RESERVATIONS TO TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/614 and Add.1–2*

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

[*Original: French*]
[*2 April, 22 May and 7 August 2009*]

CONTENTS

* Incorporating A/CN.4/614/Corr.1.

Multilateral instruments cited in the present report

	Source
Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930)	League of Nations, *Treaty Series*, vol. CLXXIX, No. 4137, p. 89.
Revised General Act for the Pacific Settlement of International Disputes (New York, 28 April 1949)	United Nations, *Treaty Series*, vol. 71, No. 912, p. 101.
Convention on Road Traffic (Geneva, 19 September 1949)	*Ibid.*, vol. 125, No. 1671, p. 22.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	*Ibid.*, vol. 213, No. 2889, p. 221.
Convention (No. 102) concerning Minimum Standards of Social Security (Geneva, 28 June 1952)	*Ibid.*, vol. 210, No. 2838, p. 131.
Convention concerning Customs Facilities for Touring (New York, 4 June 1954)	*Ibid.*, vol. 276, No. 3992, p. 191.
Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the importation of tourist publicity documents and material (New York, 4 June 1954)	*Ibid.*, p. 266.
Convention on the Recovery Abroad of Maintenance (New York, 20 June 1956)	*Ibid.*, vol. 268, No. 3850, p. 3.
European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957)	*Ibid.*, vol. 320, No. 4646, p. 243.
European Convention on Extradition (Paris, 13 December 1957)	*Ibid.*, vol. 359, No. 5146, p. 273.
Convention on the Continental Shelf (Geneva, 29 April 1958)	*Ibid.*, vol. 499, No. 7302, p. 311.
Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)	*Ibid.*, vol. 330, No. 4739, p. 3.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid.*, vol. 500, No. 7310, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*, vol. 596, No. 8638, p. 261.
European Code of Social Security (Strasbourg, 16 April 1964)	*Ibid.*, vol. 648, No. 9281, p. 235.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	*Ibid.*, vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid.*, vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid.*
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	*Ibid.*, vol. 993, No. 14531, p. 3.
Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) (with annexed Additional Protocols I and II) (Mexico, Federal District, 14 February 1967)	*Ibid.*, vol. 634, No. 9068, p. 281.

	Source
Convention (No. 128) concerning Invalidity, Old-Age and Survivors' Benefits (Geneva, 29 June 1967)	*Ibid.*, vol. 699, No. 10030, p. 185.
Convention on Road Signs and Signals (Vienna, 8 November 1968)	*Ibid.*, vol. 1091, No. 16743, p. 3.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid*., vol. 1144, No. 17955, p. 123.
Convention on Special Missions (New York, 8 December 1969)	*Ibid*., vol. 1400, No. 23431, p. 231.
Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP) (Geneva, 1 September 1970)	*Ibid*., vol. 1028, No. 15121, p. 121.
Convention on Psychotropic Substances (Vienna, 21 February 1971)	*Ibid*., vol. 1019, No. 14956, p. 175.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	*Ibid.*, vol. 1249, No. 20378, p. 13.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid*., vol. 1833, No. 31363, p. 3.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Ibid.*, vol. 1465, No. 24841, p. 85.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Convention on the Rights of the Child (New York, 20 November 1989)	United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3.
European Charter for Regional or Minority Languages (Strasbourg, 5 November 1992)	*Ibid.*, vol. 2044, No. 35358, p. 575.
Framework Convention for the Protection of National Minorities (Strasbourg, 1 February 1995)	*Ibid.*, vol. 2151, No. 37548, p. 243.
European Social Charter (revised) (Strasbourg, 3 May 1996)	*Ibid.*, vol. 2151, No. 37549, p. 277.
International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997)	*Ibid.*, vol. 2149, No. 37517, p. 256.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	*Ibid.*, vol. 2187, No. 38544, p. 3.
International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)	*Ibid*., vol. 2178, No. 38349, p. 197.
United Nations Convention against Corruption (New York, 31 October 2003)	*Ibid*., vol. 2349, No. 42146, p. 41.

Works cited in the present report

Anzilotti, Dionisio

Corso di diritto internazionale. 4th ed. Padua, CEDAM, 1955. Vol. I: Introduzione—teorie generali. 438 p.

Aust, Anthony

Modern Treaty Law and Practice. 2nd ed. Cambridge, Cambridge University Press, 2007.

Baratta, Roberto

Gli effetti delle riserve ai trattati. Milan, Giuffrè, 1999.

Bowett, Derek William

"Reservations to non-restricted multilateral treaties", BYBIL, 1976–1977, vol. 48, pp. 67–92.

Coccia, Massimo

"Reservations to multilateral treaties on human rights", *California Western International Law Journal*, vol. 15, 1985, pp. 1–51.

Combacau, Jean and Serge Sur

Droit international public. 8th ed. Paris, Montchrestien, 2008.

Daillier, Patrick and Alain Pellet

Droit international public. 7th ed. Paris, LGDJ, 2002.

De Cesari, Patrizia

"Riserve, dichiarazioni e facoltà nelle convenzioni dell'Aja di diritto internazionale privato", *Communicazioni e Studi*, vol. 22, 2002, pp. 149–174.

Fitzmaurice, Sir Gerald

The Law and Procedure of the International Court of Justice. Cambridge, Grotius, 1986. 860 p.

Gaja, Giorgio

"Il regime della Convenzione di Vienna concernente le riserve inammissibili", *Studi in onore di Vincenzo Starace.* Naples, Editoriale Scientifica, 2008, vol. I, pp. 349–361.

"Unruly treaty reservations", *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*. Milan, Giuffrè, 1987. Vol. I, pp. 307–330.

Gormley, W. Paul

"The modification of multilateral conventions by means of 'negotiated reservations' and other 'alternatives': a comparative study of the ILO and Council of Europe—part one", *Fordham Law Review*, vol. XXXIX, 1970–1971, pp. 59–80.

Greig, D.W.

"Reservations: equity as a balancing factor?", *Australian Year Book of International Law 1995*, vol. 16, pp. 21–172.

HEYMANN, Monica

Einseitige Interpretationserklärungen zu multilateralen Verträgen (Unilateral interpretative declarations to multilateral treaties). Berlin, Duncker & Humblot, 2005.

HORN, Frank

Reservations and Interpretative Declarations to Multilateral Treaties. The Hague, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, 1988.

HYLTON, Daniel N.

"Default breakdown: the Vienna Convention on the Law of Treaties' inadequate framework on reservations", *Vanderbilt Journal of Transnational Law*, vol. 27, 1994, pp. 419–451.

IMBERT, Pierre-Henri

"À 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", AFDI, vol. 26, 1980, pp. 524–541.

"La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", AFDI, vol. 24, 1978, pp. 29–58.

Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951. Paris, Pedone, 1978. 503 p.

KELSEN, Hans

Pure Theory of Law. Translation from the 2nd (revised and enlarged) German ed. by Max Knight. Berkeley, University of California, 1967.

KOH, Jean Kyongun

"Reservations to multilateral treaties: How international legal doctrine reflects world vision", *Harvard International Law Journal*, vol. 23, 1982, pp. 71–116.

MAJOROS, Ferenc

"Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", *Journal du droit international*, vol. 101, 1974, pp. 73–109.

MÜLLER, Daniel

"Article 20" and "Article 21", in Olivier Corten and Pierre Klein, eds., *Les Conventions de Vienne sur le droit des traités: commentaire article par article*. Vol. I. Brussels, Bruylant, 2006, pp. 797–882 and 883–934, respectively.

PARISI, Francesco and Catherine ŠEVČENKO

"Treaty reservations and the economics of article 21 (1) of the Vienna Convention", *Berkeley Journal of International Law*, vol. 21, 2003, pp. 1–26.

PELLET, Alain

"Article 19 (1969)", in Olivier Corten and Pierre Klein, eds., *Les Conventions de Vienne sur le droit des traités: commentaire article par article*. Vol. I. Brussels, Bruylant, 2006, pp. 641–788.

REDGWELL, Catherine

"Universality or integrity? Some reflections on reservations to general multilateral treaties", BYBIL, 1993, vol. 64, pp. 245–282.

RIQUELME CORTADO, Rosa

Las reservas a los tratados: Lagunas y ambigüedades del régimen de Viena. Murcia, University of Murcia, 2004.

ROUSSEAU, Charles

Droit international public, vol. I: *Introduction et sources*. Paris, Sirey, 1970.

SAPIENZA, Rosario

Dichiarazioni interpretative unilaterali e trattati internazionali. Milan, Giuffrè, 1996.

SCHERMERS, Henri G.

"The suitability of reservations to multilateral treaties", *Netherlands International Law Review*, vol. VI, 1959, pp. 350–361.

SIMMA, Bruno

Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge. Berlin, Duncker & Humblot, 1972. 347 p.

SINCLAIR, Sir Ian

The Vienna Convention on the Law of Treaties. 2nd ed. Manchester, Manchester University Press, 1984.

SUCHARIPA-BEHRMANN, Lilly

"The legal effects of reservations to multilateral treaties", *Austrian Review of International and European Law*, vol. 1, 1996, pp. 67–88.

SZAFARZ, Renata

"Reservations to multilateral treaties", *Polish Yearbook of International Law*, vol. 3, 1970, pp. 293–316.

SZTUCKI, Jerzy

"Some questions arising from reservations to the Vienna Convention on the Law of Treaties", *German Yearbook of International Law*, vol. 20, 1977, pp. 277–305.

TOMUSCHAT, Christian

"Admissibility and legal effects of reservations to multilateral treaties", *Heidelberg Journal of International Law*, vol. 27, 1967, p. 466.

VIRALLY, Michel

"Le principe de réciprocité dans le droit international contemporain", *Collected Courses of The Hague Academy of International Law*, 1967–III, vol. 122, pp. 1–105.

WALDOCK, Sir Humphrey

"General course on public international law", *Collected Courses of The Hague Academy of International Law*, 1962–II, vol. 106, pp. 1–251.

Introduction

1. The eleventh report on reservations to treaties (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574), submitted at the fifty-eighth session of the Commission, contained a brief summary of the work of the Commission on the subject (paras. 1–43). In a continuation of this tradition, deemed helpful by the members of the Commission, this year's report summarizes briefly the lessons to be drawn from the completion of the consideration of the tenth report in 2006 (*Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2), and from the consideration of the eleventh, twelfth (*Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584) and thirteenth (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600) reports in 2007 and 2008 by the Commission and by the Sixth Committee of the General Assembly. These last three reports constitute a single text, all three of

them relating to the procedure for the formulation of reactions to reservations (acceptance and objection) and to interpretative declarations (approval, opposition, reclassification and silence).[1] This summary is supplemented by a presentation of the main developments concerning reservations that have occurred in recent years and have come to the attention of the Special Rapporteur.

A. Tenth report on reservations to treaties and the outcome

1. Completion of consideration of the tenth report by the Commission

2. At its fifty-eighth session, the Commission completed its consideration of the second part of the tenth report on reservations to treaties[2] which, owing to lack of time, had not been discussed in depth at the preceding session.[3] This part of the tenth report, devoted entirely to the question of the validity of reservations, related to the concept of the object and purpose of the treaty, competence to assess the validity of reservations and the consequences of the invalidity of a reservation. The Commission also had before it a note by the Special Rapporteur on draft guideline 3.1.5 (Definition of the object and purpose of the treaty)[4] in which he proposed two alternative formulations, taking into account the preliminary discussion that had taken place at the fifty-seventh session (2005).[5]

3. The discussion of the definition of the object and purpose of a treaty was fruitful and productive.[6] The idea of formulating a definition was favourably received, although the wording gave rise to questions and doubts. Nevertheless, the Commission and the Special Rapporteur considered that the three alternative versions of guideline 3.1.5 served as a basis for a definition, bearing in mind the element of subjectivity inherent in the concept.

4. Guidelines 3.1.7 to 3.1.13, which provide specific examples of reservations that are incompatible with the object and purpose of the treaty, generally met with support among the members of the Commission and the pragmatic approach they represented was deemed judicious.

5. The Commission welcomed guidelines 3.2 and 3.2.1 to 3.2.4, on competence to assess the validity of reservations, including that of dispute settlement bodies and treaty monitoring bodies.[7]

6. With regard to the effects of the invalidity of a reservation, the Commission referred guidelines 3.3 and 3.3.1 to the Drafting Committee, indicating that there was no reason to distinguish between the different types of invalidity in article 19 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the 1969 Vienna Convention) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the 1986 Vienna Convention) and that invalidity applied only within the restricted context of treaty law and did not involve engaging the international responsibility of its author. However, the Commission preferred to defer its consideration of guidelines 3.3.2 to 3.3.4 pending its consideration of the effect of reservations, objections to reservations and acceptances of reservations.[8] The Special Rapporteur supported this position.[9]

7. The Commission decided to refer guidelines 3.1.5 to 3.1.13, 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee.[10]

8. In addition, the Commission adopted seven guidelines[11] and their commentaries which had been referred to the Drafting Committee at the preceding session.[12]

2. Consideration of chapter VIII of the 2006 report of the Commission by the Sixth Committee

9. Chapter VIII of the Commission's report on the work of its fifty-eighth session[13] deals with reservations to treaties. As is customary, a very brief summary of it is given in chapter II[14] and the "specific issues on which comments would be of particular interest to the Commission" are set out in chapter III. In the perspective of the meeting it was planning to have with experts in the field of human rights in order to hold a discussion on issues relating to reservations, the Commission wished to know the views of Governments that are necessary or useful adjustments to the "preliminary conclusions" of 1997.[15]

10. The idea of exchanging views with human rights experts, including the monitoring bodies, met with wide support in the Sixth Committee.[16] It was maintained that the establishment of a special regime relating to

[1] See the thirteenth report on reservations to treaties, *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600, para. 7.

[2] *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2.

[3] See *Yearbook ... 2005*, vol. II (Part Two), p. 64, para. 345. See also the eleventh report on reservations to treaties, *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 28.

[4] *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/572 and Corr.1.

[5] See *Yearbook ... 2005*, vol. I, 2856th, 2857th and 2858th meetings, pp. 177–204.

[6] *Yearbook ... 2006*, vol. II (Part Two), p. 137, para. 144.

[7] *Ibid.*, p. 136, paras. 130–136, and pp. 137–138, paras. 153–155.

[8] *Ibid.*, p. 136, para. 139.

[9] *Ibid.*, p. 138, para. 157.

[10] *Ibid.*, p. 134, para. 103.

[11] Guidelines 3.1 (Permissible reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2 (Definition of specified reservations), 3.1.3 (Permissibility of reservations not prohibited by the treaty) and 3.1.4 (Permissibility of specified reservations). In addition, the Commission provisionally adopted guidelines 1.6 (Scope of definitions) and 2.1.8 [2.1.7 *bis*] (Procedure in case of manifestly invalid reservations). See the text of and commentary to these guidelines (*ibid.*, para. 159).

[12] *Yearbook ... 2005*, vol. II (Part Two), p. 64, para. 345. See also the eleventh report on reservations to treaties, *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 30.

[13] *Yearbook ... 2006*, vol. II (Part Two), pp. 133–158, paras. 92–159.

[14] *Ibid.*, p. 19, para. 17.

[15] *Ibid.*, p. 21, para. 29. For the preliminary conclusions, see *Yearbook ... 1997*, vol. II (Part Two), p. 56, para. 157.

[16] Sweden, on behalf of the Nordic countries (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 16th meeting (A/C.6/61/SR.16), para. 44); Austria (*ibid.*, para. 48); Netherlands (*ibid.*, para. 57); Portugal (*ibid.*, para. 83); Japan (*ibid.*, para. 87); Chile (19th meeting (A/C.6/61/SR.19), para. 6); New Zealand (*ibid.*, para. 11). See, however, United Kingdom (16th meeting (A/C.6/61/SR.16), para. 91).

reservations to human rights treaties was not desirable.[17] Other delegations wished the preliminary conclusions to be reviewed by the Commission, particularly with respect to the role, functions and powers of the monitoring bodies. In the view of some delegations, views consistently expressed by those bodies regarding the validity of a certain category of reservations could become authoritative.[18]

11. On the whole, the work of the Special Rapporteur was favourably received.[19] However, in one view the work of the Commission and its Special Rapporteur was too far advanced in relation to the actual practice followed by States, and could lead to amendment of the 1969 and 1986 Vienna Conventions.[20]

12. A number of delegations felt that the question of reservations incompatible with the object and purpose of a treaty was the most important aspect of the topic.[21] Nevertheless, it was maintained that the proposed definition, which was too loose, would hardly contribute to clarifying the definition of that concept.[22] According to another view, definition of the object and purpose of a treaty was necessary,[23] but must be sufficiently broad that it could be applicable on a case-by-case basis in accordance with the rules of treaty interpretation.[24] Few delegations commented on guidelines 3.1.7 to 3.1.13 designed to provide more specific examples of reservations incompatible with the object and purpose of a treaty.[25]

13. Regarding the guidelines on competence to assess the validity of reservations, some delegations pointed out that, although their overall approach was commendable,[26] they lacked consistency.[27] It was recalled that the competence of monitoring bodies could stem only from the functions assigned to them in the treaty that itself established them.[28] Some States expressed doubts as to the competence of monitoring bodies in that respect, and asserted that it was not their task to assess the validity of reservations.[29] In one view, only the States parties concerned possessed such competence.[30] Greater caution was also urged with regard to the functions of the depositary and its role with respect to manifestly invalid reservations,[31] particularly because of the vagueness of the concept of object and purpose of a treaty.

14. With regard to the consequences of the non-validity of a reservation, it was said that this was an issue central to the study.[32] According to some delegations, such reservations must be regarded as null and void,[33] but the view was expressed that the specific consequences of that nullity should be specified.[34] Doubts were expressed regarding the desirability of guideline 3.3.4 regarding the unanimous acceptance of an invalid reservation.[35]

B. Eleventh and twelfth reports on reservations to treaties and the outcome

1. Consideration of the eleventh and twelfth reports by the Commission

15. The eleventh report on reservations to treaties had been submitted at the fifty-eighth session, in 2006, but the Commission decided to consider it at its fifty-ninth session, owing to a lack of time.[36] Therefore in 2007, the Commission had before it the eleventh report on reservations to treaties, which in fact constitutes the second part of the eleventh report, from which it carries on.

16. The majority of the guidelines relating to the formulation of objections and the withdrawal and modification of objections proposed in the eleventh report were approved without objection by the Commission.[37]

17. However, there were major divergences of views among members of the Commission as to the author of an objection (guideline 2.6.5), including as to whether any State or international organization that was entitled to become a party to the treaty might also formulate an objection to a reservation. The view was expressed that

[17] Sweden, on behalf of the Nordic countries (*ibid.*, para. 46); Belgium (*ibid.*, para. 69); Romania (19th meeting (A/C.6/61/SR.19), para. 61).

[18] Netherlands (*ibid.*, 16th meeting (A/C.6/61/SR.16), para. 57). See, however, Canada (*ibid.*, para. 58).

[19] Japan (*ibid.*, para. 86); Germany (*ibid.*, para. 88); Russian Federation (18th meeting (A/C.6/61/SR.18), para. 72); New Zealand (19th meeting (A/C.6/61/SR.19), para. 11).

[20] Portugal (*ibid.*, 16th meeting (A/C.6/61/SR.16), paras. 76 and 78).

[21] Sweden, on behalf of the Nordic countries (*ibid.*, para. 42).

[22] Sweden, on behalf of the Nordic countries (*ibid.*); Netherlands (*ibid.*, para. 55); United Kingdom (*ibid.*, para. 92); Israel (17th meeting (A/C.6/61/SR.17), para. 16).

[23] Spain (*ibid.*, 16th meeting (A/C.6/61/SR.16), para. 73).

[24] Mexico (*ibid.*, para. 47).

[25] See, for example,United Kingdom (*ibid.*, para. 92).

[26] Spain (*ibid.*, para. 74); Romania (19th meeting (A/C.6/61/SR.19), para. 61).

[27] Austria (*ibid.*, 16th meeting (A/C.6/61/SR.16), paras. 51–53); Spain (*ibid.*, para. 74); Israel (17th meeting (A/C.6/61/SR.17), para. 20).

[28] France (*ibid.*, para. 2); United States of America (*ibid.*, para. 8); Israel (*ibid.*, paras. 17–19). Although the Special Rapporteur does not wish to start an argument with the States which held this view, he does wish to state as clearly as possible that they are implicitly attributing to him intentions he did not have and that he never claimed that the competence of those bodies with respect to reservations could be based on a legal foundation other than the treaty establishing them (see tenth report on reservations to treaties, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, pp. 181–182, paras. 169–171; second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, pp. 75 and 79, paras. 209 and 234 respectively; and *Yearbook ... 2006*, vol. II (Part Two), pp. 134–135, para. 111).

[29] China (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 16th meeting (A/C.6/61/SR.16), para. 63). See also Russian Federation (18th meeting (A/C.6/61/SR.18), para. 73) or Australia (19th meeting (A/C.6/61/SR.19), para. 17).

[30] Ethiopia (*ibid.*, 14th meeting (A/C.6/61/SR.14), para. 94).

[31] Ethiopia (*ibid.*); Canada (16th meeting (A/C.6/61/SR.16), para. 60); Spain (*ibid.*, para. 72); United Kingdom (*ibid.*, para. 93); South Africa (*ibid.*, para. 96); France (17th meeting (A/C.6/61/SR.17), para. 1); Poland (*ibid.*, para. 13); Russian Federation (18th meeting (A/C.6/61/SR.18), para. 72); Australia (19th meeting (A/C.6/61/SR.19), para. 17). See also China (16th meeting (A/C.6/61/SR.16), para. 64).

[32] France (*ibid.*, 17th meeting (A/C.6/61/SR.17), para. 5).

[33] Sweden, on behalf of the Nordic countries (*ibid.*, 16th meeting (A/C.6/61/SR.16), para. 43); Austria (*ibid.*, para. 51); France (17th meeting (A/C.6/61/SR.17), para. 7). See, however, China (16th meeting (A/C.6/61/SR.16), paras. 65–67).

[34] Canada (*ibid.*, para. 59).

[35] Portugal (*ibid.*, para. 79) and Austria (*ibid.*, para. 54).

[36] *Yearbook ... 2007*, vol. II (Part Two), pp. 15–16, para. 43.

[37] *Ibid.*, p. 22, paras. 102–105.

such States and international organizations did not have the same rights as contracting States and contracting international organizations and might therefore not formulate objections in the strict sense of the term. Therefore, the statements formulated by States and international organizations which were only entitled to become parties to the treaty, should not be referred to as objections. According to that view, to provide for such a possibility would create a practical problem for, where an open treaty was concerned, the parties thereto might not have been aware of some objections.

18. However, according to the majority opinion, the provisions of article 20, paragraphs 4 (*b*) and 5, of the 1969 and 1986 Vienna Conventions not only in no way excluded, but indeed implied, the entitlement of States and international organizations that were entitled to become parties to the treaty to formulate objections. Article 21, paragraph 3, of the Vienna Conventions on the effects of objections on the application of the treaty in cases where the author of the objection had not opposed the entry into force of the treaty between itself and the reserving State provided for no limitation on the potential authors of an objection. Furthermore, as article 23, paragraph 1, of the 1986 Convention clearly states, reservations, express acceptances of and objections to reservations must be communicated not only to the contracting States and contracting organizations but also to "other States and international organizations entitled to become parties to the treaty". Such notification had meaning only if those other States and other international organizations could, in fact, react to the reservation by way of an express acceptance or an objection. In the opinion of the Commission, that approach alone was consistent with the letter and spirit of guideline 2.6.1, which defined objections to reservations not on the basis of their legal effects but according to the effects *intended* by the objecting States or international organizations.

19. Concerns were also expressed as to whether preemptive or late objections could be formulated (guidelines 2.6.14 and 2.6.15). The view was expressed that such objections did not have the effects of an objection *per se*. Therefore, such phenomena, which did occur in State practice, should be referred to differently.

20. The guidelines on procedure did not raise any concerns and were widely endorsed by members of the Commission.[38] In particular, the introduction of a guideline on the statement of reasons for objections and the suggestion by the Special Rapporteur that a similar draft guideline should be proposed on the reasons for reservations[39] were welcomed.

21. Few concerns were raised with respect to the guidelines concerning acceptance of reservations. Such concerns were often of an editorial nature or related to the translation of the guidelines into languages other than French.[40]

22. The Commission decided to refer guidelines 2.6.3 to 2.6.6, 2.6.7 to 2.6.15, 2.7.1 to 2.7.9, 2.8 and 2.8.1 to 2.8.12 to the Drafting Committee, and to review the wording of guideline 2.1.6.[41]

23. The Commission also adopted nine guidelines[42] that had been referred to the Drafting Committee in 2006[43] together with commentaries thereto.[44]

24. Pursuant to General Assembly resolution 61/34 of 4 December 2006, the Commission convened a meeting with representatives of United Nations human rights treaty bodies. The meeting took place on 15 and 16 May 2007. The following bodies were represented: the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee against Torture; the Committee on the Rights of the Child; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee on Migrant Workers; the Council of Europe (European Court of Human Rights and the Committee of Legal Advisers on Public International Law (CAHDI)); and the Subcommission on the Promotion and Protection of Human Rights. The meeting provided an opportunity for a fruitful exchange of views that was welcomed by all participants.[45] There was consensus among representatives of human rights treaty bodies and some members of the Commission on the lack of a special regime applicable to reservations to human rights treaties which, like all other treaties, continued to be governed by the 1969 and 1986 Vienna Conventions and by individual norms and rules provided for under a particular treaty. However, there might arise under human rights treaties specific issues calling for specific solutions, such as whether treaty monitoring bodies had the power to rule on reservations formulated by States parties.

2. Consideration of chapter IV of the 2007 report of the Commission by the Sixth Committee

25. Chapter IV of the Commission's report on the work of its fifty-ninth session[46] deals with the topic of reservations to treaties. As is customary, a very brief summary is given in chapter II[47] and "specific issues on which comments would be of particular interest to the Commission" are set out in chapter III. In 2007, the Commission posed the following four questions on the invalidity of reservations and the effects thereof:

---

[38] *Ibid.*

[39] See note by the Special Rapporteur on draft guideline 2.1.9, "Statement of reasons for reservations", *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/586.

[40] *Yearbook ... 2007*, vol. II (Part Two), p. 25, para. 141.

[41] *Ibid.*, p. 16, para. 45.

[42] Guidelines 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty), 3.1.6 (Determination of the object and purpose of the treaty), 3.1.7 (Vague or general reservations), 3.1.8 (Reservations to a provision reflecting a customary norm), 3.1.9 (Reservations contrary to a rule of *jus cogens*), 3.1.10 (Reservations to provisions relating to non-derogable rights), 3.1.11 (Reservations relating to internal law), 3.1.12 (Reservations to general human rights treaties) and 3.1.13 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty).

[43] See paragraph 7 above.

[44] *Yearbook ... 2007*, vol. II (Part Two), pp. 33 *et seq.*, para. 154.

[45] For a more detailed account of this meeting, see the annex to the present report.

[46] *Yearbook ... 2007*, vol. II (Part Two), pp. 15–55, paras. 34–154.

[47] *Ibid.*, p. 11, para. 13.

"(*a*) What conclusions do States draw if a reservation is found to be invalid for any of the reasons listed in article 19 of the 1969 and 1986 Vienna Conventions? Do they consider that the State formulating the reservation is still bound by the treaty without being able to enjoy the benefit of the reservation? Or, conversely, do they believe that the acceptance of the reserving State is flawed and that that State cannot be considered to be bound by the treaty? Or do they favour a compromise solution and, if so, what is it?

"(*b*) Are the replies to the preceding questions based on a position of principle or are they based on practical considerations? Do they (or should they) vary according to whether the State has or has not formulated an objection to the reservation in question?

"(*c*) Do the replies to the above two sets of questions vary (or should they vary) according to the type of treaty concerned (bilateral or normative, human rights, environmental protection, codification, etc.)?

"(*d*) More specifically, State practice offers examples of objections that are intended to produce effects different from those provided for in article 21, paragraph 3 (objection with minimum effect), or article 20, paragraph 4 (*b*) (maximum effect), of the Vienna Conventions, either because the objecting State wishes to exclude from its treaty relations with the reserving State provisions that are not related to the reservation (intermediate effect), or because it wishes to render the reservation ineffective and considers the reserving State to be bound by the treaty as a whole and that the reservation thus has no effect ("super-maximum" effect). The Commission would welcome the views of States regarding these practices (irrespective of their own practice)."[48]

26. Some States replied in writing to these questions[49] while others responded to them in greater[50] or less[51] detail during the debates of the Sixth Committee.

27. Delegations reiterated their support for the work of the Commission and for its Special Rapporteur[52] although some expressed concern that the guidelines and the commentaries thereto[53] were too complex.

28. The difficulty of defining the object and purpose of a treaty was stressed once again.[54] Some States generally endorsed the Commission's approach, as reflected in guidelines 3.1.5 and 3.1.6[55] and in the guidelines intended to provide examples of the types of reservations that were incompatible with the object and purpose of the treaty,[56] despite some of the criticisms and suggestions made.[57]

29. The guidelines on objections and the formulation of objections were welcomed by the delegations which spoke on that issue. It was also stated that, while a State might raise an objection for any reason whatsoever,[58] such reason must be in conformity with international law.[59]

30. Concerning guideline 2.6.5 (Author of an objection), several delegations were of the view that the phrase "any State and any international organization that is entitled to become a party to the treaty" referred to signatory States and international organizations, since a State or international organization that had no intention of becoming a party to a treaty should not have the right to object to a reservation made by a State party.[60] It was also argued that such objections should be subsequently confirmed because of the considerable time which would have elapsed between when the objection was formulated and when the author of the objection expressed its consent to be bound by the treaty.[61]

31. The guidelines on the formulation of reservations were endorsed.[62] It was pointed out, however, that the provision for written form should also take account of modern means of communication.[63] Guideline 3.1.10 recommending that reservations should be justified[64] was also endorsed. Support was also expressed for the suggestion that a similar guideline should be elaborated for reservations, since a statement of reasons for reservations and objections to reservations promoted dialogue between the parties directly concerned.[65] However, some delegations found pre-emptive objections unacceptable.[66]

---

[48] *Ibid.*, p. 13, para. 23.

[49] The Czech Republic, Mauritius and South Africa.

[50] Germany (*Official Records of the General Assembly, Sixty-second Session, Sixth Committee*, 19th meeting (A/C.6/62/SR.19), paras. 21–27); Sweden, on behalf of the Nordic countries (22nd meeting (A/C.6/62/SR.22), paras. 27–30); France (23rd meeting (A/C.6/62/SR.23), paras. 64–67); Romania (24th meeting (A/C.6/62/SR.24), paras. 16 and 17); Japan (*ibid.*, paras. 88–90); Belgium (25th meeting (A/C.6/62/SR.25), paras. 20–22); Greece (*ibid.*, paras. 28 and 29).

[51] India (*ibid.*, 22nd meeting (A/C.6/62/SR.22), para. 37); Austria (*ibid.*, para. 50); Egypt (*ibid.*, para. 66); Hungary (23rd meeting (A/C.6/62/SR.23), para. 38); Belarus (*ibid.*, para. 43).

[52] Canada (*ibid.*, 19th meeting (A/C.6/62/SR.19), para. 53); Sweden, on behalf of the Nordic countries (*ibid.*, 22nd meeting (A/C.6/62/SR.22), para. 27); India (*ibid.*, para. 37); Germany (*ibid.*, paras. 78 and 79); Hungary (23rd meeting (A/C.6/62/SR.23), para. 37); Czech Republic (*ibid.*, para. 52); Cuba (*ibid.*, para. 72); New Zealand (25th meeting (A/C.6/62/SR.25), para. 11).

[53] Italy (*ibid.*, 22nd meeting (A/C.6/62/SR.22), para. 85); Hungary (23rd meeting (A/C.6/62/SR.23), para. 37); Poland (26th meeting (A/C.6/62/SR.26), para. 17).

[54] Austria (*ibid.*, 22nd meeting (A/C.6/62/SR.22), para. 40). See also United Kingdom (24th meeting (A/C.6/62/SR.24), para. 56) and New Zealand (25th meeting (A/C.6/62/SR.25), para. 11).

[55] Austria (*ibid.*, 22nd meeting (A/C.6/62/SR.22), paras. 40 and 41); Belarus (23rd meeting (A/C.6/62/SR.23), para. 46); Cuba (24th meeting (A/C.6/62/SR.24), para. 72); New Zealand (25th meeting (A/C.6/62/SR.25), para. 11); Slovakia (26th meeting (A/C.6/62/SR.26), para. 15). See, however, United States of America (22nd meeting (A/C.6/62/SR.22), para. 87); United Kingdom (24th meeting (A/C.6/62/SR.24), paras. 57–59); Republic of Korea (26th meeting (A/C.6/62/SR.26), para. 2).

