

RESERVATIONS TO TREATIES

[Agenda item 5]

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Sixth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

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Multilateral instruments cited in the present report

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International Opium Convention (Geneva, 19 February 1925)	League of Nations, <i>Treaty Series</i> , vol. LXXXI, No. 1845, p. 317.
Convention on the Pan American Union (Havana, 20 February 1928)	James Brown Scott, ed., <i>The International Conferences of American States, 1889–1928</i> (New York, Oxford University Press, 1931), p. 398.
General Act (Pacific Settlement of International Disputes) (Geneva, 26 September 1928)	League of Nations, <i>Treaty Series</i> , vol. XCIII, No. 2123, p. 343.
Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, <i>Treaty Series</i> , vol. 15, No. 102, p. 295.
Constitution of the World Health Organization (New York, 22 July 1946)	WHO, <i>Basic Documents</i> , 42nd ed. (Geneva, 1999), p. 1.
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, No. 814, p. 187.
Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)	<i>Ibid.</i> , vol. 33, No. 521, p. 261.
Convention on the International Maritime Organization (Geneva, 6 March 1948)	<i>Ibid.</i> , vol. 289, No. 4214, p. 3.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
European Convention on Extradition (Paris, 13 December 1957)	<i>Ibid.</i> , vol. 359, No. 5146, p. 273.
Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions (Geneva, 20 March 1958)	<i>Ibid.</i> , vols. 335, 516, 609 and 1891, No. 4789, pp. 211, 378, 290 and 381 respectively.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Agreement establishing the Caribbean Development Bank (Kingston, 18 October 1969)	<i>Ibid.</i> , vol. 712, 1021 and 1401, No. 10232, pp. 217, 437 and 265 respectively.
International Convention on the Suppression and Punishment of the Crime of <i>Apartheid</i> (New York, 30 November 1973)	<i>Ibid.</i> , vol. 1015, No. 14861, p. 243.
Agreement establishing the Asia-Pacific Institute for Broadcasting Development (Kuala Lumpur, 12 August 1977)	<i>Ibid.</i> , vols. 1216 and 2167, No. 19609, pp. 81 and 422 respectively.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	<i>Ibid.</i> , vol. 1946, No. 33356, p. 3.
Agreement establishing the African Development Bank, as amended (Lusaka, 7 May 1982)	<i>Ibid.</i> , vol. 1276, No. 21052, p. 3.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1833, No. 31363, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

	<i>Source</i>
Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora (Lusaka, 8 September 1994)	United Nations, <i>Treaty Series</i> , vol. 1950, No. 33409, p. 35.
Inter-American Convention against Corruption (Caracas, 29 March 1996)	ILM, vol. 35, No. 3 (May 1996), p. 724.
European Social Charter (revised) (Strasbourg, 3 May 1996)	United Nations, <i>Treaty Series</i> , vol. 2151, No. 37549, p. 277.
Agreement establishing the Bank for Economic Cooperation and Development in the Middle East and North Africa (Cairo, 28 August 1996)	<i>United Nations Juridical Yearbook, 1996</i> (United Nations publication, Sales No. E.01.V.10), p. 286.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, <i>Treaty Series</i> , vol. 2187, No. 38544, p. 3.
Criminal Law Convention on Corruption (Strasbourg, 27 January 1999)	<i>Ibid.</i> , vol. 2216, No. 39391, p. 228.

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Introduction

1. As an introduction to his sixth report, the Special Rapporteur deems it useful to present, as he did in his previous reports:

(a) A brief summary of the lessons which in his view can be drawn from the consideration of his preceding report both by the Commission itself and by the Sixth Committee of the General Assembly;

(b) A concise account of the main developments with regard to reservations that occurred during the past year and were brought to his attention;

(c) A general presentation of this report.

A. Outcome of the fifth report

1. OBJECT OF THE FIFTH REPORT

2. The fifth report on reservations to treaties,¹ which essentially replaced the fourth report,² comprised, in addition to a general introduction drafted along the same lines as the one in this report, a part one on alternatives to reservations and interpretative declarations³ and a part two dealing with the procedure regarding reservations and interpretative declarations.⁴

3. The Special Rapporteur, who had hoped to dispose of these procedural issues in his fifth report, had planned to deal in two separate chapters with the formulation, modification and withdrawal of reservations and with the formulation and withdrawal of acceptances of, and objections to, reservations and of reactions to interpretative declarations. In addition, he had planned to present a general overview of the effects of reservations, acceptances and objections.⁵

4. Regrettably, the Special Rapporteur is compelled to admit that he had somewhat overestimated his capabilities; it proved impossible for him to deliver in time for translation not only the parts of his report dealing with the effects of reservations, but also the entire chapter on the reactions of other parties to reservations and interpretative declarations made by a State or an international organization, and even the end of the chapter dealing with the procedure for formulating reservations and interpretative declarations.

5. Nevertheless, this failing, for which the Special Rapporteur bears sole responsibility, has not had any consequences, since the Commission was unable to consider the fifth report, as presented to it, in its entirety.

¹ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1-4, p. 139.

² On this subject, see paragraphs 21 and 59 of the fifth report (*ibid.*).

³ *Ibid.*, paras. 66-213. See also annex II (*ibid.*), containing the consolidated text of all draft guidelines dealing with definitions adopted on first reading or proposed in the fifth report.

⁴ *Ibid.*, paras. 214-332.

⁵ *Ibid.*, paras. 63-65.

2. CONSIDERATION OF THE FIFTH REPORT BY THE COMMISSION

6. During its fifty-second session, at its 2630th to 2633rd meetings held on 31 May and 2, 6 and 7 June 2000, the Commission considered part one of the fifth report on alternatives to reservations. Upon the conclusion of this consideration, it sent the draft guidelines proposed on this topic by the Special Rapporteur to the Drafting Committee, which considered and amended them at its meetings held from 6 to 8 June 2000.⁶

7. At its 2640th meeting on 14 July 2000, the Commission adopted on first reading draft guidelines 1.1.8 (Reservations formulated under exclusionary clauses), 1.4.6 (Unilateral statements adopted under an optional clause), 1.4.7 (Unilateral statements providing for a choice between the provisions of a treaty), 1.7.1 (Alternatives to reservations) and 1.7.2 (Alternatives to interpretative declarations). This concluded, at least provisionally,⁷ the adoption of part one of the Guide to Practice in respect of reservations to treaties.⁸

8. The commentaries on the new draft guidelines were adopted by the Commission at its 2659th and 2660th meetings on 15 and 16 August 2000. They are contained in the report of the Commission on the work of its fifty-second session.⁹

9. The Special Rapporteur presented part two of his fifth report to the Commission at the 2651st meeting. A summary of this presentation can be found in the report of the Commission.¹⁰

10. Owing to lack of time, the Commission was unable either to consider this part of the fifth report or, consequently, to transmit the 14 draft guidelines contained therein to the Drafting Committee. It will need to do so during its fifty-third session, in 2001.

3. CONSIDERATION OF CHAPTER VII OF THE REPORT OF THE COMMISSION BY THE SIXTH COMMITTEE

11. Chapter VII of the report of the Commission on the work of its fifty-second session deals with reservations to treaties. This report was considered by the Sixth Committee of the General Assembly from 23 October to 3 November 2000.¹¹

⁶ *Yearbook ... 2000*, vol. II (Part Two), p. 102, paras. 635-636.

⁷ It is not precluded that in the course of its further work, the Commission may find it necessary to add to part one of the Guide to Practice in respect of reservations to treaties, if it believes that some additional clarifications might prove useful.

⁸ For the full text of this part, see *Yearbook ... 2000* (footnote 6 above), p. 106, para. 662.

⁹ *Ibid.*, p. 108, para. 663.

¹⁰ *Ibid.*, pp. 103-106, paras. 639-660.

¹¹ See the summary records of the 14th to 24th meetings, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee* (A/C.6/55/SR.14-A/C.6/55/SR.24); see also the very useful topical summary of the discussions (A/CN.4/513, paras. 283-312). To his great regret, when drafting his report, the Special Rapporteur had at his disposal only the English version of the summary records of the debate in

12. Generally speaking, the part of the report of the Commission that dealt with reservations to treaties was well received by the States whose representatives made statements in the Sixth Committee on this topic. All of them reaffirmed their interest in the Guide to Practice¹² and most of them welcomed the additional clarifications on the nature of ambiguous unilateral declarations¹³ and the efforts made by the Commission to specify the possible alternatives to reservations.¹⁴

13. Nevertheless, several delegations again made known their impatience to see the Commission address the crux of the issue, namely, the legal effects of reservations—whether lawful or unlawful—and the objections that may be made to them.¹⁵

14. The Special Rapporteur understands this impatience, which he knows is shared by a number of members of the Commission. Unfortunately, he can only repeat what he wrote in his fifth report:¹⁶ he takes his share of responsibility for the delay in the preparation of the Guide to Practice; in his “defence”, he would note that he received no assistance other than what the Commission secretariat was able to provide (assistance which he wholeheartedly welcomed), that he would not place excessive demands on the secretariat, given its heavy workload, and that the topic itself proved to be sprawling and complex.

15. During the debate many delegations also made very useful comments and suggestions regarding the draft guidelines already adopted by the Commission.¹⁷ While endeavouring to keep these remarks in mind for the remainder of his study, the Special Rapporteur nonetheless believes that these comments can only be taken fully into consideration when the Commission takes up the consideration of the Guide to Practice on second reading; otherwise, his work would be a truly Herculean effort.¹⁸

the Sixth Committee, with two exceptions; while paying tribute to the outstanding work of the secretariat, he wishes to draw its attention to the fact that French is also an official working language of the General Assembly and the Commission.

¹² A/CN.4/513 (see footnote 11 above), para. 283.

¹³ See, in particular, the statements by Chile, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 17th meeting (A/C.6/55/SR.17), para. 59; Austria, *ibid.*, 22nd meeting (A/C.6/55/SR.22), para. 1; Colombia, on behalf of the Rio Group, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 7; France, *ibid.*, 22nd meeting (A/C.6/55/SR.22), para. 14; and the Russian Federation, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 64.

¹⁴ Cf. the statements by Germany, *ibid.*, 21st meeting (A/C.6/55/SR.21), paras. 59–60; Sweden, on behalf of the Nordic countries, *ibid.*, para. 107; Mexico, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 18; or Greece, *ibid.*, 24th meeting (A/C.6/55/SR.24), para. 46; against Bahrain, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 24, and Japan, *ibid.*, para. 85.

¹⁵ A/CN.4/513 (see footnote 11 above), para. 288.

¹⁶ *Yearbook ... 2000* (see footnote 1 above), p. 154, footnote 95.

¹⁷ A/CN.4/513 (see footnote 11 above), paras. 291–312.

¹⁸ The Special Rapporteur does not, however, consider it necessary to defer his reply to a question raised somewhat insistently by Greece on 3 November 2000, concerning the nature of declarations made by States under article 124 of the Rome Statute of the International Criminal Court, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 24th meeting (A/C.6/55/SR.24), para. 45; see also the comments by Austria (*ibid.*, 22nd meeting (A/C.6/55/SR.22), para. 2). In his view, there is no doubt that such statements are akin to genuine reservations provided for in the treaty (see *Yearbook ... 2000* (foot-

16. The situation is different with regard to the comments of States concerning the draft guidelines submitted by the Special Rapporteur in his fifth report, which the Commission has not yet had the opportunity to consider. Likewise, it would be useful for the Commission to be informed of the valuable observations transmitted to him by the United Kingdom of Great Britain and Northern Ireland on 21 February 2001, for which he especially wishes to thank that country.

17. Essentially, these comments pertain to the following draft guidelines:

(a) 2.2.1 (Reservations formulated when signing and formal confirmation) and 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation), which, it was suggested, could be combined;¹⁹ moreover, the United Kingdom fears that the inclusion of guideline 2.2.2 would enshrine a practice that has no legal basis;

(b) 2.2.4 (Reservations formulated when signing for which the treaty makes express provision),²⁰ about which the question was asked whether it was not the expression of a *lex specialis*, which is always possible;²¹ and

(c) 2.3.1 (Late reservations).²²

18. With regard to this latter draft, a fair number of speakers expressed agreement with the Special Rapporteur²³ and dwelt on the need to limit the practice of late reservations.²⁴ Moreover, during the consideration

note 1 above), paras. 148–167); see also Pellet, “Entry into force and amendment of the statute”.

¹⁹ See the comments by Austria, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 22nd meeting (A/C.6/55/SR.22), para. 3; Hungary stated that it fully endorsed the text of draft guideline 2.2.2 (*ibid.*, para. 40).

²⁰ Moreover, the United Kingdom suggests amendments to the wording of draft guideline 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form][a treaty that enters into force solely by being signed]).

²¹ See the comments by Austria, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 22nd meeting (A/C.6/55/SR.22), para. 3; see also the drafting amendment suggested by the United Kingdom; Romania in particular welcomed draft guideline 2.2.4 (*ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 77).

²² The Netherlands, sceptical of the very notion of “conditional interpretative declarations”, also expressed doubts regarding the validity of draft guidelines 2.4.4–2.4.6 (*ibid.*, 24th meeting (A/C.6/55/SR.24), para. 6. See also the comments by the United Kingdom on draft guidelines 2.3.2–2.3.3 and 2.4.3–2.4.8 (the latter were deemed unnecessary).

²³ See *Yearbook ... 2000* (footnote 1 above), paras. 305–306 and 311.

²⁴ See, in particular, the statements by South Africa, on behalf of SADC, *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 15th meeting (A/C.6/55/SR.15), para. 73; Chile, *ibid.*, 17th meeting (A/C.6/55/SR.17), para. 60; Austria, *ibid.*, 22nd meeting (A/C.6/55/SR.22), para. 4; Germany, *ibid.*, 21st meeting (A/C.6/55/SR.21), para. 61; Spain, *ibid.* (A/C.6/55/SR.21), para. 81; Sweden, on behalf of the Nordic countries, *ibid.*, para. 108; France, *ibid.*, 22nd meeting (A/C.6/55/SR.22), para. 21; Romania, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 78; Brazil, *ibid.*, 24th meeting (A/C.6/55/SR.24), para. 17; and Portugal, *ibid.*, para. 27. Mexico and the Netherlands both have doubts as to the appropriateness of this draft guideline (*ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 16, and 24th meeting (A/C.6/55/SR.24), para. 7). See also the written observations of the United Kingdom, which also proposes some drafting amendments.

of draft guideline 2.3.1, several delegations expressed a positive assessment of the decision by the Secretary-General to extend to 12 months the period during which States can react to late reservations.²⁵

19. Moreover, several States took the opportunity afforded by this debate to express their views on the rules applicable to amendments to reservations.²⁶ The Special Rapporteur took these remarks into consideration in the drafting of this report.

