of the reservation”; it also recognized that “the rules proposed by the Commission might be more readily acceptable if their interpretation and application were made subject to international adjudication”;⁷⁹⁵

—the Commission’s commentaries on draft articles 16 and 17 (subsequently 19 and 20 respectively) are no longer so clear, however, and confine themselves to indicating that “[t]he admissibility or otherwise of a reservation under paragraph (c) ... is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States” and that, for that reason, draft article 16 (c) should be understood “in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations”;⁷⁹⁶

—at the Vienna Conference, some delegations tried to put more content into the criterion of the object and purpose of the treaty. Accordingly, the delegation of Mexico proposed that the consequences of a judicial decision recognizing the incompatibility of a reservation with the object and purpose of the treaty should be spelled out.⁷⁹⁷ However, it was mainly those in favour of a system of collegial assessment who tried to draw concrete conclusions from the incompatibility of a reservation with the object and purpose of the treaty.⁷⁹⁸

(4) Moreover, nothing, either in the text of article 19 or in the *travaux préparatoires*, gives grounds for thinking that a distinction should be made between the different cases: *ubi lex non distinguit, nec nos distinguere debemus*. In all three cases, as clearly emerges from the chapeau of article 19, a State is prevented from formulating a reservation and, once it is accepted that a reservation prohibited by the treaty is null and void by virtue of subparagraphs (a) and (b) of article 19, there is no reason to draw different conclusions from subparagraph (c). Three objections, of unequal weight, have nevertheless been raised to this conclusion.

(5) First, it has been pointed out that, whereas the depositaries reject reservations prohibited by the treaty,

⁷⁹⁵ Fourth report by Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 52, para. 9.

⁷⁹⁶ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 207, para. 17.

⁷⁹⁷ United Nations Conference on the Law of Treaties, *Official Records of the United Nations Conference on the Law of Treaties, first session...* (see footnote 568 above), Plenary Commission, 21st meeting, 10 April 1968, p. 113, para. 63. Mexico proposed two solutions. The first was that the State that had formulated the incompatible reservation should be obliged to withdraw it, failing which it should forfeit the right to become a party to the treaty; and the second was that the treaty in its entirety should be deemed not to be in force between the reserving State and the objecting State.

⁷⁹⁸ See, in particular, the statements of the various delegations cited above, commentary to guideline 3.2, para. (3), footnotes 728 to 732 above.

they communicate to other contracting States the text of those that are, *prima facie*, incompatible with its object and purpose.⁷⁹⁹ Such, indeed, is the practice followed by the Secretary-General of the United Nations,⁸⁰⁰ albeit that its significance is only relative. For “*only if there is prima facie no doubt*” that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit. ... *In case of doubt*,* the Secretary-General shall request clarification from the State concerned. ... However, the Secretary-General feels that it is not incumbent upon him to request systematically such clarifications; rather, it is for the States concerned to raise, if they so wish, objections to statements which they would consider to constitute unauthorized reservations”.⁸⁰¹ In other words, the difference noted in the practice of the Secretary-General is not based on the distinction between the situations in subparagraphs (a) and (b) on the one hand and subparagraph (c) of article 19 on the other hand, but on the certainty that the reservation is contrary to the treaty. When an interpretation is necessary, the Secretary-General relies on States; such is always the case when the reservation is incompatible with the object and purpose of the treaty; it may also be so when the reservations are expressly or implicitly prohibited. Furthermore, in guideline 2.1.8 of the Guide to Practice, the Commission, in a context of progressive development, considered that “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 the grounds for the impermissibility of the reservation”. To that end, “the Commission considered that it was not [justified] to make a distinction between the different types of ‘impermissibility’ listed in article 19”.⁸⁰²

(6) Secondly, it has been pointed out in the same spirit that in the situation in subparagraphs (a) and (b), the reserving State could not be unaware of the prohibition and that, for that reason, it should be assumed to have accepted the treaty as a whole, notwithstanding its reservation (doctrine of “severability”).⁸⁰³ There is no doubt that it is less easy to determine objectively that a reservation is incompatible with the object and purpose of a treaty than it is when there is a prohibition clause. The remark is certainly relevant, although not decisive. It is less obvious than is sometimes thought to determine the scope of reservation clauses, especially when the prohibition is implicit, as in the situation in subparagraph (b).⁸⁰⁴

⁷⁹⁹ Cf. G. Gaja, “Unruly treaty reservations”, *Le droit international à l’heure de sa codification: études en l’honneur de Roberto Ago*, vol. I, Milan: Giuffrè, 1987, p. 317.