[56] Italy (*ibid.*, 22nd meeting (A/C.6/62/SR.22), para. 86); Slovakia (26th meeting (A/C.6/62/SR.26), para. 16).

[57] Austria (*ibid.*, 22nd meeting (A/C.6/62/SR.22), paras. 40–42); China (*ibid.*, para. 60); Belarus (23rd meeting (A/C.6/62/SR.23), paras. 47–50); Australia (25th meeting (A/C.6/62/SR.25), para. 9).

[58] Argentina (*ibid.*, 22nd meeting (A/C.6/62/SR.22), para. 56); Malaysia (23rd meeting (A/C.6/62/SR.23), para. 1); Slovakia (26th meeting (A/C.6/62/SR.26), para. 13). See, however, Egypt (22nd meeting (A/C.6/62/SR.22), para. 66).

[59] Argentina (*ibid.* (A/C.6/62/SR.22), para. 56); China (*ibid.*, para. 60); Islamic Republic of Iran (25th meeting (A/C.6/62/SR.25), para. 41).

[60] Malaysia (*ibid.*, 23rd meeting (A/C.6/62/SR.23), para. 2); Canada (*ibid.*, para. 15); Russian Federation (24th meeting (A/C.6/62/SR.24), paras. 57 and 58); Portugal (*ibid.*, para. 101); Greece (25th meeting (A/C.6/62/SR.25), para. 31); Islamic Republic of Iran (*ibid.*, para. 42). See, however, Mexico (24th meeting (A/C.6/62/SR.24), para. 12).

[61] Malaysia (*ibid.*, 23rd meeting (A/C.6/62/SR.23), para. 2); Greece (25th meeting (A/C.6/62/SR.25), para. 12).

[62] Mexico (*ibid.*, 24th meeting (A/C.6/62/SR.24), para. 12).

[63] Belarus (*ibid.*, 23rd meeting (A/C.6/62/SR.23), para. 45).

[64] Argentina (*ibid.*, 22nd meeting (A/C.6/62/SR.22), para. 56); Czech Republic (23rd meeting (A/C.6/62/SR.23), para. 52); Democratic Republic of the Congo (24th meeting (A/C.6/62/SR.24), para. 26); Portugal (*ibid.*, para. 101). See also Mexico (*ibid.*, para. 14); New Zealand (25th meeting (A/C.6/62/SR.25), para. 13).

[65] Argentina (*ibid.*, 22nd meeting (A/C.6/62/SR.22), para. 56). For the action taken on this proposal, see paragraphs. 34 and 35 below.

[66] Malaysia (*ibid.*, 23rd meeting (A/C.6/62/SR.23), para. 4). See also Czech Republic (*ibid.*, para. 54); France (*ibid.*, para. 61); Portugal (24th meeting (A/C.6/62/SR.24), para. 101); Greece (25th meeting (A/C.6/62/SR.25), para. 31); Islamic Republic of Iran (*ibid.*, para. 43). For an opposing view, see Slovakia (26th meeting (A/C.6/62/SR.26), para. 14).

32. The Commission's general approach to late objections (guideline 2.6.15) was endorsed,[67] although it was suggested that late objections could be equated with simple interpretative declarations.[68] It was suggested that the legal effects, if any, of late objections should be further clarified.[69]

33. Few comments were made on the guidelines on acceptance. In general, delegations expressed support for them. However, several delegations were of the view that the distinction between tacit acceptance and implicit acceptance was superfluous and should be deleted.[70] There was support for the view that acceptance was irreversible.[71]

C. Thirteenth report on reservations to treaties and the outcome

1. Consideration of the thirteenth report by the Commission

34. At its sixtieth session, in 2008, the Commission had before it the thirteenth report on reservations to treaties,[72] which was devoted entirely to the subject of interpretative declarations. The Commission also considered the note by the Special Rapporteur on the statement of reasons for reservations,[73] which had been submitted in 2007 but had not been discussed owing to lack of time.

35. The Special Rapporteur's proposal to include, in the Guide to Practice, a guideline on the statement of reasons for reservations was received positively by the members of the Commission. Guideline 2.1.9 was referred to the Drafting Committee, and later was provisionally adopted.

36. There was no major opposition to the Special Rapporteur's thirteenth report. The majority of Commission members approved the various categories of reactions to interpretative declarations and the terminology proposed by the Special Rapporteur.[74] The Commission also agreed that it would be useful to include, in the Guide to Practice, guidelines on the formulation of, reasons for and communication of responses to interpretative declarations.

37. Generally speaking, the most vexatious problem was that of silence as a response to an interpretative declaration, as addressed in guidelines 2.9.8[75] and 2.9.9.[76] While the majority of Commission members approved the language used in guideline 2.9.8, whereby silence is not to be interpreted as either approval of or opposition to an interpretative declaration, the wording of guideline 2.9.9, particularly paragraph 2, was challenged. In stating that "in certain specific circumstances", silence could be construed as consent to an interpretative declaration, the guideline is intended solely to allow greater flexibility in applying the principle of neutrality set out in guideline 2.9.8; nevertheless, a number of members expressed reservations regarding the validity of the expression "in certain specific circumstances", which they considered too general, and suggested providing specific examples of such circumstances.

38. With regard to guideline 2.9.10[77] on reactions to conditional interpretative declarations, members voiced doubts about the relevance of such a distinction, given that, according to a majority of Commission members, the legal regime of conditional interpretative declarations was indistinguishable from that of reservations.[78] Nevertheless, in line with the proposal of the Special Rapporteur—who shares that position *a priori*—it was decided that it would be premature to do away with the intermediate category of conditional interpretative declarations as the Commission had not yet considered the effects of such declarations.[79]

39. At its 2978th meeting, the Commission decided to refer all the guidelines proposed in the thirteenth report, that is, guidelines 2.9.1 (including the second paragraph of guideline 2.9.3) to 2.9.10, to the Drafting Committee, while emphasizing that guideline 2.9.10 was without prejudice to the subsequent retention or otherwise of the guidelines on conditional interpretative declarations.

40. The Commission also provisionally adopted 23 guidelines and the commentaries thereto.[80] In addition, it

---

[67] Mexico (*ibid.*, 24th meeting (A/C.6/62/SR.24), para. 15).

[68] Czech Republic (*ibid.*, 23rd meeting (A/C.6/62/SR.23), para. 53).

[69] France (*ibid.*, para. 61); Portugal (24th meeting (A/C.6/62/SR.24), para. 101); Australia (25th meeting (A/C.6/62/SR.25), para. 9).

[70] Argentina (*ibid.*, 22nd meeting (A/C.6/62/SR.22), para. 56); France (23rd meeting (A/C.6/62/SR.23), para. 62).

[71] Argentina (*ibid.*, 22nd meeting (A/C.6/62/SR.22), para. 56); El Salvador (23rd meeting (A/C.6/62/SR.23), para. 33).

[72] *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600.

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

[74] *Yearbook ... 2008*, vol. II (Part Two), para. 94.

[75] Guideline 2.9.8 reads as follows:

"**2.9.8** *Non-presumption of approval or opposition*

"Neither approval of nor opposition to an interpretative declaration shall be presumed."

[76] Guideline 2.9.9 reads as follows:

"**2.9.9** *Silence in response to an interpretative declaration*

"Consent to an interpretative declaration shall not be inferred from the mere silence of a State or an international organization in response to an interpretative declaration formulated by another State or another international organization in respect of a treaty."

"In certain specific circumstances, however, a State or an international organization may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be."

[77] Guideline 2.9.10 reads as follows:

"**2.9.10** *Reactions to conditional interpretative declarations*

"Guidelines 2.6 to 2.8.12 shall apply to reactions of States and international organizations to conditional interpretative declarations."

[78] *Yearbook ... 2008*, vol. II (Part Two), para. 108.

[79] *Ibid.*, paras. 109–110.

[80] *Ibid.*, paras. 75, 76 and 78: guidelines 2.1.6 (Procedure for communication of reservations) (as amended), 2.1.9 (Statement of reasons [for reservations]), 2.6.5 (Author [of an objection]), 2.6.6 (Joint formulation [of objections to reservations]), 2.6.7 (Written form), 2.6.8 (Expression of intention to preclude the entry into force of the treaty), 2.6.9 (Procedure for the formulation of objections), 2.6.10 (Statement of reasons), 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation), 2.6.12 (Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty), 2.6.13 (Time period for formulating an objection), 2.6.14 (Conditional objections), 2.6.15 (Late objections), 2.7.1 (Withdrawal of objections to reservations), 2.7.2 (Form of withdrawal of objections to reservations), 2.7.3 (Formulation and communication of the withdrawal of objections to reservations), 2.7.4 (Effect on reservation of withdrawal of an objection), 2.7.5 (Effective date of withdrawal of an objection), 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation), 2.7.7 (Partial withdrawal of an objection), 2.7.8 (Effect of a partial withdrawal of an objection), 2.7.9 (Widening of the scope of an objection to a reservation) and 2.8 (Forms of acceptance of reservations).

took note of guidelines 2.8.1 to 2.8.12 as provisionally adopted by the Drafting Committee.[81]

2. Consideration of chapter VI of the 2008 report of the Commission by the Sixth Committee

41. Chapter VI of the Commission's report on the work of its sixtieth session[82] deals with reservations to treaties. As usual, a very brief summary is provided in chapter II[83] and the "specific issues on which comments would be of particular interest to the Commission" are dealt with in chapter III. The Commission asked several questions regarding the role of silence as a reaction to an interpretative declaration[84] as well as the potential effects of interpretative declarations.[85] The Secretariat has received written responses to the questions from Germany and Portugal.

42. Regarding the role of silence, the views expressed by the Sixth Committee supported the general approach of the Special Rapporteur appointed by the Commission. Several delegations argued that mere silence could not be considered as either approval of or opposition to an interpretative declaration and that, in theory, the consent of a State or international organization to an interpretative declaration should not be presumed.[86] The argument that silence can, in certain specific circumstances, be interpreted as consent was also approved.[87] Therefore, although it would seem that the principle has been accepted, the specific circumstances in which mere silence may be interpreted as acquiescence or consent have yet to be determined. Some members contended that it was not possible to identify in the abstract those situations in which the silence of a State or international organization constituted acquiescence or consent to an interpretative declaration. Because an enumeration of such situations would be difficult and possibly futile, the circumstances of a State's reaction of silence should be examined on a case-by-case basis.[88] Another view was that the legal consequences of such silence should be assessed in the light of article 31, paragraph 3 (*a*), of the Vienna Convention; consequently, the general rules for entering into an agreement were sufficient to resolve the issue.[89] It was also agreed that silence had a legal effect in cases where a protest against the interpretation given in an interpretative declaration would be expected from the State or international organization directly concerned. The arbitral award in the *North Atlantic Coast Fisheries Case (Great Britain, United States)*[90] was cited as an example. It was further argued that silence on the part of a Contracting Party must be considered to play a role in the event of a dispute between that party and the author of the interpretative declaration.[91] Likewise, one delegation maintained that consent could be inferred from silence in the case of treaties the subject matter of which would require a prompt reaction to any interpretative declaration.[92]

43. The second question, which dealt with the legal effects of an interpretative declaration on its author and on a State or an international organization having approved or objected to the declaration, produced a wide range of reactions and positions. It was generally stressed that a distinction must be drawn between the legal effect of interpretative declarations and that of reservations, and that that distinction should be borne in mind when considering the question of reactions to declarations and to reservations and their respective effects.[93] It was stated that the general rules governing the interpretation of treaties were sufficient to establish the effects of an interpretative declaration and the reactions it might prompt. According to the same view, a reference to those customary rules could resolve the issue within the framework of the Guide to Practice[94] without prejudice to the flexibility of those rules or to the essential role played by the intention of the parties. Some delegations specifically referred to article 31, paragraph 3 (*a*), of the 1969 Vienna Convention.[95] According to another point of view, the consequences of an interpretative declaration should be considered in the light of the principle of estoppel.[96] Thus, the author of an interpretative declaration was bound by the interpretation expressed only if another Contracting Party came to rely on the declaration.[97] It was also suggested that interpretative declarations could act as an aid to interpretation.[98] As far as reactions of opposition were concerned, it was stressed that, although they could limit the potential legal consequences of interpretative declarations, they could not in any way exclude application of the provision in question in the relationship between the author of the declaration and the party having expressed opposition.[99]

---

[81] *Ibid.*, para. 77.

[82] *Ibid.*, paras. 67–124.

[83] *Ibid.*, paras. 16–18.

[84] *Ibid.*, para. 26.

[85] *Ibid.*, paras. 27–28.

[86] France (*Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 19th meeting (A/C.6/63/SR.19), para. 19); Belarus (*ibid.*, para. 51); Argentina (*ibid.*, para. 74); Netherlands (20th meeting (A/C.6/63/SR.20), para. 9); Portugal (*ibid.*, para. 21); New Zealand (22nd meeting (A/C.6/63/SR.22), para. 7); Japan (23rd meeting (A/C.6/63/SR.23), para. 45); Greece (24th meeting (A/C.6/63/SR.24), para. 2).

[87] Argentina (*ibid.*, 19th meeting (A/C.6/63/SR.19), para. 74); Qatar (24th meeting (A/C.6/63/SR.24), para. 77). See, however, China (19th meeting (A/C.6/63/SR.19), para. 67); Netherlands (20th meeting (A/C.6/63/SR.20), para. 9); Sweden, on behalf of the Nordic countries (19th meeting (A/C.6/63/SR.19), para. 40); United Kingdom (21st meeting (A/C.6/63/SR.21), para. 18).

[88] Spain (*ibid.*, 22nd meeting (A/C.6/63/SR.22), para. 4). See, however, New Zealand (*ibid.*, para. 7); Japan (23rd meeting (A/C.6/63/SR.23), para. 45).

[89] Sweden (*ibid.*, 19th meeting (A/C.6/63/SR.19), para. 39); Germany (*ibid.*, para. 80).

[90] Arbitral award of 7 September 1910, UNRIAA, vol. XI, pp. 173–226.

[91] France (*Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 19th meeting (A/C.6/63/SR.19), para. 19).

[92] Romania (*ibid.*, 21st meeting (A/C.6/63/SR.21), para. 55).

[93] France (*ibid.*, 19th meeting (A/C.6/63/SR.19), para. 18); Romania (*ibid.*, 21st meeting (A/C.6/63/SR.21), para. 54).

[94] Austria (*ibid.*, 18th meeting (A/C.6/63/SR.18), para. 79); France (*ibid.*, 19th meeting (A/C.6/63/SR.19), para. 20); Belarus (*ibid.*, para. 49); Belgium (*ibid.*, 21st meeting (A/C.6/63/SR.21), para. 46); Greece (*ibid.*, 24th meeting (A/C.6/63/SR.24), para. 1).

[95] Sweden, on behalf of the Nordic countries (*ibid.*, 19th meeting (A/C.6/63/SR.19), para. 39); Germany (*ibid.*, paras. 81 and 83).

[96] Belarus (*ibid.*, para. 52); Germany (*ibid.*, para. 81).

[97] Austria (*ibid.*, 18th meeting (A/C.6/63/SR.18), para. 79); Germany (*ibid.*, 19th meeting (A/C.6/63/SR.19), para. 81).

[98] United Kingdom (*ibid.*, 21st meeting (A/C.6/63/SR.21), para. 19).

[99] Germany (*ibid.*, 19th meeting (A/C.6/63/SR.19), para. 82).

44. Aside from the suggestions and criticisms made with regard to the wording of the guidelines already approved by the Commission that the Special Rapporteur and the Commission would consider during their second reading, it was suggested more generally that the subject of reactions to interpretative declarations was not sufficiently ripe for codification and that, therefore, drafting guidelines in that respect would go beyond the mandate of the Commission.[100] Other delegations, however, expressed support for the inclusion of such guidelines in the Guide to Practice.[101]

45. Several delegations expressed reservations about the concept of "reclassification", which they believed did not reflect reality. According to that view, it was pointless to change the classification of a declaration, since it could be assessed objectively according to criteria already agreed by the Commission.[102] Other delegations expressed support for the guideline presented by the Special Rapporteur.[103]

46. Other reservations were expressed with regard to the issue of "conditional interpretative declarations" and the separate treatment given to them in the study. Like the majority of Commission members,[104] several delegations argued that there was no reason to distinguish such declarations from reservations, since they obeyed the same rules.[105] According to another view, the pure and simple assimilation of conditional interpretative declarations with reservations nevertheless remained premature as long as the specific legal effects of those declarations had not been analysed by the Commission.[106]

D. Recent developments with regard to reservations and interpretative declarations

47. On 3 February 2009, ICJ rendered a unanimous judgment in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. In that dispute, Romania invoked paragraph 3 of its interpretative declaration made upon signature and confirmed upon ratification of the United Nations Convention on the Law of the Sea of 1982. That declaration concerns article 121 of the Convention and reads as follows:

> 1. As a geographically disadvantaged country bordering a sea poor in living resources, Romania reaffirms the necessity to develop international cooperation for the exploitation of the living resources of the economic zones, on the basis of just and equitable agreements that should ensure the access of the countries from this category to the fishing resources in the economic zones of other regions or subregions.
>
> 2. The Socialist Republic of Romania reaffirms the right of coastal States to adopt measures to safeguard their security interests, including the right to adopt national laws and regulations relating to the passage of foreign warships through their territorial sea.
>
> The right to adopt such measures is in full conformity with articles 19 and 25 of the Convention, as it is also specified in the Statement by the President of the United Nations Conference on the Law of the Sea in the plenary meeting of the Conference on April 26, 1982.
>
> 3. The Socialist Republic of Romania states that according to the requirements of equity—as it results from articles 74 and 83 of the Convention on the Law of the Sea—the uninhabited islands and without economic life can in no way affect the delimitation of the maritime spaces belonging to the main land coasts of the coastal States.[107]

48. According to Romania, Ukraine accepted the applicability of article 121, paragraph 3, of the Montego Bay Convention in the delimitation of the continental shelf and exclusive economic zones, as interpreted by Romania when signing and ratifying it, and therefore Serpents' Island, which lies off the coasts of Romania and Ukraine, could not affect the delimitation between the two States.[108]

49. For its part, Ukraine stated, invoking the Commission's work on interpretative declarations, that its silence could not amount to consent to Romania's declaration because there is no obligation to respond to such a declaration.[109]

50. The Court seems to have admitted that point of view:

> Regarding Romania's declaration, quoted in paragraph 35 above, the Court observes that under Article 310 of UNCLOS, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of UNCLOS in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of UNCLOS as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation.[110]

51. The concrete implications of that judgment will be discussed in the study of the effects of an interpretative declaration and the responses to which it might give rise.

52. For their part, the bodies created within the United Nations or by international human rights conventions have continued to develop and harmonize their approaches to this issue at inter-committee meetings. Those meetings provide a forum for the bodies to exchange their views on the subject of their experiences in reservations. Their respective practices in the field were presented and discussed at the meeting between the Commission and the representatives of human rights

---

[100] United States of America (*ibid.*, 21st meeting (A/C.6/63/SR.21), paras. 4–6); United Kingdom (*ibid.*, para. 16). See also Islamic Republic of Iran (*ibid.*, 24th meeting (A/C.6/63/SR.24), para. 32).

[101] France (*ibid.*, 19th meeting (A/C.6/63/SR.19), para. 18); Sweden, on behalf of the Nordic countries (*ibid.*, para. 35); Spain (*ibid.*, 22nd meeting (A/C.6/63/SR.22), para. 2); Greece (*ibid.*, 24th meeting (A/C.6/63/SR.24), para. 1). See, however, Poland (*ibid.*, 21st meeting (A/C.6/63/SR.21), para. 31).

[102] Austria (*ibid.*, 18th meeting (A/C.6/63/SR.18), para. 80); Sweden, on behalf of the Nordic countries (*ibid.*, 19th meeting (A/C.6/63/SR.19), para. 36). See also Portugal (*ibid.*, 20th meeting (A/C.6/63/SR.20), para. 19); Greece (*ibid.*, 24th meeting (A/C.6/63/SR.24), para. 3). For another critical view on "reclassifications", see Republic of Korea (*ibid.*, 19th meeting (A/C.6/63/SR.19), para. 62).

[103] Mexico (*ibid.*, 20th meeting (A/C.6/63/SR.20), para. 4); Romania (*ibid.*, 21st meeting (A/C.6/63/SR.21), para. 54).

[104] See paragraph 38 above.

[105] Belarus (*Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 19th meeting (A/C.6/63/SR.19), paras. 49 and 50); Republic of Korea (*ibid.*, para. 62); Estonia (*ibid.*, para. 88); Netherlands (*ibid.*, 20th meeting (A/C.6/63/SR.20), para. 8); Spain (*ibid.*, 22nd meeting (A/C.6/63/SR.22), para. 2).

[106] Portugal (*ibid.*, 20th meeting (A/C.6/63/SR.20), para. 22).

[107] United Nations, *Treaty Series*, vol. 1835, No. 31363, pp. 88–89.

[108] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 76, para. 35; CR 2008/18, 2 September 2008, paras. 39–41 (M. Aurescu); CR 2008/20, 4 September 2008, paras. 73–79 (M. Lowe).

[109] *Ibid.*, p. 77, para. 39. See also CR 2008/29, 12 September 2008, paras. 63–68 (Mme Malintoppi).

[110] *Ibid.*, p. 78, para. 42.

bodies, held in May 2007 pursuant to General Assembly resolution 61/34 of 4 December 2006.[111] At the meeting, the practice of human rights bodies was said to be relatively uniform and characterized by a high level of pragmatism.[112]

53. At the December 2006 meeting of the Working Group on Reservations to examine the report on the practice of human rights treaty bodies with respect to reservations to international human rights treaties and report on its work to the inter-committee meeting, the recommendations adopted in June[113] were modified. The sixth inter-committee meeting welcomed the report of the working group on reservations[114] and accepted the recommendations thus modified:[115]

1. The working group welcomes the report on the practice of human rights treaty bodies with respect to reservations to international human rights treaties (HRI/MC/2005/5) and its updated version (HRI/MC/2005/5/Add.1) which the secretariat had compiled for the fourth inter-committee meeting.

2. The working group recommends that while any statement made at the time of ratification may be considered as a reservation, however it was termed, particular care should be exercised before concluding that the statement should be considered as a reservation, when the State party has not used that term.

3. The working group recognizes that, despite the specific nature of the human rights treaties which do not constitute a simple exchange of obligations between States but are the legal expression of the essential rights that each individual must be able to exercise as a human being, general treaty law remains applicable to human rights instruments; however, that law can only be applied taking fully into account their specific nature, including their content and monitoring mechanisms.

4. The working group considers that when reservations are permitted, whether explicitly or implicitly, they can contribute to the attainment of the objective of universal ratification. Reservations which are not permitted, including those that are incompatible with the object and purpose of the treaty, do not contribute to attainment of the objective of universal ratification.

5. The working group considers that for the purpose of discharging their functions, treaty bodies are competent to assess the validity of reservations and, in the event, the implications of a finding of invalidity of a reservation, particularly in the examination of individual communications or in exercising other fact-finding functions in the case of treaty bodies that have such competence.

6. The working group considers that the identification of criteria for determining the validity of reservations in the light of the object and purpose of a treaty may be useful not only for States when they are considering making reservations, but also for treaty bodies in the performance of their functions. In this regard, the working group notes the potential significance of the criteria contained in the draft guidelines included in the tenth report of the Special Rapporteur of the International Law Commission on reservations to treaties (A/CN.4/558/Add.1). The working group appreciated its dialogue with the International Law Commission and welcomes the prospect of further dialogue.

7. As to the consequences of invalidity, the working group agrees with the proposal of the Special Rapporteur of the International Law Commission according to which an invalid reservation is to be considered null and void. It follows that a State will not be able to rely on such a reservation and, unless its contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation.

8. The working group welcomes the inclusion of a provision on reservations in the draft harmonized guidelines on reporting under the international human rights treaties, including the common core document and treaty-specific reports (HRI/MC/2006/3).

9. The working group recommends that:

(*a*) Treaty bodies should request in their lists of issues information, especially when it is provided neither in the common core document (where available), nor in the treaty-specific report, about:

(i) the nature and scope of reservations or interpretative declarations;

(ii) the reason why such reservations were considered to be necessary and have been maintained;

(iii) the precise effect of each reservation in terms of national law and policy;

(iv) any plans to limit the effect of reservations and ultimately withdraw them within a specific time frame.

(*b*) Treaty bodies should clarify to States parties their reasons for concern over particular reservations in light of the provisions of the treaty concerned and, as relevant, its object and purpose.

(*c*) Treaty bodies should in their concluding observations:

(i) welcome the withdrawal, whether total or partial, of a reservation;

(ii) acknowledge ongoing reviews of reservations or expressions of willingness to review;

(iii) express concern for the maintenance of reservations;

(iv) encourage the complete withdrawal of reservations, the review of the need for them or the progressive narrowing of scope through partial withdrawals of reservations.

(*d*) Treaty bodies should highlight the lack of consistency among reservations formulated to certain provisions protected in more than one treaty and encourage the withdrawal of a reservation on the basis of the availability of better protection in other international conventions resulting from the absence of a reservation to comparable provisions.

10. The working group recommends that the inter-committee meeting and the meeting of chairpersons decide whether another meeting of the working group should be convened taking into account the reactions and queries of treaty bodies on the recommendations of the working group, the outcome of the meeting with the International Law Commission and any further developments in the International Law Commission on the subject of reservations to treaties.[116]

54. The most remarkable change relates to paragraph 7, on the consequences the formulation of an invalid reservation has for the convention obligation of the author of the reservation. The previous text placed the emphasis on the intention of the State "at the time it enters its reservation", an intention which must be determined "during a serious examination of the available information, with the presumption, which may be refuted, that a State would prefer to remain a party to the treaty without the benefit of the reservation".[117] The new formulation of paragraph 7 places the emphasis solely on the presumption that the State entering an invalid reservation has the intention to remain bound by the treaty without the benefit of the reservation as long as its contrary intention has not been "incontrovertibly"

[111] See, in the annex to the present report, the account of the meeting prepared by the Special Rapporteur. See also paragraph 24 above.

[112] See paragraph 7 of the annex to the present report.

[113] HRI/MC/2006/5, para. 16; see also the eleventh report on reservations to treaties, *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 55.

[114] HRI/MC/2007/5 and Add.1.

[115] See the report of the nineteenth meeting of chairpersons of human rights treaty bodies, (A/62/224, annex, subpara. 48 (*v*)).

[116] HRI/MC/2007/5, para. 19.

[117] HRI/MC/2006/5, para. 16 (7).

established—which perhaps goes a little far (and in any case does not reflect the Special Rapporteur's position).

55. In the context of the universal periodic review mechanism, the Human Rights Council has raised the issue of reservations with States under review, and a number of them have been urged to withdraw their reservations to international human rights instruments.[118]

56. At the regional level, the Inter-American Court of Human Rights has again had to face the issue of reservations. In *Boyce et al. v. Barbados*, the Court had to rule on the effects of the respondent State's reservation to the American Convention on Human Rights. This reservation reads:

> In respect of 4(4), the criminal code of Barbados provides for death by hanging as a penalty for murder and treason. The Government is at present reviewing the whole matter of the death penalty which is only rarely inflicted but wishes to enter a reservation on this point in as much as treason in certain circumstances might be regarded as a political offence and falling within the terms of section 4(4).
>
> In respect of 4(5) while the youth or old age of an offender may be matters which the Privy Council, the highest Court of Appeal, might take into account in considering whether the sentence of death should be carried out, persons of 16 years and over or over 70 years of age may be executed under Barbadian law.[119]

57. Barbados maintained *inter alia* that its reservation to the Convention prevented the Court from ruling on the question of capital punishment, on the one hand, and the means of carrying it out, on the other.

58. Citing its advisory opinions of 1982 and 1983,[120] the Court recalled:

> Firstly, in interpreting reservations the Court must first and foremost rely on a strictly textual analysis. Secondly, due consideration must also be assigned to the object and purpose of the relevant treaty which, in the case of the American Convention, involves the "protection of the basic rights of individual human beings". In addition, the reservation must be interpreted in accordance with Article 29 of the Convention, which implies that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognized in the Convention to a greater extent than is provided for in the reservation itself.[121]

59. Having considered the reservation of Barbados from this standpoint, the Court concluded that:

> The text of the reservation does not explicitly state whether a sentence of death is mandatory for the crime of murder, nor does it address whether other possible methods of execution or sentences are available under Barbadian law for such a crime. Accordingly, the Court finds that a textual interpretation of the reservation entered by Barbados at the time of ratification of the American Convention clearly indicates that this reservation was not intended to exclude from the jurisdiction of this Court neither the mandatory nature of the death penalty nor the particular form of execution by hanging. Thus the State may not avail itself of this reservation to that effect.[122]

60. The Court emphasizes, moreover, that it "has previously considered that 'a State reserves no more than what is contained in the text of the reservation itself' ".[123] These findings relate to the interpretation of reservations, an issue hitherto neglected in the work of the Commission, and the effects of reservations; they are very useful, and should be taken into consideration when the Committee considers these issues.

61. The European Court of Human Rights, for its part, has also had occasion to rule on the extent of the effects of a valid reservation. In two cases against Finland, the Court referred to and considered the application of the reservation of Finland to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[124] The reservation reads as follows:

> For the time being, Finland cannot guarantee a right to an oral hearing insofar as the current Finnish laws do not provide such a right. This applies to:
>
> 1. Proceedings before the Supreme Court in accordance with Chapter 30, Section 20, of the Code of Judicial Procedure and proceedings before the Courts of Appeal as regards the consideration of petition, civil and criminal cases to which Chapter 26 (661/1978), Sections 7 and 8, of the Code of Judicial Procedure are applied if the decision of a District Court has been made before 1 May 1998, when the amendments made to the provisions concerning proceedings before Courts of Appeal entered into force;
>
> And the consideration of criminal cases before the Supreme Court and the Courts of Appeal if the case has been pending before a District Court at the time of entry into force of the Criminal Proceedings Act on 1 October 1997 and to which existing provisions have been applied by the District Court; ...
>
> 3. Proceedings, which are held before the Insurance Court as the Court of Final Instance, in accordance with Section 9 of the Insurance Court Act, if they concern an appeal which has become pending before the entry into force of the Act Amending the Insurance Court Act on 1 April 1999;
>
> 4. Proceedings before the Appellate Board for Social Insurance, in accordance with Section 8 of the Decree on the Appellate Board for Social Insurance, if they concern an appeal which has become pending before the entry into force of the Act Amending the Health Insurance Act on 1 April 1999.

62. According to the Court, the application of this reservation deprives the applicant of the right, otherwise guaranteed in the context of article 6 of the Convention, to be heard:

> In view of the above and having regard to the terms of Finland's reservation, Finland was under no Convention obligation to ensure in respect of the Court of Appeal that an oral hearing was held on count 9. While it is true that the effect of the reservation was to deny the applicant a right to an oral hearing as to the charge in dispute before the Court of Appeal, this result must be considered compatible with the Convention as a consequence of the operation of a valid reservation" (see *Helle v. Finland*, Judgment of 19 December 1996, *Reports 1997*, pp. 2925–2926, §§ 44 and 47).[125]

---

[118] HRI/MC/2008/5, para. 3. See the reports of the Working Group on the Universal Periodic Review, Bahrain (A/HRC/8/19, para. 6 (2)), Tunisia (A/HRC/8/21, para. 83 (3)), Morocco (A/HRC/8/22, para. 75 (3)), Indonesia (A/HRC/8/23, para. 76 (2)), United Kingdom (A/HRC/8/25, para. 56 (24) to (26)), India (A/HRC/8/26, para. 86 (9)), Algeria (A/HRC/8/29, para. 69 (10)) and Netherlands (A/HRC/8/31, para. 78 (10)).

[119] United Nations, *Treaty Series*, vol. 1298, (No. A-17955) p. 441.

[120] Advisory opinion OC-2/82, 24 September 1982, *Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Series A, No. 2*, para. 35; advisory opinion OC-3/83, 8 September 1983, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4)) American Convention on Human Rights, Series A, No. 3*, paras. 62–66.

[121] *Boyce et al. v. Barbados*, Series C, No. 169, para. 15 (footnotes omitted).

[122] *Ibid.*, para. 17.

[123] *Ibid.* See also advisory opinion OC–3/83 (footnote 120 above), para. 69.

[124] United Nations, *Treaty Series*, vol. 2158, No. A-2889, p. 140.

[125] Judgement of 12 April 2007, *Laaksonen v. Finland* (Application No. 70216/01), para. 24—the judgement is available only in English. See also judgement of 24 April 2007, *V. v. Finland* (Application No. 40412/98), para. 61.