B. Recent developments with regard to reservations to treaties

20. The fifth report sought to give an account of action by other bodies with regard to reservations to treaties.²⁷ The Special Rapporteur provided additional information during the oral presentation of his report to the 2630th meeting of the Commission²⁸ with regard to the decision of 2 November 1999 of the Human Rights Committee in the *Rawle Kennedy v. Trinidad and Tobago* case²⁹ and the working paper prepared by Ms. Françoise Hampson pursuant to decision 1998/113 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.³⁰

21. On 26 August 1999 the Sub-Commission, which had become the Sub-Commission on the Promotion and Protection of Human Rights, took note of that working paper, endorsed the conclusions contained therein and decided to appoint Ms. Hampson as Special Rapporteur “with the task of preparing a comprehensive study on reservations to human rights treaties”.³¹ Nevertheless,

[i]n view of the fact that the Commission on Human Rights at its fifty-sixth session decided to request the Sub-Commission to request Ms. Hampson to submit to the Sub-Commission revised terms of reference for her proposed study further clarifying how this study would complement work already under way on reservations to human rights treaties, in particular by the International Law Commission (decision 2000/108), no document has been prepared by Ms. Hampson³²

for the fifty-second session of the Sub-Commission in July-August 2000.

22. In the light of this request, the Sub-Commission on the Promotion and Protection of Human Rights, in its resolution 2000/26 of 18 August 2000, renewed its 1999 decision, stipulating that Ms. Hampson’s “study will not duplicate the work of the International Law Commission, which concerns the legal regime applicable to

reservations and interpretative declarations in general, whereas the proposed study involves the examination of the actual reservations and interpretative declarations made to human rights treaties in the light of the legal regime applicable to reservations and interpretative declarations, as set out in the working paper”;³³ accordingly, the Sub-Commission requested the Special Rapporteur (Ms. Hampson) to submit “a preliminary report to the Sub-Commission at its fifty-third session [2001], a progress report at its fifty-fourth session [2002] and a final report at its fifty-fifth session [2003]”.³⁴

23. In this same resolution, the Sub-Commission

Requests the Special Rapporteur to seek the advice and cooperation of the Special Rapporteur of the International Law Commission and of all relevant treaty bodies and, to that end, requests the authorization of a meeting between the Special Rapporteur of the Sub-Commission, the Special Rapporteur of the International Law Commission and the Chairpersons of the relevant treaty bodies or their nominees, when both the International Law Commission and the Sub-Commission are in session.³⁵

24. Even before the adoption of this resolution, the Special Rapporteur had made contact with Ms. Hampson, as the Commission had authorized him to do in the previous year. He had gathered from these informal contacts that the future report of the Special Rapporteur appointed by the Sub-Commission on the Promotion and Protection of Human Rights would not necessarily duplicate the work of the Commission if, as Ms. Hampson had assured him it would, her study dealt exclusively with the *practice* of reservations to human rights treaties. Quite the contrary, such a study could provide the Commission with food for thought when it returned to the study of reservations to human rights treaties in order to arrive at definitive conclusions in that regard.

25. It must be stated, however, that if the Special Rapporteur appointed by the Sub-Commission on the Promotion and Protection of Human Rights keeps to the agenda that she set out in the 1999 working paper³⁶ and that the Sub-Commission endorsed in its resolutions of 26 August 1999 and 18 August 2000, the study that she proposes to undertake goes well beyond a survey of the practice of States and human rights treaty monitoring bodies, and deals specifically with the regime of reservations to treaties—assuming that such a regime exists. If this proved to be the case, such a study would inevitably duplicate the work of the Commission.

26. Moreover, the Commission on Human Rights appears to share this concern; in its decision 2001/113, adopted on 25 April 2001,³⁷ it again requested the Sub-Commission on the Promotion and Protection of Human Rights to reconsider its decision in the light of the work undertaken by the International Law Commission.

27. The Special Rapporteur cannot hide his confusion over what attitude to take. It cannot be ruled out

²⁵ See the comments by Germany, *ibid.*, 21st meeting (A/C.6/55/SR.21), para. 62; Spain, *ibid.*, para. 82; Sweden, on behalf of the Nordic countries, *ibid.*, para. 109; Italy, *ibid.*, 23rd meeting (A/C.6/55/SR.23), para. 36; Romania, *ibid.*, para. 78; and Brazil, *ibid.*, 24th meeting (A/C.6/55/SR.24), para. 17.

²⁶ See the statements by Germany, *ibid.*, 21st meeting (A/C.6/55/SR.21), paras. 65–67; Spain, *ibid.*, para. 82; the Netherlands, *ibid.*, 24th meeting (A/C.6/55/SR.24), para. 8; and Portugal, *ibid.*, para. 27.

²⁷ *Yearbook ... 2000* (see footnote 1 above), p. 157, paras. 51–56.

²⁸ *Yearbook ... 2000*, vol. I, 2630th meeting, p. 145.

²⁹ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40* (A/55/40), vol. II, annex XI, communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, p. 258.

³⁰ E/CN.4/Sub.2/1999/28 and Corr.1.

³¹ E/CN.4/2000/2-E/CN.4/Sub.2/1999/54, resolution 1999/27, adopted without a vote, p. 72, para. 3.

³² E/CN.4/Sub.2/2000/32, para. 2.

³³ E/CN.4/2001/2-E/CN.4/Sub.2/2000/46, resolution 2000/26, pp. 73–74, para. 3.

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 5.

³⁶ See footnote 30 above.

³⁷ *Official Records of the Economic and Social Council, Fifty-seventh Session, Supplement No. 3* (E/2001/23-E/CN.4/2001/167, p. 348).

that the Sub-Commission on the Promotion and Protection of Human Rights might disregard what on its face would appear to be a refusal on the part of the Commission on Human Rights, and it does not seem appropriate for the International Law Commission to intervene in the relations between those two bodies. Accordingly, if the International Law Commission agrees, the Special Rapporteur proposes to write to Ms. Hampson to enquire about her intentions and convey to her the possible observations of the Commission.

28. For its part, the Committee on the Elimination of Discrimination against Women, during its session held from 15 January to 2 February 2001, “requested the Secretariat to prepare ... an analysis of the approach of other human rights treaty bodies to reservations to human rights treaties in the consideration of reports and communications of States parties”.³⁸ Unless otherwise instructed by the Commission, the Special Rapporteur proposes to transmit to the Chairperson of the Committee a copy of the preliminary conclusions of the Commission on reservations to normative multilateral treaties including human rights treaties, adopted in 1997,³⁹ together with relevant extracts from the report of the Commission on its forty-ninth session and his own second report on reservations to treaties.⁴⁰

29. Moreover, the Special Rapporteur participated, at the invitation of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, in the twentieth meeting of that body in Strasbourg on 12–13 September 2000. This gathering provided an opportunity for a new and fruitful exchange of views.

C. General presentation of the sixth report

30. The primary object of this report is to conclude the study of the formulation of reservations and interpretative declarations and of reactions of other Contracting Parties, which could not be completed last year owing to lack of time.⁴¹

31. This study will, as envisaged,⁴² be organized in two parts: the first will present aspects of the formulation, modification and withdrawal of reservations and interpretative declarations that could not be addressed

in the fifth report, and the second part will deal with what might be termed the “reservations dialogue”, in other words, the formulation and withdrawal of acceptances of and objections to reservations and of reactions to interpretative declarations, along with any “counter-reactions” to one or the other.

32. Once again, the Special Rapporteur wishes to note that he will confine himself strictly to the approach proposed in the “provisional general outline of the study” contained in his second report,⁴³ which the Commission approved.⁴⁴ In these two parts, therefore, it is only a matter of examining *procedural* issues relating to the *formulation* of these various unilateral statements, to the exclusion of issues concerning their lawfulness.

33. Nevertheless, if time permits, the Special Rapporteur will begin the study of the effects of reservations, still in accordance with the 1996 general outline.

34. It goes without saying that the Special Rapporteur will remain faithful to the conclusions which he drew following the conclusion of the consideration by the Commission of his first report:

(b)⁴⁵ The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission’s statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.⁴⁶

35. Lastly, the Special Rapporteur, mindful of the impatience aroused by the slowness of his approach,⁴⁷ will resign himself, albeit somewhat reluctantly, to going a little less deeply into the various issues raised than he endeavoured to do in his previous reports.

³⁸ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 38 (A/56/38)*, p. 37, para. 363.

³⁹ See *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157.

⁴⁰ *Yearbook ... 1996*, vol. II (Part One), p. 37, document A/CN.4/477 and Add.1.

⁴¹ See paragraphs 4–5 and 10 above.

⁴² See the fifth report, *Yearbook ... 2000* (footnote 1 above), p. 158, para. 65, and pp. 180–181, paras. 214–222.

⁴³ *Yearbook ... 1996* (see footnote 40 above), p. 48, para. 37.

⁴⁴ See *Yearbook ... 1996*, vol. II (Part Two), p. 83, para. 136, and *Yearbook ... 1997* (footnote 39 above).

⁴⁵ Item (a) dealt with the change in the title of the topic, which was initially entitled “The law and practice relating to reservations to treaties”.

⁴⁶ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487.

⁴⁷ See paragraph 13 above.

Formulation, modification and withdrawal of reservations and interpretative declarations

36. In his fifth report, the Special Rapporteur introduced 14 draft guidelines⁴⁸ concerning the moment when a reservation or an interpretative declaration may be made.⁴⁹ This question need not be further considered here, given that the Commission and the Drafting Committee will doubtless wish to take account of the comments made by States during the discussions in the Sixth Committee on some of these drafts.⁵⁰

37. It was not, however, possible in the fifth report to address the question of the modalities of formulating reservations and interpretative declarations in terms of both their form and their notification. This will be the subject of the present part of this report, while the second part will deal with their withdrawal and modification.

A. Modalities of formulating reservations and interpretative declarations

38. Under article 23, paragraph 1, of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention),⁵¹ 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”. The provision thus imposes two conditions on the formulation of reservations: one purely of form—they must be in writing; the other of a procedural nature—they must be communicated to other “interested” States and international organizations.⁵²

⁴⁸ These are draft guidelines 2.2.1 (Reservations formulated when signing and formal confirmation), 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation), 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), 2.2.4 (Reservations formulated when signing for which the treaty makes express provision), 2.3.1 (Reservations formulated late—see also the three draft model clauses annexed to the provision), 2.3.2 (Acceptance of reservations formulated late), 2.3.3 (Objection to reservations formulated late), 2.3.4 (Late exclusion or modification of the legal effects of a treaty by procedures other than reservations), 2.4.3 (Times at which an interpretative declaration may be formulated), 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation), 2.4.5 (Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision), 2.4.7 (Interpretative declarations formulated late), 2.4.8 (Conditional interpretative declarations formulated late).

⁴⁹ *Yearbook ... 2000* (see footnote 1 above), pp. 180–199, paras. 214–332.

⁵⁰ See paragraphs 17–18 above.

⁵¹ As in the previous reports on reservations to treaties, unless otherwise indicated, quotations refer to the text of the 1986 Vienna Convention, which reproduces the 1969 text, but includes international organizations.

⁵² To use a neutral term provisionally. On the exact definition of “other States and international organizations”, see paragraphs 98–114 below.

39. An additional question is whether these two conditions are also applicable, *mutatis mutandis*, to interpretative declarations, whether conditional or not.

1. FORM AND NOTIFICATION OF RESERVATIONS AND INTERPRETATIVE DECLARATIONS

(a) *Form of reservations*

40. Although it is not included in the actual definition of a reservation⁵³ and the word “statement”, which is included, refers to both oral and written statements, the need for a reservation to be in writing was never called into question during the *travaux préparatoires* for the Vienna Conventions. The Commission’s final commentary on what was then the first paragraph of draft article 18 and was to become, without any change in this regard,⁵⁴ article 23, paragraph 1, of the 1969 Vienna Convention, presents it as self-evident that a reservation must be in writing.⁵⁵

41. That was the opinion expressed in 1950 by Mr. James Brierly, who, in his first report on the law of treaties, suggested the following wording for article 10, paragraph 2:

Unless the contrary is indicated in a treaty, the text of a proposed reservation thereto must be authenticated together with the text or texts of that treaty or otherwise formally communicated in the same manner as an instrument or copy of an instrument of acceptance of that treaty.⁵⁶

42. This suggestion elicited no objections (except to the word “authenticated”) during the discussions in 1950,⁵⁷ but the question of the form that reservations should take was not considered again until the first report by Sir Gerald Fitzmaurice in 1956; under draft article 37, paragraph 2, which he proposed and which is the direct precursor of current article 23, paragraph 2,

Reservations must be formally framed and proposed in writing, or recorded in some form in the minutes of a meeting or conference.⁵⁸

⁵³ See draft guideline 1.1 of the Guide to Practice, which combines the definitions in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions and article 2, paragraph 1 (*j*), of the Vienna Convention on Succession of States in respect of Treaties (hereinafter the 1978 Vienna Convention):

“‘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.”

⁵⁴ The United Nations Conference on the Law of Treaties added a more precise definition of those to be notified of reservations: see paragraph 105 below.

⁵⁵ See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208.

⁵⁶ *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 239.

⁵⁷ *Ibid.*, vol. I, 53rd meeting, pp. 91–92.

⁵⁸ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115.

43. In 1962, following the first report on the law of treaties by Sir Humphrey Waldock,⁵⁹ the Commission elaborated on this theme:

Reservations, which must be in writing, may be formulated:

- (i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty;
- (ii) Upon signing the treaty at a subsequent date; or
- (iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it.⁶⁰

This provision was hardly discussed by the members of the Commission.⁶¹

44. In conformity with the position of two Governments,⁶² which had suggested “some simplification of the procedural provisions”,⁶³ the Special Rapporteur made a far more restrained drafting proposal on second reading, namely:

A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.⁶⁴

This draft is the direct source of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions.

45. While the wording was changed, neither the Commission⁶⁵ nor the United Nations Conference on the Law of Treaties of 1968–1969⁶⁶ ever called into question

the need for reservations to be formulated in writing. And neither Mr. Paul Reuter, Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations, nor the participants in the United Nations Conference on the Law of Treaties of 1986 added clarifications or suggested any changes in this regard.⁶⁷ The *travaux préparatoires* thus show remarkable unanimity in this respect.

46. This is easily explained. It has been written that:

Reservations are formal statements. Although their formulation in writing is not embraced by the term of the definition, it would according to article 23 (1) of the Vienna Convention seem to be an absolute requirement. It is less common nowadays that the various acts of consenting to a treaty occur simultaneously, therefore it is not possible for an orally presented reservation to come to the knowledge of all contracting parties. In the era of differentiated treaty-making procedures it becomes essential for reservations to be put down in writing in order to be registered and notified by the depositary, so that all interested states would become aware of them. A reservation not notified cannot be acted upon. Other states would not be able to expressly accept or object to such reservations.⁶⁸

47. Nonetheless, during the discussions at the Commission’s fourteenth session in 1962, Sir Humphrey Waldock, replying to a question raised by Mr. Tabibi, did not totally exclude the idea of “oral reservations”. He thought, however, that the question “belonged rather to the question of reservations at the time of the adoption of the treaty, which was dealt with in sub-paragraph 2 (a) (i)” and that in any case, the requirement of a formal confirmation “should go a long way towards disposing of the difficulty”.⁶⁹

48. Ultimately, it hardly matters how reservations are formulated at the outset, if they must be formally confirmed at the moment of the definitive expression of consent to be bound. That is undoubtedly how article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions should be interpreted in the light of the *travaux préparatoires*: a reservation need be in writing only when formulated definitively, namely:

(a) When signing a treaty where the treaty makes express provision for this,⁷⁰ or if it is an agreement in simplified form,⁷¹ and

(b) In all other cases, where the State or international organization expresses its definitive consent to be bound.⁷²

⁵⁹ Under his proposal for draft article 17, paragraph 3 (a):

“Reservations shall be formulated in writing either:

- “(i) On the face of the treaty itself, and normally in the form of an adjunct to the signature of the representative of the reserving State;
- “(ii) In a Final Act of a conference, protocol, *procès-verbal* or other instrument related to the treaty and executed by a duly authorized representative of the reserving State;
- “(iii) In the instrument by which the reserving State ratifies, accedes to or accepts the treaty, or in a *procès-verbal* or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the reserving State”.

