RESERVATIONS TO TREATIES

[Agenda item 2]

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Comments and observations received from Governments

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Multilateral instruments cited in the present report

	Source
Covenant of the League of Nations (Versailles, 28 June 1919)	League of Nations, *Official Journal*, No. 1 (February 1920), p. 3.
Convention on the privileges and immunities of the specialized agencies (New York, 21 November 1947)	United Nations, *Treaty Series*, vol. 33, No. 521, p. 261.
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.
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.
Additional Protocol No. 2 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955 (Montreal, 25 September 1975)	*Ibid.*, vol. 2097, No. A-6943, p. 64.
Vienna Convention on succession of States in respect of treaties (Vienna, 23 August 1978)	*Ibid.*, vol. 1946, No. 33356, p. 3.
Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983)	United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p. 139.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

Introduction

1. At its sixty-second session, in 2010, the International Law Commission completed the provisional adoption of the set of guidelines constituting the Guide to Practice on Reservations to Treaties.[1] The Commission indicated, in its report to the General Assembly, that it intended to adopt the final version of the Guide to Practice during its sixty-third session, in 2011, and that, in so doing, it would take into consideration the observations made, since the beginning of the examination of the topic, by States, international organizations and the organs with which the Commission operates, together with any further observations received by the secretariat of the Commission before 31 January 2011. Also at its sixty-second session, the Commission indicated in its report that it would particularly welcome comments from States and international organizations on the guidelines adopted that year, and drew their attention in particular to the guidelines in sections 4.2 (Effects of an established reservation) and 4.5 (Consequences of an invalid reservation) of the Guide to Practice.[2]

2. In paragraph 3 of its resolution 65/26 of 6 December 2010, the General Assembly drew the attention of Governments to the importance for the Commission of having their views on the various aspects of, *inter alia*, the topic "Reservations to treaties", in particular on all the specific issues identified, with regard to that topic, in chapter III of the Commission's report on its sixty-second session. Furthermore, in paragraph 4 of the same resolution, the Assembly invited Governments to submit to the secretariat of the Commission, by 31 January 2011, any further observations on the entire set of guidelines constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission at its sixty-second session, with a view to finalizing the Guide at the sixty-third session.

3. The present report reproduces comments and observations that were received by the secretariat of the Commission from the Governments of the following States: Australia (31 January 2011); Austria (9 February 2011); Bangladesh (17 January 2011); El Salvador (6 January 2011); Finland (31 January 2011); France (4 March 2011); Germany (31 January 2011); Malaysia (17 March 2011); New Zealand (23 March 2011); Norway (1 February 2011); Portugal (6 January 2011); Republic of Korea (15 February 2011); Switzerland (1 February 2011); United Kingdom (23 February 2011); and the United States (14 February 2011).

4. The comments and observations reproduced below are organized thematically, starting with general comments and observations, and continuing with comments and observations on specific sections of the Guide to Practice and on specific guidelines.[3]

[1] See *Yearbook … 2010*, vol. II (Part Two), para. 45. The complete text of the set of guidelines provisionally adopted by the Commission is reproduced in paragraph 105, in which reference is also made, in footnotes, to the relevant sections of the reports of the Commission reproducing the text of the commentaries to the various guidelines constituting the Guide to Practice.

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

[3] In the present document, the Vienna Convention on the Law of Treaties is hereinafter referred to as the "1969 Vienna Convention"; the Vienna Convention on succession of States in respect of treaties, as the "1978 Vienna Convention"; and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, as the "1986 Vienna Convention".

Comments and observations received from Governments

A. General comments and observations

Australia

1. Australia welcomes the Commission's guidelines constituting the Guide to Practice on Reservations to Treaties, which were provisionally adopted at its sixty-second session, in 2010. Australia would like to express its gratitude to the Commission for the work undertaken in producing the guidelines as reflected in the report of the Commission. Australia is of the view that the guidelines will have an important and practical role for States in establishing and maintaining treaty relationships by clarifying one of the most difficult issues of treaty law, namely the effects of a reservation and an acceptance or objection thereof. Australia has some concerns with the guidelines in their current form and hope that its comments below will assist in their finalization by the Commission.

2. Australia congratulates the Commission on its achievements to date. It hopes these comments will assist the Commission as it seeks to finalize the guidelines with a view to their adoption at its sixty-third session. The Commission's Guide to Practice, together with its commentaries, should prove to be of great benefit to States and international organizations.

Austria

1. Austria's previous statements during the debates in the Sixth Committee of the General Assembly concerning the work of the Commission on the topic "Reservations to treaties" continue to reflect Austria's position in detail. The present comments focus on those areas Austria considers especially important, looking at the guidelines as a whole from today's perspective. In addition, Austria offers observations regarding a number of guidelines on which the Commission specifically requested comments from States.