⁸⁰⁰ See the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (footnote 532 above), p. 57, paras. 191–192.

⁸⁰¹ *Ibid.*, paras. 193 and 195–196. The practice followed by the Secretary-General of the Council of Europe is similar, except that, in the event of difficulty, he or she may (and does) consult the Committee of Ministers (see J. Polakiewicz, *Treaty-making in the Council of Europe*, Strasbourg, Council of Europe, 1999, pp. 90–93).

⁸⁰² *Yearbook ... 2002*, vol. II (Part Two), p. 46; *Yearbook ... 2006*, vol. II (Part Two), p. 158 (para. (5) of the commentary to guideline 2.1.8).

⁸⁰³ See A. Fodella, “The declarations of States parties to the Basel Convention”, *Comunicazioni e Studi*, vol. 22 (2002), pp. 143–147.

⁸⁰⁴ See, in particular, the commentary to guideline 3.1.2 (Definition of specified reservations), *Yearbook ... 2006*, vol. II (Part Two), pp. 150–154.

Furthermore, it may be difficult to determine whether a unilateral statement is a reservation, and the State concerned may have thought in good faith that it had not violated the prohibition, while considering that its consent to be bound by the treaty depended on the acceptance of its interpretation thereof.⁸⁰⁵ In fact, while a State is assumed not to be ignorant of the prohibition resulting from a reservation clause, by the same token it must be aware that it cannot divest a treaty of its substance through a reservation that is incompatible with the treaty's object and purpose.

(7) Thirdly and most importantly, it has been argued that paragraphs 4 and 5 of article 20 describe a single case in which the possibility of accepting a reservation is limited: when the treaty contains a contrary provision;⁸⁰⁶ *a contrario*, this would allow for complete freedom to accept reservations, notwithstanding the provisions of article 19, subparagraph (c).⁸⁰⁷ While it is true that, in practice, States infrequently object to reservations that are very possibly contrary to the object and purpose of the treaty to which they relate and that, as a consequence, the rule contained in article 19, subparagraph (c),⁸⁰⁸ is deprived of concrete effect, at least in the absence of an organ which is competent to take decisions in that regard,⁸⁰⁹ many arguments based on the text of the Convention itself conflict with that reasoning:

—articles 19 and 20 of the Convention have distinct purposes; the rules that they establish are applicable at different stages of the formulation of a reservation: article 19 sets out the cases in which a reservation may not be formulated, while article 20 describes what happens when it has been formulated;⁸¹⁰

—the proposed interpretation would strip article 19, subparagraph (c), of all useful effect: as a consequence, a reservation that is incompatible with the object and purpose of the treaty would have exactly the same effect as a compatible reservation;

—it also renders meaningless article 21, paragraph 1, which stipulates that a reservation is “established” only “in accordance with articles 19, 20 and 23”;⁸¹¹ and

⁸⁰⁵ On the distinction between reservations, on the one hand, and interpretative declarations, whether simple or conditional, on the other, see guidelines 1.3 to 1.3.3 and the commentaries thereto, *Yearbook ... 1999*, vol. II (Part Two), pp. 107–112.

⁸⁰⁶ The wording used in both provisions is “unless the treaty otherwise provides”.

⁸⁰⁷ See Greig, *loc. cit.* (footnote 575 above), pp. 83–84.

⁸⁰⁸ See, in particular, D. Carreau, *Droit international*, Paris, Pedone, 2004, p. 137; Gaja, *loc. cit.* (footnote 799 above), pp. 315–318; Greig, *loc. cit.* (footnote 575 above), pp. 86–90; or Imbert, *Les réserves...*, *op. cit.* (footnote 548 above), pp. 134–137.

⁸⁰⁹ See, above, paragraphs (8) and (9) of the commentary to guideline 3.2 (Assessment of the permissibility of reservations); see also M. Coccia, “Reservations to multilateral treaties on human rights”, *California Western International Law Journal*, vol. 15 (1985), p. 33, or R. Szafarz, “Reservations to multilateral treaties”, *Polish Yearbook of International Law*, vol. 3 (1970), p. 301.