(*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 60)

In his commentary Sir Humphrey restricts himself to saying that this provision “does not appear to require comment” (*ibid.*, p. 66).

⁶⁰ *Ibid.*, document A/5209, draft art. 18, para. 2 (a), p. 176; for the commentary on this provision, see page 180; see also the fifth report on reservations to treaties (*Yearbook ... 2000* (footnote 1 above), para. 239).

⁶¹ See the fifth report, *Yearbook ... 2000* (footnote 1 above), para. 237; however, see also paragraph 47 below.

⁶² Denmark and Sweden (see the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, pp. 46–47); see also paragraph 51 below.

⁶³ *Yearbook ... 1965* (see footnote 62 above), p. 53, para. 13.

⁶⁴ *Ibid.*, draft art. 20, para. 1.

⁶⁵ See the final text of the draft articles in *Yearbook ... 1966* (footnote 55 above), draft art. 18, para. 1.

⁶⁶ *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* (United Nations publication, Sales No. E.70.V.5), report of the Committee of

the Whole on its work at the first session of the Conference, document A/CONF.39/14, pp. 138–139, paras. 190–196.

⁶⁷ See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 1 above), p. 185, para. 242.

⁶⁸ Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, p. 44; see also Lijnzaad, *Reservations to U.N. Human Rights Treaties: Ratify and Ruin?*, p. 50.

⁶⁹ *Yearbook ... 1962*, vol. I, 663rd meeting, p. 223, para. 34. See also a remark made by Mr. Brierly in 1950: “Mr. Brierly agreed that a reservation must be presented formally, but it might be announced informally during negotiations” (*Yearbook ... 1950*, vol. I, 53rd meeting, p. 91, para. 19).

⁷⁰ See *Yearbook ... 2000* (footnote 1 above), draft guideline 2.2.4, p. 189, para. 264.

⁷¹ *Ibid.*, draft guideline 2.2.3, para. 260.

⁷² *Ibid.*, draft guidelines 2.2.1–2.2.2, para. 251.

49. These conclusions are not strictly in conformity with the letter of the text of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, which does not recognize such a distinction. In order to avoid giving the impression of rewriting the text, the Commission could perhaps simply restate it in a draft guideline 2.2.1 and explain, in a draft guideline 2.2.2, that the formal confirmation of a reservation should also be in writing, where necessary:

“2.1.1 Written form

“A reservation must be formulated in writing.

“2.1.2 Form of formal confirmation

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

50. The Special Rapporteur is aware that this type of approach would seem to exclude the possibility of an exclusively oral initial formulation, even though there is no real drawback to making such formulations. The question could perhaps be left open. As was very aptly pointed out by Sir Humphrey Waldock,⁷³ the answer has no practical impact: a Contracting Party can in any event formulate a reservation up to the date of its expression of consent to be bound; thus, even if its initial oral statement could not be regarded as a true reservation, the “confirmation” made in due course would serve as a formulation.

51. The question also arises as to whether other clarifications are necessary. It is all the more legitimate in that, in the draft articles on the law of treaties adopted on first reading, the Commission incorporated quite a number of clarifications regarding the instrument in which the reservation should appear.⁷⁴ And while these clarifications were omitted in the final draft, that was, as Sweden noted, because they were “procedural rules which would fit better into a code of recommended practices”,⁷⁵ which is precisely the function of the Guide to Practice.

52. After careful consideration, however, the Special Rapporteur has concluded that it is not useful, with one exception, to include the clarifications which appeared in draft article 17, paragraph 3 (a), of 1962,⁷⁶ the long

⁷³ See paragraph 47 above.

⁷⁴ See paragraph 43 above. Similar clarifications are found in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties* prepared by the Treaty Section of the Office of Legal Affairs in 1959 (ST/LEG/7), p. 31, para. 57:

“In practice, the Secretary-General, in the exercise of his functions as depositary, has always considered that reservations submitted at the time of signature must either be entered in the space reserved on the original for signatures, and above the signature, or be set forth in a separate document signed by the plenipotentiary; if the reservation is made at the time of ratification or accession, it must be inserted in the instrument or appear in an annexed document emanating from the authorities which drew up the instrument. Otherwise, at the time of deposit of the instrument, the representative of the Government concerned, duly authorized for that purpose, signs a *procès-verbal*, a certified copy of which is addressed to the States concerned.”

It is perhaps significant that these clarifications were omitted in 1994 (see ST/LEG/7/Rev.1 (United Nations publication, Sales No. E.94.V.15), in particular, p. 49, para. 161).

⁷⁵ Fourth report on the law of treaties by Sir Humphrey Waldock (see footnote 62 above), p. 47.

⁷⁶ Cited in footnote 59 above.

list of instruments in which reservations may appear does not add much, particularly since the list is not restrictive, as is indicated by the reference in two places to an instrument other than those expressly mentioned.

53. On one point, however, clarification is needed. This concerns the author of the instrument in question. As the Commission specified in the 1962 draft, a reservation must be formulated by “the representative of the reserving State”, at the time of signature; “a duly authorized representative of the reserving State”; or “the competent authority of the reserving State”.⁷⁷ This, in reality, amounts to saying the same thing three times; but it is not quite sufficient, because the question is whether there are rules of general international law to determine in a restrictive manner which authority or authorities are competent to formulate a reservation at the international level or whether this determination is left to the domestic law of each State.

55. In the opinion of the Special Rapporteur, the answer to this question may be deduced both from the general framework of the 1969 and 1986 Vienna Conventions and from the practice of States and international organizations in this area.

56. By definition, a reservation has the purpose of modifying the legal effect of the provisions of a treaty in the relations between the parties; although it appears in an instrument other than the treaty, the reservation is therefore part of the corpus of the treaty and has a direct influence on the respective obligations of the parties. It leaves intact the *instrumentum* (or *instrumenta*) which constitute the treaty, but it directly affects the *negotium*. In this situation, it seems logical and inevitable that reservations should be formulated under the same conditions as the consent of the State or international organization to be bound. And this is not an area in which international law is based entirely on domestic laws.

57. Article 7 of the 1969 and 1986 Vienna Conventions contains precise and detailed provisions on this point which undoubtedly reflect positive law on the subject.⁷⁸ In the words of that article in the 1986 Convention:

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) that person produces appropriate full powers; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty ...

(b) representatives accredited by States to an international conference, for the purpose of adopting the text of a treaty ...

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;

⁷⁷ See the full text in footnote 59 above.

⁷⁸ See, however, paragraph 63 below.

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty, if:

(a) that person produces appropriate full powers; or

(b) it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with the rules of the organization, without having to produce full powers.

58. *Mutatis mutandis*, these rules, for the reasons indicated above, may certainly be transposed to the competence to formulate reservations, on the understanding, of course, that the formulation of reservations by a person who cannot “be considered ... as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization”.⁷⁹

59. Moreover, these restrictions on the competence to formulate reservations at the international level have been broadly confirmed in practice.

60. In an aide-memoire of 1 July 1976, the United Nations Legal Counsel said:

A reservation must be formulated in writing (article 23, paragraph 1, of the [1969 Vienna] Convention), and both reservations and withdrawals of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally.⁸⁰

61. Similarly, the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* prepared by the Treaty Section of the United Nations Office of Legal Affairs confines itself to noting that “[t]he reservation must be included in the instrument or annexed to it and must emanate from one of the three qualified authorities” and to referring to general developments concerning the “deposit of binding instruments”.⁸¹ Likewise, according to this document, “[r]eservations made at the time of signature must be authorized by the full powers granted to the signatory by one of the three qualified authorities or the signatory must be one of these authorities”.⁸²

62. These rules seem to be strictly applied; all the instruments of ratification (or equivalents) of treaties containing reservations for which the Secretary-General is depositary and which the Special Rapporteur was able to consult with the help of the Treaty Section of the Office of Legal Affairs are signed by one of the “three authorities” and, if they are signed by the permanent representative, the latter has attached full powers emanating from one of these authorities. Moreover, it was explained to the Special Rapporteur that where this was not the case,

⁷⁹ Art. 8 of the 1969 and 1986 Vienna Conventions.

⁸⁰ *United Nations Juridical Yearbook, 1976* (United Nations publication, Sales No. E.78.V.5), p. 211, para. 7.

⁸¹ ST/LEG/7/Rev.1 (see footnote 74 above), p. 49, para. 161; the passage refers to page 36, paragraphs 121–122.

⁸² *Ibid.*, p. 62, para. 208; refers to chapter VI (Full powers and signatures) of ST/LEG/7/Rev.1.

the permanent representative was requested, informally but firmly, to make this correction.⁸³

63. The question arises, however, whether this practice, which transposes to reservations the rules contained in article 7 of the Vienna Conventions, referred to above,⁸⁴ is not excessively rigid. It might, for example, be considered whether it would not be legitimate to accept that the accredited representative of a State to an international organization, which is the depositary of the treaty to which the State that he represents wishes to make a reservation, should be authorized to make that reservation. The issue is particularly relevant because this practice is accepted in international organizations other than the United Nations.

64. Thus it seems, for example, that the OAS Secretary-General accepts that reservations of member States may be transmitted to him by their permanent representatives to the organization. This practice is in conformity with the provisions of article VII of the Convention on the Pan American Union, on treaties (not yet entered into force), which provides that all instruments relating to the expression of consent to be bound by treaties concluded at the International Conferences of American States shall be deposited “by the respective representative on the Governing Board ... without need of special credentials for the deposit of the ratification”.⁸⁵ Likewise, in the Council of Europe, many reservations appear to have been “registered” in letters from permanent representatives.⁸⁶

65. It might also be considered that the rules applying to States should be transposed more fully to international organizations than they are in article 7, paragraph 2, of the 1986 Vienna Convention and, in particular, that the head of the secretariat of an international organization or its accredited representatives to a State or another organization should be regarded as having competence *ipso facto* to bind the organization.

66. The Special Rapporteur considers that the recognition of such limited extensions to competence for the

⁸³ This is confirmed, by analogy, by the procedural incident between India and Pakistan that recently came before ICJ in *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction, Judgment, I.C.J. Reports 2000*, p. 12. Oral pleadings revealed that in an initial communication dated 3 October 1973, the Permanent Mission of Pakistan to the United Nations gave notification of that country’s intent to succeed British India as a party to the General Act (Pacific Settlement of International Disputes). In a note dated 31 January 1974, the Secretary-General requested that such notification should be made “in the form prescribed”, in other words, that it should be transmitted by one of the three authorities mentioned above; this notification took the form of a new communication (formulated in different terms than that of the preceding year), dated 30 May 1974 and signed this time by the Prime Minister of Pakistan (see the pleadings by Sir Elihu Lauterpacht on behalf of Pakistan, 5 April 2000, CR/2000/3, and by Alain Pellet on behalf of India, 6 April 2000, CR/2000/4). While this episode concerned a notification of succession and not the formulation of reservations, it testifies to the great vigilance with which the Secretary-General applies the rules set forth above (para. 61) with regard to the general expression by States of their consent to be bound by a treaty.

⁸⁴ Para. 57.

⁸⁵ See the reply by OAS in the report of the Secretary-General on depositary practice in relation to reservations, submitted in accordance with General Assembly resolution 1452 B (XIX) (document A/5687), reproduced in *Yearbook ... 1965*, vol. II, p. 84.

⁸⁶ See the European Convention on Extradition.

purpose of formulating reservations would constitute a limited but welcome progressive development. He does not, however, propose to include them in the Guide to Practice. “There is a consensus in the Commission”, consistently approved by a large majority of States, “that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions”.⁸⁷ However, even if the provisions of article 7 of the 1969 and 1986 Conventions do not expressly deal with the competence to formulate reservations, they are nonetheless rightfully⁸⁸ regarded as transposable to this case.

67. On the other hand, it may be necessary to adopt a sufficiently flexible draft guideline which, while referring to the rules in article 7, maintains the less rigid practice followed by international organizations other than the United Nations as depositaries;⁸⁹ this can be done by including an “escape clause” in the relevant draft guideline.

68. The latter can be formulated in two ways:⁹⁰ either we confine ourselves to indicating that the authorities competent to formulate reservations at the international level are the same as those having competence to adopt or authenticate the text of a treaty or to express the consent of the State or the international organization to be bound, or the draft guideline adapts the text of article 7 of the 1986 Vienna Convention. Each of these solutions has its merits: the first, that of restraint; the second, that of convenience for users. The Special Rapporteur’s preference tends towards the latter.

69. In the first case, the draft guideline might read as follows:

“[2.1.3 *Competence to formulate a reservation at the international level*

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

70. Under the second hypothesis, draft guideline 2.1.3 might be drafted as follows:

“[2.1.3 *Competence to formulate a reservation at the international level*

⁸⁷ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (d).

⁸⁸ See paragraph 56 above.

⁸⁹ See paragraph 64 above. ITU is also a special case in this regard, but in a different sense and for different reasons, since reservations to texts equivalent to treaties adopted by that body “can be formulated only by delegations, namely, *during conferences*” (reply by ITU to the Commission’s questionnaire on reservations—reproduced in *Yearbook ... 1996* (footnote 40 above), annex III, p. 107). The Special Rapporteur has no knowledge of the practices followed by depositary States.

⁹⁰ The Special Rapporteur considers that a third possibility, i.e. simply referring to article 7 of the 1969 and 1986 Vienna Conventions, should be firmly ruled out; for reasons of convenience (and legal logic), the Guide to Practice should be self-sufficient.

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

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

“(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

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

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

“(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).]”

71. In this second case, however, paragraph 2 (d) could probably be omitted, as the hypothesis envisaged is marginal; it might perhaps be sufficient to mention it in the commentary.

72. It is self-evident that the international phase of formulating reservations is only the tip of the iceberg; as is true of the entire procedure whereby a State or an international organization expresses its consent to be bound, it is the outcome of an internal process that may be quite complex. Like the ratification procedure (or the acceptance, approval or accession procedure), from which it is indissociable, the formulation of reservations is a kind of “internal parenthesis” within an overwhelmingly international process.⁹¹

73. As Reuter has noted, “[n]ational constitutional practice regarding reservations and objections varies from country to country”,⁹² and to describe them, however, briefly, would be beyond the scope of this report. At best it can be noted that, of the 33 States which replied to the Commission’s questionnaire on reservations to treaties⁹³ and whose answers to questions 1.7, 1.7.1,

⁹¹ See Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, p.144.

⁹² *Introduction to the Law of Treaties*, p. 93, note to para. 133.

⁹³ See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 1 above), p. 147, paras. 3–4.

1.7.2, 1.8, 1.8.1 and 1.8.2⁹⁴ are utilizable,⁹⁵ competence to formulate a reservation belongs to: the executive branch alone in six cases;⁹⁶ the parliament alone in five cases;⁹⁷ and it is shared between them in 12 cases.