2. What practitioners in legal offices of foreign ministries and international organizations really need is a concise guide on reservations. As regards the application of the guidelines in practice, Austria wonders whether it might be difficult to work with them, owing to their very comprehensive character and the existence of so many cross-references. The more complex the guidelines, the

less likely their acceptance and application in practice. Austria therefore suggests that further thought be given on how to enhance their user-friendliness and strongly encourages the Commission to streamline the present guidelines. Very generally, Austria suggests defining and distinguishing more clearly the concepts of established, permissible and valid reservations, including their legal effects and the effects on them of reactions thereto. In addition, it would be useful to make very clear which guidelines are interpretative guidelines to clarify provisions of the 1969 Vienna Convention, and which guidelines constitute new recommendations, which go beyond the obligations under the Vienna Convention.

Bangladesh

1. The question of reservations is one of the thorny issues of the law of treaties. Although the conditions and consequences of reservations have been fairly well laid down in the 1969 Vienna Convention and the 1986 Vienna Convention, many things have remained ambiguous, as subsequent developments have demonstrated. This especially relates to reactions and objections of the other parties to impermissible and invalid reservations. The Commission has rightly taken up the issue to shed light on these and other problems primarily based on the State's intention and practices.

2. The guidelines presented in the Commission's report on its sixty-second session, in 2010, are hugely useful to better understand the provisions of the conventions on reservations.

Finland

1. Finland wishes to express its gratitude to the Commission and to the Special Rapporteur, Alain Pellet, for their dedicated work on the subject of reservations to treaties, and thanks the Commission for the opportunity to comment on the guidelines of the Guide to Practice. The subject of impermissible reservations has been of particular interest to Finland, and the following contribution focuses on this important issue.

2. Once more, Finland wants to express its gratitude to the Commission and the Special Rapporteur for their expert work in producing these guidelines. It looks forward to the adoption of the final guidelines later this year.

France

1. At the outset, France would like to commend once again the high-quality, in-depth work of the Commission and its Special Rapporteur on this topic. The Guide to Practice on Reservations to Treaties will be an essential practical tool for States and international organizations.

2. France has followed with great interest the Commission's work on this topic and has made oral comments at meetings of the Sixth Committee of the General Assembly throughout this process. The Secretary-General will find below, in response to the aforementioned request, France's comments and observations on the set of guidelines constituting the Guide to Practice, provisionally adopted on first reading by the Commission in 2010.

3. After 15 years of work on the topic, France would like to recall its general assessment of the Guide to Practice, as well as its comments at meetings of the Sixth Committee regarding specific guidelines.

4. France, which remains committed to the reservations regime enshrined in the 1969 Vienna Convention, welcomes the Commission's decision to take that regime as a model and address its shortcomings without calling it into question; indeed, the Vienna regime seems to lend itself to all types of treaties, irrespective of their object or purpose, including human rights treaties. The Guide to Practice will thus provide a valuable addition to the provisions of the Vienna Convention relating to reservations to treaties (arts. 19 to 23).

5. While the purpose of the Guide to Practice is to help States, it is not meant to culminate in an international treaty. France reiterates its strong preference for a document to which States can look for guidance, if they so wish, and to which they can refer if they deem it necessary.

6. As the French delegation has already mentioned in the Sixth Committee, the French term "*directive*" does not seem the most appropriate one to describe the provisions of a non-binding guide to practice. The term "*lignes directrices*" would be more satisfactory.

7. In addition to these general observations, France would like to recall its more specific comments on a number of guidelines, which were updated in 2011. It nevertheless reserves the right to make further comments on certain guidelines between now and the conclusion of the Commission's second reading of the Guide to Practice.

Germany

Germany expresses great appreciation for the Commission's tremendous achievements in the complex matter of reservations to treaties. The Commission's draft guidelines and reports on the subject will be a comprehensive manual to international jurisprudence, State practice and literature for years to come. The in-depth analysis contained in the reports and the Guide to Practice has already contributed to clarifying many legal and academic debates in this area.

Malaysia

1. Malaysia recognizes that the 1969 Vienna Convention, the 1978 Vienna Convention and the 1986 Vienna Convention, which set out the core principles concerning reservations to treaties, are silent on the effect of reservations on the entry into force of treaties, problems pertaining to the particular object of some treaties, reservations to codification treaties and problems resulting from particular treaty techniques. Therefore, Malaysia appreciates the work being undertaken by the Commission to clarify and develop further guidance on these matters.