63. Nevertheless—and on this point the decisions of the European Court of Human Rights are reminiscent of the decision of the Inter-American Court[126]—the application of the reservation does not release Finland from the obligation to respect the other guarantees associated with the right to a fair trial. As the reservation relates only to the issue of the right to an oral hearing before certain courts, Finland remains bound by its obligation to ensure a fair trial. The reservation of Finland could thus not exclude the applicability of article 6 as a whole, and the Court remains competent to rule on the obligations that are not covered by the reservations.[127]

64. In the context of the Council of Europe (in the Committee of Legal Advisers on Public International Law), the member States are continuing to consider and, where necessary, react collectively or at least in a concerted manner to invalid reservations, in conformity with Recommendation No. 12 (99) 13 on responses to inadmissible reservations to international treaties.[128] Since 2004, the European Observatory of Reservations to International Treaties has been considering from a more sectoral standpoint the reservations and declarations to the international treaties relating to the fight against terrorism. It is interesting to note in this respect that the list submitted periodically by the European Observatory to the Committee containing the reservations and declarations to international treaties that are likely to give rise to objections not only reproduces reservations formulated less than 12 months previously, the limit set by article 20, paragraph 5 of the 1969 and 1986 Vienna Conventions, but also draws the attention of member States to certain reservations formulated more than 12 months earlier.[129] This practice appears to suggest that the Observatory does not consider that these reservations whose validity it deems to be open to dispute can no longer be the subject of objections, and that a response, belated though it may be, remains not only possible but also desirable. This confirms that guideline 2.6.15 (late objections), adopted in 2008, probably meets a need.[130]

E. Plan of the fourteenth report on reservations[131]

65. Following a rapid presentation of certain additional points relating to the procedure with respect to the formulation of interpretative statements in accordance with the wishes of the Commission,[132] the present report will deal with the third and fourth parts of the Guide to Practice, that is to say with issues relating to the validity of reservations,[133] interpretative declarations and reactions to reservations and interpretative declarations, on the one hand, and the effects of reservations, acceptances of reservations, objections to reservations, interpretative declarations and the reactions to them, on the other hand. If possible, a fourth part will deal with the guidelines that might be adopted by the Commission on the basis of the valuable study drawn up by the Codification Division on "reservations in the context of the succession of States".

66. Furthermore, the Special Rapporteur has decided to propose to the Commission the addition of two annexes to the Guide to Practice. The first of these might consist of a recommendation relating to the "reservations dialogue", since, upon reflection, it seems difficult to incorporate provisions relating to this in the body of the Guide: it is more, however, a state of mind that is reflected in a desirable diplomatic practice than an exercise in codification, however flexible the latter may be. As for the second annex, it could deal with the implementation mechanism that might be incorporated in the Guide to Practice. These two draft annexes will be the subject of two separate parts of the present report.

[126] See paragraphs 56–60 above.

[127] Judgement of 12 April 2007, *Laaksonen v. Finland* (Application No. 70216/01), para. 25; judgement of 24 April 2007, *V. v. Finland* (application No. 40412/98), para. 61.

[128] See also the third report on reservations to treaties, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4.491 and Add.1–6, paras. 28–29; the eighth report, *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535, para. 23; and the eleventh report, *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 56.

[129] See, for example, the United States reservation to the United Nations Convention against Corruption, formulated in 2003, CAHDI (2008) 15, 7 October 2008, appendix VII, No. C.5.

[130] *Yearbook ... 2008*, vol. II (Part Two), para. 124.

[131] The Special Rapporteur wishes to express his most profound gratitude to Daniel Müller, doctoral student and researcher at the International Law Centre (CEDIN) of Université Paris Ouest, Nanterre-La Défense, for the decisive role he played in drafting the present report.

[132] See paragraph 36 above.

[133] One part of this problem has already been the subject of the tenth report on reservations (*Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2). A number of draft guidelines in the third part have already been provisionally adopted by the Commission (see paragraph 23 above).

Chapter I

Procedure for the formulation of interpretative declarations (*continuation and conclusion*)

67. At its sixtieth session, in 2008, the Commission asked the Special Rapporteur to prepare guidelines on the form, statement of reasons for and communication of interpretative declarations in order to fill a gap in the second part of the Guide to Practice.[134]

68. The Commission has already adopted a set of rules on the procedure for the formulation of interpretative declarations, contained in section 2.4 of the Guide to Practice. These guidelines concern the authorities competent to formulate an interpretative declaration (guideline 2.4.1[135]), formulation of an interpretative declaration at the internal level (guideline 2.4.2 [2.4.1 *bis*][136]), time

[134] *Yearbook ... 2008*, vol. II (Part Two), paras. 74 and 117; see also the position taken by the Special Rapporteur in his thirteenth report on reservations to treaties (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600), para. 46. See also paragraph 36 above.

[135] *Yearbook ... 2002*, vol. II (Part Two), p. 46.

[136] *Ibid.*, p. 47.

at which an interpretative declaration may be formulated (guideline 2.4.3[137]), non-requirement of confirmation of interpretative declarations made when signing a treaty (guideline 2.4.4 [2.4.5][138]), late formulation of an interpretative declaration (guideline 2.4.6 [2.4.7][139]) and modification of an interpretative declaration (guideline 2.4.9[140]). This section also includes other guidelines on conditional interpretative declarations.[141]

69. There is no guideline on the form of interpretative declarations, on their communication (contrary to what has been decided in the case of conditional interpretative declarations[142]) or on modification of interpretative declarations. This is not an oversight, but a deliberate decision on the Special Rapporteur's part.[143] As he explained in his sixth report:

> There seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally; it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations. By refraining from such communication, the author of the declaration runs the risk that the declaration may not have the intended effect, but this is a different problem altogether. It does not seem necessary, therefore, to include a clarification of this point in the Guide to Practice.[144]

70. There is no reason to reconsider this conclusion. There would be no justification for requiring a State or an international organization to follow a given procedure in giving its interpretation of a convention to which it is a party or a signatory or to which it intends to become a party. It would thus be incongruous to propose guidelines that made the formal validity of an interpretative declaration conditional upon respect for such a procedure.[145]

71. Nevertheless, while there is no legal obligation in that regard, it seems appropriate to ensure, to the extent possible, that interpretative declarations are publicized widely. Their influence will, in practice, depend to a great extent on their dissemination. Without discussing, at this stage, the legal implications of these declarations for the interpretation and application of the treaty in question, it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their *raison d'être* and the purpose for which they are formulated by States and international organizations. ICJ has highlighted the importance of these statements in practice:

> Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.[146]

72. Mr. Rosario Sapienza also underlined the importance of reactions to interpretative declarations, which:

> Will contribute usefully to the settlement [of a dispute]. Statements will be still more useful to the interpreter when there is no dispute, but only a problem of interpretation.[147]

73. In her study, *Einseitige Interpretationserklarungen zu multilateralen Verträgen* (Unilateral interpretative declarations to multilateral treaties), Ms. Monika Heymann has rightly stressed:

> In that regard, it should be noted that a simple written interpretative declaration can take on greater importance because the other contracting parties take note of it and, in the event of a dispute, it has greater probative value.[148]

74. Moreover, in practice, States and international organizations endeavour to give their interpretative declarations the desired publicity. They transmit them to the depositary and the Secretary-General of the United Nations, in turn, disseminates the text of such declarations[149] and publishes them in *Multilateral Treaties Deposited with the Secretary-General*.[150] Clearly, this communication procedure, which ensures wide publicity, presupposes that declarations are made in writing.

75. If the authors of interpretative declarations want their position to be taken into account in the treaty's application, particularly when there is a dispute, it would doubtless be in their interest to:

(*a*) Formulate the reaction in writing to meet the requirements of legal security and to ensure notification of the declaration; and

(*b*) Follow, in making such statements, the same communication and notification procedure applicable to the communication and notification of other declarations in respect of the treaty (reservations, objections or acceptances).

---

[137] *Yearbook ... 2001*, vol. II (Part Two), p. 192.

[138] *Ibid.*, p. 193.

[139] *Ibid.*, p. 194.

[140] *Yearbook ... 2004*, vol. II (Part Two), pp. 108–109.

[141] Guidelines 2.4.5 [2.4.4], 2.4.7 [2.4.2, 2.4.9], 2.4.8 and 2.4.10.

[142] See guideline 2.4.7 [2.4.2, 2.4.9] on the formulation and communication of interpretative declarations. This guideline reads:

"**2.4.7 [2.4.2, 2.4.9]** *Formulation and communication of conditional interpretative declarations*

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

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

"3. A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

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

[143] *Yearbook ... 2001*, vol. II (Part Two), p. 157, para. 154.

[144] *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1, para. 130.

[145] See also Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* (*Unilateral interpretative declarations to multilateral treaties*), p. 117.

[146] Advisory opinion of 11 July 1950, *International Status of South-West Africa, I.C.J. Reports 1950*, pp. 135–136.

[147] *Dichiarazioni interpretative unilaterale e trattati internazionali*, p. 275.

[148] *Op. cit.*, p. 118.

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

[150] To give just one example, while article 319 of the United Nations Convention on the Law of the Sea does not explicitly require its depositary to communicate interpretative declarations made under article 311 of the Convention, the Secretary-General publishes them systematically in chapter XXI (No. 6) of *Multilateral Treaties Deposited with the Secretary-General* (http://treaties.un.org/).

76. The Commission has considered that it would be useful to include guidelines to that effect in the Guide to Practice.[151] However, these could consist only of recommendations modelled on those adopted, for example, with respect to statements of reasons for reservations[152] and objections to reservations.[153] Guidelines recommending the written form and the procedure for communication could draw upon those concerning the procedure for other types of declarations in respect of a treaty, as, for example, contained in guidelines 2.1.1[154] and 2.1.5 to 2.1.7[155] on reservations, although their wording cannot be fully aligned with these models. It is therefore proposed that these guidelines should be worded as follows:[156]

"**2.4.0** *Written form of interpretative declarations*

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

"**2.4.3 *bis*** *Communication of interpretative declarations*

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

77. This raises the question of whether the depositary can initiate a consultation procedure in cases where an interpretative declaration is manifestly invalid, in which case guideline 2.1.8[157] should also be mentioned in guideline 2.4.3 *bis*. Since, on the one hand, guideline 2.1.8 has met with criticism[158] and, on the other, it is far from clear that an interpretative declaration can be "valid" or "invalid", it seems unnecessary to make such a mention.

78. Notwithstanding the position expressed by some members of the Commission at its sixtieth session, in 2008, with which the Special Rapporteur had unwisely agreed in his thirteenth report on reservations to treaties,[159] statements of reasons for interpretative declarations do not appear to correspond to the practice of States and international organizations or, in essence, to meet a need. In formulating interpretative declarations, States and international organizations doubtless wish to set forth their position concerning the meaning of one of the treaty's provisions or of a concept used in the text of the treaty and, in general, they explain the reasons for this position. It is not necessary, or even possible, to provide explanations for these explanations. Thus, a guideline, even in the form of a simple recommendation, is not needed.

79. The situation is different with respect to reactions to interpretative declarations. In this case, the authors of an approval, opposition or reclassification may indeed explain the reasons that led them to react to the interpretative declaration in question, for example by explaining why the proposed interpretation does not correspond to the parties' intention, and it is doubtless useful for them to do so. Guideline 2.9.6 (Statement of reasons for approval, opposition and reclassification), proposed in the thirteenth report[160] and sent to the Drafting Committee in 2008,[161] is thus of continuing value.

---

[151] See footnote 134 above.

[152] Guideline 2.1.9 (Statement of reasons [for reservations]) (*Yearbook ... 2008*, vol. II (Part Two), para. 124); see also the note by the Special Rapporteur on draft guideline 2.1.9, "Statement of reasons for reservations" (*Yearbook ... 2007*, vol. II (Part One), document A/CN.4/586).

[153] Guideline 2.6.10 (Statement of reasons [for objections]) (*Yearbook ... 2008*, vol. II (Part Two), para. 124); see also the eleventh report on reservations to treaties (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574), paras. 110–111.

[154] This guideline reads:

"**2.1.1** *Written form*

"A reservation must be formulated in writing."

[155] These guidelines read:

"**2.1.5** *Communication of reservations*

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

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

"**2.1.6 [2.1.6, 2.1.8]** *Procedure for communication of reservations*

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

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

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

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

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

"**2.1.7** *Functions of depositaries*

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

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

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

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

[156] The numbering of these guidelines will certainly need to be reviewed during the second reading.

[157] This guideline reads:

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

"1. Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation.

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

[158] *See Yearbook ... 2006*, vol. II (Part Two), pp. 157–158, paras. (2)–(3) of the commentary to draft guideline 2.1.8. See also paragraph 36 above.

[159] See footnote 134 above.

[160] *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600, para. 46.

[161] See paragraph 39 above.

Chapter II

Validity of reservations and interpretative declarations (*continuation and conclusion*)

80. The Special Rapporteur began his study of the validity of reservations and interpretative declarations in 2005 in his tenth report on reservations to treaties.[162] In the second part of this report, he plans to conclude this study, with a view to the full adoption on first reading of part III of the Guide to Practice on the topic "Validity of reservations and interpretative declarations".

81. The Commission has already adopted several guidelines in part III.[163] There can be no question of reopening the debate on these guidelines, which were adopted following a full discussion of the tenth report on reservations to treaties, nor would it seem useful to reconsider the terminology used in part III, particularly the term "validity", which was approved by the Commission after a lengthy discussion.[164] However, in order to understand the guidelines proposed in this report for inclusion in part III of the Guide to Practice, it seems appropriate to recall the context of the issue of the validity of reservations and to briefly review the guidelines already adopted by the Commission in 2006 and 2007[163] (sect. A), before addressing the related issue of the validity of reactions to reservations (sect. B). A study of the validity of interpretative declarations is included for the sake of completeness rather than for its practical implications (sect. C). The same is true for the study of the validity of reactions to interpretative declarations (sect. D). The issue of the validity of conditional interpretative declarations will be dealt with in a separate short study (sect. E).

82. The Commission has also already discussed the issues relating to determination of the validity of reservations, which were set forth by the Special Rapporteur in his tenth report.[165] The corresponding guidelines were referred by the Commission to the Drafting Committee in 2006[166] but have not yet been adopted by the Committee; it is to be hoped that they will be adopted this year at last. They may need to be supplemented with guidelines on determination of the validity of reactions to reservations, of interpretative declarations and of reactions to interpretative declarations (sect. F).

83. Guidelines 3.3 and 3.3.1, which were proposed by the Special Rapporteur in his tenth report[167] and deal with the consequences of the validity of reservations, have also been referred to the Drafting Committee;[168] it is therefore unnecessary to discuss them further. However, it may be appropriate to consider their place in the Guide to Practice since they relate more to the effects of reservations (or the lack thereof) than to their validity *per se*.[169]

84. Similarly, in 2006, the Special Rapporteur decided upon reflection that it was doubtless preferable to defer a decision on guidelines 3.3.2 to 3.3.4,[170] which also deal with the consequences of the (non-)validity of a reservation, until the Commission had considered the effects of reservations.[171] Accordingly, the Commission has not yet taken any action on these guidelines. They should be included in part IV of the Guide to Practice, on the effects of reservations and interpretative declarations, and will be considered again in chapter III of this report.

A. Validity of reservations (background)

85. Part III of the Guide to Practice begins with a study of the issue of the substantive validity of reservations. It does not consider the consequences of the validity or non-validity of a reservation; it merely addresses the issue of whether the basic conditions for the validity of

[162] *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2.

[163] *Yearbook ... 2006*, vol. II (Part Two), p. 134, para. 104; and *Yearbook ... 2007*, vol. II (Part Two), p. 16, para. 47. See also paragraphs 8 and 23 above.

[164] *Yearbook ... 2005*, vol. I, 2859th meeting, pp. 12–13; *Yearbook ... 2005*, vol. II (Part Two), p. 64, para. 345. For a summary of the Sixth Committee's discussion of this terminological issue, see the eleventh report on reservations to treaties, *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, paras. 19 to 22.

[165] *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2. See also paragraphs 5 and 13 above.

[166] *Yearbook ... 2005*, vol. I, 2859th meeting, p. 204; *Yearbook ... 2005*, vol. II (Part Two), pp. 25–26, para. 103. See also paragraph 7 above.

[167] *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, pp. 183–186, paras. 181–194. The text of these guidelines reads:

"**3.3** *Consequences of the non-validity of a reservation*

"A reservation formulated in spite of the express or implicit prohibition arising from the provisions of the treaty or from its incompatibility with the object and the purpose of the treaty is not valid, without there being any need to distinguish between these two grounds for invalidity.

"**3.3.1** *Non-validity of reservations and responsibility*

"The formulation of an invalid reservation produces its effects within the framework of the law of treaties. It shall not, in itself, engage the responsibility of the State or international organization which has formulated it."

[168] *Yearbook ... 2006*, vol. II (Part Two), p. 134, para. 104. See also paragraph 6 above.

[169] *Ibid.*, para. 157.

[170] The text of these guidelines, as proposed by the Special Rapporteur in his tenth report on reservations to treaties (*Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, paras. 195–208), reads:

"**3.3.2** *Nullity of invalid reservations*

"A reservation that does not fulfil the conditions for validity laid down in guideline 3.1 is null and void.

"**3.3.3** *Effect of unilateral acceptance of an invalid reservation*

"Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.

"**3.3.4** *Effect of collective acceptance of an invalid reservation*

"1. A reservation that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and purpose, may be formulated by a State or an international organization if none of the other Contracting Parties object to it after having been expressly consulted by the depositary.

"2. During such consultation, the depositary shall draw the attention of the signatory States and international organizations and of the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, to the nature of legal problems raised by the reservation."

[171] *Yearbook ... 2006*, vol. II (Part Two), p. 138, para. 157.

reservations have been met. This is consistent with the underlying logic of the entire Guide to Practice: before the legal regime of a reservation can be considered, it must be determined whether a unilateral statement constitutes a reservation. In order for it to do so, the statement must be consistent with the definition provided in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions, as specified and supplemented in part I of the Guide to Practice. Only after the reservation has been classified is it possible to assess the validity of its form—the subject of part II of the Guide to Practice—and content—the subject of part III of the Guide. The legal effects of a reservation may be determined only subsequently and, moreover, depend not only on its validity but on the reactions of other States and international organizations.

86. The substantive validity of reservations is determined primarily by article 19 of the 1969 and 1986 Vienna Conventions. For this reason, guideline 3.1 (Permissible reservations)[172] reproduces, verbatim, the provisions of article 19 of the 1986 Vienna Convention. The purpose of guidelines 3.1.1 to 3.1.13 is to set forth the conditions for substantive validity that are listed in this key provision of the reservations regime derived from the Vienna Conventions.

87. Guideline 3.1.1 (Reservations expressly prohibited by the treaty)[173] explains the meaning of the words "prohibited by the treaty" and specifies the meaning of article 19 (*a*) of the 1969 and 1986 Vienna Conventions.

88. Guideline 3.1.2 (Definition of specified reservations)[174] explains the concept of *specified* reservations, mentioned in article 19 (*b*) of the 1969 and 1986 Vienna Conventions. Where a treaty expressly allows only specified reservations to be made—or formulated,[175] in the case of specified reservations for which the content is not made explicit in the treaty[176]—any other reservation that does not meet the criteria established by the treaty is considered to be prohibited.

89. While guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty)[177] does not establish a directly operational definition of the concept of the "object and purpose of the treaty", it does indicate when, as a general rule, a reservation should be considered as contrary to the object and purpose of the treaty and attempts to clarify the wording of article 19 (*c*) of the 1969 and 1986 Vienna Conventions. This occurs when a reservation has the potential to "affect an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the *raison d'être* of the treaty".

90. Nevertheless, the guideline does not establish a solid criterion for determining whether a reservation is incompatible with the object and purpose of the treaty. Therefore, it seems appropriate to provide further clarification of the manner in which the object and purpose of a treaty should be determined and to illustrate this methodology through specific examples.[178]

91. Guideline 3.1.6 (Determination of the object and purpose of the treaty)[179] performs the first of these functions by establishing the method to be followed in determining the object and purpose of a treaty.

92. The role and function of guidelines 3.1.7 (Vague or general reservations),[180] 3.1.8 (Reservations to a provision reflecting a customary norm),[181] 3.1.9 (Reservations contrary to a rule of *jus cogens*),[182] 3.1.10 (Reservations to provisions relating to non-derogable rights),[183] 3.1.11 (Reservations relating to internal law),[184] 3.1.12 (Reservations to general human rights treaties)[185] and 3.1.13 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty)[186] are to provide specific examples of reservations that for one reason or another (as explained in these guidelines) may be considered incompatible with the object and purpose of the treaty in question. These reasons may concern either the nature of the treaty or the specific provision to which the reservation refers, or the characteristics of the reservation itself (for example, its vague or general formulation or the fact that it relates to unspecified rules of domestic law).

93. In addition, guideline 3.1.3 (Permissibility of reservations not prohibited by the treaty) states that even where the treaty prohibits certain reservations, reservations which are not prohibited by the treaty must nevertheless be consistent with the object and purpose of the treaty. Guideline 3.1.4 (Permissibility of specified reservations) contains a similar rule for specified reservations where their content is not specified in the treaty. Such reservations must also meet the criterion established in article 19 (*c*) of the 1969 and 1986 Vienna Conventions.

B. Validity of reactions to reservations

94. Unlike the case of reservations, the 1969 and 1986 Vienna Conventions do not set forth any criteria or conditions for the substantive validity of reactions to reservations, although they deal extensively with acceptances and objections. Such reactions do not, however, constitute criteria for the validity of a reservation that can be evaluated objectively in accordance with the conditions established in article 19 of the Vienna Conventions. They are a way for States and international organizations to express their point of view regarding the validity of a reservation, but the validity (or non-validity) of a reservation must be evaluated independently of the acceptances or objections to which it gave rise. Moreover, this idea is

[172] For the text of this guideline and the commentaries thereto, see *Yearbook ... 2006*, vol. II (Part Two), pp. 145–147.

[173] *Ibid.*, pp. 147–150.

[174] *Ibid.*, pp. 150–154.

[175] See paragraph 93 below.

[176] Cf. guideline 3.1.4 and the commentary thereto (*Yearbook ... 2006*, vol. II (Part Two), pp. 155–156).

[177] *Yearbook ... 2007*, vol. II (Part Two), pp. 33–37.

[178] *Ibid.*, p. 37, para. (15) of the commentary.

[179] *Ibid.*, pp. 37–39.

[180] *Ibid.*, pp. 39–42.

[181] *Ibid.*, pp. 42–46.

[182] *Ibid.*, pp. 46–48.

[183] *Ibid.*, pp. 48–50.

[184] *Ibid.*, pp. 50–52.

[185] *Ibid.*, pp. 52–53.

[186] *Ibid.*, pp. 53–55.

clearly expressed in guideline 3.3 (Consequences of the non-validity of a reservation).[187]

95. The *travaux préparatoires* of the Vienna regime in respect of objections leave no doubt as to the lack of connection between the validity of a reservation and the reactions thereto.[188] It also follows that while it may be appropriate to refer to the substantive "validity" of an objection or acceptance, the term does not have the same connotation as in the case of reservations themselves. The main issue is whether the objection or acceptance can produce its full effects.

1. Validity of objections

96. In his eleventh report on reservations to treaties, the Special Rapporteur proposed the following wording for guideline 2.6.3:

2.6.3 *Freedom to make objections*

A State or an international organization may formulate an objection to a reservation for any reason whatsoever, in accordance with the provisions of the present Guide to Practice.[189]

97. The Commission referred this guideline to the Drafting Committee, which nevertheless decided to defer consideration of the matter.[190] Apart from the question of whether objections are a "freedom" or a genuine "right"—which the Drafting Committee could settle—the Committee preferred to wait until the Special Rapporteur submitted a study on the validity of objections before deciding on the final wording of the guideline. In other words, the guideline must take the issue of validity into account. The eleventh report (which justifies this provision)[191] should therefore be seen as a preface to the study on the issue of the validity of objections.

98. In its 1951 advisory opinion, ICJ made an analogy between the validity of objections and that of reservations. It considered that:

> The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.[192]

99. This position was endorsed by the Commission in article 20, paragraph 2 (*b*) on the law of treaties, adopted on first reading in 1962. The paragraph provides that:

> An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.[193]

100. In subsequent *travaux*, the Commission and the United Nations Conference on the Law of Treaties removed this requirement that objections to reservations must be compatible with the object and purpose of the treaty.[194] In accordance with the principle of consent that underlies all treaty law, "[n]o State can be bound by contractual obligations it does not consider suitable".[195] Moreover, in its 1951 advisory opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ had stressed that "it is well established that in its trade relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto".[196] In other words, a State may make an objection to any reservation, whether valid or invalid (including as a result of its incompatibility with the object and purpose of the treaty).

101. Does this absence of a link between the validity of a reservation and an objection mean that the substantive validity of objection is no longer an issue? Or is it possible to envisage a situation in which an objection might be incompatible with the object and purpose of the treaty or contrary to a treaty-based prohibition?

102. Regardless of whether the reservation is compatible or incompatible with the object and purpose of the treaty, any objection results, *a priori*, in exclusion of the application of the treaty as a whole (if the author has "clearly" stated that that is its intention) or, as stipulated

---

[187] See footnote 167 above.

[188] See the eleventh report on reservations to treaties (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574), paras. 61–66.

[189] *Ibid.*, para. 67.

[190] *Yearbook ... 2008*, vol. II (Part Two), footnote 233. The Commission also referred guideline 2.6.4 (Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation), which reads:

> "**2.6.4** *Freedom to oppose the entry into force vis-à-vis the author of the reservation*
>
> "A State or international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the reserving State or international organization for any reason whatsoever, in accordance with the provisions of the present Guide to Practice"

(*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 75).

[191] See the eleventh report on reservations to treaties (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574), paras. 60–75.

[192] Advisory opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 24.

[193] *Yearbook ... 1962*, vol. II, p. 176.

[194] See the eleventh report on reservations to treaties (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574), paras. 61 and 62.

[195] Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties", p. 466; see also the second report on reservations to treaties (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1), p. 57, paras. 97 and 99; and Müller, "Article 20", in *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, Corten and Klein, eds., pp. 809–811, paras. 20–24.

[196] See Advisory Opinion cited in footnote 192 above, p. 21. The dissenting judges also stressed this principle in their joint opinion: "The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later" (*ibid.*, pp. 31–32). The famous dictum of the Permanent Court of International Justice in the case of the *S.S. "Lotus"* confirms this position: "The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." (*P.C.I.J., Series A*, No. 10, p. 18). The arbitral tribunal that settled the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* also stressed the importance of the "principle … of the mutuality of consent in the conclusion of treaties" (decision of 30 June 1977, UNRIAA, vol. XVIII, p. 40, para. 57).

in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, in exclusion of the application of the provision to which the reservation relates. Thus, the purpose and possible effect of any objection is to undermine the integrity of the treaty regime applicable between the author of the reservation and the author of the objection.

103. This does not, however, render the objection invalid. The potential effect of an objection is simply the total or partial deregulation,[197] of the bilateral relations between the author of the objection and the author of the reservation. The author of the objection has merely exercised a right (or freedom)[198] which is recognized under the Vienna Conventions since they expressly establish the possibility of excluding, in this bilateral relationship, the application not only of some provisions, but also of the treaty as a whole. Even if an objection could have the effect of undermining the object and purpose of the treaty by excluding, for example, the application of an essential provision, it should be borne in mind that its author has the *right* (or, in any event, the freedom) to exclude all treaty relations with the author of the reservation. "He who can do more, can do less". While certainly unsatisfactory, this result is nevertheless the corollary of the formulation of the reservation (not that of the objection). It is immediately rectified when the reservation is withdrawn in order to restore the integrity of the treaty relations. A strong case can be made that, even if the reservation has the undesirable effect of depriving the treaty of an essential part of its content in its application as between the reserving State (or international organization) and the objecting State (or international organization), it is better to accept that risk in the hope that the effect will be temporary.

104. This does not prevent the authors of a reservation to which objections have been made from expressing their displeasure. A particularly telling example is the reaction of the United States of America to the objections made by France and Italy in respect of the United States "declaration" regarding the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP).[199] The protest by the United States reads:

> The United States considers that under the clear language of article 10 [of the Agreement], as confirmed by the negotiating history, any State party to the Agreement may file a declaration under that article. The United States therefore considers that the objections of Italy and France and the declarations that those nations will not be bound by the Agreement in their relations with the United States are unwarranted and regrettable. The United States reserves its rights with regard to this matter and proposes that the parties continue to attempt cooperatively to resolve the issue.[200]

It should nevertheless be noted that the author of the protest (reproduced in the United Nations publication, *Status of Multilateral Treaties Deposited with the Secretary-General* under the heading "objections") does not consider that the objections made by France and Italy are invalid, but "only" that they are "unwarranted and regrettable".

105. It is quite clear that if the effect of an objection is to modify the bilateral treaty relations between its author and the author of the reservation in a manner that proves to be contrary to a peremptory norm of international law (*jus cogens*), this result would be unacceptable. Such an eventuality would, however, seem to be impossible: an objection purports only to, and can only, exclude the application of one or more treaty provisions. Such an exclusion cannot "produce" a norm that is incompatible with a *jus cogens* norm. The effect is simply "deregulatory". Ultimately, therefore, the norms applicable as between the author of the reservation and the author of the objection are never different from those that predated the treaty and, unless application of the treaty as a whole is excluded, from treaty-based provisions not affected by the reservation. It is extremely difficult—and, in fact, impossible under these circumstances—to imagine an "objection" that would violate a peremptory norm.

106. Furthermore, when the definition of "objection" was adopted, the Commission refused to take a position on the question of the validity of objections that purport to produce a "super-maximum" effect.[201] These are objections in which the authors determine not only that the reservation is not valid but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States. The validity of objections with super-maximum effect has frequently been questioned,[202] including by the Special Rapporteur, primarily because the effect of such a statement is not to bar the application of the treaty as a whole or of the provisions to which the reservation refers in the relations between the two parties but to render the reservation null and void without the consent of its author. This greatly exceeds the consequences of the objections to reservations provided for in article 21, paragraph 3, and article 20, paragraph 4 (*b*), of the Vienna Conventions. Whereas "unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State", in this case it is the rule itself advocated by the reserving State which is challenged, and this is contrary to the very essence of an objection.[203] It is not, however, the validity of the objection as such that is called into question; the issue raised by this practice is whether the objection is capable of producing the effect intended by its author,[204] and this is far from certain. A State (or an international organization) may well make an objection

---

[197] In this connection, see Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, pp. 175–176.

[198] See paragraph 97 above.

[199] In their objections, France and Italy considered that "only European States can formulate the declaration provided for in article 10 with respect to carriage performed in territories situated outside Europe". The two States thus raised "an objection to the declaration by the Government of the United States of America and, consequently, declare[d] that [they would] not be bound by the ATP Agreement in [their] relations with the United States of America" (*Multilateral Treaties Deposited with the Secretary-General*, available online from http://treaties.un.org/, chap. XI.B 22).

[200] *Ibid.*

[201] See paragraph (24) of the commentary to guideline 2.6.1 (Definition of objections to reservations) (*Yearbook ... 2005*, vol. II (Part Two), p. 81).

[202] See the eighth report on reservations to treaties (*Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1), paras. 97–98, and footnote 153.

[203] *Ibid.*, para. 97.

[204] See paragraph 95 above.

and wish to give it super-maximum effect, but this does not mean that the objection is capable of producing such an effect, which is not envisaged by the Vienna regime. However, as the Commission has acknowledged in its commentary on guideline 2.6.1, where the definition of the term "objection" unquestionably includes objections with super-maximum effect:

> The Commission has endeavoured to take a completely neutral position with regard to the validity of the effects [and not of the objection] that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections.[205]

107. The same is true in the case of objections with "intermediate effect",[206] through which a State or international organization "expresses the intention to be associated with the author of the reservation but considers that the exclusion of treaty relations should go beyond what is provided for in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions".[207]

108. While treaty practice provides relatively few specific examples of intermediate-effect or "extensive" objections, some do exist. It would seem, however, that this "*nueva generación*" (new generation)[208] of objections grew up exclusively around reservations to the 1969 Vienna Convention itself. The reservations formulated by a number of States in respect of article 66 of the Vienna Convention, concerning dispute settlement procedures,[209] caused a number of other States to make objections that were broader in scope than "simple" reservations, but without stating that they did not wish to be associated with the author of the reservation through the treaty. Although a number of States parties to the Vienna Convention made objections to these reservations that were limited to the "presumed" effects envisaged in article 21, paragraph 3, of the 1969 Vienna Convention,[210] other States—Canada,[211] Egypt,[212] Japan,[213] the Netherlands,[214] New Zealand,[215] Sweden,[216] the United Kingdom[217] and the United States[218]—intended their objections to produce more serious consequences but did not wish to exclude the entry into force of the Vienna Convention as between themselves and the reserving States.[219] Indeed, these States not only wanted to exclude the application of the obligatory dispute settlement provision or provisions "to which the reservation refers"; they also do not consider themselves bound by the substantive provisions to which the dispute settlement procedure or procedures apply in their bilateral relations with the reserving State. For example, the United States, in its objection to the reservation of Tunisia to article 66 (*a*) of the Vienna Convention, states that:

> The United States Government intends, at such time as it becomes a party to the Convention, to reaffirm its objection … and declare that it will not consider that Article 53 or 64 of the Convention is in force between the United States of America and Tunisia.[220]

109. Such limitations on treaty relations between the reserving State and the objecting State are not envisaged in the wording of the Vienna Convention and the legal basis for such an intermediate effect of an objection is not clearly established either in the Vienna Convention, which does not provide for it, or in doctrine. Some authors propose to consider that "these extended objections are, in fact, reservations (limited *ratione personae*).[221] This analysis is to some extent supported by the fact that other States have chosen to formulate reservations in the strict

---

[205] See paragraph (25) of the commentary to guideline 2.6.1 (Definition of objections to reservations) (*Yearbook … 2005*, vol. II (Part Two), pp. 81–82).