74. In this last hypothesis, there are various modalities for collaboration between the executive branch and the parliament. In some cases, the parliament is merely kept informed of intended reservations⁹⁸—although not always systematically.⁹⁹ In others, it must approve all reservations before their formulation¹⁰⁰ or, where only certain treaties are submitted to the parliament, only those which relate to those treaties.¹⁰¹ Moreover, a judicial body may be called upon to intervene in the internal procedure for formulating reservations.¹⁰²

75. It is interesting to note that the procedure for formulating reservations does not necessarily follow the one generally required for the expression of the State's consent to be bound. Thus, in France, only recently was the custom established of transmitting to the parliament the text of reservations which the President of the Republic or the Government intended to attach to the ratification of treaties or the approval of agreements, even where such instruments must be submitted to the parliament under article 53 of the 1958 Constitution.¹⁰³

76. The diversity which characterizes the competence to formulate reservations and the procedure to be followed for that purpose among States seems to be mirrored among international organizations. Only two of them¹⁰⁴ answered questions 3.7, 3.7.1 and 3.7.2 of the

questionnaire on reservations:¹⁰⁵ FAO states that such competence belongs to the Conference, whereas ICAO, while emphasizing the lack of real practice, believes that if a reservation were formulated on its behalf, it would be formulated by the Secretary-General as an administrative matter and, as the case may be, by the Assembly or the Council in their respective areas of competence,¹⁰⁶ with the stipulation that it would be "appropriate" for the Assembly to be informed of the reservations formulated by the Council or by the Secretary-General.

77. In the view of the Special Rapporteur, the only conclusion that can be drawn from these observations is that international law does not impose any specific rule with regard to the internal procedure for formulating reservations. This, to be frank, seems so obvious that it hardly seems worthwhile to stipulate it expressly in a draft guideline of the Guide to Practice. If, however, the Commission holds a contrary view (which can be defended in the light of the pragmatic character of the Guide to Practice), the following type of guideline could be adopted:

“[2.1.3 bis *Competence to formulate a reservation at the internal level*]

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

78. However, the freedom of States and international organizations to determine the authority competent to decide that a reservation will be formulated and the procedure to be followed in formulating it, raises problems similar to those arising from the same freedom the parties to a treaty have with respect to the internal procedure for ratification: what happens if the internal rules are not followed?

79. In the 1986 Vienna Convention, article 46 on the provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties, provides that:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the

⁹⁴ Question 1.7: “At the internal level, which authority or authorities decide(s) that the State will formulate a reservation: The Head of State? The Government or a government body? The parliament?”; question 1.7.1: “If it is not always the same authority which has competence to decide that a reservation will be formulated, on what criteria is this competence based?”; question 1.7.2: “If the decision is taken by the Executive, is the parliament informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)”; question 1.8: “Is it possible for a national judicial body to oppose or insist on the formulation of certain reservations?”; question 1.8.1: “If so, which authority and how is it seized of the matter?”; question 1.8.2: “What reason(s) can it invoke in taking such a decision?” (*Yearbook ... 1996* (footnote 40 above), annex II, p. 98–99).

⁹⁵ Unfortunately, several of the 33 States which replied to the questionnaire gave incomplete answers.

⁹⁶ Bolivia (the Parliament can suggest reservations), Colombia (for certain treaties), Croatia (the Parliament can oppose a proposed reservation, which would imply that it is consulted), Denmark, the Holy See and Malaysia. See also the States mentioned in footnotes 98–99 below.

⁹⁷ Colombia (for certain treaties), Estonia, San Marino, Slovenia, Switzerland (but the proposal is generally made by the Federal Council), unless the Federal Council has its own competence.

⁹⁸ Kuwait since 1994 (consultation of an ad hoc commission); New Zealand “until recently” (system provisionally established).

⁹⁹ France (if the rapporteurs of the parliamentary assemblies so request and as a mere “courtesy”), Israel, Japan (if the treaty does not contain a reservation clause), Sweden (the “outlines” of reservations are transmitted to Parliament, never their exact text).

¹⁰⁰ Argentina and Morocco.

¹⁰¹ Finland, the Republic of Korea, Slovakia and Spain.

¹⁰² Colombia, Finland and Malaysia.

¹⁰³ See Pellet, “Article 53”, pp. 1047–1050.

¹⁰⁴ This is explained by the fact that international organizations are parties to treaties much more rarely than States and that, where they are parties, they generally do not formulate reservations. The sole exception concerns the European Union which, regrettably, has not replied to the questionnaire to date.

¹⁰⁵ Question 3.7: “At the internal level, which organ(s) decide(s) that the State will formulate a reservation: The chief executive officer? The general assembly? Another organ?”; question 3.7.1: “If it is not always the same organ that has competence to decide that a reservation will be formulated, on what criteria is this competence based?”; question 3.7.2: “If the decision is taken by the chief executive officer, is the general assembly: Informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)?” (*Yearbook ... 1996* (see footnote 40 above), annex III, p. 110).

¹⁰⁶ See articles 49–50 of the Convention on International Civil Aviation, which established ICAO.

matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

80. In the absence of practice, it is difficult to take a categorical position on the transposition of these rules to the formulation of reservations. Some elements argue in its favour: as discussed above, the formulation of reservations cannot be dissociated from the procedure for expressing definitive consent to be bound; it occurs or must be confirmed at the moment of expression of consent to be bound and, in almost all cases, emanates from the same authority. In the opinion of the Special Rapporteur, however, these arguments are not decisive. Whereas the internal rules on competence to conclude treaties are laid down in the constitution, at least in broad outline, that is not the case for the formulation of reservations, which derives from practice, and practice not necessarily in line with that followed when expressing consent to be bound.

81. That being so, it is unlikely that a violation of internal provisions can be “manifest” in the sense of article 46 cited above, and one must fall back on international rules such as those set forth in draft guideline 2.1.3.¹⁰⁷ The conclusion to be drawn is that a State or an international organization should never be allowed to claim that a violation of the provisions of internal law or of the rules of the organization has invalidated a reservation that it has formulated, if such formulation was the act of an authority competent at the international level.

82. Since this conclusion differs from the rules applicable to “defective ratification” as set forth in article 46, it seems essential to state it expressly in a draft guideline, which might read as follows:

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

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

(b) *Form of interpretative declarations*

83. In view of the lack of any provision on interpretative declarations in the 1969 and 1986 Vienna Conventions and the scarcity or relative uncertainty of practice with regard to such declarations, they cannot be considered in isolation. We can hardly proceed except by analogy with (or in contrast to) reservations, taking great care, of course, to distinguish conditional interpretative declarations from those that are not conditional.¹⁰⁸

84. With respect to conditional interpretative declarations, there is hardly any *prima facie* reason to depart from the rules of form and procedure applicable to the formulation of reservations; by definition, the State or international organization formulating such declara-

tions subjects its consent to be bound to a specific interpretation.¹⁰⁹ The reasons that make it necessary for reservations to be formulated in writing and authenticated by a person empowered to engage the State or the international organization are equally valid here. Since conditional interpretative declarations are indissociably linked to the consent of their author to be bound, they must be known to the other parties against whom they may be invoked, since they purport to produce effects on the treaty relations.

85. Draft guidelines 2.1.1, 2.1.2 and 2.1.3 may therefore simply be transposed to the formulation of conditional interpretative declarations, i.e. they must be formulated in writing by a person competent to represent the State or the international organization formulating the reservation with regard to the expression of consent to be bound by a treaty, and the same rules should apply if the interpretative declaration is subject to formal confirmation under the conditions stated in draft guideline 2.4.4.¹¹⁰

86. For the reasons outlined in paragraphs 270–271 of his fifth report, the Special Rapporteur believes that it would be preferable to state the applicable rules expressly (even if they are the same as those that apply to reservations), rather than refer to the draft guidelines on reservations; however, their wording could be simplified, as the Commission is not obliged to restate the provisions of the 1969 and 1986 Vienna Conventions word for word, for there are none on this topic. Nevertheless, since all interpretative declarations must be formulated by an authority competent to engage the State,¹¹¹ there would appear to be no need to repeat that rule specifically in connection with conditional declarations.

87. In the light of these observations, a single draft guideline could combine the substance of the provisions contained in draft guidelines 2.1.1, 2.1.2 and 2.1.3, as follows:¹¹²

“**2.4.2** *Formulation of conditional interpretative declarations*

“A conditional interpretative declaration must be formulated in writing. Where necessary, formal confirmation of a conditional interpretative declaration must be effected in the same manner.”

88. A very different problem arises with regard to interpretative declarations purporting to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions, without subjecting its consent to be bound to that interpretation. The author of the declaration is taking a position,¹¹³ but is not at-

¹⁰⁹ See draft guideline 1.2.1.

¹¹⁰ See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 1 above), p. 190, para. 272.

¹¹¹ See paragraph 90 below.

¹¹² This draft guideline could be supplemented by a stipulation concerning the need to communicate conditional interpretative declarations to the other interested States and international organizations; in this regard, see paragraph 133 below.

¹¹³ One which can have “considerable probative value” when it contains “recognition by a party of its own obligations under an instrument” (*International Status of South-West Africa, Advisory*

¹⁰⁷ See paragraphs 69–70 above.

¹⁰⁸ On the distinction, see draft guidelines 1.2 and 1.2.1 and the commentaries thereto (*Yearbook ... 1999*, vol. II (Part Two), pp. 97–106).

tempting to make it binding on the other Contracting Parties. Hence it is not essential for such declarations to be in writing, as it is in the case of conditional interpretative declarations and reservations. It is certainly preferable that they should be known to the other parties, but ignorance of them would not necessarily void them of all legal consequences. Moreover, the oral formulation of such declarations is not uncommon, and has not kept judges or international arbitrators from recognizing that they have certain effects.¹¹⁴

89. It goes without saying, however, that an interpretative declaration can only produce such effects if it emanates from an authority competent to engage the State. And since the declaration purports to produce effects in relation to a treaty, it would seem appropriate to limit the option of formulating it to the authorities competent to engage the State at the international level through a treaty.

90. There is no need for a draft guideline on the form that simple interpretative declarations may take, since the form is unimportant. The silence of the Guide to Practice on that point should make it sufficiently clear. The draft guideline on competence to formulate an interpretative declaration should be modelled on the one concerning reservations:

“2.4.1 Formulation of interpretative declarations

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

91. Moreover, the remarks that apply in the case of reservations also apply to the formulation of interpretative declarations at the internal level. National rules and practice are highly diverse in this regard.

92. This becomes clear from the replies of States to the Commission’s questionnaire on reservations to treaties. Of the 22 States that replied to questions 3.5 and 3.5.1,¹¹⁵ in seven cases, only the executive branch is competent to formulate a declaration;¹¹⁶ in two cases, only the parliament has such competence;¹¹⁷ and in 13 cases, competence is shared between the two,¹¹⁸ and the modalities for collaboration between them are as diverse as they are with regard to reservations.¹¹⁹

Opinion, I.C.J. Reports 1950, pp. 135–136; see the commentary to draft guideline 1.2.1 (*Yearbook ... 1999* (footnote 108 above), p. 101, footnote 342).

¹¹⁴ See the commentary to draft guideline 1.2.1 (*ibid.*)

¹¹⁵ Question 3.5: “At the internal level, what authority or authorities take(s) the decision to make such interpretative declarations?”; question 3.5.1: “Is the Parliament involved in the formulation of these declarations?” (*Yearbook ... 1996* (see footnote 40 above), annex II, p. 101). This list of States is not identical to the list of States that responded to similar questions on reservations.

¹¹⁶ Chile, the Holy See, India, Israel, Italy, Japan and Malaysia.

¹¹⁷ Estonia and Slovakia.

¹¹⁸ Argentina, Bolivia, Croatia, Finland, France, Germany, Mexico, Panama, Slovenia, Spain, Sweden, Switzerland and the United States of America.

¹¹⁹ See paragraph 74 above.

93. In general, the executive branch probably plays a more distinct role than it does in the case of reservations.

94. It follows *a fortiori* that the determination of competence to formulate interpretative declarations and the procedure to be followed in that regard is purely a matter for internal law, and that a State or an international organization would not be entitled to invoke a violation of internal law as invalidating the legal effect that its declarations might produce—especially since it appears that, in general, there is greater reliance on practice than on formal written rules. The Special Rapporteur’s only doubt is whether a guideline is needed in this regard.

95. If the Commission believes that a draft guideline is needed, it might be worded as follows:

“[2.4.1 bis Competence to formulate an interpretative declaration at the internal level

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

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

2. PUBLICITY OF RESERVATIONS AND INTERPRETATIVE DECLARATIONS

96. Once it has been formulated, the reservation (or interpretative declaration) must be made known to the other States or international organizations concerned. Such publicity is essential for enabling them to react through either a formal acceptance or an objection.

97. Article 23 of the 1969 and 1986 Vienna Conventions specifies the recipients of reservations formulated by a State or an international organization, but is silent on the procedure to be followed in effecting such notification, the burden of which is borne by the depositary in nearly all cases.

(a) *Recipients of reservations and interpretative declarations*

(i) *Reservations*

98. Under article 23, paragraph 1, of the 1986 Vienna Convention, a reservation must be communicated “to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”. In addition, article 20, paragraph 3, which stipulates that a reservation to a constituent instrument requires “the acceptance of the competent organ” of the organization in order to produce effects, implies that the reservation must be communicated to the organization in question.

- a. Reservations to treaties other than constituent instruments of international organizations

99. The first group of recipients (contracting States and contracting organizations) does not pose any particular problem. These terms are defined in article 2, paragraph 1 (f), of the 1986 Vienna Convention¹²⁰ as meaning, respectively:

- (i) a State, or
- (ii) an international organization, which has consented to be bound by the treaty, whether or not the treaty has entered into force.

100. Much more problematic, in contrast, are the definition and, still more, the determination in each specific case of the “other States and international organizations entitled to become parties to the treaty”. As has been noted, “[n]ot all treaties are wholly clear as to which other States may become parties”.¹²¹

101. In his 1951 report on reservations to multilateral treaties, Mr. Brierly suggested the following provision:

The following classes of States shall be entitled to be consulted as to any reservations formulated after the signature of this convention (or after this convention has become open to signature or accession):

- (a) States entitled to become parties to the convention,
- (b) States having signed or ratified the convention,
- (c) States having ratified or acceded to the convention.¹²²

102. In conformity with these recommendations, the Commission suggested that, “in the absence of contrary provisions in any multilateral convention ... [t]he depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention”.¹²³

103. More vaguely, Mr. H. Lauterpacht, in his first report on the law of treaties, in 1953, proposed in three of the four alternative versions of draft article 9 on reservations a provision stating that “[t]he text of the reservations received shall be communicated by the depositary authority to all the interested States”.¹²⁴ But he does not comment on this phrase,¹²⁵ which is reproduced in the first report on the law of treaties by Mr. G. G. Fitzmaurice in 1956,¹²⁶ who clarifies it as fol-

lows in draft article 39: these are “all the States which have taken part in the negotiation and drawing up of the treaty or which, by giving their signature, ratification, accession or acceptance, have manifested their interest in it”.¹²⁷

104. Conversely, in his first report on the law of treaties, in 1962, Sir Humphrey Waldock reverted to the 1951 formulation¹²⁸ and proposed that any reservation formulated “by a State signing, ratifying, acceding to, or accepting a treaty subsequently to the meeting or conference at which it was adopted shall be communicated to all other States which are, or are entitled to become, parties”.¹²⁹ This was also the formula adopted by the Commission after the Drafting Committee had considered it and made minor drafting changes.¹³⁰ While States had not expressed any objections, in this regard in their comments on the draft articles adopted on first reading, Sir Humphrey, with no explanations, proposed in his fourth report in 1965 to revert to the phrase “other States concerned”,¹³¹ which the Commission replaced by “contracting States”¹³² on the ground that the notion of “States concerned”¹³³ was “very vague”, finally adopting, at its eighteenth session in 1966, the requirement of communication “to the other States entitled to become parties to the treaty”,¹³⁴ a phrase which was “regarded as more appropriate to describe the recipients of the type of communications in question”.¹³⁵

105. At the United Nations Conference on the Law of Treaties, Mr. McKinnon pointed out, on behalf of Canada, that that wording “might create difficulties for a depositary, as there was no criterion for deciding which were those States. It would therefore be preferable to substitute the phrase ‘negotiating States and contracting States’ as proposed in his delegation’s amendment (A/CONF.39/C.1/L.158)”.¹³⁶ Although this common-sense proposal was submitted to the Drafting Commit-

¹²⁷ *Ibid.*, art. 39 (b) (ii).