2. In this regard, Malaysia supports the Commission's work on the Guide to Practice. The crystallizing of the guidelines already shows that the guidelines promise to be useful for assisting States in their formulation and interpretation of reservations to treaties. Malaysia notes

that during its sixty-second session, in 2010, the Commission provisionally adopted the entire set of guidelines of the Guide. Malaysia further recalls the invitations previously made to States to make further observations on the entire set of the provisionally adopted guidelines on this topic in 2010. Malaysia thus appreciates the opportunity given by the Commission for States and international organizations to make further observations and believes that a universally acceptable set of guidelines can only be developed by the Commission if States play their part by providing comments and practical examples of the effects of the guidelines on State practice.

3. Malaysia wishes to reiterate its views, as expressed at the sixty-fourth and sixty-fifth sessions of the General Assembly, in relation to international organizations. In this respect, since the power to make treaties by international organizations largely depends on the terms of the constituent instrument of the international organization and the mandate granted to the international organization, international organizations do not necessarily have authority or responsibility similar to that of States. Thus, Malaysia is of the view that a separate regime for international organizations should be developed to address these entities and should not be made part of the guidelines at this juncture.

4. Malaysia also wishes to draw the attention of the Commission to the fact that, previously, States have only had the benefit of studying the guidelines within the context of what had been provided by the Commission. It is Malaysia's view that the entire guidelines on the matter should be read in their entirety to ensure that all concerns have been addressed as a whole since they are interrelated. This is especially pertinent, as the work on the guidelines has continued for a period of 12 years and the entire set of provisionally adopted guidelines has only been recently made available for States to study since the sixty-second session of the Commission. However, in view of the limited period of time to really examine the guidelines in their entirety, Malaysia would like to reserve the right to make further statements on all the guidelines.

5. As such, Malaysia would like to take this opportunity to urge all States to share their invaluable inputs in relation to the matter in order to improve the current international regime on reservations to treaties as well as to assist the Commission in completing the guidelines.

New Zealand

1. New Zealand appreciates the large amount of work that lies behind the Guide to Practice and wishes to express its thanks in particular to the Special Rapporteur, Alain Pellet.

2. The Guide to Practice will be an extremely valuable resource for States in this complex aspect of treaty law. That said, New Zealand understands that it remains a guide to the practical application of the 1969 and 1986 Vienna Conventions and does not purport to modify them.

3. New Zealand appreciates the opportunity to comment on the Commission's Guide to Practice, and thanks the Commission for its work.

Norway

1. Norway considers the quality of the work carried out under the topic "Reservations to treaties" by the Special Rapporteur, Alain Pellet, to be remarkable. Its result will mark the conclusion of a particularly important piece of work of the Commission. Norway is convinced that the guidelines adopted by the Commission and the reports prepared by the Special Rapporteur will prove useful to States and international organizations.

2. Norway finds that the work of the Commission and the Special Rapporteur on this topic, as well as the resulting set of guidelines, are sufficiently clarifying and build on a careful balance. They may therefore help States in their future practice concerning reservations. Norway is of the opinion that the current text provides, with the possibility of minor refinements, a solid basis for consideration and final adoption of the Guide to Practice during the sixty-third session of the Commission in 2011.

Portugal

1. The Commission should be praised for having provisionally adopted the entire set of guidelines of the Guide to Practice on Reservations to Treaties. Portugal would also like to pay tribute to Mr. Pellet for his contribution to the topic and for the quality of the work undertaken. This masterwork will be of the utmost utility for both States and international organizations in dealing with the complex issue of reservations.

2. Portugal greatly supports the Guide to Practice as a whole. In responding to the request by the Commission for States to provide observations on the guidelines, Portugal will offer specific comments on some subjects which, in its view, may deserve a final consideration by the Commission before adopting the Guide to Practice.

Republic of Korea

1. The Republic of Korea has made reservations to about 27 multilateral treaties, 24 of which are still in effect.

2. The reservations can be divided into several categories: special circumstances with regard to the Democratic People's Republic of Korea; reciprocity with foreign Governments; harmony with domestic legislation; exclusion of privileges or immunities for nationals working for international organizations or foreign Governments inside the country; and alleviation of responsibilities that severely hamper national interests.

Switzerland

1. At the outset, Switzerland would like to express its gratitude to the Commission, as well as its admiration for the enormous amount of work that is being completed. It is convinced that the Guide to Practice will be highly useful for the development of treaty law.

2. Switzerland stresses that its comments should under no circumstances be understood as criticisms of the work of the Commission, but as constructive contributions to the Guide to Practice on the matter, in the hope that it can be completed in the very near future.

United Kingdom

1. The United Kingdom thanks and congratulates Professor Pellet and the Drafting Committee for the work that has gone into these guidelines and commentaries. The 16 reports have captured a wealth of material and practice, and sought to chart a practical course through a series of complex issues. The United Kingdom has made various comments over the years at the debates of the Commission. It would ask that the Commission bear these in mind. This note reinforces some of the main observations of the United Kingdom, as well as making new comments on the basis of the entire work taken as a whole.