[206] Eighth report on reservations to treaties, *Yearbook … 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 47, para. 95. See also the eleventh report on reservations to treaties, *Yearbook … 2006*, vol. II (Part One), document A/CN.4/574, p. 215, footnote 309.

[207] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/574, p. 215, footnote 309.

[208] Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del Régimen de Viena*, p. 293.

[209] See the reservations formulated by Algeria (*Multilateral Treaties Deposited with the Secretary-General*, available online at http://treaties.un.org/, chap. XXIII.1), Belarus (*ibid.*), China (*ibid.*), Cuba (*ibid.*), Guatemala (*ibid.*), the Russian Federation (*ibid.*), the Syrian Arab Republic (*ibid.*), Tunisia (*ibid.*), Ukraine (*ibid.*) and Viet Nam (*ibid.*). Bulgaria, the Czech Republic, Hungary and Mongolia had formulated similar reservations but withdrew them in the early 1990s (*ibid.*). The Democratic German Republic had also formulated a reservation excluding the application of article 66 (*ibid.*).

[210] This is the case with Denmark and Germany (*ibid.*).

[211] In respect of the reservation by the Syrian Arab Republic (*ibid.*).

[212] The objection of Egypt is directed not at one reservation in particular, but at any reservation that excludes the application of article 66 (*ibid.*).

[213] In respect of any reservation that excludes the application of article 66 or the annex to the Vienna Convention (*ibid.*).

[214] In respect of all States that had formulated reservations concerning the compulsory dispute settlement procedures. This general declaration was reiterated separately for each State that had formulated such a reservation (*ibid.*).

[215] In respect of the reservation of Tunisia (*ibid.*).

[216] In respect of any reservation that excludes application of the dispute settlement provisions, in general, and of the reservations made by Cuba, the Syrian Arab Republic and Tunisia, in particular (*ibid.*).

[217] As provided in its declaration of 5 June 1987 and with the exception of the reservation of Viet Nam.

[218] The objections made by the United States were formulated before it became a Contracting Party and concern the reservations made by the Syrian Arab Republic, Tunisia and Cuba (*ibid.*).

[219] The United Kingdom made maximum-effect objections, in due and proper form, to the reservations formulated by the Syrian Arab Republic and Tunisia. The effect of these objections seems, however, to have been mitigated *a posteriori* by the declaration of the United Kingdom of 5 June 1987, which constitutes in a sense the partial withdrawal of its earlier objection (see guideline 2.7.7 and the commentary thereto (*Yearbook … 2008*, vol. II (Part Two), pp. 101–102), since the author does not oppose the entry into force of the Convention as between the United Kingdom and a State that has made a reservation to article 66 or to the annex to the Vienna Convention and excludes only the application of part V in their treaty relations. This declaration, which the United Kingdom recalled in 1989 (with regard to the reservation of Algeria) and 1999 (with regard to the reservation of Cuba), states that "[w]ith respect to any other reservation the intention of which is to exclude the application, in whole or in part, of the provisions of article 66, to which the United Kingdom has already objected or which is made after the reservation by [the Union of Soviet Socialist Republics], the United Kingdom will not consider its treaty relations with the State which has formulated or will formulate such a reservation as including those provisions of Part V of the Convention with regard to which the application of article 66 is rejected by the reservation" (*Multilateral Treaties…*(see footnote 199 above), chap. XXIII.1). Nevertheless, in 2002, the United Kingdom again objected to the maximum-effect reservation made by Viet Nam by excluding all treaty relations with Viet Nam (*ibid.*). New Zealand also chose to give its objection to the Syrian reservation maximum effect (*ibid.*).

[220] *Multilateral Treaties …* (see footnote 199 above), chap. XXIII.1.

[221] See, *inter alia*, Sztucki, "Some questions arising from reservations to the Vienna Convention on the Law of Treaties", p. 297. The author suggests that such declarations should be viewed as "objections only to the initial reservations and own reservations of the objecting States in the remaining part" (*ibid.*, p. 291).

sense of the word in order to achieve the same result.[222] Thus, Belgium formulated a (late) reservation concerning the Vienna Convention, stating that:

> The Belgian State will not be bound by articles 53 and 64 of the Convention with regard to any party which, in formulating a reservation concerning article 66 (2), objects to the settlement procedure established by this article.[223]

110. On this issue, Gaja has written:

> As a partial rejection modifies the content of the treaty in relation to the reserving State to an extent that exceeds the intended effect of the reservation, acceptance or acquiescence on the part of the reserving State appear to be necessary for a partial rejection to take its effect; failing this, no relations under the treaty are established between the reserving State and an objecting State which partially rejects those relations.[224]

111. If we agree with this way of breaking down objections with intermediate effect, the logical conclusion is that they should meet the requirements for the substantive and formal validity of reservations; they would be "counter-reservations".

112. However, this approach seems debatable. It must be borne in mind that, like any objection, objections with intermediate effect are made in reaction to a reservation formulated by another State. They typically do not arise until after the objecting State has become a party to the treaty, which, generally speaking, prevents it from formulating a reservation within the time period established in the 1969 and 1986 Vienna Conventions and reproduced in guideline 1.1 of the Guide to Practice.[225] A contracting State that wished to react to a reservation through an objection of intermediate effect would inevitably be faced with the uncertainties that characterize the regime of late reservations. This is, moreover, true of the reservation of Belgium:[226] a simple objection on the grounds of the reservation's lateness would have sufficed for it to be deemed invalid as to form and without effect. Thus, the State that formulated the initial reservation would have had little difficulty in convincing other States; it would merely have had to formulate a (simple) objection in order to prevent the reservation from having effect.

113. Only the formulation of a "preventive" reservation in place of an anticipated "objection", as in the case of the reservation formulated by the United Republic of Tanzania upon accession to the Vienna Convention in 1976,[227] remains possible and appears capable of producing the desired result. It is, however, quite often difficult for States to anticipate, when expressing their consent to be bound by a treaty, all possible reservations and to evaluate their potential effects in order to formulate a preventive "counter-reservation" at that time.[228]

114. Thus, there can be no question of simply equating objections with intermediate effect to reservations; to do so would seriously undermine the principle of consent.[229] Furthermore, the Commission has already agreed that these are indeed objections, not reservations; the definition of "objection" in guideline 2.6.1[230] clearly establishes that not only unilateral declarations that purport to exclude the legal effects of the reservation or treaty as a whole, but also those that purport to "modify the legal effects of the reservation", constitute objections. This wording has been incorporated into the definition of "objection" specifically in order to reflect the actual practice in respect of objections with intermediate effect.[231] Except in the context of a "reservations dialogue", which can become complicated, the reserving State is not, in principle, in a position to respond effectively to such objections.

115. It should be noted that, while the 1969 and 1986 Vienna Conventions do not expressly authorize these objections with intermediate effect, they do not prohibit them. On the contrary, objections with intermediate effect, as their name indicates, may be entertained in that they fall midway between the two extremes envisaged under the Vienna regime: they purport to prohibit the application of the treaty to an extent greater than a minimum-effect objection (art. 21, para. 3, of the Vienna Conventions), but less than a maximum-effect objection (art. 20, para. 4 (*b*) of the Vienna Conventions).[232]

116. It would, however, be unacceptable for States and international organizations to use a reservation as an excuse for attaching intermediate-effect objections of their choosing, thereby excluding any provision that they do not like. A look back at the origins of objections with intermediate effect would be edifying.

117. This practice has been resorted to mainly, if not exclusively, in the case of reservations and objections to the provisions of part V of the 1969 Vienna Convention and makes clear the reasons which led objecting States to seek, in a sense, to expend the intended effects of their objections. Article 66 of the Vienna Convention and its annex relating to compulsory conciliation provide procedural guarantees which many States, at the time when the Convention was adopted, considered essential in order to prevent abuse of other provisions of part V.[233] This link was stressed by some of the States that formulated objections with intermediate effect in respect of reservations to article 66. For example:

---

[222] The reservation of Belgium quoted below is quite similar in spirit, purpose and technique to the conditional objections envisaged in guideline 2.6.14. See, *inter alia*, the objection of Chile to the 1969 Vienna Convention, quoted in the commentary to guideline 2.6.14 (*Yearbook ... 2008*, vol. II (Part Two), para. (2)).

[223] *Multilateral Treaties ...* (see footnote 199 above), chap. XXIII.1.

[224] Gaja, "Unruly treaty reservations", p. 326. See also Baratta, *Gli effetti delle riserve ai trattati*, p. 385.

[225] *Yearbook ... 1998*, vol. II (Part Two), pp. 99–100. See also guideline 1.1.2, *ibid.*, pp. 103–104.

[226] See paragraph 109 above.

[227] The reservation of the United Republic of Tanzania states: "Article 66 of the Convention shall not be applied to the United Republic of Tanzania by any State which enters a reservation on any provision of Part B or the whole of that part of the Convention" (*Multilateral Treaties ...* (see footnote 199 above), chap. XXIII.1).

[228] On that issue, see Horn, *op. cit.* (footnote 197 above), p. 179.

[229] See footnote 196 above.

[230] *Yearbook ... 2005*, vol. II (Part Two), p. 77.

[231] *Ibid.*, p. 81, para. (23) of the commentary to guideline 2.6.1. See also *Yearbook ... 2004*, vol. II (Part Two), p. 100, para. 293 (*d*).

[232] Müller, "Article 21", in Corten and Klein (eds.), *op. cit.* (footnote 195 above), pp. 925–926, paras. 67–69.

[233] Sztucki, *loc. cit.* (footnote 221 above), pp. 286–287 (see also the references provided by the author).

The Kingdom of the Netherlands is of the view that the provisions regarding the settlement of disputes, as laid down in article 66 of the Convention, are an important part of the Convention and cannot be separated from the substantive rules with which they are connected.[234]

The United Kingdom stated even more explicitly that:

Article 66 provides in certain circumstances for the compulsory settlement of disputes by the International Court of Justice … or by a conciliation procedure … These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference.[235]

Thus, the reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal which some States had sought to undermine through reservations and which could only be restored through an objection that went beyond the "normal" effects of the reservations envisaged by the Vienna Conventions.[236]

118. It is therefore clear from the practice concerning objections with intermediate effect that there is an intrinsic link between the provision which gave rise to the reservation and the provisions whose legal effect is affected by the objection. However, this is not a condition for the validity of the objection. On the one hand, there is no evidence that this is a "practice accepted as law". On the other hand, it would be contradictory to make objections with intermediate effect subject to conditions of validity while maximum-effect objections are not subject to such conditions. Indeed, determination and assessment of the necessary link between the provisions which could potentially be deprived of legal effect by the interaction between a reservation and a broad objection has more to do with the question of whether the objection with intermediate effect can produce the effect intended by its author. It is one thing to say that an objection with intermediate effect is not valid and quite another to maintain that such an objection cannot produce the effect intended by its author. Thus, the issue does not bear on the validity of an objection and should therefore be included not in the part of the Guide to Practice on the substantive validity of declarations in respect of treaties, but rather in the part dealing with the effects that an objection with intermediate effect can actually produce.

119. It follows from the foregoing that a State or organization has the right (or the freedom) to formulate an objection without this right (or freedom) being subject to conditions for substantive validity, as in the case of reservations. While some of the intended effects of an objection may appear undesirable—as, for example, the lack of any treaty-based relations between the author of the reservation and the author of the objection—this is simply a logical consequence of the principle of consent. It is the author of the reservation, not the reaction of the other Contracting Parties, that challenges the integrity of the treaty. As ICJ noted:

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto.[237]

120. Furthermore, it should be reiterated that one who has initially accepted a reservation to an objection may no longer properly formulate an objection thereto. While this condition may be understood as a condition for the substantive validity of an objection, it may also be viewed as a question of form or of formulation. Thus, guideline 2.8.12, of which the Commission took note in 2008[238] and which it is expected to finalize in 2009, provides:

"**2.8.12** *Final nature of acceptance of a reservation*

"Acceptance of a reservation cannot be withdrawn or amended."

There would seem to be no need to revisit this issue.

2. Validity of acceptances

121. With regard to acceptance, and in the light of the Commission's earlier work on the validity of reservations, it also seems unnecessary to address the issue of the validity of acceptances of a reservation.

122. It seems clear that contracting States or international organizations can freely accept a reservation that is valid and that the validity of such acceptances cannot be questioned. However, at least on the face of it, such is not the case where a State or international organization accepts a reservation that is substantively non-valid.

123. While acceptance cannot determine the validity of a reservation,[239] commentators have argued that:

An acceptance of an inadmissible reservation is theoretically not possible. Directly or indirectly prohibited reservations under article 19 (1) (*a*) and (*b*) cannot be accepted by any confronted state. Such reservations and acceptances of these will not have any legal effects. (…) Similarly, an incompatible reservation under article 19 (1) (*c*) should be regarded as incapable of acceptance and as *eo ipso* invalid and without any legal effect.[240]

124. The Special Rapporteur shares this view. It does not follow, however, that acceptance of a non-valid reservation is *ipso facto* invalid. It seems more accurate to state that it simply cannot produce the legal effects intended by its author, not because of the non-validity of the acceptance but because of the non-validity of the reservation. The acceptance itself may not be characterized as valid or non-valid. In his tenth report on reservations to treaties, the Special Rapporteur has already maintained that "acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation",[241] but the issue in that case is not the validity of the acceptance, but that of the reservation.

---

[234] *Multilateral Treaties …*(see footnote 199 above), chap. XXIII.1. See also footnote 214 above.

[235] United Kingdom, objection of 5 June 1987 in respect of a Soviet reservation to article 66 of the Vienna Convention (see footnote 219 above).

[236] Müller, "Article 21", *loc. cit.* (footnote 195 above), pp. 927–928, para. 70.

[237] *I.C.J. Reports 1951*, p. 21.

[238] *Yearbook … 2008*, vol. II (Part Two), para. 77.

[239] See paragraphs 94–95 above.

[240] Horn, *op. cit.* (footnote 197 above), p. 121.

[241] Guideline 3.3.3 (Effect of unilateral acceptance of an invalid reservation), proposed in the tenth report (*Yearbook … 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, para. 202).

The aim of this draft guideline is not to determine the effects of acceptance of a reservation by a State, but simply to establish that, if the reservation in question is invalid, it remains null even if it is accepted. This observation accords with article 21, which envisages the effects of reservations only if they are "established" in accordance not only with articles 20 and 23 of the Vienna Conventions but also, explicitly, with article 19. Furthermore, the principle established in draft guideline 3.3.3 is in line with the provisions of article 20; in particular, it does not exclude the possibility that acceptance may have other effects, in particular, of allowing the entry into force of the treaty with regard to the reserving State or international organization.[242]

The response to the question as to the conditions under which, in these circumstances, a treaty may enter into force for the author of the reservation and what the content of its treaty obligations would then be is in no way affected by the acceptance; it is solely dependent on the validity of the reservation and on the effects that its author intended it to produce.

125. Furthermore, to argue that no acceptance of a non-invalid reservation may, in turn, be considered valid would prevent the Contracting Parties from collectively accepting such a reservation. Yet "it can be argued that the Parties always have a right to amend the treaty by general agreement *inter se* in accordance with article 39 of the 1969 and 1986 Vienna Conventions and that nothing prevents them from adopting unanimous agreement to that end on the subject of reservations".[243]

126. Moreover, in the light of the presumption contained in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, States or international organizations which have remained silent on a reservation, whether valid or not,[244] are deemed to have "accepted" the reservation. If every acceptance were subject to conditions of validity, it would have to be concluded that the tacit acceptance that these States or international organizations are presumed to have expressed was not valid, which is absurd.[245]

3. Conclusions regarding reactions to reservations

127. In the light of the above, it is clear that, as in the case of objections, the 1969 and 1986 Vienna Conventions do not establish conditions for the substantive validity of acceptances and that it would be unwise to speak of the substantive validity of reactions to reservations, regardless of whether the latter are valid. Should the Commission deem it necessary to adopt a guideline to that effect, which strikes the Special Rapporteur as unnecessary,[246] it might read:

"**3.4**[247] *Substantive validity of acceptances and objections*

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

C. Validity of interpretative declarations

128. The 1969 and 1986 Vienna Conventions do not contain any rule on interpretative declarations as such, or, of course, on the conditions for the validity of such unilateral declarations. From that point of view, and from many others as well, they are distinct from reservations and cannot simply be equated with them.

129. The definition of "interpretative declarations" provided in guideline 1.2 (Definition of interpretative declarations) is also limited to identifying the practice in positive terms:

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.[248]

However, this definition, as noted in the commentary, "in no way prejudges the validity or the effect of such declarations and … the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them".[249] The term "permissibility", used in 1999, should now be understood, as in the case of reservations, to mean "validity", a word which, in the view of the Commission,[250] seems, in all cases, to be more appropriate.

130. There is, however, still some question as to whether an interpretative declaration can be valid, a question that is clearly different from that of whether a unilateral statement constitutes an interpretative declaration or a reservation. Indeed, it is one thing to determine whether a unilateral statement "purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions"—which corresponds to the definition of "interpretative declarations"—and another to determine whether the interpretation proposed therein is valid, or, in other words, whether the "meaning or scope attributed by the declarant to a treaty or to certain of its provisions" is valid.

131. The issue of the validity of interpretative declarations can doubtless be addressed in the treaty itself;[251] while this is not very common in practice, it is still a

---

[242] *Ibid.*, para. 203.

[243] *Ibid.*, para. 205 (footnotes omitted). In this regard, see Greig, "Reservations: equity as a balancing factor?", pp. 56–57; and Sucharipa-Behrman, "The legal effects of reservations to multilateral treaties", p. 78. This is also the position of Bowett, but he considers that the possibility does not come under the law of reservations ("Reservations to non-restricted multilateral treaties", p. 84); see Redgwell, "Universality or integrity? Some reflections on reservations to general multilateral treaties", p. 269.

[244] See, however, the position of Gaja, who contends that article 20, paragraph 5—and, indeed, all of articles 20 and 21 of the Vienna Convention—are applicable only to valid reservations ("Il regime della Convenzione di Vienna concernente le riserve inammissibili", pp. 349–361).

[245] It could no doubt be argued that article 20, paragraph 5, does not apply to non-valid reservations (*ibid.*), but how can such non-invalidity be determined *ex ante*?

[246] Its adoption would nevertheless have the "pedagogical" advantage of justifying the inclusion in the Guide to Practice of commentaries corresponding to the elements of section A above.

[247] The numbering of the guidelines proposed in the present report continues from the numbering used previously; since it has been suggested that some of the previously adopted guidelines should be moved from part III to part IV (see paragraphs 83–84 above), the Drafting Committee would have to renumber the guidelines contained in part III of the Guide to Practice.

[248] *Yearbook ... 1999*, vol. II (Part Two), p. 97.

[249] *Ibid.*, p. 103, para. (33) of the commentary.

[250] *Yearbook ... 2005*, vol. II (Part Two), p. 64, para. 345.

[251] Heymann, *op. cit.* (footnote 145 above), p. 114.

possibility. Thus, a treaty's prohibition of any interpretative declaration would invalidate any declaration that purported to "specify or clarify the meaning or scope" of the treaty or certain of its provisions. Article XV.3 of the 2001 Canada–Costa Rica Free Trade Agreement[252] is an example of such a provision. Other examples exist outside the realm of bilateral treaties. The third draft agreement for the Free Trade Area of the Americas (FTAA) of November 2003, though still in the drafting stage, states in chapter XXIV, draft article 4:

> This Agreement shall not be subject to reservations [or unilateral interpretative declarations] at the moment of its ratification.[253]

132. It is also conceivable that a treaty might merely prohibit the formulation of certain interpretative declarations to certain of its provisions. To the Special Rapporteur's knowledge, no multilateral treaty contains such a prohibition in this form. But treaty practice includes more general prohibitions which, without expressly prohibiting a particular declaration, limit the parties' capacity to interpret the treaty in one way or another. It follows that, if the treaty is not to be interpreted in a certain manner, interpretative declarations proposing the prohibited interpretation are invalid. The European Charter for Regional or Minority Languages of 5 November 1992 includes examples of such prohibition clauses; article 4, paragraph 4, states:

> Nothing in this Charter shall be construed as limiting or derogating from any of the rights guaranteed by the European Convention on Human Rights.

And article 5 states:

> Nothing in this Charter may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States.

Similarly, articles 21 and 22 of the Framework Convention for the Protection of National Minorities of 1 February 1995 also limits the potential to interpret the Convention:

> **Article 21**
>
> Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.
>
> **Article 22**
>
> Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.

133. With the exception of treaty-based prohibitions of unilateral interpretative declarations, it would seem impossible to identify any other criterion for the substantive validity of an interpretative declaration. By definition, such declarations do not purport to modify the legal effects of the treaty, but only to specify or clarify them.[254]

134. If, on the contrary, the effect of an "interpretative declaration" is to undermine the legal effect of one of the provisions of the treaty or of the treaty as a whole, it is not an interpretative declaration but a reservation which should be treated as such and should therefore meet the conditions for the substantive (and formal) validity of reservations.

135. The Court of Arbitration that settled the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *English Channel* case confirmed this approach. In that case, the United Kingdom maintained that the third reservation of France to article 6 of the Geneva Convention on the Continental Shelf was merely an interpretative declaration and subsequently rejected this interpretation on the grounds that it could not be invoked against the United Kingdom. The Court rejected this argument and considered that the declaration of France was not simply an interpretation; it had the effect of modifying the scope of application of article 6 and was therefore a reservation, as France had maintained:

> This condition, according to its terms, appears to go beyond mere interpretation; for it makes the application of that regime dependent on acceptance by the other State of the French Republic's designation of the named areas as involving "special circumstances" regardless of the validity or otherwise of that designation under Article 6. Article 2 (1) (*d*) of the Vienna Convention on the Law of Treaties, which both Parties accept as correctly defining a "reservation", provides that it means "a unilateral statement, however phrased or named, made by a State… whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in its application to that State". This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State. This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this "reservation" is to be considered a "reservation" rather than an "interpretative declaration".[255]

136. While States often maintain or suggest that an interpretation proposed by another State is incompatible with the object and purpose of the relevant treaty,[256] an interpretative declaration, by definition, cannot be contrary to the treaty or to its object or purpose. Where this is not the case, the statement is, in fact, a reservation, as noted in

---

[252] Article XV.3—Reservations: "This Agreement shall not be subject to unilateral reservations or unilateral interpretative declarations" (available from www.sice.oas.org/Trade/cancr/English/text_e.asp#p7c15arXV.3 (accessed 8 December 2014)).

[253] See the FTAA website, www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp (accessed 8 December 2014); the square brackets are original to the text.

[254] *Yearbook ... 1999*, vol. II (Part Two), p. 100 (para. (16) of the commentary to guideline 1.2.). See also the famous ICJ dictum in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 18 July 1950, I.C.J. Reports 1950*, p. 229; and the 27 August 1952 judgement of the Court in *Rights of Nationals of the United States of America in Morocco (France v. the United States of America), I.C.J. Reports 1952*, p. 196.

[255] Arbitral award of 30 June 1977, UNRIAA, vol. XVIII, p. 40, para. 55.

[256] See, for example, Germany's reactions to Poland's interpretative declaration to the European Convention on Extradition of 13 December 1957 (United Nations, *Treaty Series*, vol. 1862, No. A-5146, pp. 469 and 470) and to India's declaration interpreting article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (*Multilateral Treaties Deposited with the Secretary-General*, available online from http://treaties.un.org/, chaps. IV.3 and IV.4 respectively).

many States' reactions to "interpretative declarations".[257] Spain's reaction to the "declaration" formulated by Pakistan in signing the 1966 International Covenant on Economic, Social and Cultural Rights also demonstrates the different stages of thought in cases where the proposed "interpretation" is really a modification of the treaty that is contrary to its object and purpose. The term "declaration" must first be defined; only then will it be possible to apply to it conditions for substantive validity (of reservations):

> The Government of the Kingdom of Spain has examined the Declaration made by the Government of the Islamic Republic of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966.
>
> The Government of the Kingdom of Spain points out that regardless of what it may be called, a unilateral declaration made by a State for the purpose of excluding or changing the legal effects of certain provisions of a treaty as it applies to that State constitutes a reservation.
>
> The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan, which seeks to subject the application of the provisions of the Covenant to the provisions of the constitution of the Islamic Republic of Pakistan is a reservation which seeks to limit the legal effects of the Covenant as it applies to the Islamic Republic of Pakistan. A reservation that includes a general reference to national law without specifying its contents does not make it possible to determine clearly the extent to which the Islamic Republic of Pakistan has accepted the obligations of the Covenant and, consequently, creates doubts as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.
>
> The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan to the effect that it subjects its obligations under the International Covenant on Economic, Social and Cultural Rights to the provisions of its constitution is a reservation and that that reservation is incompatible with the object and purpose of the Covenant.
>
> According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a treaty are not permissible.
>
> Consequently, the Government of the Kingdom of Spain objects to the reservation made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.
>
> This objection shall not preclude the entry into force of the Covenant between the Kingdom of Spain and the Islamic Republic of Pakistan.[258]

137. Therefore, the issue is not the "validity" of interpretative declarations. These unilateral statements are, in reality, nothing more than reservations and will be treated as such, including with respect to their substantive and formal validity. The European Court of Human Rights followed that reasoning in its judgment in the case of *Belilos v. Switzerland*. Having reclassified Switzerland's declaration as a reservation, it applied the conditions for substantive validity of the European Convention on Human Rights:

> In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content. In the present case, it appears that Switzerland meant to remove certain categories of proceedings from the ambit of Article 6 § 1 (art. 6–1) and to secure itself against an interpretation of that Article (art. 6–1) which it considered to be too broad. However, the Court must see to it that the obligations arising under the Convention are not subject to restrictions which would not satisfy the requirements of Article 64 (art. 64) as regards reservations. Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision.[259]

138. It would therefore seem wise to specify in a guideline that any unilateral statement, which purports to be an interpretative declaration but which in fact constitutes a reservation is subject to the conditions for the validity of a reservation.

"**3.5.1** *Conditions of validity applicable to unilateral statements which constitute reservations*

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

139. But it must still be determined whether a true interpretative declaration, which purports to explain the meaning of the treaty or of its provisions, can be valid or invalid where the treaty is silent.[260]

140. It goes without saying that an interpretation may be held to be with or without merit although, in absolute terms, it is difficult to determine whether the author is right or wrong until a competent body rules on the interpretation of the treaty. Interpretation remains an eminently subjective process and it is rare that a legal provision, or a treaty as a whole, can be interpreted in only one way. "The interpretation of documents is to some extent an art, not an exact science."[261]

141. As Kelsen has noted:

> If "interpretation" is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value …[262]

Jean Combacau and Serge Sur consider that:

> The process of interpretation [in international law] is, in fact, only occasionally centralized, either through a judicial body or in some other way. Competence to interpret lies with all subjects and, individually, with each one of them. The resulting proliferation of forms

---

[257] In addition to the aforementioned example of the reservation of Spain, see the objection of Austria to the "interpretative declaration" formulated by Pakistan in respect of the 1997 International Convention for the Suppression of Terrorist Bombings and the comparable reactions of Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America (*Multilateral Treaties Deposited with the Secretary-General*, available online from http://treaties.un.org/, chap. XVIII.9). See also the reactions of Germany and the Netherlands to the unilateral statement of Malaysia (*ibid.*) and the reactions of Finland, Germany, the Netherlands and Sweden to the "interpretative declaration" formulated by Uruguay in respect of the Statute of the International Criminal Court (*ibid.*, chap. XVIII.10). For other examples of reclassifications, see the thirteenth report on reservations to treaties (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600), p. 9, para. 26.

[258] *Multilateral Treaties Deposited with the Secretary-General*, available online from http://treaties.un.org/, chap. IV.3.

[259] Judgment, 29 April 1988, *Series A*, vol. 132, para. 49, p. 18.

[260] For cases in which a treaty excludes certain interpretations, see paragraphs 131–132 above.

[261] *Yearbook ... 1966*, vol. II, p. 218, para. (4) of the commentary. See also Aust, *Modern Treaty Law and Practice*, p. 230.

[262] Kelsen, *Pure Theory of Law*, p. 351.

of interpretation is only partially compensated for by their hierarchy. Unilateral interpretations are, in principle, of equal value, and the agreed forms are optional and consequently unpredictable. However, the practical difficulties must not be overestimated. It is not so much a question of an essential flaw in international law as an aspect of its nature, which guides it in its entirety towards an ongoing negotiation that can be rationalized and channelled using the rules currently in force.[263]

142. Thus, it is accepted that "on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party".[264] If States have the right to interpret treaties unilaterally, they must also have the right to let their point of view be known as regards the interpretation of a treaty or of certain of its provisions.

143. International law does not, however, provide any criterion allowing for a definitive determination of whether a given interpretation has merit. There are, of course, methods of interpretation (see, initially, articles 31 to 33 of the 1969 and 1986 Vienna Conventions), but they are only guidelines as to the ways of finding the "right" interpretation; they do not offer a final test of whether the interpretation has merit. Thus, article 31, paragraph 1, of the Vienna Conventions specifies that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose**". This specification is in no way a criterion for merit, and still less a condition for the validity of the interpretations of the treaty, but a means of deriving *one* interpretation. That is all.

144. In international law, the value of an interpretation is assessed not on the basis of its content, but of its authority. It is not the "right" interpretation that wins out, but the one that was given either by all the parties to the treaty—in which case it is called an "authentic" interpretation—or by a body empowered to interpret the treaty in a manner that is binding on the parties. In that regard, the instructive 1923 opinion of the Permanent Court of International Justice in the *Jaworzina* case is noteworthy. Although the Court was convinced that the interpretation reached by the Conference of Ambassadors lacked merit, it did not approach the problem as a question of validity, but rather of opposability. The Court stated:

> And even leaving out of the question the principles governing the authoritative interpretation of legal documents, it is obvious that the opinion of the authors of a document cannot be endowed with a decisive value when that opinion has been formulated after the drafting of that document and conflicts with the opinion which they expressed at that time. There are still stronger grounds for refusing to recognize the authority of such an opinion when, as in the present case, a period of more than two years has elapsed between the day on which it was expressed and the day on which the decision to be interpreted was itself adopted.[265]

145. International law in general and treaty law in particular do not impose conditions for the validity of interpretation in general and of interpretative declarations in particular. It has only the notion of the opposability of an interpretation or an interpretative declaration which, as far as it is concerned, comes into full play in the context of determination of the effects of an interpretative declaration. In the absence of any condition for validity, "simple interpretative declarations are therefore, in principle, admissible",[266] although this does not mean that it is appropriate to speak of validity or non-validity unless the treaty itself sets the criterion.[267]

146. Thus, Heymann therefore was right in stating:

> International law knows no limits to the formulation of a simple interpretative declaration since treaties, regardless of the hierarchical place of their provisions in international law, are in principle interpreted in a decentralized manner and, for the entire period of their existence, must be applied and consequently interpreted. Thus, restrictions on the admissibility of simple interpretative declarations may only derive from the treaty itself. This means that a simple interpretative declaration is not prohibited, or that its formulation is not time-limited, unless the treaty in question contains special rules in that regard (translated for the report).[268]

147. In the light of these remarks, the Special Rapporteur thinks that it would be useful to include in the Guide to Practice a guideline highlighting the lack of conditions for the substantive validity of an interpretative declaration unless, of course, the treaty provides otherwise. Such a guideline could be based on article 19 of the 1969 and 1986 Vienna Conventions, which is reflected in guideline 3.1 (Permissible reservations), in so far as paragraphs (*a*) and (*b*) of the guideline cover the explicit or implicit prohibition of certain reservations by the treaty itself. This idea could be transposed to the case of interpretative declarations.

148. To the Special Rapporteur's knowledge, however, no treaty expressly authorizes "specified" interpretative declarations with a meaning corresponding to that of "specified reservations".[269] While this possibility cannot be entirely ruled out, it is difficult to imagine the purpose of such a clause or how it could be worded. Thus, in the light of its transposition to interpretative declarations, the wording of guideline 3.3 could be simplified and might simply state that the treaty-based prohibition on formulating an interpretative declaration may be express or implicit (as, for example, in the case of a treaty that permits interpretative declarations to only some of its provisions).