¹²⁸ See paragraphs 101–102 above.

¹²⁹ *Yearbook ... 1962* (see footnote 59 above), p. 60. Not without reason, Sir Humphrey believed that it was unnecessary to notify the other States which took part in the negotiations of a reservation formulated “when signing a treaty at a meeting or conference of the negotiating States” if it appeared at the end of the treaty itself or in the final act of the conference.

¹³⁰ *Ibid.*, document A/5209, p. 176, draft art. 18, para. 3. In its commentary, the Commission considered that this phrase was equivalent to “other interested States” (p. 180).

¹³¹ *Yearbook ... 1965* (see footnote 62 above), p. 56.

¹³² *Yearbook ... 1965*, vol. II, document A/6009, p. 162.

¹³³ Explanation given by Sir Humphrey at the 813th meeting of the Commission (*ibid.*, vol. I, p. 267).

¹³⁴ Draft art. 18, para. 1 (see footnote 55 above).

¹³⁵ *Yearbook ... 1966*, vol. I (Part II), 887th meeting, p. 293 (explanation given by Mr. Briggs, Chairman of the Drafting Committee).

¹³⁶ *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968* (United Nations publication, Sales No. E.68.V.7), 23rd meeting of the Committee of the Whole, p. 124, para. 38. Frowein (“Some considerations regarding the function of the depositary: comments on art. 72, para. 1 (d), of the ILC’s 1966 draft articles on the law of treaties”, p. 533) points out that the United States had expressed the same concern in 1966 in the General Assembly’s discussion of the Commission’s draft articles relating to depositaries (*Yearbook ... 1966* (see footnote 55 above), p. 352) see also Rosenne, “More on the depositary of international treaties”, pp. 847–848.

¹²⁰ See article 2, paragraph 1 (f), of the 1969 Vienna Convention and article 2, paragraph 1 (k), of the 1978 Vienna Convention, which define the term “contracting State” in the same way.

¹²¹ Jennings and Watts, eds., *Oppenheim’s International Law*, p. 1248, footnote 4.

¹²² *Yearbook ... 1951*, vol. II, document A/CN.4/41, annex E, p. 16. This puzzling formulation is explained by the fact that these are alternative model clauses.

¹²³ *Ibid.*, document A/1858, p. 130, para. 34. This point was not extensively discussed; see, however, the statements by Mr. Hudson and Mr. Spiropoulos, the latter of whom considered that communication to States not parties to the Treaty was not an obligation under positive law (*ibid.*, vol. I, 105th meeting, p. 198).

¹²⁴ *Yearbook ... 1953*, vol. II, p. 92, alternative drafts B, C and D; oddly enough, this requirement does not appear in alternative draft A (acceptance of reservations by a two-thirds majority), *ibid.*, p. 91.

¹²⁵ *Ibid.*, p. 136.

¹²⁶ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115, art. 37, para. 2: they “must be brought to the knowledge of the other interested States”.

tee,¹³⁷ the latter preferred an amendment submitted by Spain,¹³⁸ which appears in the final text of article 23, paragraph 1, of the 1969 Vienna Convention and which was reproduced in the 1986 text unchanged except for the addition of international organizations.¹³⁹

106. Not only is the phrase adopted obscure, but the *travaux préparatoires* for the 1969 Vienna Convention do little to clarify it. The same is true of subparagraphs (b) and (e) of article 77, paragraph 1, of the Convention which, while not referring expressly to reservations, provide that the depositary is responsible for transmitting “to the parties and to the States entitled to become parties to the treaty” copies of the texts of the treaty and informing them of “notifications and communications relating to the treaty”;¹⁴⁰ however, the *travaux préparatoires* for these provisions shed no light on this phrase,¹⁴¹ on which the Commission’s members have never focused their attention.

107. This was not the case during the preparation of the 1986 Vienna Convention. Whereas the Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations had, in his fourth and fifth reports,¹⁴² merely adapted without comment the text of article 23, paragraph 1, of the 1969 Vienna Convention, several members of the Commission expressed particular concern during the discussion of the draft in 1977 regarding the problems posed by the determination of “international organizations entitled to become parties to the treaty”. For example, Mr. Ushakov observed that:

In the case of treaties of a universal character concluded between States and international organizations, such communications would thus have to be made to all existing States. For the same category of treaties and also treaties concluded between international organizations only, it would, however, be more difficult to determine what international organizations were “entitled to become parties”. If 10 international organizations were parties to a treaty, to what other international organizations would the communications have to be sent?¹⁴³

¹³⁷ See *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* (United Nations publication, Sales No. E.70.V.5), report of the Committee of the Whole, document A/CONF.39/14, p. 139, para. 194.

¹³⁸ *Ibid.*, document A/CONF.39/C.1/L.149, para. 192 (i); for the text adopted, see paragraph 196 (*ibid.*).

¹³⁹ See paragraph 98 above.

¹⁴⁰ Under article 77, paragraph 1 (f), the depositary is also responsible for “informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited”.

¹⁴¹ On the origin of these provisions, see, in particular, the report by Mr. Briery on reservations to multilateral treaties, *Yearbook ... 1951* (footnote 122 above), p. 27, and the conclusions of the Commission, *ibid.*, document A/1858, p. 130, para. 34 (l); article 17, paragraph 4 (c), and article 27, paragraph 6 (c), of the draft articles proposed by Sir Humphrey Waldock in 1962, *Yearbook ... 1962* (footnote 55 above), pp. 66 and 82–83; article 29, paragraph 5, of the draft adopted by the Commission on first reading, *ibid.*, document A/5209, p. 185; and draft article 72 adopted definitively by the Commission at its eighteenth session, *Yearbook ... 1966* (footnote 55 above), p. 269.

¹⁴² *Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 38, and *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/290 and Add.1, p. 146.

¹⁴³ *Yearbook ... 1977*, vol. I, 1434th meeting, p. 101, para. 42.

108. For his part, Mr. Schwebel noted that “an international organization was entitled to become a party to a treaty if there was a link between the basic function for which it had been created and the object and purpose of the treaty”.¹⁴⁴ This opinion was not shared by Mr. Reuter, who recalled that “the phrase ‘entitled to become parties to the treaty’” had not been defined in the 1969 Vienna Convention, which “meant that entitlement to become party to a treaty concluded between States was necessarily determined by the treaty itself”, as “treaties which concerned all States should be open to all States”, and the “same would apply to international organizations”.¹⁴⁵ Mr. Ushakov, who maintained his opposition to the wording adopted by the Drafting Committee, made a formal proposal in plenary meeting to limit communications concerning reservations to treaties between States and one or more international organizations¹⁴⁶ to the “contracting organizations” only; as this proposal was not supported, a decision was taken to record it in a footnote to the commentary,¹⁴⁷ and that was done.¹⁴⁸

109. It is certainly regrettable that the limitations proposed by Canada in 1968¹⁴⁹ and by Mr. Ushakov in 1977 regarding the recipients of communications relating to reservations were not adopted (in the second case, probably out of a debatable concern with not deviating from the 1969 wording and not making any distinction between the rights of States and those of international organizations); such limitations would have obviated practical difficulties for depositaries without significantly calling into question the “useful” publicity of reservations among truly interested States and international organizations.¹⁵⁰

110. There is obviously no problem when the treaty itself determines clearly which States or international organizations are entitled to become parties, at least in the case of “closed” treaties; treaties concluded under the auspices of a regional international organization such as the Council of Europe,¹⁵¹ OAS¹⁵² or OAU¹⁵³ generally fall into this category. Things are much more complicated when it comes to treaties that do not indicate clearly

¹⁴⁴ *Ibid.*, p. 102, para. 48; in the same vein, see the statement by Mr. Verosta, *ibid.*, para. 45.

¹⁴⁵ *Ibid.*, para. 51; in the same vein, see the statement by Mr. Calle y Calle, *ibid.*, para. 46.

¹⁴⁶ But not those concerning reservations to treaties between several international organizations (*ibid.*, 1451st meeting, p. 196, para. 19).

¹⁴⁷ *Ibid.*, para. 20.

¹⁴⁸ *Yearbook ... 1977*, vol. II (Part Two), p. 115, footnote 482.

¹⁴⁹ See paragraph 105 above.

¹⁵⁰ It is interesting to note that, while the specialized agencies of the United Nations are not, and are not entitled to become, “parties” to the Convention on the Privileges and Immunities of the Specialized Agencies, they do receive communications relating to the reservations formulated by some States with regard to its provisions. See, in particular, ST/LEG/7/Rev.1 (footnote 74 above), pp. 60–61, paras. 199–203.

¹⁵¹ See, for instance, article K, paragraph 1, of the European Social Charter (revised): “This Charter shall be open for signature by the member States of the Council of Europe”; or article 32, paragraph 1, of the Criminal Law Convention on Corruption.

¹⁵² See, for example, article XXI of the Inter-American Convention against Corruption.

¹⁵³ See, for instance, article 12, paragraph 1, of the Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora.

which States are entitled to become parties to them or “open” treaties containing the words “any State”,¹⁵⁴ or when it is established that participants in the negotiations were agreed that later accessions would be possible.¹⁵⁵ This is obviously the case most particularly when depositary functions are assumed by a State which not only has no diplomatic relations with some States,¹⁵⁶ but also does not recognize as States certain entities which proclaim themselves to be States.

111. The *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* devotes an entire chapter to describing the difficulties encountered by the Secretary-General in determining the “States and international organizations which may become parties”,¹⁵⁷ difficulties which legal theorists have largely underscored.¹⁵⁸ With regard to the depositary notifications of the Secretary-General which the Special Rapporteur has been able to consult, the Special Rapporteur has noted that open treaties limit themselves to indicating that “all States” are to be notified, without giving further details, while others list the member and non-member States to which notification is to be given, whether or not the latter States have observer status.¹⁵⁹ Curiously, States which replied on this point to the Commission’s questionnaire on reservations to treaties do not mention any particular difficulties in this area, but this can probably be explained by the fact that the problem is not specific to reservations and more generally concerns depositary functions.

112. That is also why the Special Rapporteur sees no merit in proposing the adoption of one or more draft guidelines on this point.¹⁶⁰

¹⁵⁴ See, for instance, article XIII of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*: “The present Convention is open for signature by all States”; or article 84, paragraph 1, of the 1986 Vienna Convention: “The present Convention shall remain open for accession by any State, by Namibia ... and by any international organization which has the capacity to conclude treaties”. See also article 305 of the United Nations Convention on the Law of the Sea, which opens the Convention for signature by not only “all States” but also Namibia (before its independence) and self-governing States and territories.

¹⁵⁵ See article 15 of the 1969 and 1986 Vienna Conventions.

¹⁵⁶ See article 74 of the 1969 and 1986 Vienna Conventions.

¹⁵⁷ ST/LEG/7/Rev.1 (see footnote 74 above), chap. V, pp. 21–30, paras. 73–100.

¹⁵⁸ See, *inter alia*, Frowein, *loc. cit.*, and Rosenne, “More on the depositary of international treaties”, pp. 847–848.

¹⁵⁹ The notification dated 7 July 1997 concerning a reservation by Japan to the Agreement establishing the Bank for Cooperation and Development in the Middle East and North Africa (United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. I (United Nations publication, Sales No. E.01.V.5), p. 501), was also sent to the Permanent Observer Mission of Palestine to the United Nations since, under article 53 (a) of the Agreement, the Palestinian Authority is entitled to become a party thereto.

¹⁶⁰ The Special Rapporteur nevertheless acknowledges that his position poses a problem of general principle: must the Commission avail itself of the opportunity afforded by the drafting of the Guide to Practice in the area of reservations to try to solve general problems which arise with regard to reservations, but also with regard to other aspects of the law of treaties? The Special Rapporteur proposes to answer this question pragmatically, answering “yes” if the solution of an unresolved problem will have an impact on the solution of an issue specific to reservations, and “no” in other cases. However, he would welcome any guidance which the Commission might give him in this regard.

113. By contrast, no matter how problematic and arguable the provision may be,¹⁶¹ it is certainly necessary to reproduce in the Guide to Practice the rule set forth in article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions (taking the latter in its broadest formulation), presumably adding that such communication must be made in writing and setting forth this general rule in a single draft guideline, together with a special rule on the communication of reservations to constituent instruments of international organizations.¹⁶² The first paragraph of such a draft could be worded as follows:

“2.1.5 *Communication of reservations* (first paragraph)

“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.”

114. This latter requirement is only implicit in the 1969 and 1986 Vienna Conventions, but it is clear from the context, since article 23, paragraph 1, is the provision which requires that reservations be formulated in writing¹⁶³ and which uses a very concise formula to link that condition to the requirement that reservations be communicated. Besides, when there is no depositary, the formulation and communication of reservations necessarily go hand in hand.¹⁶⁴ This, moreover, conforms to practice.¹⁶⁵

b. The particular case of reservations to constituent instruments of international organizations

115. Article 23 of the 1969 and 1986 Vienna Conventions does not deal with the particular case of the procedure with regard to reservations to constituent instruments of international organizations. The general rule set forth in paragraph 1 of the article must, however, be clarified and expanded in this particular case.

116. According to article 20, paragraph 3, of the 1986 Vienna Convention:

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.

Now, that organ can take a decision only if the organization is aware of the reservation, which must therefore be communicated to it.

¹⁶¹ As the Special Rapporteur noted after the debates on his first report, there is “a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions” (see footnote 46 above). There must therefore be compelling reasons for deviating from the Guide to Practice. No matter how unsatisfactory the Special Rapporteur may find the rule in article 23, paragraph 1, he does not think that this condition is met in the present instance.

¹⁶² See paragraph 133 below: “A reservation to a treaty in force which is the constituent instrument of an international organization or creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ”.

¹⁶³ See paragraph 40 above.

¹⁶⁴ See paragraphs 115–129 below.

¹⁶⁵ See the “depositary notifications” of the Secretary-General of the United Nations.