2. The title "Guide to Practice" is ambiguous and should be clarified; it is a guide to practice to be followed, that is, practices considered desirable, both old and new. This is confirmed by the General Assembly and the Special Rapporteur when they state that the guidelines are intended "for the practice of States and international organizations in respect of reservations".

3. There should be an introductory section to the commentaries setting out the approach that has been taken and the intended purpose and/or legal status of the guidelines. In particular, there should be a clear statement confirming that the guidelines constitute guidance for States, based on the study of the practice that the Commission has undertaken, but that in themselves they do not constitute normative statements. Such an introductory section could also helpfully include a statement on the relationship of the Guide to the 1969 and 1986 Vienna Conventions. The United Kingdom understands the Guide to Practice as being intended to provide guidance on the operation in practice of the framework of the Vienna Conventions, i.e. to give guidance on the application and interpretation of that framework and, where necessary, to offer guidance to supplement it, but not to propose amendments to it.

4. Furthermore, as is often the case with instruments of the Commission that contain elements of both codification and progressive development, there are aspects of the Guide which constitute a description of existing practice and others in which proposals for new practice are made. The United Kingdom does not consider that this Guide to Practice constitutes the *lex lata*. To the extent that proposals for new practice are made, there should be an introductory section to include a clear statement that such proposals are intended as guidance for future practice only and are not intended to have any effect on any examples of existing practice that do not accord with such proposals. Moreover, the United Kingdom believes the Commission should include in the commentaries in relation to each of the guidelines a statement on the degree to which they reflect existing practice or constitute proposals for new practice.

5. A further general observation point concerns the expected users of the guidelines. The present guidelines are of considerable complexity and make some fine distinctions in their terminology (for example, "permissibility" and "validity", "formulation" and "establishment", "objections", and "reactions" and "opposition"). While the United Kingdom fully appreciates the complexity of the subject matter, it thinks that to the degree to which the text is over-elaborate it risks losing a general reader and thus risks depriving the work of some of its undoubted practical utility. The United Kingdom therefore urges the Commission, where possible, to seek to simplify the text to ensure its maximum accessibility and utility (for example, see comments below on "conditional interpretative declarations", and chapter 5 on succession).

6. In line with the practical orientation of the work, the United Kingdom supports the Commission's approach of including model clauses (with appropriate guidance on their use) alongside some of the guidelines. Indeed, it urges the Commission to seek to provide model clauses more consistently throughout the Guide, as this will enhance the practical utility of the work and contribute to bringing clarity to the practice of States.

7. Finally, the United Kingdom notes that the real crux of the issue in these guidelines, and the topic of reservations to treaties more generally, is the status of invalid reservations dealt with in guideline 4.5.2. The United Kingdom has noted the views expressed by States in the 2010 Commission debate and returns to this topic (see the observations made below in respect of guideline 4.5.2) to expand on its views expressed in the Sixth Committee.

United States

1. The United States extends its highest compliments to the Special Rapporteur on the impressive work that has gone into the provisionally adopted guidelines on reservations to treaties. After a closer review of the Guide to Practice provisionally adopted by the Commission, the painstaking efforts undertaken by both Mr. Pellet and the Commission members are clearly evident. The United States very much appreciates the opportunity to provide its further observations on the guidelines and accompanying commentary. The following comments are intended to elaborate on its statement made in the Sixth Committee during the sixty-fifth session of the General Assembly, in particular regarding the issues on which it strongly encourages further deliberation by the Commission, as well as to provide a few technical suggestions to improve the Guide to Practice before final adoption by the Commission.

2. One of the substantive concerns of the United States relates to the treatment of interpretative declarations, and in particular conditional interpretative declarations. Regarding interpretative declarations generally, the United States does not support the creation of a rigid structure along the lines of what has been proposed, as it believes it is likely to undermine the flexibility with which such declarations are currently employed by States.

3. The United States also would like to raise several technical questions and comments about the guidelines. The United States supports the Commission's efforts in many instances to clarify when its proposed guidelines are intended to reflect existing State practice or, alternatively, are intended to go beyond such State practice. In that vein, the United States continues to encourage the Commission to clarify its approach throughout the guidelines.

4. Although the guidelines have been in development for a substantial period of time, the United States strongly encourages the Commission to undertake appropriate additional consideration of the issues raised by the United States in its comments and by other States before finalizing its work. Lastly, while the United States' comments highlight several of its main remaining concerns with the guidelines, the United States will continue to review the Commission's work and offer any additional comments, if appropriate.

B. Comments and observations on specific sections of the Guide to Practice and on specific draft guidelines

Section 1 (*Definitions*)

FRANCE

1. The definition of reservations and their "permissibility" must not be confused. The definition of a unilateral statement as a reservation is obviously without prejudice to its "permissibility". It is only after a unilateral statement has been deemed to constitute a reservation that it is possible to assess its "permissibility". Some unilateral statements are clearly reservations. They are not necessarily permitted under the treaty to which they relate, but that is a separate issue.