"**3.5** *Substantive validity of interpretative declarations*

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

149. It should also be stressed that guideline 3.3 does not include the temporal limitations on the formulation of reservations contained in article 19 of the 1969 and 1986 Vienna Conventions, which guideline 3.1

[263] Combacau and Sur, *Droit international public*, p. 171.

[264] Daillier and Pellet, *Droit international public*, 7th ed., p. 254. See also Rousseau, *Droit international public*, vol. I, *Introduction et Sources*, p. 250.

[265] Advisory opinion of 6 December 1923, *P.C.I.J., Series B*, No. 8, p. 38.

[266] Heymann, *op. cit.* (footnote 145 above), p. 113.

[267] See paragraphs 131–132 above.

[268] Heymann, *op. cit.* (footnote 145 above), p. 116.

[269] See guidelines 3.1.2 (Definition of specified reservations) and 3.1.4 (Validity of specified reservations) and the commentaries thereto (*Yearbook ... 2006*, vol. II (Part Two), pp. 150–154 and 155–156).

simply reproduces in accordance with the Commission's consistent practice. There is no such limitation in respect of interpretative declarations, as the Commission has noted elsewhere.[270] It is therefore unnecessary to mention it again in guideline 3.3.

150. Ultimately, determining the validity of interpretative declarations is infinitely more complex than in the case of reservations. A treaty-based prohibition on formulating interpretative declarations should not raise major assessment issues. A guideline specifying the rules to be followed in such cases seems unnecessary.

D. Validity of reactions to interpretative declarations (approval, opposition or reclassification)

151. The question of the validity of reactions to interpretative declarations—approval, opposition or reclassification—must be considered in the light of the study of the validity of interpretative declarations themselves. Since any State, on the basis of its sovereign right to interpret the treaties to which it is a party, has the right to make interpretative declarations, there seems little doubt that the other Contracting Parties also have the right to react to these interpretative declarations without any potential for assessment of the "validity" of their reactions.

1. Validity of approval

152. In approving an interpretative declaration, the author expresses agreement with the interpretation proposed and, in so doing, conveys its own point of view regarding the interpretation of the treaty or of some of its provisions. Thus, a State or international organization which formulates an approval does exactly the same thing as the author of the interpretative declaration.[271] It is difficult to see how this reaction could be subject to different conditions of validity than those applicable to the initial act.

153. Furthermore, the relationship between an interpretation and its acceptance is mentioned in article 31, paragraph 3 (*a*), of the 1969 and 1986 Vienna Conventions, which speak of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".[272]

154. Logically, where the interpretative declaration itself is non-valid owing to a treaty-based prohibition, the approval will have no effect and there will be no need to declare it invalid. Without prejudice to the issue of the effects of an interpretative declaration, it seems clear that no subsequent agreement within the meaning of article 31, paragraph 3 (*a*), of the 1969 and 1986 Vienna Conventions can be established. Furthermore, the treaty-based prohibition deprives individual interpretations by States of all authority.

155. The question of whether the interpretation proposed by the author of the interpretative declaration, on the one hand, and accepted by the author of the approval, on the other, is the "right" interpretation and, as such, is capable of producing the effects desired by the key players in relation both to themselves and to other parties to the treaty[273] is, however, different from that of the validity of the declaration and the approval.[274] The first of these questions cannot be resolved until the effects of interpretative declarations are considered.

2. Validity of oppositions

156. The validity of a negative reaction—an opposition—is no more predicated upon respect for any specific criteria than is that of interpretative declarations or approvals.

157. This conclusion is particularly evident in the case of opposition expressed through the formulation of an interpretation different from the one initially proposed by the author of the interpretative declaration.[275] There is no reason to subject such a "counter-interpretative declaration", which simply proposes an alternate interpretation of the treaty or of some of its provisions, to stricter criteria and conditions for validity than the initial interpretative declaration. While it is clear that in the event of a conflict, only one of the two interpretations, at best,[276] could prevail, both interpretations should be presumed valid unless, at some point, it becomes clear to the key players that one interpretation has prevailed. In any event, the question of whether one of them, or neither of them, actually expresses the "correct" interpretation of the treaty is a different matter and has no impact on the validity of such declarations.[277]

158. This is also true in the case of a simple opposition, where the author merely expresses its refusal of the interpretation proposed in an interpretative declaration without proposing another interpretation that it considers

---

[270] In that regard, see guideline 2.4.3:

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

"Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7], and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time."

(*Yearbook ... 2001*, vol. II (Part Two), pp. 192–193. See also *Yearbook ... 1999*, vol. II (Part Two), p. 101, paras. (21) and (22) of the commentary to guideline 1.2.)

[271] See the thirteenth report on reservations to treaties (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600), pp. 12–13, paras. 42–48; see also Heymann's position (*op. cit.*, footnote 145 above, pp. 119–123).

[272] See also the thirteenth report on reservations to treaties (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600), p. 6, para. 10. This issue was the subject of a discussion between the parties during the oral arguments in the *Dispute regarding Navigational and Related Rights*, when Costa Rica maintained that two identical interpretations in the same language by the parties constituted such an agreement (CR 2009/2 (2 March 2009), pp. 56–57, paras. 47–48 (Mr. Kohen)). Nicaragua contested this position (CR 2009/4 (5 March 2009), p. 56, paras. 28–29 (Mr. Pellet)); at the time when this report was written, the Court had not yet issued a judgement in the case.

[273] This question must be considered, in particular, in the context of article 41 of the 1969 and 1986 Vienna Conventions (Agreements to modify multilateral treaties between certain of the parties only).

[274] See paragraphs 140–144 above.

[275] See guideline 2.9.2 in the thirteenth report on reservations to treaties (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600), para. 23.

[276] In fact, it is not impossible that a third party might not agree with either of the interpretations proposed individually and unilaterally by the parties to the treaty if, through the application of methods of interpretation, it concludes that another interpretation arises from the provisions of the treaty. See, for example, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of 27 August 1952, *I.C.J. Reports 1952*, p. 211.

[277] See paragraphs 140–144 above.

more "correct". Such oppositions are certainly not subject to any condition of validity. The position expressed by the author of an opposition may prove ineffective, particularly when the interpretation proposed in the interpretative declaration proves to be the most "correct", but this does not call the validity of the opposition into question and concerns only its possible effects.

3. Validity of reclassifications

159. The question of the validity of reclassifications of interpretative declarations must be approached from a slightly different angle. In the case of a reclassification, the author does not call into question[278] the content of the initial declaration, but rather its legal nature and the regime applicable to it.[279]

160. It must be borne in mind that the question of whether to use the term "reservation" or "interpretative declaration" must be determined objectively, taking into account the criteria that the Commission set forth in guidelines 1.3 and 1.3.1 to 1.3.3. Guideline 1.3 states:

> The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.[280]

The "objective" test takes into account only the declaration's potential effects on the treaty as intended by its author. In other words:

> only an analysis of the potential—and objective—effects of the statement can determine the purpose sought. In determining the legal nature of a statement formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement has (or would have). If it modifies or excludes the legal effect of the treaty or certain of its provisions, it is a reservation "however phrased or named"; if the statement simply clarifies the meaning or scope that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration.[281]

161. Without prejudice to the Commission's future position on the effects of these unilateral statements, it is clear that they are an important factor in determining the legal nature of the initially formulated act: in order to determine whether such statements constitute interpretative declarations or reservations, they must be taken into account as expressing the position of parties to a treaty on the nature of the "interpretative declaration" or "reservation", with all the consequences that this entails. Nevertheless, the author of a reclassification is simply expressing its opinion on this matter. That opinion may prove to be justified or unjustified when the test of guideline 1.3 is applied, but this in no way implies that the reclassification is valid or invalid; once again, these are two different questions.

162. Furthermore, the reclassification is, in itself, simply an interpretation of the "interpretative declaration" itself. As noted above, it is impossible to assess the validity of such an interpretation.[282] Except where the treaty itself prohibits an interpretation, international law establishes only the methods of interpretation, not the conditions of validity.

163. Furthermore, reclassifications, whether justified or unjustified in their use of the term "interpretative declaration" or "reservation", are not subject to criteria for validity. Abundant State practice[283] shows that Contracting Parties consider themselves entitled to make such declarations, often in order to ensure the integrity of the treaty or in response to treaty-based prohibitions of reservations.[284]

4. Conclusions regarding reactions to interpretative declarations

164. It follows from these considerations that the very idea that the concept of validity applies to reactions to interpretative declarations is unwarranted. While such reactions may prove to be "correct" or "erroneous", this does not imply that they are "valid" or "non-valid".

165. In the light of these observations, the Special Rapporteur wonders whether it would be appropriate to include guidelines specifying that there are no conditions for the validity of reactions to interpretative declarations; a detailed presentation of the matter could be provided in the commentary on guideline 2.9.4.[285] If the Commission deems it useful to include such a guideline in the Guide to Practice, it could be worded:

"**3.6** *Substantive validity of an approval, opposition or reclassification*

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

E. Validity of conditional interpretative declarations

166. According to the definition contained in guideline 1.2.1, a conditional interpretative declaration is:

> a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving

---

[278] It may *simultaneously* call into question and object to the content of the reclassified declaration by making an objection to it; in such cases, however, the reclassification and the objection remain conceptually different from one another; see the thirteenth report on reservations to treaties (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600), paras. 29–30.

[279] *Ibid.*, para. 25.

[280] For the guideline and the commentary thereto, see *Yearbook ... 1999*, vol. II (Part Two), p. 107.

[281] *Ibid.*, para. (3) of the commentary to guideline 1.3.1.

[282] See paragraphs 140–144 above.

[283] See, *inter alia*, the thirteenth report on reservations to treaties (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600), para. 26.

[284] For a particularly telling example, see the reactions of several States to the Philippines' "interpretative declaration" to the 1982 United Nations Convention on the Law of the Sea (*Multilateral Treaties Deposited with the Secretary-General* available online from http://treaties.un.org, chap. XXI.6).

[285] This guideline, proposed by the Special Rapporteur in his thirteenth report on reservations to treaties (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600, para. 48), reads:

"**2.9.4** *Freedom to formulate an approval, protest or reclassification*

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

or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof.[286]

Thus, the key feature of a conditional interpretative declaration is not that it proposes a certain interpretation, but that it constitutes a condition for its author's consent to be bound by the treaty.[287] It is that element of conditionality that brings a conditional interpretative declaration closer to being a reservation.

167. *A priori*, however, the question of the validity of conditional interpretative declarations seems little different from that of "simple" interpretative declarations and it would seem unwarranted to make formulation of a conditional interpretative declaration subject to conditions for validity other than those applicable to "simple" interpretative declarations.[288] It is clear from the definition of a conditional interpretative declaration that it does not purport to modify the treaty, but merely to interpret one or more of its provisions in a certain manner.

168. The situation changes significantly, however, where the interpretation proposed by the author of a conditional interpretative declaration does not correspond to the interpretation of the treaty established by agreement between the parties. In that case, the condition formulated by the author of the declaration, stating that it does not consider itself to be bound by the treaty in the event of a different interpretation, brings this unilateral statement considerably closer to being a reservation. Horn has stated that:

> If a state does not wish to abandon its interpretation even in the face of a contrary authoritative decision by a court, it may run the risk of violating the treaty when applying its own interpretation. In order to avoid this, it would have to qualify its interpretation as an absolute condition for participation in the treaty. The statement's nature as a reservation is established at the same time the propagated interpretation is established as the incorrect one.[289]

169. Thus, any conditional interpretative declaration potentially constitutes a reservation: a reservation conditional upon a certain interpretation. This can be seen from one particularly clear example of a conditional interpretative declaration; the declaration that France attached to its expression of consent to be bound by its signature of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) stipulates that:

> In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States.[290]

In other words, France intends to exclude the application of the treaty in its relations with any States parties that do not accept its interpretation of the treaty, exactly as if it had made a reservation.

170. While this scenario is merely a potential one, it seems clear that the declaration in question is subject to the conditions for substantive validity set out in article 19 of the 1969 and 1986 Vienna Conventions. Although it might be thought *prima facie* that the author of a conditional interpretative declaration is merely proposing a specific interpretation (not subject to conditions for validity), the effects of such unilateral statements are, in fact, made conditional by their authors upon one or more provisions of the treaty not being interpreted in the desired manner.

171. The deliberate decision of the Netherlands to formulate reservations, rather than interpretative declarations, to the International Covenant on Civil and Political Rights clearly shows the considerable similarities between the two approaches:

> The Kingdom of the Netherlands clarif[ies] that although the reservations are partly of an interpretational nature, it has preferred reservations to interpretational declarations in all cases, since if the latter form were used doubt might arise concerning whether the text of the Covenant allows for the interpretation put upon it. By using the reservation form the Kingdom of the Netherlands wishes to ensure in all cases that the relevant obligations arising out of the Covenant will not apply to the Kingdom, or will apply only in the way indicated.[291]

172. *A priori*, there is therefore no alternative to the application to these conditional interpretative declarations of the same conditions for substantive (and, moreover, formal) validity as those that apply to reservations. The (precautionary) application of the conditions set out in article 19 of the 1969 and 1986 Vienna Conventions is not easy, however, unless it has been established that the interpretation proposed by the author is unwarranted and does not correspond to the authentic interpretation of the treaty. For example, although a treaty may prohibit the formulation of reservations to its provisions, it does not follow that a State cannot subject its consent to be bound by the treaty to a certain interpretation of that treaty. If the interpretation proves to be warranted and in accordance with the authentic interpretation of the treaty, it is a genuine interpretative declaration that must meet the conditions for the validity of interpretative declarations, but only those conditions. If, however, the interpretation does not express the correct meaning of the treaty and is rejected on that account, the author of the "interpretative declaration" does not consider itself bound by the treaty unless the treaty is *modified* in accordance with its wishes. In that case, the "conditional declaration" is indeed a reservation and must meet the corresponding conditions for the validity of reservations.

173. It follows that, so long as its status as to correctness has not been, or cannot be, determined, such a conditional interpretative declaration must meet both the conditions for the validity of an interpretative declaration (in the event that the interpretation is ultimately shared by the other parties or established by a competent body) and the conditions for the validity of a reservation (in the event that the proposed interpretation is rejected). So long as the correct interpretation has not been established, the conditional interpretative declaration remains in a legal vacuum and it is impossible to determine

---

[286] *Yearbook ... 1999*, vol. II (Part Two), pp. 103–106.

[287] *Ibid.*, p. 105, para. (16) of the commentary.

[288] See paragraphs 128–148 above.

[289] Horn, *op. cit.* (footnote 197 above), p. 326.

[290] This declaration was confirmed in 1974 at the time of ratification (United Nations, *Treaty Series*, vol. 936, No. 9068, p. 419).

[291] *Multilateral Treaties Deposited with the Secretary-General*, available online from http://treaties.un.org/, chap. IV.4.

whether it is a mere interpretation or a reservation. Either case is still possible.

174. However, the problem remains largely theoretical. Where a treaty prohibits the formulation of interpretative declarations, a conditional interpretative declaration that proposes the "correct" interpretation must logically be considered non-valid, but the result is exactly the same: the interpretation of the author of the declaration is accepted (otherwise, the conditional declaration would not be an interpretative declaration). Thus, the validity or non-validity of the conditional interpretative declaration as an "interpretative declaration" has no practical effect. Whether or not it is valid, the proposed interpretation is identical with the authoritative interpretation of the treaty.

175. If, on the other hand, the treaty prohibits reservations, but not interpretative declarations, a conditional interpretative declaration is considered non-valid since it does not meet the conditions for the validity of a reservation. But, here again, if the proposed interpretation is ultimately accepted as the correct and authoritative interpretation, the author of the conditional interpretative declaration has achieved its aim, despite the non-validity of its declaration.

176. The question of whether a conditional interpretative declaration meets the conditions for the validity of an interpretative declaration does not actually affect the interpretation of the treaty. The "interpretation" element is merely the condition that transforms the declaration into a reservation. However, in the event that the conditional interpretative declaration is indeed transformed into a reservation, the question of whether it meets the conditions for the validity of reservations does have a real impact on the content (and even the existence) of treaty relations.

177. In the light of these observations, there is no reason to think that conditional interpretative declarations are subject to the same conditions for the validity as "simple" interpretative declarations. Instead, they are subject to the conditions for the validity of reservations, as in the case of conditions for formal validity.[292] The conditional interpretative declaration is in fact a conditional reservation.

"**3.5.2** *Conditions for the substantive validity of a conditional interpretative declaration*

"The validity of a conditional interpretative declaration must be assessed in accordance with the provisions of draft guidelines 3.1 and 3.1.1 to 3.1.15."

178. No specific new provision needs to be adopted, at this stage of the study, regarding the issue of assessment of the validity of conditional interpretative declarations. In the light of the observations concerning their validity, it would seem that the issue must be resolved in the same way as that of competence to assess the validity of reservations. In accordance with the Commission's consistent practice regarding these specific interpretative declarations, and pending its final decision as to whether to maintain the distinction—which cannot be made until it has considered the effects of these declarations—the Special Rapporteur proposes the provisional inclusion in the Guide to Practice of a guideline consisting of a simple cross-reference to other guidelines, which could be worded:

"**3.5.3** *Competence to assess the validity of conditional interpretative declarations*

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

[292] See guidelines 2.4.5 to 2.4.8 and 2.4.10 (*Yearbook ... 2001*, vol. II (Part Two), pp. 194–195; *Yearbook ... 2002*, vol. II (Part Two), pp. 47–48; and *Yearbook ... 2004*, vol. II (Part Two)), p. 109.

Chapter III

Effects of reservations and interpretative declarations

179. The fourth part of the Guide to Practice, as provided for in the general outline of the study,[293] covers the effects of reservations, acceptances and objections, to which the effects of interpretative declarations and reactions thereto (approval, opposition, recharacterization or silence) should also be added. This part follows the logic of the Guide to Practice, in which an attempt is made to present, as systematically as possible, all of the legal issues concerning reservations and related unilateral declarations, as well as interpretative declarations: after defining the issues (in the first part of the Guide) and establishing the rules for assessing the validity (second part of the Guide) and permissibility (third part of the Guide) of these various declarations, the fourth part is concerned with determining the legal effects of the reservation or interpretative declaration.[294]

180. Although it was initially planned that the fourth part would address issues relating to "The prohibition of certain reservations",[295] it does not seem to be the appropriate place for this section of the provisional outline. Those issues have in fact been addressed in the context of permissibility of reservations, in the third part of the Guide. The study should therefore concentrate on the effects of reservations, acceptances and objections, on the one hand, and on the effects of interpretative declarations and reactions to them, on the other.

[293] Second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, pp. 48–49, para. 37.

[294] The fifth and final part of the Guide to Practice will address the succession of States in relation to reservations.

[295] Second report on reservations to treaties, *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, pp. 48–49, para. 37, sect. IV.A.

181. First of all, it is worth recalling a point that is crucial to understanding the legal effects of a reservation or interpretative declaration. It is now accepted by the International Law Commission that both reservations and interpretative declarations are defined in relation to the legal effects that their authors intend them to have on the treaty. Accordingly, guideline 1.1 (Definition of reservations) provides as follows:

> "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.[296]

In the same spirit, guideline 1.2 (Definition of interpretative declarations) states that:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.[297]

182. Although the potential legal effects of a reservation or interpretative declaration are thus a "substantive element"[298] of its definition,[299] this does not at all mean that a reservation or interpretative declaration actually produces those effects. The fourth part of the Guide is not intended to determine the effects that the author of a reservation or the author of an interpretative declaration purported it to have—this issue was dealt with in the first part on the definition and identification of reservations and interpretative declarations. The fourth part, in contrast, deals with determining the legal effects that reservations and interpretative declarations actually produce in relation to eventual reactions from other Contracting Parties. The purported effects and the effects actually achieved are not necessarily identical and depend on the one hand on the validity and permissibility of the reservations and interpretative declarations and, on the other hand, on the reactions of other interested States or international organizations.

A. Effects of reservations, acceptances and objections

1. The rules of the 1969 and 1986 Vienna Conventions

183. Despite the relevant provisions set out in the 1969 and 1986 Vienna Conventions, the effects of a reservation or of an acceptance of or objection to a reservation remain one of the most controversial issues of treaty law. Article 21 of the two Conventions refers exclusively to the "legal effects of reservations and of objections to reservations". The drafting of this provision was relatively simple compared to that of the other provisions on reservations. Neither the International Law Commission nor the United Nations Conference on the Law of Treaties, held at Vienna in 1969, seem to have had any particular difficulty in formulating the rules presented in the first two paragraphs of article 21 concerning the effects of reservations (whereas paragraph 3 deals with the effects of objections).

184. The Commission's first Special Rapporteur on the law of treaties, J. L. Brierly, had already suggested in his draft article 10, paragraph 1, that a reservation be considered as:

> limiting or varying the effect of [a] treaty in so far as concerns the relation of [the] State or organization [author of the reservation] with one or more of the existing or future parties to the treaty.[300]

Fitzmaurice made the first proposal for a separate provision on the legal effects of a reservation, which largely prefigured the first two paragraphs of the current article 21.[301] It is interesting that these draft provisions seemed to smack of the obvious: Fitzmaurice did not make any comment on the draft and only noted that "it is considered useful to state these consequences, but they require no explanation".[302]

185. At the outset, Sir Humphrey Waldock suggested a provision on the effects of a reservation deemed "admissible",[303] and since then his proposal has undergone only minor drafting changes.[304] Neither Sir Humphrey[305] nor the Commission considered it necessary to comment at length on that rule, the Commission merely stating that:

> These rules, which appear not to be questioned, follow directly from the consensual basis of the relations between parties to a treaty.[306]

Nor did the issue give rise to observations or criticisms from States between the two readings by the Commission or at the United Nations Conference on the Law of Treaties.

---

[296] *Yearbook ... 1998*, vol. II (Part Two), p. 99.

[297] *Yearbook ... 1999*, vol. II (Part Two), p. 92.

[298] *Yearbook ... 1998*, vol. II (Part Two), p. 94, para. 495. The Special Rapporteur has emphasized that "it is generally recognized that the function of reservations is to purport to produce legal effects" (Third report on reservations to treaties, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 248, para. 144). Horn, *op cit.* (footnote 197 above), p. 41, maintains that the fact that reservations purport to produce certain specific legal effects is the "*differentia specifica*" of this type of unilateral act. See also the statements of Ruda and Rosenne, who have emphasized the close link between the definition of the reservation and the legal effects that it is likely to produce (*Yearbook ... 1965*, vol. I, 799th meeting, p. 167, para. 46, and 800th meeting, p. 171, para. 8).

[299] For a definition of reservations in general, see draft guidelines 1.1, *Yearbook ... 1998*, vol. II (Part Two), pp. 108–110, and 1.1.1 (*Yearbook ... 1999*, vol. II (Part Two), pp. 93–95).

[300] [First] Report on the law of treaties, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 222.

[301] Report on the law of treaties, *Yearbook ... 1956,* vol. II, document A/CN.4/101, pp. 115–116.

[302] *Ibid.*, p. 127, para. 101.

[303] This is the term that was used in draft article 18, paragraph 5, as presented in Sir Humphrey Waldock's first report, *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 61.

[304] The text proposed by Sir Humphrey for article 18, paragraph 5, became article 18 *ter*, entirely devoted to the legal effect of reservations, with a few editorial changes from the Drafting Committee (see *Yearbook ... 1962*, vol. I, 664th meeting, p. 234, para. 63). Subsequently, the Committee made other changes to the draft (*ibid.*, 667th meeting, p. 253, para. 71). It ultimately became article 21, as adopted by the Commission on first reading in 1962 (*ibid.*, vol. II, p. 181). The text underwent changes made necessary by the rephrasing of other provisions on reservations. The changes were purely editorial, except for the change to subparagraph 1 (*b*) (on this point, see paragraph 279 below).

[305] *Ibid.*, p. 68, para. 21.

[306] See the commentary in 1962 (*Yearbook ... 1962,* vol. II, p. 181 (commentary to article 21)) and the commentary to draft article 19 adopted on second reading in 1965 (*Yearbook ... 1966*, vol. II, p. 209, para. 1).

186. The drafting of the current article 21, paragraph 3, posed greater difficulties. This provision, logically absent from Sir Humphrey's first proposals, had to be included in the article on the effects of reservations and objections when the Commission accepted that a State objecting to a reservation could nevertheless establish treaty relations with the author of the reservation.[307] A United States proposal to that effect convinced Sir Humphrey of the logical need for such a provision,[308] but its drafting by the Commission was nevertheless time-consuming.[309] The Conference made only a relatively minor change in order to harmonize paragraph 3 with the reversal of the presumption of article 20, paragraph 4 (*b*).[310]

187. The resumed consideration of article 21 during the drafting of the 1986 Vienna Convention did not pose any significant difficulties. During the very brief discussion of draft article 21, two members of the Commission emphasized that the provision in question "followed logically" from draft articles 19 and 20.[311] Even more clearly, Mr. Calle y Calle stated that:

> If reservations were admitted, their legal effect was obviously to modify the relations between the reserving party and the party with regard to which the reservation was established.[312]

The Commission, and then several years later the United Nations Conference on the Law of Treaties, adopted article 21 with only the drafting changes required by the broader scope of the 1986 Vienna Convention.

188. One might think that the widespread acceptance of article 21 during adoption of the draft articles on the law of treaties between States and international organizations or between international organizations showed that the provision was even then accepted as reflecting international custom on the subject. The arbitral ruling made concerning the delimitation of the continental shelf in the *English Channel* case corroborates this analysis. The Court of Arbitration recognized:

> … that the law governing reservations to multilateral treaties was then undergoing an evolution which crystallized only in 1969 in Articles 19 to 23 of the Vienna Convention on the Law of Treaties.[313]

189. Nevertheless, the effects of a reservation, acceptance or objection are not fully addressed by article 21 of the 1969 and 1986 Vienna Conventions. This provision concerns only the effect of those instruments on the content of the treaty relationship between the reserving party and the other Contracting Parties. The separate issue of the effect of the reservation, acceptance or objection on the consent of the reserving party to be bound by the treaty is covered not by article 21 of the two Vienna Conventions, but by article 20, entitled "Acceptance of and objection to reservations":

190. This provision is the result of draft article 20 adopted by the Commission on first reading in 1962, entitled "The effects of reservations":

> 1. (*a*) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.
>
> (*b*) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 below shall apply.
>
> 2. Except in cases falling under paragraphs 3 and 4 below and unless the treaty otherwise provides:
>
> (*a*) Acceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State, as soon as the treaty is in force;
>
> (*b*) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.
>
> 3. Except in a case falling under paragraph 4 below, the effect of a reservation to a treaty which has been concluded between a small group of States shall be conditional upon its acceptance by all the States concerned unless:
>
> (*a*) The treaty otherwise provides; or
>
> (*b*) The States are members of an international organization which applies a different rule to treaties concluded under its auspices.
>
> 4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides.[314]

191. This provision was appropriate to its title, as it did indeed cover the effects of a reservation and the reactions to a reservation on the entry into force of the treaty for the reserving State. In 1965, however, it was included in the

---

[307] See Müller, "Article 21", *loc. cit.* (footnote 195 above), p. 888, paras. 7–8.

[308] Fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1, pp. 47 and 55. See also the comments of Denmark (*ibid.*, p. 46).

[309] Although Sir Humphrey considered that the case of a reservation to which a simple objection had been made was "not altogether easy to express" (*Yearbook ... 1965*, vol. I, 813th meeting, p. 270, para. 96), most of the members (see Mr. Ruda (*ibid.*, para. 13); Mr. Ago (*ibid.*, 814th meeting, p. 271, paras. 7 and 11); Mr. Tunkin (*ibid.*, para. 8) and Mr. Briggs (*ibid.*, p. 272, para. 14) were convinced that it was necessary, and even "indispensable" (Mr. Ago, *ibid.*, p. 271, para. 7) to introduce a provision on that subject "in order to forestall ambiguous situations" (*ibid.*, p. 271, para. 7). However, members had different opinions as to the basis of the paragraph proposed by the United States and the Special Rapporteur: whereas Sir Humphrey's proposal emphasized the consensual basis of the treaty relationship established despite the objection, the paragraph proposed by the United States seemed to suggest that the intended effect originated only from the unilateral act of the objecting State, that is, from the objection, without the reserving State having a real choice. The two positions had their supporters within the Commission (see the positions of Mr. Yasseen (*ibid.*, 800th meeting, p. 171, para. 7 and pp. 172–173, paras. 21–23 and 26), Mr. Tunkin (*ibid.*, 800th meeting, p. 172, para. 18) and Mr. Pal (*ibid.*, para. 24) and those of Sir Humphrey (*ibid.*, p. 173, para. 31), Mr. Rosenne (*ibid.*, p. 172, para. 10) and Mr. Ruda (*ibid.*, p. 172, para. 13)). The text that the Commission finally adopted on a unanimous basis (*ibid.*, 816th meeting, p. 284), however, is very neutral and clearly shows that the issue was left open by the Commission (see also the Special Rapporteur's summing-up, *ibid.*, 800th meeting, p, 173, para. 31).

[310] *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April to 22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), 33rd plenary meeting, 21 May 1969, p. 181.

[311] Cf. Mr. Tabibi, *Yearbook ... 1977*, vol. I, 1434th meeting, p. 98, para. 7; Mr. Dadzie, *ibid.*, p. 99, para. 18.

[312] *Ibid.*, p. 98, para. 8.

[313] *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 32, para. 38.

[314] *Yearbook ... 1962*, vol. II, p. 176.

new draft article 19 entitled "Acceptance of and objection to reservations"[315] (which later became article 20 of the 1969 Vienna Convention), after significant reworking out of concern for clarity and simplicity.[316] In the context of that reworking, the Commission also decided to abandon the link between objections and the conditions for permissibility of a reservation, including its compatibility with the object and purpose of the treaty.

192. At the United Nations Conference on the Law of Treaties, the first paragraph of this provision underwent substantial amendment,[317] and paragraph 4 (*b*) was then altered by a Soviet amendment.[318] This latter amendment was very significant as it reversed the presumption of article 4 (*b*): any objection would in future be considered a simple objection unless its author had clearly expressed an intention to the contrary. Furthermore, despite the inappropriate title of article 20, it is clear from the origin of this provision that it was intended to cover, *inter alia*, the effects of a reservation of it, any acceptance and of objections to that reservation.

193. Nevertheless, articles 20 and 21 of the 1969 and 1986 Vienna Conventions have some unclear elements and some gaps. In State practice, the case foreseen by article 21, paragraph 3, is no longer seen as "unusual"[319] as the Commission had initially envisaged; on the contrary, owing to the presumption of article 20, paragraph 4 (*b*), it has become the most frequent type of objection.

194. The practice of States is not limited to recourse to the effects set out in paragraph 3. They are increasingly trying to have their objections produce different effects. The absence of a firm position on the part of the Commission, which intentionally opted for a neutral solution that was acceptable to everyone, far from resolving the problem, created others that should be resolved in the Guide to Practice.

195. Nor do articles 20 and 21 respond to the question of what effects are produced by a reservation that does not meet the conditions of substantial permissibility set out in article 19 or of formal permissibility (contained in article 23 and elsewhere). In other words, neither article 20 nor article 21 set out the consequences of the non-permissibility of a reservation, at least not expressly. It is also of particular concern that the application of paragraph 3 on the combined effects of a reservation and an objection is not limited to cases of permissible reservations, that is, reservations established in accordance with article 19, contrary to the provision of paragraph 1. Gaja is therefore quite right to consider that "Article 21 is somewhat obscure".[320]

196. Under these conditions, it seems logical to begin the study by examining the legal effects of a permissible reservation, which are set out—at least partially—in the two 1969 and 1986 Vienna Conventions. The issue of the legal effects of a non-permissible reservation, which has—in part—already been addressed by a section of the tenth report on reservations to treaties[321] and on which the Commission has already adopted two guidelines,[322] should also be given further consideration, so as to give some guidance to the author of such a reservation and to other Contracting Parties.

2. Permissible reservations

197. The legal effects of a permissible reservation depend to a large extent on the reactions that it has received. A permissible and accepted reservation has different legal effects to those of a permissible reservation to which objections have been made. Article 21 of the 1969 and 1986 Vienna Conventions establishes this distinction clearly. In its 1986 version, which is fuller in that it includes the effects of reservations and reactions from international organizations:

> 1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (*a*) Modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
>
> (*b*) Modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.
>
> 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.
>
> 3. When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

While paragraph 1 of this provision concerns the legal effects of an established reservation, a concept that should be clarified, paragraph 3 covers the legal effects

---

[315] *Yearbook ... 1965*, vol. II, p. 162.

[316] Fourth report on the law of treaties (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2), p. 50, paras. 4–5.