117. This problem was overlooked by the first three Special Rapporteurs on the law of treaties and taken up only by Sir Humphrey Waldock in his first report in 1962. He proposed a long draft article 17 on the power to formulate and withdraw reservations, paragraph 5 of which provided that:

However, in any case where a reservation is formulated to an instrument which is the constituent instrument of an international organization and the reservation is not one specifically authorized by such instrument, it shall be communicated to the Head of the secretariat of the organization concerned in order that the question of its admissibility may be brought before the competent organ of such organization.¹⁶⁶

118. Sir Humphrey Waldock indicated that this clarification was motivated by:

a point to which attention is drawn in paragraph 81 of the Summary of the Practice of the Secretary-General (ST/LEG/7), where it is said:

“If the agreement should be a constitution establishing an international organization, the practice followed by the Secretary-General and the discussions in the Sixth Committee show that the reservation would be submitted to the competent organ of the organization before the State concerned was counted among the parties. The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions.”¹⁶⁷

119. This provision disappeared from the draft after its consideration by the Drafting Committee,¹⁶⁸ probably because the latter’s members felt that the adoption of an express stipulation that the decision on the effect of a reservation to a constituent instrument must be taken by “the competent organ of the organization in question”¹⁶⁹ made that clarification superfluous. The question does not appear to have been raised again subsequently.

120. It is not surprising that Sir Humphrey Waldock asked the question in 1962: three years earlier, the problem had arisen critically in connection with a reservation by India to the Convention on the Intergovernmental Maritime Consultative Organization (IMCO)—later the International Maritime Organization (IMO). The Secretary-General of the United Nations, as depositary of the Convention, transmitted to IMCO the text of the Indian reservation, which had been made that same day on the opening of the first session of the IMCO Assembly. He suggested that the IMCO secretariat should refer the question to the IMCO Assembly for a decision. When this referral was contested, the Secretary-General, in a well-argued report, maintained that:

This procedure conformed (1) to the terms of the IMCO Convention; (2) to the precedents in depositary practice where an organ or body was in a position to pass upon a reservation; and (3) to the views on this specific situation expressed by the General Assembly during its previous debates on reservations to multilateral conventions.¹⁷⁰

121. The Secretary-General stated, *inter alia*, that “[i]n previous cases where reservations had been made to multilateral conventions which were in force and which either were constitutions of organizations or which oth-

erwise created deliberative organs, the Secretary-General has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question”.¹⁷¹ He cited as examples the communication to the World Health Assembly of the reservation formulated in 1948 by the United States to the Constitution of the World Health Organization¹⁷² and the communication the following year of reservations made by the Union of South Africa and by Southern Rhodesia to GATT to the Contracting Parties to the Agreement.¹⁷³ In the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the Secretary-General gives another example of his consistent practice in this regard:

[W]hen Germany and the United Kingdom accepted the Agreement Establishing the African Development Bank of 17 May 1979, as amended, they made reservations which had not been contemplated in the Agreement. The Secretary-General, as depositary, duly communicated the reservations to the Bank and accepted the deposit of the instruments only after the Bank had informed him that it had accepted the reservations.¹⁷⁴

122. In view of the principle set forth in article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions and of the practice which normally appears to be followed,¹⁷⁵ it does seem appropriate to set forth in a draft guideline the obligation to communicate reservations to the constituent instrument of an international organization to the organization in question.

123. Three questions arise, however, with regard to the precise scope of this rule, the principle of which does not appear to be in doubt:

(a) Should the draft guideline include the clarification (which was included in Sir Humphrey Waldock’s 1962 draft¹⁷⁶) that the reservation must be communicated to the head of the secretariat of the organization concerned?

(b) Should it state that the same rule applies when the treaty is not, strictly speaking, the constituent instrument of an international organization, but creates a “deliberative organ” that may take a position on whether or not the reservation is lawful, as the Secretary-General had done in ST/LEG/7?¹⁷⁷

(c) Does the communication of a reservation to the constituent instrument of an international organization to the latter organization remove the obligation to communicate the text of the reservation also to interested States and international organizations?

¹⁷¹ A/4235 (see footnote 170 above), para. 21.

¹⁷² See also Schachter, “The development of international law through the legal opinions of the United Nations Secretariat part VII: reservations to multipartite treaties”, pp. 124–126.

¹⁷³ A/4235 (see footnote 170 above), para. 22.

¹⁷⁴ ST/LEG/7/Rev.1 (see footnote 74 above), p. 59, para. 198. See also Horn, *op. cit.*, pp. 346–347.

¹⁷⁵ The Special Rapporteur must, however, admit that he is familiar only with the depositary practice of the Secretary-General of the United Nations. Nevertheless, he attaches particular importance to it because the Secretary-General is currently, without a doubt, the principal depositary of constituent instruments of other international organizations.

¹⁷⁶ See paragraph 117 above.

¹⁷⁷ See footnote 74 and paragraph 121 above.

¹⁶⁶ *Yearbook ... 1962* (see footnote 59 above), p. 61.

¹⁶⁷ *Ibid.*, p. 66, para. (12) of the commentary on article 17.

¹⁶⁸ *Ibid.*, document A/5209, draft art. 18, pp. 175–176.

¹⁶⁹ *Ibid.*, draft art. 20, p. 176, para. 4.

¹⁷⁰ *Official Records of the General Assembly, Fourteenth Session, Annexes*, agenda item 65, document A/4235, para. 18. See also, on this incident, Schachter, “The question of treaty reservations at the 1959 General Assembly”.

124. On the first question, the Special Rapporteur is of the view that such a clarification is not necessary: even if, generally speaking, the communication will be addressed to the head of the secretariat, this may not always be the case because of the particular structure of a given organization. In the case of the European Union, for example, the collegial nature of the European Commission might suggest that such a communication should more logically be addressed to the Secretary-General of the organization.¹⁷⁸ Moreover, such a clarification has hardly any concrete value: what matters is that the organization in question be duly alerted to the problem.

125. On the question of whether the same rule should apply to “deliberative organs” created by a treaty which nonetheless are not international organizations in the strict sense of the term, it is very likely that in 1959 the drafters of the report of the Secretary-General of the United Nations had GATT in mind—especially since one of the examples cited related to that organization.¹⁷⁹ The problem no longer arises in that connection, since GATT has been replaced by WTO. The fact remains, however, that certain treaties, especially in the field of disarmament or environmental protection, create deliberative bodies having a secretariat which have sometimes been denied the status of an international organization.¹⁸⁰ While the Special Rapporteur does not share this viewpoint, it would be useful perhaps to include this clarification in the Guide to Practice—on the understanding that it should also be included in the draft guideline(s) that will clarify the meaning of article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions. It would seem justifiable in fact to apply this same rule to reservations to constituent instruments *sensu stricto* and to reservations to treaties creating oversight bodies that assist in the application of the treaty whose status as international organizations might be subject to challenge.

126. The reply to the last question is the trickiest. It is also the one that has the greatest practical significance, for a reply in the affirmative would impose a heavier burden on the depositary than a negative one. Moreover, the practice of the Secretary-General—which does not appear to be wholly consistent¹⁸¹—seems to tend rather in the opposite direction.¹⁸² The Special Rapporteur neverthe-

less believes that a reservation to a constituent instrument should be communicated not only to the organization concerned but also to all other contracting States and organizations and to those entitled to become members thereof.

127. Two arguments are advanced in support of this position. The first is that it is by no means evident that an organization’s acceptance of the reservation precludes member States (and international organizations) from objecting to it. The Special Rapporteur has no final position on the matter, which can be decided only after the Commission undertakes an in-depth study of whether or not it is possible to object to a reservation that is expressly provided for in a treaty. Even if there are good reasons to believe that this is not the case, it would seem premature to make such a claim. Secondly, there is a good practical argument to support this affirmative reply: even if the reservation is communicated to the organization itself, it is in fact its own member States (or international organizations) that will decide. It is therefore important for them to be aware of the reservation. A two-step procedure is a waste of time.

128. Lastly, it goes without saying that the obligation to communicate the text of reservations to a constituent instrument to the international organization concerned arises only if the organization exists, in other words, if the treaty is in force.¹⁸³ The question may nevertheless arise as to whether such reservations should not also be communicated before the effective creation of the organization to the “preparatory committees” (or whatever name they may be given) that are often established to prepare for the prompt and effective entry into force of the constituent instrument. Even if in many cases an affirmative reply again appears necessary, it would be difficult to generalize, since everything depends on the exact mandate that the conference that adopted the treaty gives to the preparatory committee. Moreover, the reference to “deliberative organs” established by a treaty seems to cover this possibility; the Special Rapporteur therefore does not propose to include it in the second paragraph which he proposes to add to draft guideline 2.1.5.

129. This second paragraph could read as follows:

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

Draft guideline 2.1.5 in its entirety would therefore read as follows:

“2.1.5 *Communication of reservations*

“1. A reservation must be communicated in writing to the contracting States and contracting organizations

¹⁷⁸ The Special Rapporteur once again regrets that the European Union did not think it necessary to reply to the Commission’s questionnaire on reservations to treaties.

¹⁷⁹ See paragraph 121 above.

¹⁸⁰ See, for example, Churchill and Ulfstein, “Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law”; some authors also argue that the International Criminal Court is not, strictly speaking, an international organization.

¹⁸¹ For an earlier example in which it appears that the Secretary-General communicated the reservation (of the United States to the Constitution of WHO) both to interested States and to the organization concerned, see Schachter, “The development of international law through the legal opinions of the United Nations Secretariat”, p. 125. See also ST/LEG/7/Rev.1 (footnote 74 above), p. 51, para. 170.

¹⁸² In at least one case, however, the State author of a unilateral declaration (which was tantamount to a reservation)—in this case, the United Kingdom—directly consulted the signatories to an agreement establishing an international organization, the Agreement establishing the Caribbean Development Bank, about the declaration (see United Nations, *Multilateral Treaties Deposited with the Secretary-General* (footnote 159 above), pp. 472–473, note 8. The author of the reservation may also take the initiative to consult the international organization

concerned (see the reservation of France to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, *ibid.*, vol. II, p. 291, note 3).

¹⁸³ If the treaty is not in force, according to the information that was kindly communicated to the Special Rapporteur by the Treaty Section of the United Nations Office of Legal Affairs, that is indeed the practice of the Secretary-General of the United Nations, who proceeds in this case as he would in respect of any other treaty.

and other States and international organizations entitled to become parties to the treaty.

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

(ii) *Interpretative declarations*

130. There seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally,¹⁸⁴ 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. It does not seem necessary, therefore, to include a clarification of this point in the Guide to Practice.

131. This is not the case, however, with regard to conditional interpretative declarations, which require a reaction from other interested States or international organizations;¹⁸⁵ the procedure regarding their formulation must therefore be the same as that used for reservations.

132. The inclusion of a draft guideline on this point in the Guide to Practice could provide an opportunity for limiting the scope of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions without changing the text, since it does not deal with interpretative declarations, by limiting the recipients of notifications to contracting States and international organizations and negotiating parties. The Special Rapporteur is of the view, however, that this minor change, while positive in itself, could give rise to confusion and that it would be artificial to provide for different procedures for the notification of instruments that are often difficult to distinguish clearly.

133. For this reason, he believes that draft guideline 2.4.2¹⁸⁶ could be supplemented by a paragraph based on the text of draft guideline 2.1.5 and could also include the special rule governing the communication of reservations to the constituent instruments of international organizations, proposed above to supplement draft guideline 2.1.5.¹⁸⁷ The full text of the draft would therefore read as follows:

“2.4.2 Formulation of conditional interpretative declarations

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

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

“3. A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.”

B. Communication of reservations and interpretative declarations

134. Article 23 of the 1969 and 1986 Vienna Conventions requires that reservations be communicated to recipients whom the provision defines, albeit somewhat enigmatically; it is silent, however, as to the person responsible for such communication. In most cases this will be the depositary, as shown by the general provisions of article 79 of the 1986 Convention,¹⁸⁸ which also give some information on the modalities for such communication and its effects. Nevertheless, it follows from both article 78¹⁸⁹ and the legal regime of reservations, as established by the Conventions, that the depositary's role is strictly limited and that he appears largely as a mere “conveyor belt” between the author of the reservation (or conditional interpretative declaration) and the States and international organizations to which it must be communicated. These considerations do not apply as strongly in the case of “simple” interpretative declarations; they are, however, equally compelling, and for the same reasons, in the case of conditional interpretative declarations.

1. AUTHORITY RESPONSIBLE AND MODALITIES FOR COMMUNICATING RESERVATIONS

135. On prior occasions when the topic of reservations to treaties was considered, the Commission or its special rapporteurs planned to stipulate expressly that it was the duty of the depositary to communicate the text of formulated reservations to interested States. Thus, in 1951 at its third session, for example, the Commission believed that “[t]he depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention”.¹⁹⁰ Likewise, in his fourth report on the law of treaties in 1965, Sir Humphrey Waldock proposed that a reservation “must be notified to the depositary or, where there is no depositary, to the other interested States”.¹⁹¹

136. In the end, this formula was not adopted by the Commission, which, noting that the drafts previously adopted “contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter”, came to the conclusion that “it would allow a considerable simplification to be

¹⁸⁴ See paragraph 88 above.

¹⁸⁵ See paragraph 84 above.

¹⁸⁶ For the first two paragraphs of this draft guideline, see paragraph 87 above.

¹⁸⁷ See paragraphs 113 and 129 above.

¹⁸⁸ Art. 78 of the 1969 Vienna Convention.

¹⁸⁹ Art. 77 of the 1969 Vienna Convention.

¹⁹⁰ *Yearbook ... 1951*, vol. II (see footnote 121 above). See also paragraph 103 above.

¹⁹¹ *Yearbook ... 1965* (see footnote 62 above), p. 53, para. 13. See also paragraph 44 and footnote 64 above.

effected in the texts of the various articles if a general article were to be introduced covering notifications and communications".¹⁹²

137. That is the object of draft article 73 of 1966, now article 78 of the 1969 Vienna Convention, which was reproduced, without change except for the addition of international organizations, in article 79 of the 1986 Vienna Convention:

Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State or any international organization under the present Convention shall:

(a) if there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1 (e).

138. Article 79 is indissociable from this latter provision, under which:

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

...

(e) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty.

139. It may be noted in passing that the expression "the parties and the States and international organizations entitled to become parties to the treaty", which is used in that paragraph, is not the exact equivalent of the formula used in article 23, paragraph 1, which refers to "contracting States and contracting organizations". The difference has no practical consequences, since the contracting States and contracting international organizations are entitled to become parties in accordance with the definition of that term given in article 2, paragraph 1 (f), of the 1986 Vienna Convention;¹⁹³ it poses a problem, however, with regard to the wording of the draft guideline(s) to be included in the Guide to Practice.

140. Without doubt, the provisions of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention should be reproduced in the Guide to Practice and adapted to the special case of reservations; otherwise, the Guide would not fulfil its pragmatic purpose of making available to users a full set of guidelines enabling them to determine what conduct to adopt whenever they are faced with a question relating to reservations. But in preparing this draft (or these drafts), should the wording of these two provisions be reproduced, or that of article 23, paragraph 1?

¹⁹² *Yearbook ... 1966* (see footnote 55 above), p. 270, para. (1) of the commentary to draft article 73.

¹⁹³ See paragraph 99 above.