2. The Special Rapporteur has pursued the task of defining concepts and France welcomes that approach. Many of the issues raised to date originated in vague definitions which require clarification. The distinction between a "reservation" and an "interpretative declaration" is important, but a useful distinction has also been made between reservations and other types of acts which were previously scarcely or poorly defined. Insofar as the current study focuses on definitions, it seems important that legal terms should be used with the utmost rigour. In particular, the word "reservation" should be used only for statements matching the precise criteria of the definition in guideline 1.1. The ongoing work of definition is especially important and will determine the scope of application of the reservations regime. Nevertheless, it is necessary to stress that any new guidelines adopted must complement articles 19 to 23 of the 1969 Vienna Convention and should not fundamentally alter their spirit.

Guideline 1.1 (*Definition of reservations*)

FRANCE

1. A reservation is a unilateral act (a unilateral statement) that is formulated in writing when a State or international organization expresses its consent to be bound by a treaty, and that purports to exclude or to modify the legal effect of certain provisions of the treaty. While the first criterion (a unilateral act formulated in writing) does not raise any particular issues, the other two criteria (timing and purpose) are doubtless more problematic. With regard to timing, it seems necessary to prevent States and international organizations from formulating reservations at any time of their choosing, as that might result in considerable legal uncertainty in treaty relations. It is therefore essential to make an exhaustive, rigorous list of the times at which a reservation may be formulated. The definitions contained in the Vienna Conventions do not provide such a list as various potential scenarios have been omitted. On the issue of purpose, it can be assumed that a reservation purports to limit, modify and sometimes even exclude the legal effect of certain treaty provisions. The definition used by the Special Rapporteur in his report appears to cover all these scenarios. It would, however, be preferable to use the term "restrict" rather than "modify" as modification of the legal effect entails a restriction.

2. It would doubtless be preferable to clearly identify the author of a reservation, specifically, whether it is a State or an international organization, in order to avoid any confusion. Acts of formal confirmation, for instance, concern international organizations, not States, while ratifications concern States, not international organizations. Two paragraphs relating to States and international organizations, respectively, are therefore necessary.

3. The Commission's definition of reservations appears to be exhaustive and to provide a valuable addition to the relevant treaties.

Guideline 1.1.1 (*Object of reservations*)

FRANCE

1. France fully agrees with the wording proposed by the Special Rapporteur, namely, that a reservation may relate to one or more provisions of a treaty or, more generally, to the way in which a State or an international organization intends to implement the treaty. A reservation can be referred to as having a general scope if it applies to more than one or several provisions of the treaty to which it relates. This issue concerns the definition of reservations rather than their permissibility. Nevertheless, for a State to make such a reservation inevitably casts doubt on its commitment, good faith and willingness to implement the treaty effectively. In practice, the reservations that pose the greatest problems are not those which concern a single or a few provisions of a treaty, but more general reservations.

2. France is in favour of this guideline. Across-the-board reservations that, on the basis of their wording, cannot be linked to specific treaty provisions and yet do not divest the treaty of its very purpose are thus taken into consideration. The usefulness of these reservations has been demonstrated in practice and it was necessary to distinguish them from general reservations that completely vitiate the commitment made.

3. Guideline 1.1.5, on statements purporting to limit the obligations of their author, and guideline 1.1.6, on statements purporting to discharge an obligation by equivalent means, are satisfactory in terms of their substance. Nevertheless, it might be wondered whether it is really useful to present them as separate guidelines. They clarify the meaning of the word "modify" as used in the guidelines that define reservations (1.1) and specify their object (1.1.1), as do the guidelines on statements purporting to undertake unilateral commitments (1.4.1) and on unilateral statements purporting to add further elements to a treaty (1.4.2). All these provisions confirm that the

word "modify" cannot be understood, in the context of the definition of reservations, as purporting to extend either the reserving State's treaty obligations or its rights under the treaty. Unless a modification introduced by a reservation establishes an equivalent means of discharging an obligation, it can only serve to restrict the commitment. It would therefore seem that guidelines 1.1.5 and 1.1.6 could become new paragraphs of guideline 1.1.1 on the object of reservations.