[317] See the amendments by Switzerland (A/CONF.39/C.1/L.97), France and Tunisia (A/CONF/39/C.1/L.113) and Thailand (A/CONF.39/C.1/L.150), *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference (A/CONF.39/14), p. 135, para. 179(ii)(b)–(d). These amendments were adopted by a large majority (*ibid., First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 25th meeting of the Committee of the Whole, p. 135, para. 30.

[318] A/CONF/39/L.3, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference (A/CONF.39/L.3), pp. 265–266. This amendment was adopted by 49 votes to 21, with 30 abstentions (*ibid., Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1, United Nations publication, Sales No. E.70.V.6), 10th plenary meeting, p. 35, para. 79). See also Müller, "Article 20", *loc. cit.* (footnote 195 above), pp. 806–807, para. 14.

[319] See the fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 55.

[320] Gaja, "Unruly treaty reservations", p. 330.

[321] *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, pp. 183–189, paras. 181–208.

[322] These are guidelines 3.3 (Consequences of the non-permissibility of a reservation) and 3.3.1 (Non-permissibility of reservations and international responsibility). See *Yearbook ... 2009*, vol. II (Part Two), chap. V, sect. C.2.

of a reservation to which an objection has been made. A distinction should therefore be made between the case of a permissible and accepted reservation—that is, an "established" reservation, on the one hand, and that of a permissible reservation[323] to which an objection has been made, on the other hand. Paragraph 2 of article 21 does not, properly speaking, address the legal effects of a reservation, but rather the absence of legal effects of the reservation on the legal relations between Contracting Parties other than the author of the reservation, independently of its established or permissible nature. This issue will be examined below in the section on the effects of reservations on treaty relations between other Contracting Parties.

(a) *Established reservations*

198. According to the chapeau of article 21, paragraph 1, only an established reservation—in accordance with the provisions of articles 19, 20 and 23—has the legal effects set out in that paragraph and, in particular, in its subparagraphs (*a*) and (*b*). As for the scope of application of article 21, paragraph 1, the 1969 and 1986 Vienna Conventions merely make a rather clumsy reference to provisions concerning the substantial permissibility of a reservation (art. 19), consent to a reservation (art. 20) and the form of a reservation (art. 23), without explaining the interrelation of those provisions in greater detail. It therefore seems appropriate, before considering the legal effects produced by an established reservation, to return to the concept of established reservation, which is essential for determining the "normal" legal effects of a reservation.

(i) *The "establishment" of a reservation*

a. The general rule

199. Under the terms of the chapeau of article 21 of the 1969 and 1986 Vienna Conventions, a reservation is established "with regard to another party in accordance with articles 19, 20 and 23". The phrase, which appears clear on the surface and which is often understood as referring to permissible reservations accepted by a Contracting Party, contains many uncertainties and imprecisions which are the result of a significant recasting undertaken by the Commission during the second reading of the draft articles on the law of treaties in 1965, on the one hand, and changes introduced to article 20, paragraph 4 (*b*) of the Convention during the United Nations Conference on the Law of Treaties in 1969.

200. First of all, the reference to article 23 as a whole is awkward, to say the least, since the provisions of article 23, paragraphs 3 and 4, have no effect on the establishment of a reservation. They concern only its withdrawal and the fact that, in certain cases, the formulation of an acceptance or an objection does not require confirmation.

201. Secondly, it is difficult, indeed, impossible, to determine what connection might exist between the establishment of a reservation and the effect on the entry into force of the treaty of an objection provided for in article 20, paragraph 4 (*b*). The objection cannot be considered as consent to the reservation since, to the contrary, it aims to "exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization".[324] Accordingly, a reservation to which an objection has been made is obviously not established within the meaning of article 21, paragraph 1.

202. Consultation of the *travaux préparatoires* provides an explanation for this "contradiction". In the draft articles adopted by the Commission, which contained in article 19 (later art. 21) the same reference, the presumption of article 17 (future art. 20), para. 4 (*b*)) established the principle that a treaty did not enter into force between a reserving State and a State which had made an objection. Since the treaty was not in force, there was no reason to determine the legal effects of the reservation on the content of treaty relations. Moreover, the comments of the Commission specified: "Paragraphs 1 and 2 of this article set out the rules concerning the legal effects of a reservation which has been established under the provisions of articles 16, 17 and 18, *assuming that the treaty is in force*.*"[325] The "contradiction" was introduced only during the Conference through the reversal of the presumption of article 20, paragraph 4 (*b*), following the adoption of the Soviet amendment.[326] Because of this new presumption, a treaty does remain in force for the reserving State even if a simple objection is formulated. However, this could not mean that the reservation is established under article 21.

203. In his first report, Sir Humphrey Waldock took into account the condition of consent to a reservation for it to be able to produce its effects. The draft article 18 that he proposed to devote to "Consent to reservations and its effects" specified that:

> A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is presumed to have given, its consent thereto in accordance with the provisions of the following paragraphs of this article.[327]

In its advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ also highlighted this basic principle of the law of reservations, and of treaty law as well:

> It is well established that in its treaty relations a State cannot be bound without its consent and that consequently no reservation can be effective against any State without its agreement thereto.[328]

It is this idea to which paragraph 1 of article 21 of the 1969 and 1986 Vienna Conventions refers, and this is the meaning which must be given to the reference to article 20.

---

[323] It should be noted that paragraph 3 of article 21 does not refer only to a permissible reservation which has been the subject of an objection. It is therefore possible that this provision also applies to the case of an objection to a non-permissible reservation.

[324] See guideline 2.6.1 (Definition of objections to reservations), *Yearbook ... 2005*, vol. II (Part Two), pp. 77–82.

[325] *Yearbook ... 1966*, vol. II, p. 209, para. (1) of the commentary to article 19.

[326] See paragraph 192 above.

[327] *Yearbook ... 1962*, vol. II, p. 61.

[328] Advisory opinion of 28 May 1951, *I.C.J. Reports 1951*, p. 17. See also Müller, "Article 20", *loc. cit.* (footnote 195 above), pp. 809–811, paras. 20–24.

204. Consent to the reservation is therefore a *sine qua non* for the reservation to be considered established and to produce its effects. But contrary to what has been maintained by certain partisans of the opposability school,[329] consent is not the only condition. The chapeau of article 21, paragraph 1, cumulatively refers to consent to the reservation (the reference to art. 20), permissibility (art. 19) and validity (art. 23). Consent alone is thus not sufficient for the reservation to produce its "normal" effects. Moreover, the reservation must be permissible within the meaning of article 19 and have been so formulated that it complies with the rules of procedure and form set forth in article 23. Only this combination can "establish" the reservation.

205. This necessary combination of permissibility and consent results also from the phrase in article 21, paragraph 1, which states that a reservation is established "with regard to another party". Logically, a reservation cannot be permissible only with regard to another party. Either it is permissible or it is not. This is a question which in principle is not subject to the will of the other Contracting Parties[330] unless, of course, they decide by common accord to "permit" the reservation.[331] On the other hand, a reservation which is objectively permissible is opposable only to the parties which have, in one way or another, consented to it. It is a bilateral link which is created, following acceptance, between the reserving State and the Contracting Party which has consented thereto. The reservation is established only in regard to that party and it is only in relations with that party that it produces its effects.

206. As a consequence, it seems necessary to emphasize once again in the Guide to Practice that the establishment of a reservation results from the combination of its permissibility and of consent. To simply reproduce article 21, paragraph 1, which defines the notion of an established reservation, does not seem feasible precisely because of the references to other provisions of the 1969 and 1986 Vienna Conventions. The fourth part, on the legal effects of reservations and interpretative declarations, could open with a guideline 4.1 reading as follows:

"**4.** *Legal effects of reservations and interpretative declarations*

"**4.1** *Establishment of a reservation*

"A reservation is established with regard to another Contracting Party if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if the other Contracting Party has accepted it."

b. Special situations

207. Guideline 4.1 relates only to the general rule, and does not fully answer the question of whether a reservation is established. Article 20, which embodies in its paragraph 4 the general rule regarding consent to a reservation and hence constitutes the cornerstone of the "flexible" Vienna system,[332] does in fact contain exceptions as regards the expression of consent to the reservation by the other Contracting Parties. Moreover, paragraph 4 clearly specifies that it applies only in "cases not falling under the preceding paragraphs and unless the treaty otherwise provides". The establishment of the reservation, and particularly the requirement of consent, may thus be modified depending on the nature of the reservation or of the treaty, but also by any provision incorporated in the treaty to that effect.

i. Expressly authorized reservations

208. According to article 20, paragraph 1, expressly authorized reservations need not be accepted "subsequently" by the other Contracting Parties. However, this paragraph 1 does not mean that the reservation is exempt from the requirement for the Contracting Parties' assent; it simply expresses the idea that, since the parties have given their assent even before the formulation of the reservation, and have done so in the text of the treaty itself, subsequent acceptance is superfluous. Moreover, the expression "unless the treaty so provides" which appears in the text of this provision[333] clearly requires this interpretation. Only reservations that are actually covered by this prior agreement do not require subsequent acceptance, and are thus, logically established from the moment they are permissibly made.[334]

209. It should be recalled that the draft articles adopted by the Commission on second reading did not continue the possibility of *a priori* acceptance solely to reservations "expressly" authorized by the treaty, but also included reservations "impliedly" authorized; however, the work of the Commission sheds no light on the meaning to be attributed to this concept.[335] At the United Nations Conference on the Law of Treaties, a number of delegations expressed their doubts regarding this solution[336] and

[329] On these two schools, see First report on the law and practice relating to reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 142–143, paras. 101–105. See also Koh, "Reservations to multilateral treaties: how international legal doctrine reflects world vision", pp. 71–116; Redgwell, *op. cit.* (footnote 243 above), pp. 263–269; Cortado, *op. cit.* (footnote 208 above), pp. 73–82; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, p. 81, footnote 78; and Pellet, "Article 19 (1969)", pp. 696 *et seq.*, paras. 111 *et seq.*

[330] See the tenth report on reservations to treaties, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, pp. 187–188, paras. 201–203.

[331] *Ibid.*, pp. 188–189, paras. 205–208.

[332] See *Yearbook ... 1966*, vol. II, p. 207, para. (21) of the commentary to article 17. See also Bowett, "Reservations to non-restricted multilateral treaties", p. 84; Müller, "Article 20" (footnote 195 above), p. 799, para. 1.

[333] The words "unless the treaty so provides" were added by the Special Rapporteur in order to take account of "the possibility … that a treaty may specifically authorize reservations but on condition of their acceptance by a specified number or fraction of the parties" (Fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 50). This wording was slightly modified by the Drafting Committee (*Yearbook ... 1965*, vol. I, 813th meeting, p. 265, para. 30). In 1966, the wording was once again slightly modified, but the summary records of the meetings shed no light on the reasons for this change.

[334] "Made", not "formulated", because they produce their effects without any additional formality being required. See the commentary to guideline 3.1 (Permissible reservations), *Yearbook ... 2006*, vol. II (Part Two) p. 146, para. (6).

[335] *Yearbook ... 1966*, vol. II, p. 202 and the commentary, which is not particularly illuminating on this point, p. 207, para. (18).

[336] See the statements by the representatives of India (*Summary records of the plenary meetings and of the meetings of the Committee of*

proposed amendments aimed at deleting the words "or impliedly",[337] and the change was accepted.[338] Sir Humphrey Waldock, Expert Consultant at the Conference, had himself recognized that "the words 'or impliedly' in article 17, paragraph 1, seemed to have been retained in the draft articles as a relic from earlier and more detailed drafts which dealt with implied prohibition and implied authorization of reservations".[339] It is thus with good reason that reservations implicitly authorized by the treaty are not mentioned in article 20, paragraph 1.

210. Had it been held, as Horn suggests,[340] that where a treaty prohibits certain reservations or certain categories of reservations, it *ipso facto* authorizes all others, which amounts to a reversal of the presumption of article 19 (*b*), this interpretation would clearly place article 20, paragraph 1, in direct contradiction to article 19. Assuming this to be the case, the inclusion in the treaty of a clause prohibiting reservations to a specific provision would suffice to institute total freedom to make any reservation whatsoever other than those that were expressly prohibited; the criterion of the object and purpose of the treaty would then be rendered inapplicable.[341] The Commission has already ruled out this interpretation in guideline 3.1.3 (Permissibility of reservations not prohibited by the treaty), which makes it clear that reservations not prohibited by the treaty are not *ipso facto* permissible and hence can with still greater reason not be regarded as established and accepted by the terms of the treaty itself.

211. By the same token, and despite the regrettable lack of precision in the 1969 and 1986 Vienna Conventions on this point, a general authorization of reservations in a treaty cannot constitute *a priori* acceptance on the part of the Contracting Parties. To say that all the parties have the right to formulate reservations to the treaty cannot imply that this right is unlimited, still less that all reservations so formulated are, by virtue of the simple general clause included in the treaty, established within the meaning of the chapeau to article 21, paragraph 1. To accept this way of looking at things would render the Vienna regime utterly meaningless. Such general authorizations do no more than refer to the general regime, of which the Vienna Conventions constitute the expression, and which is based on the fundamental principle that the parties to a treaty have the power to formulate reservations.

212. Nor is the notion of an expressly authorized reservation identical or equivalent[342] to the concept of a specified reservation. This was very clearly established by the arbitral tribunal in the *English Channel* case in relation to the interpretation of article 12 of the 1958 Convention on the Continental Shelf, paragraph 1 of which provides that:

> At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive.

213. There can be no doubt that, pursuant to this provision, any State may make its consent to be bound by the Convention on me Continental Shelf subject to the formulation of a reservation so "specified", that is to say any reservation relating to articles 4 to 15, in accordance with article 19 (*b*) of the 1969 and 1986 Vienna Conventions. This authorization does not however imply that any reservation so formulated is necessarily valid,[343] nor, *a fortiori*, that the other parties have consented, under article 12, paragraph 1, to any and every reservation to articles 4 to 15. The Court of Arbitration considered that this provision:

> … cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1 to 3 … Such an interpretation … would amount almost to a license to contracting States to write their own treaty.[344]

214. State practice supports the solution used by the Court of Arbitration. The fact that 11 States objected to reservations made to the Convention on the Continental Shelf,[345] although those reservations only concern articles other than articles 1 to 3, as provided for in article 12, paragraph 1, of the Convention, is moreover revealing as regards the interpretation to be followed.

215. The term "reservations expressly authorized" by the treaty must be interpreted restrictively in order to meet the objective of article 20, paragraph 1. In the *English Channel* case, the Court of Arbitration rightly considered that:

> … only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance.

216. In order to determine which "expressly authorized" reservations do not require subsequent unilateral acceptance, it is thus appropriate to determine which reservations the parties have already consented to in the treaty. In this regard, Horn emphasized that "where the contents

the Whole (A/CONF.39/11) (footnote 317 above), 24th meeting, p. 128, para. 30), the United States (*ibid.*, p. 130, para. 53) and Ethiopia (*ibid.*, 25th meeting, p. 134, para. 15).

[337] See the amendments by France and Tunisia (A/CONF.39/C.1/L.113), Switzerland (A/CONF.39/C.1/L.97) and Thailand (A/CONF.39/C.1/L.150) (*Documents of the Conference* (A/CONF.39/11/Add.2 (footnote 318 above), p. 135)).

[338] The three amendments aimed at deleting "or impliedly" (see footnote 337 above) were adopted by 55 votes to 18, with 12 abstentions (*Summary Records* … (A/CONF.39/11) (footnote 317 above), 25th meeting, p. 135, para. 30).

[339] *Ibid.*, 24th meeting, pp. 126–127, para. 14.

[340] Horn, *op. cit.* (footnote 197 above), p. 132.

[341] See, *inter alia*, the criticisms by Tomuschat (*loc. cit.* (footnote 195 above)), p. 475.

[342] Imbert nevertheless maintains that specified reservations are included within the term "expressly authorized reservation". In support of this interpretation he suggests that article 20, paragraph 1, in no way limits the right of contracting States to object to an expressly authorized reservation, but expresses only the idea that the reserving State becomes a Contracting Party upon the deposit of its instrument of ratification or accession ("La question des réserves dans la décision arbitrale du 30 juin 1977 relative á la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", pp. 52–57). He does not deny that this solution openly contradicts the provisions of article 20, but justifies his approach by referring to the work of the United Nations Conference on the Law of Treaties. See also the commentary to guideline 3.1.2, *Yearbook ... 2006*, vol. II (Part Two), p. 153, para. (11).

[343] See on this question guideline 3.1.4 (Permissibility of specified reservations) and the commentary thereto, *Yearbook ... 2006*, vol. II (Part Two), pp. 155–156.

[344] Arbitral award of 30 June 1977, UNRIAA, vol. XVIII, p. 32, para. 39.

[345] *Multilateral Treaties Deposited with the Secretary-General*, available online from http://treaties.un.org/ (Status of treaties), chap. XXI.4.

of authorized reservations are fixed beforehand, acceptance can reasonably be construed as having been given in advance, at the moment of consenting to the treaty".[346]

217. In line with this opinion, the scope of article 20, paragraph 1, contains two types of prior authorizations through which parties do not simply accept the abstract possibility of formulating reservations, but determine in advance exactly what reservations may be made. On the one hand, a reservation made pursuant to a reservations clause that authorizes the parties purely and simply to exclude the application of a provision[347] or an entire part of the treaty[348] must be deemed to be an "expressly authorized reservation". In this case, the other Contracting Parties may appreciate exactly, when the treaty is concluded, what contractual relations they will have with the parties that exercise the option of making reservations pursuant to the exclusion clause. On the other hand, "negotiated"[349] reservations can also be regarded as specified reservations. Indeed, certain international conventions do not purely and simply authorize State parties to make reservations to one provision or another, but contain an exhaustive list of reservations from among which States must make their choice.[350] This procedure also allows contracting States to gauge precisely and *a priori* the impact and effect of a reservation on treaty relations. By expressing its consent to be bound by the convention, a State or an international organization consents to any reservations permitted by the "list".

218. In these two cases, the content of the reservation is sufficiently predetermined by the treaty for these reservations to be able to be considered "expressly authorized" within the meaning of article 20, paragraph 1, of the Vienna Conventions. The Contracting Parties are aware in advance of the treaty relations that derive from the formulation of a given reservation and have agreed to it in the actual text of the treaty. There is no surprise and the principle of consent is not undermined.)

219. The Commission has, moreover, provided a starting point for a definition of the notion of expressly authorized reservations in its guideline 3.1.4 (Permissibility of specified reservations). Pursuant to this provision:

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

A contrario, a specified reservation whose content is fixed in the treaty is considered *ipso facto* to be permissible and, given the provision expressly authorizing them, established.

220. Guideline 4.1.1 presents the exception to the general rule contained in article 20, paragraph 1, of the 1969 and 1986 Vienna Conventions while establishing a link to the notion of "established reservation". Indeed, since a reservation expressly authorized by the treaty is, by definition, permissible and accepted by the Contracting Parties, making it in a way that respects the rules applicable to the formulation and the communication of reservations is all that is required to establish it. That makes it binding on all the Contracting Parties.

"**4.1.1** *Establishment of a reservation expressly authorized by the treaty*

"A reservation expressly authorized by the treaty is established with regard to the other Contracting Parties if it was formulated in accordance with the form and procedure specified for the purpose.

"A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and organizations, unless the treaty so provides.

"The term 'reservation expressly authorized by the treaty' applies to reservations excluding the application of one or more provisions of the treaty or modifying the legal effect of one or more of its provisions or of the treaty as a whole, pursuant to and to the extent provided by an express provision contained in the treaty."

221. The first paragraph of guideline 4.1.1 sets forth the specific rule that applies to the establishment of reservations expressly authorized by the treaty, while the second recalls article 20, paragraph 1, of the 1986 Vienna Convention. While that reference may not be strictly necessary, as it follows from a close reading of guidelines 4.1 and 4.1.1, it is in line with the Commission's established and consistent practice of incorporating to the extent possible the provisions of the Convention. That is also why the Special Rapporteur has not changed the wording despite the fact that the phrase "unless the treaty so provides" states the obvious and, moreover, appears superfluous in this provision.[351] The third paragraph endeavours to define the concept of an "expressly authorized reservation".

222. It should also be emphasized that once it has been clearly established that a given reservation falls under article 20, paragraph 1, not only is its acceptance by the other parties not necessary, but they are deemed to have

---

[346] Horn, *op. cit.* (footnote 197 above), p. 133.

[347] See, for example, article 20, paragraph 1, of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws: "Any High Contracting Party may, when signing or ratifying the present Convention or acceding thereto, append an express reservation excluding any one or more of the provisions of Articles 1 to 17 and 21." Treaties often authorize a reservation excluding the application of a provision concerning the settlement of disputes (see Imbert, *Les réserves aux traités multilatéraux*, p. 169, footnote 27, and Riquelme Cortado, *op. cit.* (footnote 208 above), pp. 135 and 136).

[348] Revised General Act for the Pacific Settlement of International Disputes of 1949, art. 38; European Convention for the Peaceful Settlement of Disputes of 1957, art. 34. The Convention concerning Minimum Standards of Social Security, No. 102, of the International Labour Organization (ILO) combines, moreover, this possibility of rejecting the application of entire chapters with a minimum number of chapters that must actually be applied (art. 2) (see also article 2 of ILO Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits, article 20 of the European Social Charter or article 2 of the European Code of Social Security of 1964). See also Riquelme Cortado, *op. cit.* (footnote 208 above), p. 134.

[349] On this notion, see also *Yearbook ... 2000*, vol. II (Part Two), p. 116, para. (11) of the commentary to guideline 1.1.8. See also Gormley, "The modification of multilateral conventions by means of 'negotiated reservations' and other 'alternatives': a comparative study of the ILO and Council of Europe", p. 59 (1970–1971), pp. 75–76, and Imbert, *op. cit.* (footnote 347 above), pp. 196 *et seq.*

[350] For Council of Europe practice, see Riquelme Cortado, *op. cit.* (footnote 208 above), pp. 130 *et seq.*

[351] See Müller, "Article 20" (footnote 195 above), p. 888, para. 7.

effectively and definitively accepted it, with all the consequences that follow therefrom. One of the consequences of this particular regime is that the other parties cannot object to this type of reservation.[352] Accepting this reservation in advance in the text of the treaty itself effectively prevents the Contracting Parties from subsequently making an objection, as "[t]he Parties have already agreed that the reservation is permissible and, having made its permissibility the object of an express agreement, the Parties have abandoned any right thereafter to object to such a reservation".[353] An amendment[354] proposed by France at the United Nations Conference on the Law of Treaties expressed exactly the same idea, but was not adopted by the Drafting Committee.[355] Guideline 2.8.12 (Final nature of acceptance of a reservation) is therefore applicable *a fortiori* to expressly authorized reservations. They are deemed to have been accepted, and thus there can be no objection to them. The commentary on guideline 4.1.1 might draw attention to the matter.

ii. Reservations to treaties "with limited participation"

223. Another specific case provided for by the 1969 and 1986 Vienna Conventions, article 20, paragraph 2, is that of treaties "with limited participation". Paragraph 2 states that the flexible system shall not apply to any treaty whose application in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty. In such cases, a reservation requires acceptance by all the parties.

224. Fitzmaurice made a distinction between plurilateral treaties, which were in his view closer to bilateral treaties, and multilateral treaties.[356] However, it was only in Sir Humphrey Waldock's first report that the usefulness of such a distinction became clearly apparent. What is now article 20, paragraph 2, resulted from a compromise between the members of the Commission who remained deeply convinced of the virtues of the traditional system of unanimity and the proponents of Sir Humphrey's flexible system.[357] At the time, the paragraph represented the last bastion which the proponents of unanimity refused to give up. During the second reading of the Waldock draft, the principle behind article 20, paragraph 2, no longer gave rise to debate in the Commission or at the United Nations Conference on the Law of Treaties.

225. However, the main issue is not the principle of unanimity, which has long been practised. Rather, the question is how to determine which treaties are not subject to the safeguard clause and are therefore excluded from the flexible system. Until 1965, the limited number of parties was the only criterion referred to by the special rapporteurs and the Commission.[358] Sir Humphrey's fourth report took into account the criticisms levelled against that criterion, and recognized that "to find a completely precise definition of the category of treaties in issue is not within the bounds of possibility".[359] At the same time, he proposed a reference to the intention of the parties: "the application of its provisions between all the parties is to be considered an essential condition of the treaty".[360] The parties' intention to preserve the integrity of the treaty was therefore the criterion for ruling out the "flexible" system and retaining the traditional unanimity system. The Commission adopted that idea, making minor drafting changes to what would become the present paragraph 2.[361]

226. It is worth noting, however, that the new provision addresses a completely different category of treaty than had been envisaged before 1962. The reference to intention has two advantages. First, it allows the flexible system to extend to treaties which, although ratified by only a small number of States, are otherwise more akin to general multilateral treaties. Secondly, it excludes treaties that have been ratified by a more significant number of States, but whose very nature requires that the integrity of the treaty be preserved. The concept of the plurilateral treaty has therefore shifted towards that of a treaty whose integrity must be ensured.[362]

227. The criterion of number was never completely discarded, and remains in paragraph 2. However, its function has changed. Before 1965, it was the sole factor in determining whether or not a given treaty belonged within the "flexible" system. Its purpose is now to shed light on the intention of the parties. As a result, it now carries less weight in determining the nature of a treaty, having become an auxiliary criterion in this respect while unfortunately remaining somewhat imprecise and difficult to apply.[363] The reference to the "limited number of the negotiating States" is particularly unusual, and does not allow a clear distinction between such treaties and multilateral treaties proper; the latter can also be concluded as a result of negotiations between only a few States. It seems

[352] Bowett, *loc. cit.* (see footnote 332 above), p. 84; Coccia, "Reservations to multilateral treaties on human rights", p. 9.

[353] Bowett, *loc. cit.* (see footnote 332 above), pp. 84–85.

[354] A/CONF.39/C.1/L.169. Paragraph 2 of the single article that, according to the French proposal, was to replace articles 16 and 17 of the draft of the Commission provided that "a reservation expressly authorized by the treaty cannot be the subject of an objection by other contracting States, unless the treaty so provides" (*Documents of the Conference* (A/CONF.39/11/Add.2) (see footnote 318 above), p. 133).

[355] With regard to the rejection of that amendment, Imbert concluded that the States represented at the Conference did not want to restrict the right to object to expressly authorized reservations (*op. cit.* (footnote 347 above), p. 55).

[356] First report on the law of treaties, *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 127, para. 97.

[357] The Special Rapporteur stressed that "paragraph [4] and paragraph 2 represented the balance on which the whole article was based" (*Yearbook ... 1962*, vol. I, 664th meeting, p. 230, para. 17). See also the statements made by Gros (*ibid.*, 663rd meeting, pp. 228–229, para. 97) and Ago (*ibid.*, p. 228, para. 87).

[358] This is true of Fitzmaurice (draft art. 38 in the Report on the law of treaties, *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115) and of Sir Humphrey Waldock (draft art. 1 (*d*), First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 221). Draft article 20, paragraph 3, which was adopted by the Commission on first reading in 1962, refers to treaties concluded "between a small group of States" (*Yearbook ... 1962*, vol. II, p. 176).

[359] *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 51, para. 7.

[360] Draft art. 19, para. 2, *ibid.*, p. 50.

[361] *Yearbook ... 1965*, vol. I, 813th meeting, pp. 258–260, paras. 36–53, and 816th meeting, pp. 283–284, paras. 43–49.

[362] See Imbert, *op. cit.* (footnote 347 above), p. 115.

[363] See in particular the criticisms made by Imbert, *ibid.*, pp. 112–113. See also the United States proposal at the United Nations Conference on the Law of Treaties, to delete any reference to criteria other than intention, owing to those difficulties; *Summary records* (A/CONF.39/11) (see footnote 318 above), 21st meeting, p. 108, para. 9.

preferable to refer not to negotiating States, but rather to States authorized to become parties to the treaty.[364]

228. Sir Humphrey proposed other "auxiliary" criteria that could assist in the intrinsically problematic task of establishing the parties' intentions. In his fourth report, he also mentioned the nature of the treaty and the circumstances of its conclusion.[365] The change was never explained, and despite the proposals of the United States, which pressed for the definition to refer to the nature of the treaty,[366] the object and purpose of the treaty was the only other "auxiliary" criterion adopted by the Committee and subsequently at the United Nations Conference on the Law of Treaties. The criterion of object and purpose, like that of number, is far from clear-cut. The inclusion of such an enigmatic criterion[367] does not help clarify the interpretation of paragraph 2. Indeed, one could argue that it makes the task even more arbitrary and subjective.[368]

229. Paragraph 2 of article 20 is unclear, or at any rate difficult to interpret, not only in respect of its scope, but also in respect of the applicable legal regime. According to paragraph 2, reservations require acceptance by all parties. Only two things can be deduced for certain. First, such reservations are not subject to the "flexible" system set forth in paragraph 4. Indeed, paragraph 4 confirms that view, in that it applies only to "cases not falling under the preceding paragraphs". Secondly, the reservations are indeed subject to unanimous acceptance: they must be accepted "by *all** the parties".

230. However, paragraph 2 of article 20 does not clearly state who should actually accept the reservation. The text does refer to "the parties", but this is hardly satisfactory. It is questionable whether the acceptance of a reservation by all "parties" only should be a condition, a "party" being defined under article 2, paragraph 1 (*g*), as "a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force". That would contradict the underlying idea, which is that the treaty should be implemented in its entirety by all current and future parties. To argue otherwise would, in no small measure, deprive unanimous consent of its meaning.

231. Moreover, although article 20, paragraph 5, connects the principle of tacit or implied consent to paragraph 2, it remains a mystery how implied acceptance could apply to the treaties referred to in the latter provision. It follows from article 20, paragraph 5, that a contracting State may make any objection only on becoming a party to the treaty. A signatory State could thus block unanimous acceptance even without formulating a formal objection to the reservation, because it is impossible to presume that State's assent before the 12-month deadline to elapse. Article 20, paragraph 5, would therefore have the exact opposite of the desired effect, namely the rapid stabilization of treaty relations and of the status of the reserving State.[369] For precisely that reason, the Special Rapporteur argued in 1962 that where States not yet parties to a treaty are concerned:

> [t]his qualification of the rule is not possible in the case of plurilateral treaties because there the delay of taking a decision does place in suspense the status of the reserving State *vis-à-vis* all the States participating in the treaty.[370]

232. Such lacunae and inconsistencies are particularly surprising given that article 18 as proposed by Sir Humphrey Waldock in 1962 made a clear distinction between the tacit or implied acceptance of "plurilateral treaties" on the one hand and of multilateral treaties on the other hand.[371] These clarifications described the legal regime for the treaties referred to in article 20, paragraph 2, perfectly well. They were nevertheless sacrificed in order to make the provisions on reservations less complex and more succinct.

233. It therefore seems appropriate and necessary to include in the Guide to Practice a guideline on how to establish a reservation to treaties with "limited participation":

"**4.1.2** *Establishment of a reservation to a treaty with limited participation*

"A reservation to a treaty with limited participation is established with regard to the other Contracting Parties if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if all the other Contracting Parties have accepted it.

"The term 'treaty with limited participation' means a treaty of which the application in its entirety between the parties is an essential condition of the consent of each one to be bound by the treaty."

iii. Reservations to be bound by constituent instruments of international organizations

234. The other exception to the principle that tacit acceptance is sufficient to establish a reservation is provided for by article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions and relates to constituent treaties of international organizations. Under the terms of this provision:

> 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.

235. A simple perusal of this provision shows that, in order to be established, a reservation to a constituent treaty of an international organization calls for the acceptance of the competent organ of the organization. The formulation

[364] Imbert, *op. cit.* (footnote 347 above), pp. 112–113.

[365] *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 51, para. 7.

[366] See amendment, A/CONF.39/C.1/L.127, *Official Records: Documents of the Conference* (A/CONF.39/11/Add.2) (footnote 318 above), p. 135.

[367] See guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty) and 3.1.6 (Determination of the object and purpose of the treaty), *Yearbook ... 2007*, vol. II (Part Two), pp. 33–39.

[368] See Tomuschat, *loc. cit.* (footnote 195 above), p. 479; Imbert, *op. cit.* (footnote 347 above), pp. 114–115.

[369] See Müller, "Article 20" (footnote 195 above), pp. 820–821, paras. 46–47.

[370] *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 67, para. (16).

[371] *Ibid.*, pp. 61–62.

of this acceptance was the subject of a detailed study in the twelfth report on reservations to treaties,[372] which, *inter alia*, presents the *travaux préparatoires* of this provision. On the basis of that report, the Commission adopted a number of guidelines related to this exception to the rules. These are guidelines 2.8.7 to 2.8.11:

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

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

2.8.8 *Organ competent to accept a reservation to a constituent instrument*

Subject to the rules of the organization, competence to accept the reservation to a constituent instrument of an international organization belongs to the organ competent to decide on the admission of a member to the organization, or to the organ competent to amend the constituent instrument, or to the organ competent to interpret this instrument.