⁸¹⁰ See Bowett, “Reservations...”, *loc. cit.* (footnote 749 above), p. 80, or C. J. Redgwell, “Reservations to treaties and Human Rights Committee general comment No. 24 (52)”, *International and Comparative Law Quarterly*, vol. 46 (1997), pp. 404–406.

⁸¹¹ See paragraph (6) of the commentary to guideline 3.1 (*Yearbook ... 2006*, vol. II (Part Two), p. 146) and paragraph (8) of the present commentary.

—it introduces a distinction between the scope of article 19, subparagraphs (a) and (b), on the one hand, and article 19, subparagraph (c), on the other, which the text in no way authorizes.⁸¹²

(8) Consequently, there is nothing in the text of article 19 of the Vienna Conventions, or in its context, or in the *travaux préparatoires* for the Conventions, or even in the practice of States or depositaries, to justify drawing such a distinction between the consequences, on the one hand, of the formulation of a reservation in spite of a treaty-based prohibition (article 19, subparagraphs (a) and (b)) and, on the other, of its incompatibility with the object and purpose of the treaty (article 19, subparagraph (c)). However, some members of the Commission consider that this conclusion is too categorical and that the effects of these various types of reservation could differ.

3.3.1 Non-permissibility of reservations and international responsibility

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

Commentary

(1) Once it has been accepted that, in accordance with guideline 3.3, the three subparagraphs of article 19 (reproduced in guideline 3.1) have the same function and that a reservation that is contrary to their provisions is impermissible, it still remains to be seen what happens when, in spite of these prohibitions, a State or an international organization formulates a reservation. If it does so, the reservation certainly cannot have the legal effects which, pursuant to article 21, are clearly contingent on its “establishment” “in accordance with articles 19 [in its entirety], 20 and 23”.⁸¹³

(2) Whatever its effects,⁸¹⁴ the question remains: on the one hand, should it be concluded that, by proceeding thus, the author of the reservation is committing an internationally wrongful act which engages its international responsibility? On the other hand, are other parties prevented from accepting a reservation formulated in spite of the prohibitions contained in article 19?

(3) With regard to the first of these two questions, it has been argued that a reservation that is incompatible with the object and purpose of the treaty⁸¹⁵ “amounts to a breach of [the] obligation” arising from article 19, subparagraph (c). “Therefore, it is a wrongful act, entailing such State’s responsibility *vis-à-vis* each other party to the treaty. It does not amount to a breach of the treaty itself,

⁸¹² See paragraph (4) of the present commentary.

⁸¹³ Article 21 (Legal effects of reservations and of objections to reservations): “A reservation established with regard to another party in accordance with articles 19, 20 and 23 ...”.

⁸¹⁴ These will form the subject of the fourth part of the Guide to Practice.

⁸¹⁵ This should also hold true *a fortiori* for reservations prohibited by the treaty.

but rather of the general norm embodied in the Vienna Convention forbidding ‘incompatible’ reservations.”⁸¹⁶ This reasoning, based expressly on the rules governing the responsibility of States for internationally wrongful acts,⁸¹⁷ is not entirely convincing.⁸¹⁸

(4) It is clear that “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”,⁸¹⁹ and that a breach of an obligation not to act (in this case, not to formulate a reservation which is incompatible with the object and purpose of the treaty) is an internationally wrongful act liable to engage the international responsibility of a State in the same way as an obligation to act. However, that question has not yet arisen in the sphere of the law of responsibility. As the ICJ forcefully recalled in the case concerning the *Gabčíkovo–Nagymaros Project*, that branch of law and the law of treaties “obviously have a scope that is distinct”; while a “determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties”,⁸²⁰ it falls to this same branch of law to determine whether or not a reservation may be formulated. It follows, at the very least, that the potential responsibility of a reserving State cannot be determined in the light of the Vienna rules and is not relevant to the “law of reservations”. Furthermore, even if damage is not a requirement for engaging the responsibility of a State,⁸²¹ it conditions the implementation of the latter and,

in particular, reparation,⁸²² whereas, for an impermissible reservation to have concrete consequences in the sphere of the law of responsibility, the State relying on it must be able to invoke an injury, which is highly unlikely.