Guideline 1.1.3 (*Reservations having territorial scope*)

FRANCE

The Special Rapporteur's conclusions on what he refers to as "reservations having territorial scope", a complex and controversial subject if ever there was one, are acceptable. Indeed, if the purpose of a unilateral statement is in fact to exclude or modify the legal effect of certain provisions of a treaty in relation to a particular territory, that statement must be understood as constituting a reservation. Thus, a State that formulates a statement on the application *ratione loci* of a treaty could be considered as having made a reservation to the treaty in question. The 1969 Vienna Convention does not state that reservations must relate solely to the implementation *ratione materiae* of a treaty. Reservations certainly may relate to the implementation *ratione loci* of a treaty. According to the Special Rapporteur, a State consents to application of a treaty as a whole *ratione materiae*, except with regard to one or more territories that are nonetheless under its jurisdiction. Absent such a reservation, a treaty to which a State becomes a party is applicable to the entire territory of that State pursuant to article 29 of the 1969 Vienna Convention, which establishes the principle that a treaty is binding upon each party in respect of its entire territory, unless a different intention appears from the treaty or is otherwise established. On the one hand, this article does not prohibit a State from limiting the territorial scope of its commitment. On the other, the article is without prejudice to the issue of the legal definition of the statement made by the State. "Reservations having territorial scope" do not have to be authorized expressly by the treaty. Article 29 of the Vienna Convention must not be interpreted too narrowly.

NEW ZEALAND

1. New Zealand wishes to offer a specific comment on guideline 1.1.3 [1.1.8]. New Zealand does not consider that this guideline accurately reflects established State practice on the extension of treaty obligations to territories.

2. New Zealand has had international responsibilities in respect of a number of territories throughout the twentieth century. The relevant territories are the Cook Islands, Niue, Tokelau and the former Trust Territory of Western Samoa. Since 1 January 1962, Samoa has been a fully independent sovereign State, assuming treaty-making responsibility. The Cook Islands and Niue, following acts of self-determination supervised by the United Nations, are self-governing in free association with New Zealand and have developed a separate treaty-making capacity in their own right.[1] Tokelau remains on the United Nations list of Non-Self-Governing Territories (following two referendums, supervised by the United Nations, which failed to reach the requisite majority in order for Tokelau to become self-governing in free association with New Zealand).

3. New Zealand has on many occasions over the years made declarations regarding the application of treaties to these territories, even when reservations have been expressly prohibited or restricted. New Zealand accepts that a declaration as to the territorial application of a treaty which purports to apply only part of a treaty to a territory may be regarded as a reservation for the purposes of article 2 (*d*) of the 1969 Vienna Convention. However, New Zealand does not support the proposition that a declaration excluding an entire treaty from application to a territory should be characterized as a reservation. In New Zealand's view, such a declaration does not concern the legal effect of the treaty in its application to New Zealand. It merely determines how "New Zealand territory" is to be interpreted for the purposes of that treaty. The legal obligations imposed by the treaty are unaltered to the extent that they have been assumed by New Zealand. New Zealand considers that a declaration excluding an entire treaty from application to a territory merely establishes a "different intention" as to the territorial application of the treaty, in accordance with article 29 of the Convention, and excludes entirely the operation of the treaty in the territory in question.

4. If territorial exclusions were to be treated as reservations this would not only be contrary to long-established State practice and United Nations treaty practice, but it would have practical effects that would be at odds with policy objectives supported by the United Nations. For example, in the case of Tokelau, it would mean either (*a*) that New Zealand would be prevented from becoming party to a treaty unless and until Tokelau was ready to be bound by it, or (*b*) that New Zealand's decision would be imposed on Tokelau, which would be contrary to the constitutional and administrative arrangements between Tokelau and New Zealand, on which New Zealand continues to report to the United Nations under Article 73 of the Charter of the United Nations.

5. It is New Zealand's understanding that the practice of other States which have been responsible for the international affairs of territories (such as Denmark, the Netherlands and the United Kingdom) closely corresponds to that of New Zealand.

[1] By a note of 10 December 1988 to the Secretary-General of the United Nations, New Zealand advised that from that date forward no treaty signed, ratified, accepted, approved or acceded to by New Zealand would extend to the Cook Islands or Niue unless the treaty was signed, ratified, accepted, approved or acceded to expressly on behalf of the Cook Islands or Niue.

UNITED KINGDOM

1. The United Kingdom commented extensively on this guideline in 1999 and maintains its strong concerns expressed there. In the view of the United Kingdom, a declaration regarding the extent of the territorial application of a treaty does not constitute a reservation to that treaty. As article 2 (*d*) of the 1969 Vienna Convention makes

clear, a declaration or statement is capable of constituting a reservation if "it purports to exclude or modify the legal effect of *certain provisions** of the treaty in their application" to the State concerned. A declaration or statement which excludes entirely a treaty's application to a given territory would not therefore constitute a reservation, since it does not concern the legal effect of provisions of the treaty. Rather, it is directed towards excluding the "residual rule" on territorial application incorporated in article 29 of the Convention (which falls outside section 2 of part II on reservations), namely:

> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

The effect of this provision is clear that, unless a different intention is established, a treaty will be binding upon a party in respect of its non-metropolitan as well as its metropolitan territory.