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

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

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

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

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

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

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.[373]

236. It does not appear necessary to recall once again the reasons that led the Commission and the Conference to adopt the provisions contained in article 20, paragraph 3, of the 1969 Vienna Convention. Although guideline 2.8.7 is sufficient to express the need for the acceptance of the competent organ of the organization, it is nevertheless worth recalling this particular requirement in the section dealing with the effects of reservations, given that the acceptance of the competent organization is the *sine qua non* for the establishment of a reservation to the constituent instrument of an international organization. Only this collective acceptance can enable the reservation to produce all its effects. The individual acceptance of the other members of the organization is indeed not prohibited, but remains without effect on the establishment of the reservation. Guideline 4.1.3 could read as follows:

"**4.1.3** *Establishment of a reservation to a constituent instrument of an international organization*

"A reservation to a constituent instrument of an international organization is established with regard to the other Contracting Parties if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if the competent organ of the organization has accepted it in conformity with guidelines 2.8.7 and 2.8.10."

(ii) *Effects of established reservations*

237. A reservation "established" within the meaning of guideline 4.1 produces all the effects purported by its author, that is to say, to echo the wording of guideline 1.1.1 (Object of reservations), "to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects".[374] If that is done, the object of the reservation as desired or purported by its author is achieved.

238. However, modifying or excluding the legal effect of one or more provisions of the treaty is not the only effect of the establishment of the reservation; it also constitutes the author of the reservation a Contracting Party to the treaty. Following the establishment of the reservation, the treaty relationship is established between the author of the reservation and the Contracting Party or parties for which the reservation is established.

a. Entry into force of the treaty and status of the author of the reservation

239. The establishment of the reservation has a number of consequences for its author relating to the very existence of the treaty relationship and the author's status in relation to the other Contracting Parties. It may even result in the entry into force of the treaty for all of the contracting States or contracting international organizations. These consequences follow directly from article 20, paragraph 4 (*a*) and (*c*), of the 1969 and 1986 Vienna Conventions: the first of these provisions relates to the establishment of treaty relations between the author of the reservation and the Contracting Party which has accepted it (hence, the Contracting Party for which the reservation is established), whereas the second relates to whether the consent of the reserving State or reserving international organization takes effect, or in other words whether the author of the reservation becomes a Contracting Party to the treaty. They read as follows:

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(*a*) Acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(*b*) …

(*c*) An act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

[372] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/584 and Corr.1, paras. 60–90.

[373] *Yearbook … 2009*, vol. II (Part Two), para. 83.

[374] *Yearbook … 1999*, vol. II (Part Two), p. 91.

240. The Commission's comments on draft article 17 (which becomes article 20) clearly explain the object of the provisions:

> Paragraph 4 contains the three basic rules of the "flexible" system which are to govern the position of the contracting States in regard to reservations to any multilateral treaties not covered by the preceding paragraphs. Subparagraph (*a*) provides that acceptance of a reservation by another contracting State constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force. Subparagraph (*b*), on the other hand, states that a contracting State's objection precludes the entry into force of the treaty as between the objecting and reserving States, unless a contrary intention is expressed by the objecting State. Although an objection to a reservation normally indicates a refusal to enter into treaty relations on the basis of the reservation, objections are sometimes made to reservations for reasons of principle or policy without the intention of precluding the entry into force of the treaty between the objecting and reserving States. Subparagraph (*c*) then provides that an act expressing the consent of a State to be bound and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation. This provision is important since it determines the moment at which a reserving State may be considered as a State which has ratified, accepted or otherwise become bound by the treaty.[375]

241. The rule that the acceptance of a permissible reservation establishes a treaty relationship between the author of the reservation and the State or international organization that has accepted it also makes good sense. It appears in various forms in the drafts by all the special rapporteurs on the law of treaties. The only difference between Sir Humphrey Waldock's approach and that of his predecessors lies in the number of acceptances needed in order to produce this effect. The attachment of the first three rapporteurs to the traditional regime of unanimity meant that they did not accept the establishment of a treaty relationship unless all the other Contracting Parties had accepted the reservations. In Sir Humphrey's flexible approach, each State (or international organization) not only decides individually whether a reservation is opposable to it or not; this individual acceptance also has effects independently of the reactions of the other States or international organizations, but logically, only in the bilateral relations between the author of the reservation and the author of the acceptance. The Commission explained in its commentary on draft article 20 as adopted on first reading that the application of this flexible system may:

> certainly have the result that a reserving State may be a party to the treaty with regard to State X, but not with regard to State Y, although States X and Y are mutually bound by the treaty. But in the case of a general multilateral treaty or of a treaty concluded between a considerable number of States, this result appears to the Commission not to be as unsatisfactory as allowing State Y, by its objection, to prevent the treaty from coming into force between the reserving State and State X, which has accepted the reservation.[376]

242. This system of "relative" participation in the treaty[377] is applicable, however, only in the "normal" instance of establishment of the reservation. Clearly, it cannot be applied in cases where unanimous acceptance is required in order to establish a reservation. For the reservation to be able to produce its effects, including the entry into force of the treaty for the author of the reservation, all of the Contracting Parties must consent to the reservation. Consequently, the treaty necessarily enters into force in the same way for all of the Contracting Parties, on the one hand, and the author of the reservation, on the other hand. A comparable solution is necessary in the case of a reservation to the constituent instrument of an international organization; only the acceptance of the competent organ can establish the reservation and constitute its author one of the circle of Contracting Parties. Once this acceptance is obtained, the author of the reservation establishes treaty relations with all the other Contracting Parties without their individual consent being required.

243. It should however be noted that once the reservation is established, in conformity with the rules described in guidelines 4.1 to 4.1.3 depending on the nature of the reservation and of the treaty, a treaty relationship is formed between the author of the reservation and the Contracting Party or parties in respect of whom the reservation is established: the Contracting Party which accepted the reservation (in the "normal" case), and all the Contracting Parties (in the other cases). It thus suffices to recall this rule which constitutes the core of the Vienna regime, without any need to distinguish again between the general rule and the exceptions to it, as the drafting of guidelines 4.1, 4.1.1, 4.1.2 and 4.1.3 makes it possible to determine in respect of whom the reservation is established and with whom the treaty relationship is constituted:

"**4.2** *Effects of an established reservation*

"**4.2.3** *Effects of the entry into force of a treaty on the status of the author of an established reservation*

"The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States or international organizations in respect of which the reservation is established if or when the treaty is in force."

244. Guideline 4.2.3 does not resolve the issue of the date on which the author of the reservation may be considered to have joined the group of contracting States or contracting international organizations. Article 20, paragraph 4 (*c*), of the 1969 Vienna Convention was quite rightly inserted by the Commission in order to fill that gap. As Sir Humphrey Waldock explained in his fourth report:

> The point is not purely one of drafting, since it touches the question of the conditions under which a reserving State is to be considered a "party" to a multilateral treaty under the "flexible" system. Indeed, not only the Australian but also the Danish Government urges the Commission to deal explicitly with that question, since it may affect the determination of the date on which the treaty comes into force and may otherwise be of concern to a depositary. The Special Rapporteur understands the position under the "flexible" system to be that a reserving State is to be considered as a "party" if and at the moment when another State which has established its consent to be bound by the treaty accepts the reservation either expressly or tacitly under paragraph 3 of the existing article 19 (paragraph 4 of the new article 20 as given below).[378]

Sir Humphrey's explanation, which thus gave rise to article 20, paragraph 4 (*c*), of the 1969 Vienna Convention, is perhaps not entirely correct: indeed, it is impossible to determine whether the author of the reservation becomes a "party" to the treaty in the sense of article 2, paragraph 1 (*g*),

---

[375] *Yearbook ... 1966*, vol. II, p. 207, para. (21) of the commentary.

[376] *Yearbook ... 1962*, vol. II, p. 181, para. (23) of the commentary. See also *Yearbook ... 1966*, vol. II, pp. 207–208, para. (22) of the commentary to draft article 17.

[377] *Yearbook ... 1966*, vol. II, pp. 207–208, para. (22) of the commentary to draft article 17.

[378] *Yearbook ... 1965*, vol. II, pp. 52–53, para. 11.

of the 1969 Vienna Convention, as, independently of the establishment of the reservation, the treaty may not be in force owing to the low number of ratifications or acceptances. However, what can be determined with certainty is the issue of whether the author becomes a contracting State or contracting organization, that is, whether the author has "consented to be bound by the treaty, whether or not the treaty has entered into force" (art. 2, para. 1 (*f*)). It is also the subject of article 20, paragraph 4 (*c*), which merely states that the "act expressing … [the author of the reservation's] consent to be bound by the treaty and containing a reservation *is effective** when at least one other contracting State has accepted the reservation".

245. Although the rule seems to be clearly established by article 20, paragraph 4 (*c*), of the 1969 and 1986 Vienna Conventions—the author of a reservation becomes a contracting State or contracting organization as soon as the author's permissible reservation has been accepted by at least one contracting State or organization—its practical application is far from consistent and is even less coherent. The main parties concerned by the application of this rule, that is, depositaries, have applied and continue to apply it in a very approximate manner.

246. The Secretary-General of the United Nations, in his capacity as depositary of multilateral treaties, for example, agrees that any instrument expressing consent to be bound by a treaty which is accompanied by a reservation may be deposited and, refusing to adopt a position on the issue of the permissibility or effects of the reservation, "indicates the date on which, in accordance with the treaty provisions, the instrument would normally produce its effect, leaving it to each party to draw the legal consequences of the reservations that it deems fit".[379] In other words, the Secretary-General does not wait for at least one acceptance to be received before accepting the definitive deposit of an instrument of ratification or accession accompanied by a reservation, but treats such instruments in the same way as any other ratification or accession that is not accompanied by an objection:

> Since he is not to pass judgement, the Secretary-General is not therefore in a position to ascertain the effects, if any, of the instrument containing reservations thereto, *inter alia*, whether the treaty enters into force as between the reserving State and any other State, *a fortiori* between a reserving State and an objecting State if there have been objections. As a consequence, if the final clauses of the treaty in question stipulate that the treaty shall enter into force after the deposit of a certain number of instruments of ratification, approval, acceptance or accession, the Secretary-General as depositary will, subject to the considerations in the following paragraph, include in the number of instruments required for entry into force all those that have been accepted for deposit, whether or not they are accompanied by reservations and whether or not those reservations have met with objections.[380]

This position, which is entirely open to criticism[381] in view of the content of article 20, paragraph 4 (*c*), of the 1969 and 1986 Vienna Conventions (read in conjunction with article 20, paragraph 5), has been justified by the Secretary-General by the fact that:

> no objection had ever in fact been received from any State concerning an entry into force that included States making reservations. Finally, for a State's instrument not to be counted, it might conceivably be required that all other contracting States, without exception, would have not only objected to the participation of the reserving State, but that those objecting States would all have definitely expressed their intention that their objection would preclude the entry into force of the treaty as between them and the objecting State.[382]

247. To give a recent example, Pakistan has acceded to the International Convention for the Suppression of the Financing of Terrorism through a notification dated 17 June 2009. This instrument was accompanied by reservations to articles 11, 14 and 24 of the Convention. Despite the reservations, the Secretary-General noted in his depositary notification of 19 June 2009 that:

> The Convention will enter into force for Pakistan on 17 July 2009 in accordance with its article 26 (2) which reads as follows: "For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession."[383]

Pakistan's instrument is therefore considered by the depositary as taking immediate effect, notwithstanding article 20, paragraph 4 (*c*), of the 1969 Vienna Convention. For the depositary, Pakistan is one of the contracting States, and even a party to the International Convention for the Suppression of the Financing of Terrorism, independently of whether its reservations have been accepted by at least one other Contracting Party.

248. This practice, which seems to have been followed for many years and which existed well before the 1969 Vienna Convention,[384] has also been followed by other depositary institutions or States. Thus, both the Dominican Republic and the Council of Europe informed the Secretary-General of the United Nations in 1965 that, as a depositary, a reserving State was "counted among the number of countries necessary for bringing the convention into force"[385]—in other words, as soon as it acquired the status of a contracting State. Other depositaries, including the United States, the Organization of American States and the Food and Agriculture Organization of the United Nations, reported a more nuanced practice and do not in principle count reserving States as contracting States.[389]

249. However, the Special Rapporteur is of the view that although the application of article 20, paragraph 4 (*c*), of the 1969 and 1986 Vienna Conventions is hesitant, to say the least, the rule expressed in this provision has not lost its authority. It is certainly part of the reservations regime established by the Conventions and it has been a principle

---

[379] United Nations, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, New York, 1999, (ST/LEG/7/Rev.1), para. 187.

[380] *Ibid.*, para. 184.

[381] Imbert, "*À 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. 524–541; Gaja, *loc. cit.* (see footnote 320 above), pp. 323–324; Riquelme Cortado, *op. cit.* (see footnote 208 above), pp. 245–250; or Müller, "Article 20" (see footnote 195 above), pp. 821 and 822, para. 48.

[382] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, United Nations, New York, 1999 (ST/LEG/7/Rev.1), para. 186.

[383] *Multilateral Treaties Deposited with the Secretary-General*, available online from http://treaties.un.org/ (Status of treaties, chap. XVIII.11).

[384] See *Yearbook ... 1965*, vol. II, para. 109, p. 103.

[385] *Ibid.*, p. 98.

of the Commission to complement the provisions on reservations of these two Conventions, rather than to contradict them.[386] According to the terms of article 20, paragraph 4 (*c*), of the Conventions, the author of a reservation does not become a contracting State or organization until at least one other contracting State or other contracting organization accepts the reservation, either expressly—which seldom occurs—or tacitly on expiration of the time period set by article 20, paragraph 5, and referred to in guidelines 2.6.13[387] and 2.8.1.[388] In the worst case, the consequence of strict application of this provision is a delay of 12 months in the entry into force of the treaty for the author of the reservation. This delay may certainly be considered undesirable; nevertheless, it is caused by the author of the reservation, and it can be reduced by express acceptance of the reservation on the part of a single other contracting State or a single other contracting international organization.

250. In the light of the above, a guideline should be included in the Guide to Practice which expresses the idea of article 20, paragraph 4 (*c*), rather than reproducing it word for word. As soon as a valid reservation is accepted by at least one contracting State or one contracting international organization, the reservation is established as indicated in guidelines 4.1, 4.1.1, 4.1.2 and 4.1.3, and the instrument of ratification or accession of the author of the reservation takes effect and constitutes the author a contracting State or a contracting international organization. This has the consequence that the author of the reservation is one of the contracting States or contracting organizations even if the treaty has not yet entered into force. This is the idea reflected in guideline 4.2.1:

"**4.2.1** *Status of the author of an established reservation*

"As soon as the reservation is established, its author is considered a contracting State or contracting organization to the treaty."

251. Clearly, if the treaty is in force, the author of an established reservation also becomes a party to it.

252. Moreover, if the treaty has not yet entered into force, the establishment of the reservation and the permissibility of the instrument through which the author of the reservation has expressed consent to be bound by the treaty may have the consequence that the treaty enters into force for all contracting States and organizations, including the author of the reservation. That is the case if, following the establishment of the reservation, the addition of the author to the number of Contracting Parties has the result that the conditions for the entry into force of the treaty are fulfilled. This consequence then depends largely on the circumstances of the case, and in particular on the conditions for the entry into force of the treaty as established by the final clauses, the number of Contracting Parties and so on. It is thus scarcely possible to draw a general rule in this respect except that the author of the established reservation must be included in the number of contracting States or organizations that determines the entry into force of the treaty. This is made clear by guideline 4.2.2:

"**4.2.2** *Effect of the establishment of a reservation on the entry into force of a treaty*

"When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States or contracting organizations required for the treaty to enter into force once the reservation is established."

b. Effect of an established reservation on the content of treaty relations

253. The entry into force of the treaty between the author of the reservation and the parties to the treaty that have accepted it is not the only consequence of the establishment of the reservation. It also modifies the content of the treaty relationship thus constituted and thus achieves the object of the reservation in the sense that "the provisions of the treaty to which the reservation relates" will be modified "to the extent of the reservation" in the mutual relations between the two States concerned.[389] This effect follows, as the Commission pointed out, "directly from the consensual basis of the relations between parties to a treaty".[390] The reservation, which is nothing but an offer formulated by its author purporting to modify or exclude the application of certain provisions of the treaty, and its acceptance constitute an agreement between the protagonists, an agreement *inter partes*, which modulates their treaty relations deriving from the treaty.

254. Article 21, paragraph 1 (*a*), of the 1969 and 1986 Vienna Conventions specifies the effect an established reservation produces for its author on the content of treaty relations. In the 1986 Vienna Convention, this provision reads:

> A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (*a*) Modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation.

255. The term "modify" used in this provision must however be interpreted broadly. It seems strange that the texts of this provision and of article 2, paragraph 1 (*d*), should never have been harmonized. Article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions defines a reservation as any unilateral statement whereby a State "purports to exclude or to modify the legal effect of certain provisions of the treaty". However, this inconsistency scarcely affects the outcome, given that paragraphs 1 (*a*) and (*b*) clearly specify that the provision of the treaty will be modified "to the extent of the reservation". This wording includes both excluding reservations—whereby States purport purely and simply to exclude the application of one or more provisions of the treaty—and limiting reservations, which simply relate to a specific aspect of the provision in question, without completely excluding its application.

---

[386] First report on the law and practice relating to reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, vol. pp. 151–154, paras. 153–169.

[387] *Yearbook ... 2008*, vol. II (Part Two), para. 123.

[388] *Yearbook ... 2009*, vol. II (Part Two), para. 83.

[389] On the principle of reciprocity, see paragraphs 272–290 below.

[390] *Yearbook ... 1966,* vol. II, p. 209, para. (1) of the commentary to article 19 [21].

256. Another inconsistency, and a more serious one, may be signalled between the definition of the term "reservation" in the 1969 and 1986 Vienna Conventions and the effects provided for by article 21, paragraph 1, two provisions that need to be juxtaposed:[391] whereas according to article 21 the reservation modifies "the provisions of the treaty", the object of the reservation under article 2, paragraph 1 (*b*), is to modify or exclude "the legal effect of certain provisions of the treaty". This problem did not go unnoticed during the discussions in the Commission: while some members stressed that the reservation could not change the provisions of the treaty, and that it would be preferable to replace "provisions" by "application",[392] other members paid little attention to the matter[393] or indicated their clear satisfaction with the text proposed by the Drafting Committee.[394]

257. In the literature, the question of whether it is the "provisions of the treaty" or their "legal effects" that are modified has been raised more forcefully. Imbert is of the view that:

> It is precisely the link which the drafters of the Vienna Convention established between reservations and the provisions of a convention that seems to be most open to criticism, in that a reservation is aimed at eliminating not a *provision* but an *obligation*.[395]

258. However, this view considers the effect of the reservation only from the standpoint of its author, and appears to overlook the fact that in modifying the author's obligation the reservation also affects the correlative rights of the States or international organizations that have accepted the reservation. It is thus more convincing to conclude that, with regard to this question:

> article 2, paragraph 1 (*b*), of the 1969 and 1986 Vienna Conventions is better drafted than article 21, paragraph 1. It is unclear how a reservation, which is an instrument *external* to the treaty, could modify *a provision of that treaty*. It might exclude or modify its application, i.e. its effect, but not the text itself, i.e. the provision.[396]

259. And yet the text of article 2, paragraph 1 (*d*), also does not appear to correspond fully to State practice with respect to reservations, in that it specifies that a reservation can purport to exclude or modify only "the legal effect of *certain provisions* of the treaty".[397] It is in fact not uncommon for States to formulate reservations in order to modify the application of a treaty as a whole, or at least of a substantial part of it. In some cases, such reservations can certainly not be regarded as permissible, in that they deprive the treaty of its object and purpose, so that they no longer have the status of "established reservations".[398] However, this is not always the case, and there are in practice many examples of such across-the-board reservations which were not the subject of objections or challenges by the other contracting States.[399] Article 21, paragraph 1, appears more open in this respect, in that it simply provides that the reservation modifies (or excludes) "the provisions of the treaty to which the reservation relates to the extent of the reservation". If a reservation can thus permissibly purport to modify the legal effects of all of the provisions of a treaty in certain specific aspects, as the Commission clearly acknowledged in guideline 1.1.1 (Object of reservations),[400] it will have the effect, once established, of modifying all these provisions in accordance with article 21, paragraph 1, or indeed, as the case may be, all of the provisions of the treaty.[401]

260. It follows that a permissibly established reservation affects the treaty relations of the author of the reservation in that it excludes or modifies the legal effect of a provision or provisions of the treaty, or even of the treaty as a whole, on a specific aspect and on a reciprocal basis.[402]

261. In accordance with the Commission's well-established practice in the context of the Guide to Practice, it is consequently appropriate to incorporate a guideline 4.2.4 which largely reproduces article 21, paragraph 1 (*a*), of the 1986 Vienna Convention while specifying that the reservation modifies not the provision of the treaty in question, but its legal effects:[403]

"**4.2.4** *Content of treaty relations*

"A reservation established with regard to another party modifies for the reserving State or international organization in its relations with that other party the legal effects of the provisions of the treaty to which the reservation relates, to the extent of the reservation."

262. In order to clarify further the content of the obligations and rights of the author of the reservation and of the State or international organization with regard to which the reservation is established, it is wise to distinguish between, as Horn terms them, on the one hand

---

[391] Third report on reservations to treaties, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 249, para. 149.

[392] Mr. Rosenne (*Yearbook ... 1965*, vol. I, 800th meeting, p. 172, para. 9, and 814th meeting, p. 271, para. 2) and Mr. Tsuruoka (*ibid.*, p. 272, para. 16).

[393] Mr. Tunkin "considered it of no great importance whether the wording used was 'modifies the provisions of the treaty' or 'modifies the application of the provisions of the treaty'" (814th meeting, p. 271, para. 9). For a similar view, see Mr. Briggs (*ibid.*, p. 272, para. 13).

[394] Mr. Briggs (*ibid.*, 800th meeting, p. 173, para. 28).

[395] Imbert, *op. cit.* (footnote 347 above), p. 15.

[396] Third report on reservations to treaties, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, para. 150.

[397] Imbert, *op. cit.* (footnote 347 above), pp. 14–15; Szafarz, "Reservations to multilateral treaties", p. 296. See also Pellet (Third report on reservations to treaties, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, para. 156. See, however, Hylton, who maintains that "reservations modify a treaty only in regard to specific provisions" ("Default breakdown: the Vienna Convention on the Law of Treaties: inadequate framework on reservations," p. 422).

[398] See guideline 1.1.1 (Object of reservations), *Yearbook ... 1999*, vol. II (Part Two), p. 94, paras. (6) and (7) of the commentary.

[399] *Ibid.*, pp. 93–94, para. (5).

[400] Guideline 1.1.1 (Object of reservations) reads: "A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation" (*Yearbook ... 1999*, vol. II (Part Two), p. 93).

[401] De Cesari has written on this subject that "By means of reservations, States can reduce the material or subjective scope of application of a treaty to the point of exclusion of one or more provisions of the treaty or its non-application to specific subjects, or again they can demonstrate willingness to accept the provisions of the treaty in accordance with restrictive modalities or by attaching to the limitations of a temporal or territorial nature." ("Riserve, dichiarazioni e facoltà nelle convenzioni dell'Aja di diretto internazionale privato", p. 167, para. 8.)

[402] On the question of reciprocity, see paragraphs 272–290 below.

[403] See paragraph 258 above.

"modifying reservations" and on the other hand "excluding reservations".[404] The distinction is certainly not always easy to make. Thus, a reservation by which its author purports to limit the scope of application of a treaty obligation only to a certain category of persons may be understood equally well as a modifying reservation (it modifies the legal effect of the initial obligation by limiting the circle of persons concerned) or as an excluding reservation (it purports to exclude the application of the treaty obligation for all persons not forming part of the specified category).[405] The distinction does, however, permit a better insight into the two most common hypotheses. The vast majority of reservations may be classified in one or other of these categories, or at least understood by means of this distinction.

263. In the case of excluding reservations, the author of the reservation purports to exclude the legal effect of one or more provisions of the treaty. There are many examples of this.[406] An excluding reservation that is particularly frequently utilized is that relating to compulsory dispute settlement procedures. Thus Pakistan notified the Secretary-General of the following reservation when it acceded on 17 June 2009 to the International Convention for the Suppression of the Financing of Terrorism:

> The Government of the Islamic Republic of Pakistan does not consider itself bound by Article 24, Paragraph 1 of the International Convention for the Suppression of the Financing of Terrorism.
>
> The Government of Islamic Republic of Pakistan hereby declares that, for a dispute to be referred to the International Court of Justice, the agreement of all parties shall in every case be required.[407]

264. A large number of reservations also purport to exclude the application of material provisions of the treaty. Egypt, for example, formulated a reservation to the Vienna Convention on Diplomatic Relations purporting to exclude the legal effect of article 37, paragraph 2:

> Paragraph 2 of article 37 shall not apply.[408]

Cuba also made a reservation purporting to exclude the application of article 25, paragraph 1, of the Convention on special missions:

> The Revolutionary Government of the Republic of Cuba enters an express reservation with regard to the third sentence of paragraph 1, article 25 of the Convention and consequently does not accept the assumption of consent to enter the premises of the special mission for any of the reasons mentioned in that paragraph or for any other reasons.[409]

Or again, the Government of Rwanda formulated a reservation to the International Convention on the Elimination of All Forms of Racial Discrimination worded as follows:

> The Rwandese Republic does not consider itself as bound by article 22 of the Convention.[410]

265. Applying article 21, paragraph 1 (*a*), of the 1969 and 1986 Vienna Conventions to reservations of this kind is relatively easy. An established reservation modifies the legal effect of the treaty provision to which the reservation relates "to the extent of the reservation", that is to say by purely and simply excluding any legal effect of the treaty provision. Once the reservation is established, everything in the treaty relations between the author of the reservation and the parties that have accepted it takes place as if the treaty did not include the provision referred to in the reservation. Excluding reservations thus have a "contraregulatory effect".[411] The author of the reservation is no longer bound by the obligation stemming from the treaty provision in question, but is in no way prevented from complying with it (and being held to it if the treaty norm enunciates a customary obligation). Logically, the other States or international organizations with regard to which the reservation is established have, through their acceptance, waived their right to demand performance of the obligation stemming from the treaty provision in question in the context of their treaty relationship with the author of the reservation.

266. This shows, moreover, that the exclusion of an obligation stemming from a provision of the treaty by a reservation does not automatically mean that the author of the reservation refuses to fulfil the obligation. The author of the reservation may simply wish to exclude the application of the treaty obligation *within the legal framework established by the treaty*. A State or an international organization may be in full agreement with a norm contained in a provision of the treaty, but nevertheless reject the competence of a treaty body or a judicial authority with respect to the application and interpretation of that norm. Although remaining entirely free to comply with the obligation established within the treaty framework, the author nevertheless excludes the opposability of the control mechanisms established by the treaty.[412]

267. It thus seems appropriate to specify the exclusion effect produced by such reservations. This is the purpose of guideline 4.2.5, which is not an alternative to guidelines 4.2.3 but seeks to specify its meaning with respect to a particular category of reservations:

"**4.2.5** *Exclusion of the legal effect of a treaty provision*

"A reservation established with regard to another party which purports to exclude the legal effect of a treaty provision renders the treaty provision(s) inapplicable in relations between the author of the reservation and the other party.

---

[404] See Horn, *op. cit.* (footnote 197 above), pp. 80–87.

[405] See, for example the Egyptian reservation to the Vienna Convention on Consular Reservations: "Article 49 concerning exemption from taxation shall apply only to consular officers, their spouses and minor children. This exemption cannot be extended to consular employees and to members of the service staff".

[406] *Multilateral Treaties Deposited with the Secretary-General*, available online from http://treaties.un.org/ (Status of treaties), chap. III.6. See also guideline 1.1.8 and the commentary thereto (*Yearbook ... 2000*, vol. II (Part Two)), pp. 108–112.

[407] See also the comparable reservations of Algeria, Andorra, Bahrain, Bangladesh, China, Colombia, Cuba, Egypt, El Salvador, Saudi Arabia, the United Arab Emirates, the United States of America, etc. (*Multilateral Treaties Deposited with the Secretary-General*, available online from http://treaties.un.org/, chap. XVIII.11).

[408] *Ibid.*, chap. III.3. See also the reservation formulated by Morocco (*ibid.*).

[409] *Ibid.*, chap. III.9.

[410] *Ibid.*, chap. IV.2.

[411] Horn, *op. cit.* (footnote 197 above), p. 84.

[412] See also guideline 3.1.8 (Reservations to a provision reflecting a customary norm) and the commentary thereto, *Yearbook ... 2007*, vol. II (Part Two), pp. 42–46, and in particular para. (7) of the commentary.

"The author of the established reservation is not required to comply with the obligation imposed by the treaty provision(s) concerned in treaty relations between it and States and international organizations with regard to which the reservation is established.

"The State or international organization with regard to which the reservation is established cannot claim the right contained in the relevant provision in the context of its treaty relations with the author of the reservation."

268. The concrete effect of a modifying reservation is significantly different. In contrast to excluding reservations, the author of a reservation does not purport to be released from its obligations under one or more treaty provisions in order to regain freedom of action within the treaty legal framework. Rather, it purports to replace the obligation under the treaty with a different one. A clear example of this type of reservation is the reservation of the Federal Republic of Germany to the Convention on Psychotropic Substances:

> In the Federal Republic of Germany, manufacturers, wholesale distributors, importers and exporters are not required to keep records of the type described [in paragraph 2 of article 11 of the Convention] but instead to mark specifically those items in their invoices which contain substances and preparations in Schedule III. Invoices and packaging slips showing such items are to be preserved by these persons for a minimum period of five years.[413]

By this reservation, Germany thus purported not only to exclude the application of article 11, paragraph 2, of the Convention on Psychotropic Substances, but to replace the obligation under that provision with another, different one.

269. The reservation of Finland to article 18 of the Convention on Road Signs and Signals of 1968 is another example that clearly shows that the author of the reservation is not simply releasing itself from its obligation under the treaty, but is replacing the latter with another obligation:

> Finland reserves the right not to use signs E,9a or E,9b to indicate the beginning of a built-up area, nor signs E,9c or E,9d to indicate the end of such an area. Instead of them symbols are used. A sign corresponding to sign E,9b is used to indicate the name of a place, but it does not signify the same as sign E,9b.[414]

270. By such a modifying reservation the author, once the reservation is established, is not simply released from all treaty obligations covered by the reservation. The effect of the reservation is to replace the obligation initially provided for in the treaty by another one which is provided for in the reservation. In other words, the obligation under the treaty provision which is the subject of the reservation is replaced or modified, in the treaty relations between its author and the State or international organization in regard to which the reservation is established, by the one set forth in the reservation; or, more exactly, the established reservation leads to replacement of the obligation and the correlative right under the relevant treaty provision by the obligation and the correlative right provided for in the reservation or resulting from the treaty provision as modified by the reservation.

271. Guideline 4.2.6 clarifies guideline 4.2.2 by explaining the effect of a reservation with a modifying effect on the content of treaty relations:

"**4.2.6** *Modification of the legal effect of a treaty provision*

"A reservation established with regard to another party which purports to modify the legal effect of a treaty provision has the effect, in the relations between the author of the reservation and the other party, of substituting the rights and obligations contained in the provision as modified by the reservation for the rights and obligations under the treaty provision which is the subject of the reservation.

"The author of an established reservation is required to comply with the obligation under the treaty provision (or provisions) modified by the reservation in the treaty relations between it and the States and international organizations with regard to which the reservation is established.

"The State or international organization with regard to which the reservation is established can claim the right under the treaty provision modified by the reservation in the context of its treaty relations with the author of the reservation in question."

272. As soon as the reservation has been "established", it can be invoked not only by its author but also by any other party in regard to which it has acquired this status. The reservation creates between its author and the parties with regard to which it is established a special regulatory system which is applied on a reciprocal basis. In this regard, Sir Humphrey Waldock has explained that "reservations always work both ways".[415] This idea is also to be found in article 21, paragraph 1 (*b*), of the Vienna Convention, which, in its 1986 version, reads as follows:

> 1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (*a*) …
>
> (*b*) Modifies those provisions [of the treaty which is their subject] to the same extent for that other party in its relations with the reserving State or international organization.

273. It follows that the author of the reservation is not only released from compliance with the treaty obligations which are the subject of the reservation; it also loses the right to require the State or international organization with regard to which the reservation is established to fulfil the treaty obligations covered by the reservation.

274. This principle of reciprocity is based on common sense.[416] The regulatory system governing treaty relations between the two States concerned reflects the common denominator of their respective commitments resulting

---

[413] *Multilateral Treaties Deposited with the Secretary-General,* available online from http://treaties.un.org/, chap. VI.6.

[414] *Ibid.*, chap. XI.B.20.