(5) There is more, however. It is telling that no State has ever, when formulating an objection to a prohibited reservation, invoked the responsibility of the reserving State: the consequences of the observation that a reservation is not permissible may be varied,⁸²³ but they never constitute an obligation to make reparation and if an objecting State were to invite the reserving State to withdraw its reservation or to amend it within the framework of the “reservations dialogue”, it would be acting, not in the sphere of the law of responsibility, but in that of the law of treaties alone.

(6) That is in fact why the Commission, which had at first used the term “*illicite*” as an equivalent to the English word “impermissible” to describe reservations formulated in spite of the provisions of article 19, decided in 2002 to reserve its position on this matter pending an examination of the effect of such reservations.⁸²⁴ It seems certain that the formulation of a reservation excluded by any of the subparagraphs of article 19 falls within the sphere of the law of treaties and not within that of responsibility of States for internationally wrongful acts. Accordingly, it does not entail the responsibility of the reserving State.⁸²⁵ While this seems self-evident, the Commission’s intention in adopting guideline 3.3.1 was to remove any remaining ambiguity.

(7) A minority view within the Commission holds that an exception to the principle set out in guideline 3.3.1 could arise when the reservation in question was incompatible with a peremptory norm of general international law, in which case it would entail the international responsibility of the reserving State. While some other members of the Commission doubt that a reservation could breach *jus cogens*, the majority considers that, in any case, the mere formulation of a reservation cannot of itself entail the responsibility of its author. The phrase “in itself” nonetheless leaves open the possibility that the responsibility of the reserving State or international organization might be engaged as a result of the effects produced by such a reservation.⁸²⁶

⁸¹⁶ Coccia, *loc. cit.* (footnote 809 above), pp. 25–26.

⁸¹⁷ Cf. articles 1 and 2 of the draft articles adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26.

⁸¹⁸ See Gaja, *loc. cit.* (footnote 799 above), p. 314, note 29.

⁸¹⁹ Article 12 of the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26.

⁸²⁰ *Gabčíkovo–Nagymaros Project* (see footnote 209 above), p. 38, para. 47; see also the arbitral ruling of 30 April 1990 in the *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair*, Decision of 30 April 1990, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215, at p. 251, para. 75. On the relationships between the two branches of law, see, in particular, D. W. Bowett, “Treaties and State responsibility”, *Le droit international au service de la paix...*, *op. cit.* (footnote 752 above), pp. 137–145; Combacau, *loc. cit.* (footnote 752 above), pp. 195–203; P.-M. Dupuy, “Droit de traités, codification et responsabilité internationale”, *Annuaire français de droit international*, vol. 43 (1997), pp. 7–30; Ph. Weckel, “Convergence du droit des traités et du droit de la responsabilité internationale à la lumière de l’Arrêt du 25 septembre 1997 de la Cour internationale de Justice relatif au projet Gabčíkovo–Nagymaros (Hongrie/Slovaquie)”, *Revue générale de droit international public*, vol. 102 (1998), pp. 647–684; P. Weil, “Droit de traités et droit de la responsabilité”, in M. Rama-Montaldo (ed.), *International Law in an Evolving World: Liber Amicorum Jiménez de Aréchaga*, Montevideo, Fundación de Cultura Universitaria, 1994, pp. 523–543; and A. Yahi, “La violation d’un traité: l’articulation du droit des traités et du droit de la responsabilité internationale”, *Revue belge de droit international*, vol. 26 (1993), pp. 437–469.

⁸²¹ See, in this connection, article 1 of the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26.

⁸²² Cf. articles 31 and 34 of the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 28.

⁸²³ They arise, *a contrario*, from article 20 and, above all, article 21 of the Vienna Conventions.

⁸²⁴ See *Yearbook ... 2005*, vol. II (Part Two), p. 68, para. 391.

⁸²⁵ Much less that of States which implicitly accept a reservation that is prohibited or incompatible with the object and purpose of the treaty—see, however, Lijnzaad, *op. cit.* (footnote 575 above), p. 56: “The responsibility for incompatible reservations is ... shared by reserving and accepting States”—but it appears from the context that the author does not consider either the incompatible reservation or its acceptance as internationally wrongful acts; rather than “responsibility” in the strictly legal sense, it is no doubt necessary to refer here to “accountability” in the sense of having to provide an explanation.

⁸²⁶ See also guideline 3.1.9.