2. The United Kingdom considers that the procedure whereby, on ratification, a State makes a declaration as to the territorial effect or extent of the act of ratification, which has long been known and accepted in State practice, expressly establishes a "different intention", in the words of article 29 of the Vienna Convention. The essential features of this practice are as follows:

(*a*) Where a multilateral treaty contains no express provision regarding its territorial application, the practice of the United Kingdom and that of a number of other States with non-metropolitan internally autonomous territories (such as Denmark, the Netherlands and New Zealand) is to name expressly in their instruments of ratification or accompanying declarations, the territories to which the treaty is to apply (or, occasionally, to specify those territories to which the treaty is not to apply);

(*b*) When a non-metropolitan territory not named at the time of ratification wishes eventually to participate in the treaty, separate notification is thereupon sent to the depositary;

(*c*) The same practice is followed in cases where the treaty concerned either prohibits reservations or restricts them to specific provisions.

3. Some examples of this practice were cited in the observations of the United Kingdom to the Commission in 1999. The United Kingdom is not aware of any cases in which a State has made a counter-statement or objected to a declaration or form of words in an instrument of ratification put forward by another State concerning the territorial application of a treaty (except where it challenges the inclusion of a particular named territory, by reason of a competing claim to sovereignty over it).

4. It has been the long-standing practice of the United Kingdom (since at least 1967), in relation to multilateral treaties which are silent on territorial application, to specify in the instrument of ratification (or accession) the territories in respect of which the treaty is being ratified (or acceded to). Territories may be included (or excluded) at a later stage by means of a separate notification made by the United Kingdom to the depositary power. It is notable that such "declarations" have also been treated separately from "reservations" by the United Nations in performing depositary functions.

Guidelines 1.1.5 (*Statements purporting to limit the obligations of their author*), 1.1.6 (*Statements purporting to discharge an obligation by equivalent means*) and 1.1.8 (*Reservations made under exclusionary clauses*)

MALAYSIA

With respect to guidelines 1.1.5, 1.1.6 and 1.1.8, Malaysia is of the view that the wording of the guidelines seems to provide the instances where a unilateral statement amounts to a reservation. It is Malaysia's opinion that the definition in these guidelines should not in any way prejudge the nature of the unilateral statement in question in the very beginning itself, as reference must be made to the effects that these unilateral statements might intend to produce in order to determine its status. Furthermore, in order to determine the character/status of such a unilateral statement, Malaysia is of the opinion that States could possibly fall back on guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretative declarations), 1.3.2 (Phrasing and name) and 1.3.3 (Formulation of a unilateral statement when a reservation is prohibited). Thus, these definitions may be inappropriate as they tend to restrict States at the very initial stage by imposing that such unilateral statements are tantamount to reservations even though that may not have been the intention of the States.

Guideline 1.1.5 (*Statements purporting to limit the obligations of their author*)

FRANCE

1. This guideline is a positive development. A unilateral statement purporting to limit the obligations imposed on a State by a treaty or, similarly, to limit the rights that other States may acquire under the same treaty does, in fact, constitute a reservation.

2. Where a unilateral statement effectively extends the obligations of the declaring State, it would be somewhat difficult to speak of a "reservation". Rather, it is a unilateral commitment by the State to go beyond that which is required of it under the treaty. The unilateral statement in question does not purport to exclude, limit or even modify—not restrictively in any case—certain provisions of the treaty.

3. The problem is somewhat different, however, if the State purports, on the basis of a unilateral statement, to expand its rights, that is, the rights conferred on it by the treaty. This unlikely scenario is obviously not covered by the provisions of the 1969 Vienna Convention. Treaty law must be distinguished from customary law; it is impossible to imagine that a State might modify, in its favour, customary international law as codified in the treaty to which it becomes a party by formulating a reservation to that end. As for treaty law, the scenario is not unrealistic and the Commission should consider it, as well as the ways in which other States parties to the treaty might object to such a situation. Nevertheless, it is difficult to

speak of a "reservation" in this case, especially as such statements, if it was agreed to define them as "reservations", would have serious consequences for those States which, having remained silent, would be deemed to have accepted them after a certain period of time, as is the case with reservations.

4. The guideline on statements purporting to limit the obligations of their author does not pose any particular difficulties in terms of substance. Article 2, paragraph 1 (*d*), of the 1969 Vienna Convention states that a reservation "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State", without providing further details on the modification effected by the reservation. The guideline rightly points out that this modification may be a limitation. Such information could certainly be included during the drafting of a Guide to Practice, which allows for further elaboration than a treaty.

5. See the comments on guideline 1.1.1, above.

Guideline 1.1.6 (*Statements purporting to discharge an obligation by equivalent means*)

FRANCE

1. In terms of substance, the wording of this guideline is acceptable. A State may be permitted to discharge a treaty obligation by equivalent means only if the other States parties are in a position to agree to those means. The mechanism of reservations and objections offers such an opportunity.