141. The question is a minor one; the Commission need not resolve it. The Special Rapporteur has a slight preference for the second solution; since it is primarily a matter of clarifying and completing the provisions of the 1969 and 1986 Vienna Conventions relating to reservations, it would seem logical to adopt the terminology used in those provisions so as to avoid any ambiguity and conflict—even purely superficial—between the various guidelines of the Guide to Practice.

142. Moreover, there can be no doubt that communications relating to reservations—especially those concerning the actual text of reservations formulated by a State or an international organization—are communications "relating to the treaty", within the meaning of article 78, paragraph 1 (e), referred to above. Furthermore, in its 1966 draft, the Commission expressly entrusted the depositary with the task of examining "whether a signature, an instrument or a reservation* is in conformity with the provisions of the treaty and of the present articles"¹⁹⁴. This expression was replaced in the 1969 Vienna Convention with a broader one—"the signature or any instrument, notification or communication relating to the treaty"¹⁹⁵—which cannot, however, be construed as excluding reservations from the scope of the provision.

143. In addition, as indicated in the Commission's commentary on draft article 73 (now article 79 of the 1986 Vienna Convention), the rule laid down in subparagraph (a) of this provision "relates essentially to notifications and communications relating to the 'life' of the treaty—acts establishing consent, *reservations*,* objections, notices regarding invalidity, termination, etc."¹⁹⁶

144. In essence, there is no doubt that both article 78, paragraph 1 (e), and article 79 (a) reflect current practice.¹⁹⁷ They warrant no special comment, except for the observation that, even in cases where there is a depositary, the State which is the author of the reservation may directly inform the other States or international organizations concerned of the text of the reservation. Thus, the United Kingdom, for example, informed the Secretary-General of the United Nations, as depositary of the Agreement establishing the Caribbean Development Bank, that it had consulted all the signatories to that Agreement with regard to an aspect of the declaration (constituting a reservation) which it had attached to its instrument of ratification (and which was subsequently accepted by the Board of Governors of the Bank, and then withdrawn by the United Kingdom).¹⁹⁸ Likewise, France itself submitted to the Board of Governors of the Asia-Pacific Institute for Broadcasting Development a

¹⁹⁴ *Yearbook ... 1966* (see footnote 55 above), p. 269, para. 1 (d). On the substance of this provision, see paragraph 164 below.

¹⁹⁵ Art. 77, para. 1 (d). The new formula is derived from an amendment proposed by the Byelorussian Soviet Socialist Republic, which was adopted by the Committee of the Whole by 32 votes to 24, with 27 abstentions (*Official Records of the United Nations Conference on the Law of Treaties* (see footnote 66 above), p. 202, para. 657 (iv) (4), and p. 203, para. 660 (i); see also paragraph 164, third bullet, below.

¹⁹⁶ *Yearbook ... 1966* (see footnote 55 above), p. 270, para. (2).

¹⁹⁷ *Ibid.*, with regard to draft article 73 (a) (which became article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention).

¹⁹⁸ See footnote 182 above.

reservation which it had formulated to the agreement establishing that organization, for which the Secretary-General is also depositary.¹⁹⁹

145. There seem to be no objections to this practice, provided that the depositary is not thereby released from his own obligations.²⁰⁰ It is, however, a source of confusion and uncertainty in the sense that the depositary could rely on States formulating reservations to perform the function expressly conferred on him by article 78, paragraph 1 (e), and the final phrase of article 79 (a), of the 1986 Vienna Convention.²⁰¹ The practice should probably not be encouraged; for this reason, the Special Rapporteur will refrain from proposing a draft guideline enshrining it and will, unless otherwise instructed by the Commission, confine himself to noting its existence in the commentary to draft guideline 2.1.6.²⁰²

146. In its 1966 commentary, the Commission dwelt on the importance of the task entrusted to the depositary in draft article 72, paragraph 1 (e) (now art. 78, para. 1 (e), of the 1986 Vienna Convention), and stressed “the obvious desirability of the prompt performance of this function by a depositary”.²⁰³ This is an important issue, which is linked to article 79 (b)–(c) of the Convention:²⁰⁴ the reservation produces effects only as from the date on which the communication relating thereto is received by the States and organizations for which it is intended, and not as from the date of its formulation. In truth, it matters little whether the communication is made directly by the author of the reservation, who will have no one but himself to blame if it is transmitted late to its recipients. On the other hand, if there is a depositary, it is essential for the latter to display promptness; otherwise, the depositary could stall both the effect of the reservation and the opportunity for the other States and international organizations concerned to react to it.²⁰⁵

147. Some of the main international organizations which are depositaries of treaties and which were consulted by the Secretariat at the Special Rapporteur’s request were kind enough to send information on their practice in this regard.²⁰⁶ This information shows that, at the current stage of modern means of communication, they perform their tasks with great speed.

148. In its reply, the Treaty Section of the United Nations Office of Legal Affairs²⁰⁷ stated:

1. The time period between receipt of a formality by the Treaty Section and its communication to the parties to a treaty is approximately 24 hours unless a translation is required or a legal issue is involved. If a translation is required, in all cases, it is requested by the Treaty Section on an urgent basis. If the legal issue is complex or involves communications with parties outside the control of the United Nations, then there may be some delay; however, this is highly unusual. It should be noted that, in all but a few cases, formalities are communicated to the relevant parties within 24 hours.

2. Depositary notifications are communicated to permanent missions and relevant organizations by both regular mail and electronic mail, within 24 hours of processing (see LA41TR/221). Additionally, effective January 2001, depositary notifications can be viewed in the United Nations Treaty Collection on the Internet at <http://untreaty.un.org> (depositary notifications on the Internet are for information purposes only and are not considered to be formal notifications by the depositary). Depositary notifications with bulky attachments, for example those relating to chapter XI.B.16,²⁰⁸ are sent by facsimile.²⁰⁹

149. For its part, IMO has indicated²¹⁰ that the time period between the communication of a reservation to a treaty for which the organization is depositary and its transmittal to the States concerned is generally from one to two weeks. Communications, which are translated into the three official languages of the organization (English, Spanish and French), are always transmitted by regular mail.

150. The practice of the Council of Europe has been described as follows:

The usual period is two to three weeks (notifications are grouped and sent out approximately every two weeks). In some cases, delays occur owing to voluminous

¹⁹⁹ *Ibid.*

²⁰⁰ See paragraphs 156–170 below.

²⁰¹ In the aforesaid case of the reservation of France to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, it seems that the Secretary-General confined himself to taking note of the absence of objections from the organization’s Governing Council (see *Multilateral Treaties Deposited with the Secretary-General* (footnote 159 above), vol. II, p. 291, note 2. The Secretary-General’s passivity in this instance is subject to criticism.

²⁰² See paragraph 153 below.

²⁰³ *Yearbook ... 1966* (see footnote 55 above), p. 270, para. (5) of the commentary to article 72.

²⁰⁴ See the text of these provisions in paragraph 137 above; see also the text of draft guideline 2.1.6 in paragraph 153 below.

²⁰⁵ See the commentary on draft article 72, *Yearbook ... 1966* (footnote 55 above), pp. 270–271, paras. (3)–(6); see also Elias, *The Modern Law of Treaties*, pp. 216–217.

²⁰⁶ The Special Rapporteur wishes to express his gratitude to the persons who kindly sent him this valuable information.

²⁰⁷ In the past, the time period between the receipt of reservations and their communication to the parties was longer than the one now mentioned by the Treaty Section. In the 1980s, this period varied between one and, in exceptional cases, two or even three months.

²⁰⁸ These are communications relating to the Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions (see *Multilateral Treaties Deposited with the Secretary-General*, vol. I (footnote 159 above), p. 584).

²⁰⁹ Electronic mail of 25 May 2001. The Treaty Section has also advised:

3. Please note that the depositary practice has been changed in cases where the treaty action is a modification to an existing reservation and where a reservation has been formulated by a party subsequent to establishing its consent to be bound. A party to the relevant treaty now has 12 months within which to inform the depositary that it objects to the modification or that it does not wish to consider the reservation made subsequent to ratification, acceptance, approval, etc. The time period for this 12 months is calculated by the depositary on the basis of the date of issue of the depositary notification (see LA41TR/221 (23–1) (*Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2, p. 42).

²¹⁰ Telephone conversation of 24 May 2001.

declarations/reservations or appendices (descriptions or extracts of domestic law and practices) that must be checked and translated into the other official language (the Council of Europe requires that all notifications be made in one of the official languages or at least be accompanied by a translation into one of these languages. The translation into the other official language is provided by the Treaty Office). Urgent notifications that have immediate effect (e.g. derogations under article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)) are carried out within a couple of days.

Unless they prefer notifications to be sent directly to the Ministry for Foreign Affairs (currently 11 out of 43 member States), the original notifications are sent out in writing to the permanent representations in Strasbourg, France, which in turn forward them to their capitals. Non-member States that have no diplomatic mission (consulate) in Strasbourg are notified via a diplomatic mission in Paris or Brussels or directly. The increase in member States and notifications over the last 10 years has prompted one simplification: since 1999, each notification is no longer signed individually by the Director-General of Legal Affairs (acting for the Secretary-General of the Council of Europe), but notifications are grouped and only each cover letter is signed individually. There have not been any complaints against this procedure.

Since the new website (<http://conventions.coe.int>) became operational in January 2000, all information relating to formalities is immediately made available on the website. The texts of reservations or declarations are put on the website the day they are officially notified. Publication on the website is, however, not considered to constitute an official notification.²¹¹

151. At OAS:

Member States are notified of any new signatures and ratifications to inter-American treaties through the OAS Newspaper which circulates every day. In a more formal way, OAS notifies member States every three months through a *procès-verbal* sent to the permanent missions to OAS or after meetings where there are a significant number of new signatures and ratifications such as, for example, the General Assembly.

The formal notifications, which also include the bilateral agreements signed between the General Secretariat and other parties, are done in Spanish and English.²¹²

152. While it is probably unnecessary for these very helpful clarifications to be reproduced in full in the Guide to Practice, it would nevertheless be useful to give some information in the form of general guidelines intended both for the depositary (where there is one) and for the authors of reservations (where there is no depositary). This draft guideline might provide that:

(a) The communication must be made in writing (and that, where it is transmitted by electronic mail,

confirmation must be sent by regular mail, or even by facsimile);

(b) The communication should be transmitted with all due speed (even though it appears neither possible nor necessary to set a fixed time limit).

On the other hand, it is difficult to be specific about the language or languages in which such communications must be transmitted, since the practices of depositaries vary.²¹³ Similarly, it is no doubt better to follow the customary practice on the question of to whom, specifically, the communications should be addressed.²¹⁴

153. The draft guideline could combine the text of the two above-mentioned provisions of the 1986 Vienna Convention and read as follows:

“2.1.6 Procedure for communication of reservations

“1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations,²¹⁵ a communication relating to a reservation to a treaty shall be transmitted:

“(a) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or,

“(b) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

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

154. The *chapeau* of the draft guideline reproduces the relevant parts that are common to the *chapeaux* of articles 77–78 of the 1969 Vienna Convention and articles 78–79 of the 1986 Vienna Convention, with some simplification: the wording decided upon in Vienna to introduce article 78 of the 1986 Convention (“the contracting States and contracting organizations or, as the case may be, by the contracting organizations” appears to be unnecessarily cumbersome and contains little additional information. Moreover, as was mentioned above,²¹⁶ the text of the draft reproduces the formulation used in article 23, paragraph 1, of the 1986 Convention (“to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”), in preference to that used in article 78, paragraph 1 (e), (“the parties

²¹³ Where the depositary is a State, it seems that such communications are generally made in the official language or languages of that State. Where the depositary is an international organization, it may use either all its official languages (IMO) or one or two working languages (United Nations).

²¹⁴ Ministries for foreign affairs, diplomatic missions to the depositary State or States, permanent missions to the depositary organization.

²¹⁵ The official French text (art. 78, para. 1) of the 1986 Convention adopted in Vienna uses the word in its feminine form (“*contractantes*”). Since the masculine form takes precedence over the feminine form, this is a grammatical error.

²¹⁶ Paras. 139–141 above.

²¹¹ Electronic mail of 25 May 2001.

²¹² Electronic mail of 29 May 2001.

and the States and international organizations entitled to become parties to the treaty”). While the latter formulation is probably more elegant and has the same meaning, it departs from the terminology used in the section of the Vienna Conventions relating to reservations. Nevertheless, it did not seem useful to burden the text by using this expression twice in paragraph 1 (a)–(b) of the guideline; in order to remove any ambiguity, however, the commentary should clearly specify that the expression “States and organizations for which it is intended” (subpara. (b)) refers to the “contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty” (subpara. (a)). Lastly, the division of paragraph 1 of the draft guideline into two subparagraphs probably makes it easier to understand without changing the meaning.

155. It is also essential to reproduce the rule contained in article 79 (b)–(c) of the 1986 Vienna Convention,²¹⁷ adapting it to the specific case of reservations. However, since the distinction made in these two paragraphs can be understood²¹⁸ only in relation to article 78, paragraph 1 (e), which it does not appear useful to reproduce separately in the Guide to Practice²¹⁹ and since, in any event, a reservation can in principle produce effects only if it is accepted by the other Contracting Parties²²⁰ (so that it is the date on which it is received by the other parties that matters), draft guideline 2.1.8 could no doubt be drafted more simply and concisely, as follows:

“2.1.8 Effective date of communications relating to reservations

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

2. FUNCTIONS OF DEPOSITARIES

156. The belated decision to subsume the provisions relating to the communication of reservations within the general articles of the 1969 Vienna Convention relating to depositaries²²¹ explains the lack of any reference to the depositary in the section on reservations. On the other hand (and consequently), it is self-evident that the provisions of articles 77–78 of the 1986 Convention²²² are fully applicable to reservations insofar as they are relevant to them.

157. This is clearly the case with regard to article 78, paragraph 1 (e), under which the depositary is responsible for “informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty”. This rule, combined with the one in article 79 (a), is reproduced in draft guideline 2.1.6.²²³ This

same draft implies also that the depositary receives and keeps custody of reservations;²²⁴ it therefore seems unnecessary to mention this expressly.

158. It goes without saying that the general provisions of article 77, paragraph 2, of the 1986 Vienna Convention, relating to the international character of the functions of depositaries and their obligation to act impartially apply to reservations as to any other field.²²⁵ In this general form, these guidelines do not specifically concern the functions of depositaries in relation to reservations and, accordingly, there seems to be no need to reproduce them as such in the Guide to Practice. But these provisions should be placed in the context of those in article 78, paragraph 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.

159. These substantial limitations on the functions of depositaries were enshrined as a result of problems that arose with regard to certain reservations; hence, it appears all the more essential to recall these provisions in the Guide to Practice, adapting them to the special case of reservations.

160. As has been noted, the problem is posed in different terms when the depositary is a State that is itself a party to the treaty, or when it is “an international organization or the chief administrative officer of the organization”.²²⁶ In the first case, “if the other parties found themselves in disagreement with the depositary on this question—a situation which, to our knowledge, has never materialized—they would not be in a position to insist that he follow a course of conduct different from the one he believed that he should adopt”.²²⁷ In contrast, in the second case, the political organs of the organization (composed of States not necessarily parties to the treaty) can give instructions to the depositary. It is in this context that problems arose, and their solution has consistently tended towards a strict limitation on the depositary’s power of judgement, culminating finally in the rules laid down in the 1969 Vienna Convention and reproduced in the 1986 Convention.