[415] "General course on public international Law", p. 87.

[416] Anzilotti believed that "the effect of the reservation is that the reserving State is not bound by the provisions which are the subject of the reservation; *naturally**, the other parties are not bound in respect to it; thus, in relations between the reserving State and the others, it is as if the provisions which are the subject of the reservation are not part of the treaty" (*Corso di diritto internazionale*, p. 355).

from the overlap—albeit partial—of their wills.[417] It follows "directly from the consensual basis of treaty regulations", which has a significant influence on the general regime of reservations of the 1969 Vienna Convention. In his first report on treaty law, Sir Humphrey Waldock explains:

> A reservation operates reciprocally between the reserving State and any other party to the treaty, so that both are exempted from the reserved provisions in their mutual relations.[418]

ICJ has presented the problem of the reciprocal application of the optional declarations of acceptance of compulsory jurisdiction contained in article 36, paragraph 2, of the Statute of the Court in a comparable, although slightly different, way. In its judgment in the *Norwegian Loans* case, it stated:

> Since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the two Declarations coincide in conferring it. A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdictions, exists within these narrower limits indicated by the French reservation.[419]

275. The reciprocity of the effects of the reservation also rebalances the inequalities created by the reservation in the bilateral relations between the author of the reservation and the other States or international organizations with regard to which the reservation is established. The latter cannot, through the reservations mechanism, be bound by more obligations towards the author of the reservation than the latter itself is ready to assume.[420] Simma believed the following in this regard:

> Whoever has withdrawn from certain treaty obligations by a reservation cannot claim treatment in accordance with the treaty provisions which are the subject of the reservation.[421]

276. The reciprocal application of a reservation follows directly from the idea of the reciprocity of international commitments and of give-and-take between the parties and conforms to the maxim *do ut des*.

277. Furthermore, the reciprocity of the effects of the reservation plays a regulatory, even a deterrent role, which is not unimportant in the exercise of the widely recognized freedom to formulate a reservation: the author of the reservation must have in mind that the effects of the reservation are not only to the author's benefit; the author also runs the risk of the reservation being invoked against it. On this subject, Sir Humphrey Waldock has written:

> There is of course another check upon undue exercise of the freedom to make reservations in the fundamental rule that a reservation always works both ways, so that any other State may invoke it against the reserving State in their mutual relations.[422]

Reciprocal application thus cuts both ways and "contributes significantly to resolving the inherent tension between treaty flexibility and integrity".[423] In a way, this principle appears to be a complement to, and is often far more effective than, the requirement of permissibility of the reservation, owing to the uncertain determination of permissibility in a good number of cases. The proliferation of reservations in human rights treaties, in which context the principle of reciprocity plays only a marginal role,[424] can probably be explained in part by the link between the formulation of reservations and their reciprocal application:[425] when reciprocity is not a factor, there are more reservations.

278. A number of reservation clauses thus make express reference to the principle of reciprocal application of reservation,[426] whereas other treaties recall the principle of reciprocal application in more general terms.[427] However, such express clauses appear to be superfluous.[428] The principle of reciprocity is recognized not only as a general principle,[429] but also as a principle that applies

---

[417] Baratta, *Gli effetti della riserve ai trattati*, p. 291: "We have seen, moreover, that the trend resulting from international practice seems to be linked with the consensual principle, a basic element of treaty law: the rule which is the subject of the reservation loses its juridical status, absent an agreement between subjects of law due to the fact of the formulation of the reservation itself."

[418] Sir Humphrey Waldock, First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 68, para. 21. The Commission endorsed this explanation in the comments on draft article 19 (which became article 21) adopted on second reading (*Yearbook ... 1966*, vol. II, p. 227, para. (1) of the commentary).

[419] Judgment of 6 July 1957, *Case of Certain Norwegian Loans, I.C.J. Reports 1957*, p. 23.

[420] See *Yearbook ... 1966*, vol. II, p. 206, para. (13) of the commentary on draft articles 16 and 17. Baratta has rightly maintained that the reciprocity of the effects of a reservation has proved to be a "compensatory mechanism in the mutual relations between contracting parties which has served to restore the balance in the *quantum* of reciprocally assumed treaty obligations that was unilaterally altered by a given reservation" (*op. cit.* (footnote 417 above), p. 292).

[421] *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge*, p. 60.

[422] Sir Humphrey Waldock, *loc. cit.* (footnote 415 above), p. 87. See also Parisi and Ševcenko, "Treaty reservations and the economics of article 21 (l) of the Vienna Convention", pp. 1–26.

[423] *Ibid.* See also Baratta, *op. cit.* (footnote 417 above), pp. 295–296.

[424] See paragraph 285 below.

[425] Parisi and Ševcenko, *loc. cit.* (footnote 422 above).

[426] This was already the case in article 20, paragraph 2, of The Hague Convention on Conflict of Nationality Laws of 1930 ("The provisions thus excluded cannot be applied against the Contracting Party who has made the reservation nor relied on by that Party against any other Contracting Party"). Other examples are found in The Hague Conventions on International Private Law (for these reservation clauses, see Majoros, "Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", pp. 90 *et seq.*), in a number of conventions concluded within the Economic Commission for Europe (see Imbert, *op. cit.* (footnote 347 above), pp. 188–191 and p. 251) and in some conventions drawn up and concluded within the Council of Europe. The Model Final Clauses for Conventions and Agreements Concluded within the Council of Europe adopted by the Council of Ministers in 1980 proposes the following provision relating to reciprocity of the effects of reservation: "A Party which has made a reservation in respect of a provision of [the Agreement concerned] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it" (art. *e*, para. 3). See also Horn, *op. cit.* (footnote 197 above), pp. 146–147.

[427] See, for example, article 18 of the Convention on the Recovery Abroad of Maintenance ("A Contracting Party shall not be entitled to avail itself of this Convention against other Contracting Parties except to the extent that it is itself bound by the Convention") or article XIV of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound by the Convention").

[428] Imbert, *op. cit.* (see footnote 347 above), p. 252; Majoros, *op. cit.* (see footnote 426 above), pp. 83 and 109. Majoros's criticism of the suggestion that clauses reiterating the reciprocity principle should be introduced into treaties is "for reasons of clarity and legal stability" (*ibid.*, p. 81).

[429] Majoros, *op. cit.*, pp. 83 and 109; Baratta, *op. cit.* (footnote 417 above), p. 243 *et seq.*; Horn, *op. cit.* (footnote 197 above), p. 148; see also Simma, *op. cit.* (footnote 421 above), pp. 60–61.

automatically, requiring neither a specific clause in the treaty nor a unilateral declaration by the States or international organizations that have accepted the reservation to that effect.[430]

279. Draft article 21 adopted on first reading by the Commission in 1962 was, however, not very clear as regards the question of automaticity of the reciprocity principle, in that it provided that the reservation would operate "reciprocally to entitle any other State Party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving State".[431] This formulation of the rule implied that the other contracting States should claim the reservation in order to benefit from the effects of reciprocity. Following the comments of Japan and the United States,[432] the text was recast so as to establish that the reservation produces *ipso jure* the same effect for the reserving State and the State accepting it.[433] The text finally adopted by the Commission in 1965 thus clearly expresses the idea of automaticity, although it still underwent a number of drafting changes.[434]

280. This does not mean, however, that the principle of reciprocity is absolute—far from it. Although today it constitutes, under cover of article 21, paragraph 1, the general rule, there are nevertheless major exceptions[435] which stem either from the content of the reservation itself or from the content or nature of the treaty.

281. The principle of reciprocity cannot find application in cases where a rebalancing between the obligations of the author of the reservation and the State or international organization with regard to which the reservation is established is unnecessary or proves impossible.

282. This situation arises, for example, in the case of reservations purporting to limit the territorial application of a treaty. Reciprocal application of such reservation is quite simply not possible in practice.[436] Similarly, reciprocal application of the effects of the reservation is also excluded if it was motivated by situations obtaining specifically in the reserving State.[437] Thus, a party to the 1971 Convention on Psychotropic Substances can certainly not invoke in its favour the reservation formulated by Canada purporting to exclude peyotl,[438] from the application of the Convention; it was formulated solely because of the presence in Canadian territory of groups which use in their magical or religious ceremonies certain psychotropic substances that would normally fall under the Convention regime.[439]

283. The principle of reciprocal application of reservations may also be limited by reservation clauses contained in the treaty itself. An example is the 1954 Convention on Customs Facilities for Touring and its Additional Protocol. Article 20, paragraph 7, of the Convention provides that:

> No Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies. Any State availing itself of this right shall notify the Secretary-General accordingly and the latter shall communicate its decision to all signatory and contracting States.[440]

Even though this particular clause does not in itself exclude the principle of reciprocal application, it deprives it of automaticity by making it subject to notification by the accepting State. Such notifications have been made by the United States in relation to the reservations formulated by Bulgaria, Romania and the Union of Soviet Socialist Republics to the dispute settlement mechanism provided for in article 21 of that Convention.[441]

284. In other cases, it is not the clauses or provisions of the treaty that invalidate the application of the principle of reciprocity, but the nature and object of the treaty and the obligations it contains. The principle of reciprocity is conditioned by the reciprocal application of the provisions and obligations of the treaty. If the treaty is not itself based on reciprocity of rights and obligations between the parties, a reservation can also produce no such reciprocal effect.

285. A typical example is afforded by the human rights treaties.[442] The fact that a State formulates a reservation excluding the application of one of the obligations contained in such a treaty does not release a State which accepts the reservation from respecting that obligation, despite the existence of the reservation, as these obligations apply not in an inter-State relationship between the reserving State and the State which has accepted the reservation, but simply in a State-human being relationship. The Human Rights Committee considered in this respect in its general comment No. 24 that:

---

[430] Baratta, *op. cit.* (footnote 417 above), pp. 227 *et seq.* and 291; Majoros, *op. cit.* (footnote 426 above), pp. 83 and 109; Parisi and Ševcenko, *loc. cit.* (see footnote 422 above). There have, however, been cases where, simply as a precaution, States have made their acceptance conditional upon the reciprocal application of the reservation. It is in this sense that we must understand the United States declarations in response to the reservation by Romania and the Union of Soviet Socialist Republics to the 1949 Convention on Road Traffic whereby the Government of the United States specified that it "has no objection to [these] reservation[s] but 'considers that it may and hereby states that it will apply [these] reservation[s] reciprocally with respect to [their respective author States]'". (*Multilateral Treaties Deposited with the Secretary-General*, available online from http://treaties.un.org/, chap. XI.B.1).

[431] *Yearbook ... 1962*, vol. II, p. 181.

[432] *Yearbook ... 1966*, vol. II, pp. 303 and 351. See also the comments by Austria, *ibid.*, p. 282.

[433] Fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 58.

[434] For the final text of draft article 19, see *Yearbook ... 1966*, vol. II, p. 227.

[435] Simma, *op. cit.* (footnote 421 above), p. 61; Baratta, *op. cit.* (footnote 417 above), p. 292; Greig, "Reservations: equity as a balancing factor?", p. 139; Horn, *op. cit.* (footnote 197 above), p. 148.

[436] Imbert, *op. cit.* (footnote 347 above), p. 258; Simma, *op. cit.* (footnote 421 above), p. 61.

[437] Horn, *op. cit*. (footnote 197 above), pp. 165–166; Imbert, *op. cit.* (footnote 347 above, pp. 258–260. See, however, the more cautious ideas relating to these assumptions formulated by Majoros, *op. cit.* (footnote 426 above), pp. 83–84).

[438] This is a species of small cactus which has hallucinogenic psychotropic properties.

[439] *Multilateral Treaties Deposited with the Secretary-General*, available online from http://treaties.un.org/, chap. VI.16.

[440] *Ibid.*, chap. XI.A.6.

[441] *Ibid.*, chap. XI.A.6 and A.7. See Riquelme Cortado, *op. cit.* (footnote 208 above), p. 212, footnote 44.

[442] First report on the law and practice relating to reservations to treaties (*Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 148, para. 138.

> Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.[443]

For this reason, the Committee continues, the human rights treaties, "and the Covenant [on Civil and Political Rights] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place".[444]

286. The human rights treaties are not, however, the only ones that do not lend themselves to reciprocity. This effect is also absent from treaties establishing obligations owed to the community of contracting States. Examples can be found in treaties on commodities,[445] in environmental protection treaties, in some demilitarization or disarmament treaties[446] and also in international private law treaties providing uniform law.[447]

287. In all of these situations, the reservation cannot produce a reciprocal effect in the bilateral relations between its author and the State or international organization with regard to which it is established. Such a bilateral relationship does not exist between the two States. A State party does not owe an individual obligation to another State party to respect the obligation, and the latter does not individually have a right for the obligation to be respected. Thus the reverse effect of the reservation has "nothing on which it can 'bite' or operate".[448]

288. This does not mean, however, that the principle of reciprocity plays no role in these exceptions. The reservation will nevertheless produce at least one effect: even if a State or international organization accepting the reservation, or for that matter a State or international organization formulating an objection to it, is required to discharge the obligations contained in the treaty, the reserving State is not entitled to call for compliance with these obligations which it does not assume on its own account. As Baratta has rightly pointed out:

> Even on the assumption of reservations to the norms enunciated in the above-mentioned agreements, the effect of reciprocity is produced, as neither practice nor the principles applicable suggest that the reserving State would have a legal right to call for the application of the provision to which the reservation relates by a subject which is not the author of the reservation. There nonetheless remains the obligation for all subjects which have not formulated the reservation to apply in all cases the norm to which the reservation relates, by virtue of the regime of solidarity established by the agreement.[449]

289. This moreover was the thinking underlying the model clause on reciprocity adopted by the Council of Ministers of the Council of Europe in 1980:

> A Party which has made a reservation in respect of a provision of [the agreement concerned] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it.[450]

290. Guideline 4.2.7 takes account of the reciprocal application of a reservation by reproducing in large measure article 21, paragraph 1, of the 1986 Vienna Convention. It nevertheless emphasizes that this general rule has major exceptions, contrary to what a reading of article 21 of the Vienna Conventions might suggest:

"**4.2.7** *Reciprocal application of the effects of an established reservation*

"A reservation modifies the content of treaty relations for the State or international organization with regard to which the reservation is established in their relations with the author of the reservation to the same extent as for the author, unless:

"(*a*) Reciprocal application of the reservation is not possible because of the nature or content of the reservation;

"(*b*) The treaty obligation to which the reservation relates is not owed individually to the author of the reservation; or

"(*c*) The object and purpose of the treaty or the nature of the obligation to which the reservation relates exclude any reciprocal application of the reservation."

---

[443] Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V, p. 120, para. 8. See also Coccia, *loc. cit.* (footnote 352 above), p. 37; Imbert, *op cit.* (footnote 347 above), p. 153; Virally, "Le principe de réciprocité dans le droit international contemporain", pp. 26 – 27.

[444] Report of the Human Rights Committee (see preceding footnote), annex V, p. 123, para. 17.

[445] Schermers, "The suitability of reservations to multilateral treaties", p. 356. See also Greig, *loc. cit.* (footnote 435 above), p. 140.

[446] Horn, *op. cit.* (footnote 197 above), pp. 164–165.

[447] On the conventions of The Hague Conference on International Private Law, see de Cesari, *loc. cit.* (footnote 401 above), pp. 149–174, and Majoros, *op. cit.* (footnote 426 above), pp. 73–109.

[448] Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. 1, p. 412.

[449] Baratta, *op. cit.* (footnote 417), p. 294; Greig, *loc. cit.* (footnote 435), p. 140.

[450] See footnote 427 above.

Annex

MEETING WITH HUMAN RIGHTS BODIES, 15 AND 16 MAY 2007[a]

Report prepared by Mr. Alain Pellet, Special Rapporteur[b]

1. Pursuant to General Assembly resolution 61/34 of 4 December 2006, the International Law Commission convened a meeting with representatives of United Nations human rights treaty bodies and regional human rights bodies. The meeting took place on 15 and 16 May 2007 at the United Nations Office at Geneva and provided an opportunity for a fruitful exchange of views that was welcomed by all participants.

2. Mr. Ian Brownlie, Q.C., Chairman of the International Law Commission, chaired the meeting, the last segment of which was co-chaired by Sir Nigel Rodley, member of the Human Rights Committee and Chairperson-Rapporteur of the Working Group on reservations to treaties of the Meeting of chairpersons of the human rights treaty bodies. Mr. Brownlie welcomed the participants and explained that the meeting offered a unique opportunity to pursue a dialogue with the human rights bodies on the issue of reservations to treaties. Mr. Alain Pellet, Special Rapporteur of the International Law Commission on reservations to treaties, underscored the importance of such an exchange of ideas for strengthening mutual understanding between the Commission and the human rights expert bodies.

1. Introduction of the practice of the human rights bodies represented

3. The meeting began with brief presentations by the representatives of the human rights bodies participating in the meeting on the respective practice of each of the bodies represented, with the understanding that neither those presentations nor what was said during the meeting would in any way engage the responsibility of the bodies in question. The following bodies were represented: the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee against Torture; the Committee on the Rights of the Child; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee on Migrant Workers; the Council of Europe (the European Court of Human Rights and the Committee of Legal Advisers on Public International Law (CAHDI));[c] and the Sub-Commission on the Promotion and Protection of Human Rights.

(a) *Reservations to human rights treaties*

4. The use of reservations in human rights treaties varied from treaty to treaty. For that matter, some conventions explicitly provided for the formulation of reservations (Convention against Torture, European Convention on Human Rights and Fundamental Freedoms). Two broad trends could be observed.

5. On the one hand, some treaties—in particular, those that had been widely ratified—had been the subject of numerous reservations. Significant examples included the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, but also the conventions against torture and the elimination of all forms of racial discrimination and the European Convention on Human Rights. Conversely, few reservations had been made to the International Covenant on Economic, Social and Cultural Rights.

6. On the other hand, reservations were too frequently made to fundamental or substantive provisions of human rights treaties. In that connection, the representative of the Committee on the Elimination of Racial Discrimination pointed to the large number of reservations made to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, concerning the prohibition of incitement to hatred or to racial discrimination. The same comment was made with regard to the Convention on the Elimination of All Forms of Discrimination against Women.

(b) *The practice of human rights bodies with respect to reservations*

7. The practice of human rights bodies, as described by some representatives, was relatively uniform and was characterized by a high level of pragmatism. The question of reservations could arise in two situations: the consideration of periodic reports submitted by States and the examination of individual communications. However, the latter option was available only to bodies charged with receiving individual petitions or communications.

---

[a] The present report—which is not a "statement of conclusions"—was prepared on the sole responsibility of the Special Rapporteur on reservations to treaties. It was submitted for opinion to outside participants and to those members of the Commission who had made introductory presentations but in no way engages their responsibility. This annex is a very slightly revised version of document ILC(LIX)/RT/CRP.1, which appears on the website of the International Law Commission at http://legal.un.org/ilc/documentation/english/ilc_lix_rt_crp1.pdf (accessed on 8 September 2014).

[b] I wish to extend warm thanks to Céline Folsché, intern from New York University (LLM) during the fifty-ninth session of the International Law Commission, who wrote the first draft of this report.

[c] The other regional bodies invited were unable to send representatives.

8. In considering the periodic reports submitted by States, nearly all the various committees had taken a somewhat pragmatic approach to the question of reservations. Their chief position was that the formulation of reservations by States should be strictly limited. In practice, however, they were relatively flexible and showed great willingness to establish a dialogue with States, to which the latter were generally amenable. While encouraging and recommending the withdrawal of reservations, the committees engaged in discussions with States about the justification and the scope of their reservations. Although the objective of the dialogue was the complete withdrawal of reservations, the committees' position was flexible, owing to their goal of achieving universal ratification of their conventions. Only very rarely had the committees taken a formal position to declare a reservation invalid.

9. Some committees had considered the scope and even the validity of reservations when considering individual communications or requests. However, that practice was limited, if only because few bodies received such communications or requests. Currently, only the Human Rights Committee and the European Court of Human Rights followed it. In the case of the Human Rights Committee, the risk that the State whose reservation was declared invalid might withdraw from the Optional Protocol could not be overlooked.

2. Presentations

10. Presentations serving as a basis for the discussion were delivered by:

—Mr. Alain Pellet, Special Rapporteur of the Commission on reservations to treaties: "Codification of the right to formulate reservations to treaties";

—Ms. Françoise Hampson, member of the Sub-Commission on the Promotion and Protection of Human Rights: "Principal aspects of the problem";

—Mr. Enrique Candioti, member of the Commission: "Grounds for the invalidity of reservations to human rights treaties";

—Mr. Alexandre Sicilianos, member of the Committee on the Elimination of Racial Discrimination: "Assessment of the validity of reservations to human rights treaties";

—Mr. Giorgio Gaja, member of the Commission: "The consequences of the non-validity of reservations to human rights treaties".

(a) *Codification of the right to formulate reservations to treaties*

11. Mr. Alain Pellet, Special Rapporteur of the International Law Commission on reservations to treaties, described the history of the codification of the law of treaties. He began by recalling the Commission's mission of codification and presenting the 1969 Vienna Convention as its most significant achievement. He went on to describe the process used by the Commission in drawing up draft conventions or draft guidelines. Lastly, he described the Commission's consideration of the topic of reservations.

12. Although flexible and relatively detailed, the Vienna regime was vague and ambiguous with respect to the legal regime of reservations to treaties. Efforts to draft a Guide to Practice that would complement the provisions of the Vienna Conventions had been initiated in 1996. The lack of specific rules governing reservations to human rights treaties had been considered by the drafters of the Vienna Conventions. For one thing, human rights treaties had not been accorded the same importance at the time the Convention was drafted; for another, and most notably, the authors of the Convention, who had been cognizant of the specificity of certain types of treaties, including human rights treaties (see article 60, paragraph 5), had intended that the rules pertaining to reservations should be uniformly applied. However, as the Special Rapporteur had demonstrated in his second report (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/478), the considerable extent of practice in respect of reservations to human rights treaties could not be ignored, and the Commission was thus very interested in the practice of human rights bodies.

(b) *Principal aspects of the problem*

13. Ms. Françoise Hampson, member of the Sub-Commission on the Promotion and Protection of Human Rights, began by outlining those aspects of the problem on which there was general consensus. One point on which consensus had been reached was the principle that reservations that were incompatible with the object and purpose of a treaty produced no effects. An invalid reservation was null and void. In such cases it was assumed that the other Contracting Parties did not have the option of accepting such a reservation. Moreover, articles 20 to 23 of the 1969 Vienna Convention and, in particular, the rules concerning objections to reservations did not apply in the event of incompatibility. The "validity" or "effectiveness" of a reservation depended on an objective criterion and not on the potential acceptance or objection of States. Such a declaration of incompatibility could be made by the Contracting Parties—which were not compelled to take such action—or by any body whose functions required it to take such a decision.

14. There was also consensus that there was no special regime applicable to reservations to human rights treaties. Nevertheless, the possibility existed that certain specific situations might produce predictable results. In the case of human rights treaties, the bodies established by those instruments were competent to determine whether or not a reservation was compatible with the object and purpose of the treaty. That observation applied both to judicial bodies that were competent to hand down decisions having the authority of *res judicata* and to bodies whose monitoring of the implementation of treaties resulted in recommendations or opinions that were not legally binding.

15. Ms. Hampson next identified the areas in which problems remained. There were a number of unanswered questions with respect to the general regime of reservations and, in particular, with respect to the effects that a declaration of incompatibility of a reservation with the object and purpose of a treaty might have. In the case of human rights treaties, questions arose as to whether the treaty bodies were under an obligation to enter into

a "reservations dialogue" with States or simply had the option of doing so. Moreover, given the diversity of human rights bodies, it was difficult to adopt a general method for assessing a reservation's compatibility with the object and purpose of the treaty. Lastly, in cases involving incompatibility, the question arose as to the severability of the invalid reservation and whether or not the author of the reservation retained the status of Contracting Party. The precedents established by the human rights bodies and the reactions of the States that had taken the floor in the Sixth Committee of the General Assembly would seem to indicate that the rule of severability could stand to be revised in certain areas of international law and, in particular, in the area of human rights.

(c) *Grounds for the invalidity of reservations to human rights treaties*

16. Mr. Enrique Candioti, member of the Commission, emphasized that it was difficult to define objectively the grounds for the invalidity of reservations to treaties. He described the guidelines contained in the Guide to Practice that had been prepared by the Commission. The Special Rapporteur had proposed a general definition according to which a reservation was incompatible with the object and purpose of a treaty if it affected an essential element of the treaty. Another group of guidelines concerning non-derogable norms and human rights treaties were currently being considered by the Commission.

(d) *Assessment of the validity of reservations to human rights treaties*

17. Mr. Alexandre Sicilianos, member of the Committee on the Elimination of Racial Discrimination, generally approved of the principles contained in the tenth report on reservations to treaties (*Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2) and in particular the assertion that human rights bodies were competent to assess a reservation's compatibility with the object and purpose of a treaty. He particularly supported the guideline which indicated that there were various bodies that were competent to determine the validity of a reservation.

18. Human rights bodies—for which the issue of human rights was not necessarily paramount—assessed reservations through two distinct procedures: the consideration of periodic reports and the examination of individual complaints.

19. In considering reports, committees exercised a quasi-"diplomatic" function. In some instances, the assessment of reservations was clear-cut. There were, however, situations in which it was not necessarily useful or desirable for the committee to make a "yes" or "no" pronouncement. For that reason, Mr. Sicilianos recommended that the realities of the situation should be taken into account: it was essential to deal with political considerations as well as with practical problems (such as the amount of time available to committees for considering reports). He stressed the importance of dialogue with States and of studying States' internal law, since reservations could not be considered in the abstract and their scope was dependent on internal law. It was therefore necessary to establish priorities for the purpose of determining the validity of reservations during the consideration of reports.

20. The individual complaints procedures of the human rights bodies conferred a quasi-judicial function on those bodies. Although the bodies' decisions were not binding, the States concerned were required to draw the appropriate conclusions from the opinions expressed by the bodies. Mr. Sicilianos stressed that a distinction should be made between reservations to jurisdictional clauses and reservations to substantive provisions. He drew attention in that connection to the ICJ judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*.

(e) *The consequences of the non-validity of reservations to human rights treaties*

21. Mr. Giorgio Gaja, member of the Commission, shared the view expressed by Ms. Hampson that articles 20 to 23 of the 1969 Vienna Convention did not apply to invalid reservations, and particularly to those that were incompatible with the object and purpose of the treaty. Nevertheless, in practice it was generally considered that even invalid reservations were subject to the general regime of reservations and could therefore be accepted by other contracting States.

22. The treaty bodies made use of their authority to play an active role in respect of reservations they considered invalid. They relied on two techniques to accomplish that end. The first was the approach taken by the European Court of Human Rights in the case of *Belilos v. Switzerland*. The Court had concluded that the willingness of Switzerland to be a party to the European Convention on Human Rights was "stronger" than its willingness to maintain the reservation in question. The invalidity of the reservation did not subsequently impair the status of Switzerland as a State party to the Convention.

23. The second approach was the one adopted by the Human Rights Committee in its general comment No. 24. The Committee did not seek to verify a State's willingness to be bound by the International Covenant on Civil and Political Rights. It maintained that reservations were severable from the treaty and produced no effects if they were incompatible with its object and purpose.

24. Mr. Gaja urged caution. A restrictive attitude towards the reserving State could lead to political difficulties, such as a State's withdrawal from the Optional Protocol to the International Covenant on Civil and Political Rights concerning individual communications. He welcomed the spirit of openness to dialogue that existed between the human rights treaty bodies and States. Even though the question of the validity of reservations was a difficult one, a "gentle" approach was called for. The reservations dialogue should be encouraged by the Commission.

3. Summary of the discussion

25. The members of the International Law Commission and the representatives of the human rights bodies had an opportunity to participate in a general discussion following each of the presentations. Mr. Roman Kolodkin and Ms. Hanqin Xue, members of the Commission,

summarized the discussions on grounds for and assessment of the validity of reservations and on the consequences of the non-validity of reservations, respectively. Their views are reflected in the present report, as are the conclusions of Sir Nigel Rodley, member of the Human Rights Committee and Chairperson-Rapporteur of the Working Group on Reservations of the Meeting of Chairpersons of Human Rights Treaty Bodies.

(a) *The specific nature of human rights treaties*

26. Some participants emphasized the special nature of human rights treaties. That specific nature did not, however, imply that the law of treaties was not applicable to them. Human rights treaties continued to be governed by treaty law.

27. The special nature of human rights treaties was reflected in the test provided for in article 19 (*c*) of the 1969 Vienna Convention, which concerned the incompatibility of a reservation with the object and purpose of the treaty. It was nevertheless pointed out that that specific feature was not unique and that environmental protection treaties and disarmament treaties also presented particular features that could have an impact in terms of reservations. The reason that human rights treaties were of special interest to the Commission was that they had treaty monitoring bodies. The representatives of the human rights bodies stressed the fact that it was not necessary to establish a separate regime governing reservations to human rights treaties. However, they did feel that the general regime should be applied in an appropriate and suitably adapted manner.

28. A number of participants highlighted the fact that the delicate balance between the integrity and the universality of the treaty lay at the heart of the debate on the specific nature of human rights treaties. According to some, the treaty bodies gave precedence to integrity; however, the opposing view was also expressed, i.e., that treaty bodies sought to work on the basis of reservations and to hold discussions with States, which showed a greater concern for universality.

(b) *The use of the term "validity"*

29. Several participants expressed uncertainty as to the terminology to be employed. All the members of the human rights bodies had used the term "validity". Nevertheless, notwithstanding the previous decision of the Commission on the matter, some Commission members were once again specifically opposed to the use of that term, owing to its objectivistic connotation and lack of neutrality.

(c) *Grounds for invalidity*

30. The participants were in general agreement that article 19 of the 1969 Vienna Convention set forth the conditions for the validity of a reservation. However, discussion focused on subparagraph (*c*), according to which a reservation was prohibited if it was "incompatible with the object and purpose of the treaty". While some participants were opposed to the use of the term "reservation" to designate a reservation that was prohibited under article 19 (*c*), others pointed to the practical problem that would arise if another term was used.

31. It was noted that because it was not possible to establish a standard criterion for the object and purpose, the guidelines of the Commission had been limited to identifying typical problems and attempting to illustrate article 19 (*c*).

32. Many participants noted the problematic nature of general and vague reservations. Although they were not considered to be incompatible with the object and purpose of the treaty, it was impossible to assess the validity of such reservations.

33. Participants also discussed the issue of reservations to provisions setting forth a rule of *jus cogens*. Some were of the view that any reservation to that type of clause should automatically be considered invalid, since it would inevitably affect the "quintessence" of the treaty. Others observed that the problem arose in much the same way that it did for reservations to provisions setting forth a customary norm—which could not be considered to be invalid *ipso jure*.

(d) *Assessment of validity*

34. All participants agreed that the competence of the human rights bodies to assess the validity of reservations was unquestionable. Many welcomed their reliance on political means of persuasion rather than on legal imperatives in their interactions with States.

35. The discussion focused in particular on the issue of the "reservations dialogue". It was observed that, in practice, such an approach was extremely useful for understanding the political considerations underlying reservations and that the pragmatism and discretion exercised by the human rights bodies had already met with success.

(e) *The consequences of non-validity*

36. To date, the human rights bodies had endeavoured, insofar as possible, to avoid taking a position on the validity of reservations. Examples of assessments of validity or declarations of invalidity of reservations were the exception and had occurred only in the rare cases in which such determinations were unavoidable. In any event, the consequences of the non-validity of a reservation were not obvious. The participants were unanimous in considering that a reservation that was incompatible with the object and purpose of a treaty was null and void. However, some disagreement was voiced as to whether there was any need for States to rule on that matter, and it was considered unnecessary for States to object to an invalid reservation. Conversely, several participants felt that States had an interest in taking a position owing both to a lack of monitoring bodies in certain areas or, where such bodies did exist, to the sometimes random manner in which they considered the matters referred to them.

37. The consequences of the non-validity of a reservation for the status of the treaty presented a major difficulty, one which was linked, more specifically, to the

consent of the author of the reservation to be bound by the treaty. The problem lay in determining whether or not the invalid reservation was severable from consent to be bound by the treaty. The participants stressed that the human rights bodies must act with caution. Their approach consisted in determining the State party's intention. If intention could not be discerned, a presumption would have to be made. In the view of several speakers, such a presumption should be in favour of severing the invalid reservation from consent to be bound by the treaty and firmly maintained by the human rights bodies (with the understanding that it must not constitute a conclusive presumption). Other participants, however, believed that the principle of State sovereignty must prevail. A reservation that was declared invalid altered the scope of the treaty for the reserving State, which should then have the option of withdrawing its consent to be bound by the treaty. Some participants pointed to the dangers inherent in the severance of an invalid reservation and considered that there was a risk that the reserving State might withdraw its participation in the optional protocol, or even in the treaty. According to one opinion, however, experience had shown that risk to be quite small.