161. As early as 1927, as a result of the difficulties created by the reservations to which Austria intended to subject its deferred signature of the International Opium Convention, the Council of the League of Nations adopted a resolution endorsing the conclusions of a Committee of

²²⁴ See article 78, paragraph 1 (c), of the 1986 Vienna Convention.

²²⁵ “The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter’s functions shall not affect that obligation.”

²²⁶ Art. 77, para. 1, of the 1986 Vienna Convention.

²²⁷ Dehaussy, “Le dépositaire de traités”, p. 515.

²¹⁷ Para. 137 above.

²¹⁸ It is also difficult to understand.

²¹⁹ See paragraphs 139 and 153 above.

²²⁰ See article 20, paragraphs 4–5, of the 1969 and 1986 Vienna Conventions.

²²¹ See paragraph 136 above.

²²² Arts. 76–77 of the 1969 Vienna Convention.

²²³ See paragraph 153 above.

Experts²²⁸ and giving instructions to the Secretary-General of the League on what conduct to adopt.²²⁹ But it is in the context of the United Nations that the most serious problems have arisen.

162. It is sufficient to recall the main stages in the evolution of the role of the Secretary-General as depositary in respect of reservations:²³⁰

(a) Initially, the Secretary-General “seemed to determine alone ... his own rules of conduct in the matter”²³¹ and subjected the admissibility of reservations to the unanimous acceptance of the Contracting Parties or the international organization whose constituent instrument was involved;²³²

(b) Following the ICJ advisory opinion of 28 May 1951 on *Reservations to the Convention on Genocide*,²³³ the General Assembly adopted its first resolution calling on the Secretary-General, in respect of future conventions:

- (i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and
- (ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications;²³⁴

These guidelines were extended to all treaties for which the Secretary-General assumes depositary functions under resolution 1452 B (XIV) of 7 December 1959, adopted as a result of the problems related to the reservations formulated by India to the constituent instrument of IMCO.²³⁵

163. This is the practice followed since then by the Secretary-General of the United Nations and, apparently, by all international organizations (or the heads of the secretariats of international organizations) with regard to reservations where the treaty in question does not contain a reservations clause.²³⁶ And this is the practice that the

²²⁸ See the report of the Committee of Experts for the Progressive Codification of International Law on the admissibility of reservations to general conventions, of which the subcommittee was composed of Messrs. Fromageot, McNair and Diena, League of Nations, *Official Journal*, 8th year, No. 7 (July 1927), p. 880.

²²⁹ *Ibid.*, resolution of 17 June 1927, p. 800. See also resolution XXIX of the Eighth International Conference of American States (Lima, 1938) which established the rules to be followed by the Pan American Union with regard to reservations (*Yearbook ... 1965*, vol. II, document A/5687, p. 80).

²³⁰ See also, for example, Imbert, “A l’occasion de l’entrée en vigueur de la Convention de Vienne sur le droit des traités: réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l’exercice de ses fonctions de dépositaire”, pp. 528–529; or Rosenne, *Developments in the Law of Treaties 1945-1986*, pp. 429–434.

²³¹ Dehaussy, *loc. cit.*, p. 514.

²³² See ST/LEG/7/Rev.1 (footnote 74 above), pp. 50–51, paras. 168–172.

²³³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15.

²³⁴ Resolution 598 (VI) of 12 January 1952, para. 3 (b).

²³⁵ See paragraph 120 above.

²³⁶ See ST/LEG/7/Rev.1 (footnote 74 above), pp. 52–56, paras. 177–188.

Commission drew on in formulating the rules to be applied by the depositary in this area.

164. It should also be noted that here, too, the formulation adopted tended towards an ever greater limitation on the depositary’s powers:

- In the draft articles on the law of treaties adopted by the Commission on first reading at its first session in 1962, paragraph 5 of draft article 29 on the functions of a depositary provided that:

On a reservation having been formulated, the depositary shall have the duty:

(a) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the State which formulated the reservations;

(b) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19.²³⁷

- The draft articles adopted on second reading in 1966 further provided that the functions of the depositary comprised:

Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question;²³⁸

The commentary on this provision dwelt, however, on the strict limits on the depositary’s examining power:

Paragraph 1 (d) recognizes that a depositary has a certain duty to examine whether signatures, instruments and reservations are in conformity with any applicable provisions of the treaty or of the present articles, and if necessary to bring the matter to the attention of the State in question. That is, however, the limit of the depositary’s duty in this connexion. It is no part of the functions to adjudicate on the validity of an instrument or reservation. If an instrument or reservation appears to be irregular, the proper course of a depositary is to draw the attention of the reserving State to the matter and, if the latter does not concur with the depositary, to communicate the reservation to the other interested States and bring the question of the apparent irregularity to their attention.²³⁹

- During the United Nations Conference on the Law of Treaties an amendment proposed by the Byelorussian Soviet Socialist Republic²⁴⁰ further attenuated the provision in question: even if the disappearance of any express reference to reservations certainly does not prevent the rule laid down in article 77,²⁴¹ paragraph 1 (d), from applying to these instruments,²⁴² the fact remains that the depositary’s power is limited henceforth to examining the *form* of reservations, his function being that of:

Examining whether the signature or any instrument, notification or communication relating to the treaty is *in due and proper form** and, if need be, bringing the matter to the attention of the States in question*.²⁴³

²³⁷ *Yearbook ... 1962*, vol. II, document A/5209, p. 185.

²³⁸ *Yearbook ... 1966* (see footnote 55 above), p. 269, draft art. 72, para. 1 (d).

²³⁹ *Ibid.*, pp. 269–270, para. (4) of the commentary to article 72.

²⁴⁰ See footnote 195 above.

²⁴¹ Art. 78 of the 1986 Vienna Convention.

²⁴² See footnote 195 and paragraph 142 above.

²⁴³ The 1986 text.

165. In this way the principle of the depositary as “letter box” has been enshrined. As Elias has written:

It is essential to emphasize that it is no part of the depositary’s function to assume the role of interpreter or judge in any dispute regarding the nature or character of a party’s reservation vis-à-vis the other parties to a treaty, or to pronounce a treaty as having come into force when that is challenged by one or more of the parties to the treaty in question.²⁴⁴

166. Opinions are divided as to the advantages or disadvantages of this diminution of the depositary’s competencies with regard to reservations. Of course, as ICJ emphasized in its 1951 advisory opinion, “the task of the [depositary] would be simplified and would be confined to receiving reservations and objections and notifying them”.²⁴⁵

The effect of this, it is suggested, is to transfer the undoubted subjectivities of the United Nations system from the shoulders of the depositary to those of the individual States concerned, in their quality of parties to that treaty, and in that quality alone. This may be regarded as a positive innovation, or perhaps clarification of the modern law of treaties, especially of reservations to multilateral treaties, and is likely to reduce or at least limit the “dispute” element of unacceptable reservations.²⁴⁶

167. Conversely, we may also see in the practice followed by the Secretary-General of the United Nations and embodied, indeed “solidified”, in the 1969 Vienna Convention, “an unnecessarily complex system”²⁴⁷ insofar as the depositary is no longer able to impose the least amount of coherence and unity in the interpretation and implementation of reservations.²⁴⁸

168. The fact remains that distrust of the depositary, as reflected in the provisions analysed above of the relevant articles of the 1969 and 1986 Vienna Conventions, is too deeply entrenched, both in minds and in practice, for there to be any consideration of revising the rules adopted in 1969 and perpetuated in 1986. In the view of the Special Rapporteur, there is little choice but to reproduce them verbatim in the Guide to Practice, combining the relevant provisions of article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention²⁴⁹ in a single guideline, and applying them only to the functions of depositaries with regard to reservations.

²⁴⁴ *Op. cit.*, p. 213.

²⁴⁵ *I.C.J. Reports 1951* (see footnote 233 above), p. 27; and it may be considered that:

“It is that passage which has established the theoretical basis for the subsequent actions by the General Assembly and the International Law Commission. For it is in that sentence that the essentially administrative features of the function [of the depositary] are emphasized and any possible political (and that means decisive) role is depressed to the greatest extent.”

(Rosenne, “The depositary of international treaties”, p. 931)

²⁴⁶ Rosenne, *op. cit.*, pp. 435–436.

²⁴⁷ Imbert, *loc. cit.*, p. 534; the author applies the term only to the practice of the Secretary-General and seems to consider that the 1969 Vienna Convention simplifies the context of the problem; this is doubtful.

²⁴⁸ The depositary can, however, play a not insignificant role in the “reservations dialogue” in reconciling opposing points of view, where appropriate. See Han, “The U.N. Secretary-General’s treaty depositary function: legal implications”, pp. 570–571; the author here dwells on the importance of the role that the depositary can play.

²⁴⁹ In view of its highly general character, it does not seem appropriate to recall in the Guide to Practice the general principle set forth in article 77, paragraph 2 (see footnote 225 above).

169. On this basis, draft guideline 2.1.7 would read as follows:

“2.1.7 Functions of depositaries

“1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

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

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

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

170. Paragraph 1 of this draft guideline reproduces the text of the first phrase of article 78, paragraph 1 (d), of the 1986 Vienna Convention, referring expressly and exclusively to the attitude to be adopted by the depositary with regard to reservations. In contrast, it did not seem useful to transpose the second phrase of this provision since article 78, paragraph 2, which is reproduced word for word in paragraph 2 of draft guideline 2.1.7, contains the same rule in greater detail.

3. COMMUNICATION OF INTERPRETATIVE DECLARATIONS

171. In view of the very informal character of the formulation of “simple” interpretative declarations,²⁵⁰ the problem of communicating them obviously does not arise.

172. The situation is different with regard to conditional interpretative declarations. The reasons which justify the transposition of the rules relating to the formulation of reservations to the formulation of such declarations²⁵¹ are equally compelling when it comes to their communication and publicity: at issue are, inevitably, formal declarations which, by definition, establish the conditions for their author’s expression of consent to be bound by the treaty and to which other interested States and international organizations must have an opportunity to react.

173. It seems legitimate, therefore, to include in the Guide to Practice a consolidated draft guideline which, in order to avoid reproducing the entire text of draft guidelines 2.1.5–2.1.8, could simply refer to them, without, however, formally citing them for the reasons outlined in paragraph 86 of this report. In that case, the text would read as follows:

²⁵⁰ See paragraphs 88 and 90 above.

²⁵¹ See paragraph 84 above.

“2.4.9²⁵² *Communication of conditional interpretative declarations*

“1. A conditional interpretative declaration must be communicated in writing to the contracting States and

²⁵² It would probably be preferable to insert this draft guideline between draft guidelines 2.4.2 (Formulation of conditional interpretative declarations) and 2.4.3 (Times at which an interpretative declaration may be formulated)—indeed, to include it in draft guideline 2.4.2.

contracting organizations and other States and international organizations entitled to become parties to the treaty under the same conditions as a reservation.

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

Annex

**PROCEDURE: CONSOLIDATED TEXT OF DRAFT GUIDELINES
DEALING WITH THE FORMULATION OF RESERVATIONS AND INTERPRETATIVE
DECLARATIONS PROPOSED IN THE FIFTH AND SIXTH REPORTS**

2.1 Form and notification of reservations**2.1.1 Written form**

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation

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

[2.1.3 Competence to formulate a reservation at the international level

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

[2.1.3 Competence to formulate a reservation at the international level

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

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

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

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

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

(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).]

[2.1.3 bis Competence to formulate a reservation at the internal level

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

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

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

2.1.5 Communication of reservations

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

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

2.1.6 Procedure for communication of reservations

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(a) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(b) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

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

2.1.7 Functions of depositaries

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

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

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

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

2.1.8 Effective date of communications relating to reservations

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

2.2 Confirmation of reservations made when signing

2.2.1 Reservations formulated when signing and formal confirmation

If formulated when signing the 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 Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation¹

If formulated when negotiating, adopting or authenticating the text of the treaty, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by

¹ Draft guidelines 2.2.1 and 2.2.2 could be combined into a single draft guideline as follows:

“Reservations formulated when negotiating, adopting or authenticating or when signing the text of the treaty and formal confirmation

“If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the 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.”

The Special Rapporteur is not in favour of this combination (see his fifth report (*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1-4, p. 188, para. 257).

the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.

2.2.3 Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]²

A reservation formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.

2.2.4 Reservations formulated when signing for which the treaty makes express provision

A reservation formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate a reservation at such a 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 Reservations formulated late

2.3.1 Reservations formulated late

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 unless the other Contracting Parties do not object to the late formulation of the reservation.

Model clauses 2.3.1—Reservations formulated after the expression of consent to be bound

A. A contracting Party may formulate a reservation after expressing its consent to be bound by the present treaty.

B. A contracting Party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] when signing, ratifying, formally ratifying, accepting or approving the treaty or acceding thereto or at any time thereafter.

C. A contracting Party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] at any time by means of a notification addressed to the depositary.

2.3.2 Acceptance of reservations formulated late

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

² The alternative draftings that have been proposed relate to the fact that, as indicated in footnote 446 of the fifth report (see footnote 1 above), p. 188, the term “agreements in simplified form”, familiar to jurists schooled in the Roman law tradition, might bewilder those with training in common law.

2.3.3 *Objection to reservations formulated late*

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

2.3.4 *Late exclusion or modification of the legal effects of a treaty by procedures other than reservations*

Unless otherwise provided in the treaty, 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 under an optional clause.

2.4 *Procedure regarding interpretative declarations*

2.4.1 *Formulation of interpretative declarations*

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

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

1. The determination of the competent body and the procedure to be followed for formulating an interpretative declaration at the internal level is a matter for the internal law of each State or international organization.
2. A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

2.4.2 *Formulation of conditional interpretative declarations*

1. A conditional interpretative declaration must be formulated in writing.
2. Where necessary, the formal confirmation of a conditional interpretative declaration must be effected in the same manner.
3. A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

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

Without prejudice to the provisions of guidelines 1.2.1, 2.4.4, 2.4.7 and 2.4.8, an interpretative declaration may be formulated at any time, unless [otherwise provided by an express provision of the treaty] [the treaty states that it may be made only at specified times].

2.4.4 *Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation*

If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a conditional interpretative declaration 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 declaration shall be considered as having been made on the date of its confirmation.

2.4.5 *Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]*

An interpretative declaration formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.

2.4.6 *Interpretative declarations formulated when signing for which the treaty makes express provision*

An interpretative declaration formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate such a declaration at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

2.4.7 *Interpretative declarations formulated late*

Where a treaty provides that an interpretative declaration can be made only at specified times, a State or an international organization may not formulate an interpretative declaration on that treaty at another time, unless the late formulation of the interpretative declaration does not elicit any objections from the other Contracting Parties.

2.4.8 *Conditional interpretative declarations formulated late*

A State or an international organization may not formulate a conditional interpretative declaration on a treaty

after expressing its consent to be bound by the treaty unless the late formulation of the declaration does not elicit any objections from the other Contracting Parties.

2.4.9 *Communication of conditional interpretative declarations*

1. A conditional interpretative declaration must be communicated in writing to the contracting States and

contracting organizations and other States and international organizations entitled to become parties to the treaty under the same conditions as a reservation.

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