2. See the comments on guideline 1.1.1, above.

Guideline 1.1.8 (*Reservations made under exclusionary clauses*)

UNITED KINGDOM

Guideline 1.1.8, in defining all statements made pursuant to so-called exclusionary clauses as reservations, is in the view of the United Kingdom too wide and inconsistent with other guidelines. Where a treaty envisages that some of its provisions may not apply at the choice of a party, this may simply mean that in exercising its right to choose, the State is implementing the treaty in accordance with its terms rather than excluding or modifying their effect. Guideline 1.1.8 at its broadest also appears to be inconsistent with guidelines 1.4.6 and 1.4.7 (exercise of options or choice between two provisions). Furthermore, the commentary suggests that where a statement is made pursuant to an exclusionary clause after the State in question has become bound by the treaty, such a declaration is not to be considered a late reservation. In the view of the United Kingdom, therefore, the definition of reservations in the case of exclusionary clauses should be confined to those treaty provisions which "specify" the exclusion as being by way of reservation.

[1] *Yearbook … 2000*, vol. II (Part Two), p. 112, para. (17) of the commentary to guideline 1.1.8.

Guideline 1.2 (*Definition of interpretative declarations*)

FRANCE

France is particularly interested in this guideline. It is useful for the Commission to clarify what practice has shown to be a thorny issue. The criterion of "purpose"—the objective pursued—used to define interpretative declarations is completely satisfactory, as it makes it possible to distinguish clearly between interpretative declarations and reservations. Interpretative declarations "purport to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions" (guideline 1.2), whereas reservations purport "to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects" (guideline 1.1.1). This criterion applies irrespective of the name given by the State to its statement; as with reservations, therefore, any nominalism should be eschewed.

UNITED KINGDOM

1. In broad terms, the United Kingdom welcomes the definition of "interpretative declarations", which is clearly important in enabling a distinction to be drawn between an interpretative declaration properly so-called and their use as a form of "disguised reservation". In the view of the United Kingdom, the definition of an interpretative declaration is helpful, particularly when combined with the method of implementation of the distinction between reservations and simple interpretative declarations in guideline 1.3.1 and with the process of re-characterization in guidelines 2.9.3 *et seq.*

2. However, the United Kingdom has concerns with the latter part of paragraph (34) of the commentary,[1] which suggests that the definition should include both interpretative declarations and conditional interpretative declarations. The consequence of this approach is not clear. The United Kingdom would therefore delete this aspect of the commentary in line with its suggestion for the removal of reference to a category of "conditional interpretative declarations" separate from reservations and interpretative declarations *simpliciter* (see comments on guideline 1.2.1 below).

[1] *Yearbook … 1999*, vol. II (Part Two), p. 103.

Guideline 1.2.1 (*Conditional interpretative declarations*)

FRANCE

1. Unless guideline 1.2.1 is more precisely worded, there would seem to be no criterion for drawing a definite distinction between an interpretative declaration and a conditional interpretative declaration. Nothing is said about the procedure by which authors of conditional interpretative declarations can make their consent to be bound subject to a specific interpretation of the treaty or some of its provisions. That will has to be explicitly expressed. The fact that an interpretative declaration made on signature, or at some previous time during negotiations, is confirmed when consent to be bound is expressed, is not in itself a criterion.

2. The Commission's definition of conditional interpretative declarations is, in fact, akin to that of reservations. Conditional declarations are considered to be nothing more than reservations formulated in terms that clearly show the indissociable link between the commitment itself and the reservation. The term therefore seems poorly chosen. Moreover, while conditional declarations might constitute a subcategory of reservations, the wisdom of making them a separate category might be disputed. The submission of conditional declarations under the reservations regime is hardly questionable. Furthermore, if the regime of reservations is identical to that of conditional declarations, it would be simpler to liken such declarations to reservations, at least for this part of the draft.

UNITED KINGDOM

The United Kingdom has consistently questioned the utility of the inclusion of separate provisions in the guidelines dealing with conditional interpretative declarations. The United Kingdom notes that in response the Special Rapporteur suggested that it would be worth maintaining their inclusion pending completion of the work, at which point a fully informed view could be taken on the question. With the benefit now of the full set of guidelines and in the light, in particular, of the guidelines which enable the differentiation of interpretative declarations and reservations (guideline 1.3 *et seq.*) and guideline 2.9.3 on re-characterization, the United Kingdom sees no need for separate guidelines on conditional interpretative declarations. Removal of the separate guidelines in this respect would help to simplify the text in line with our general comments above.

Guideline 1.3 (*Distinction between reservations and interpretative declarations*)

FRANCE

1. The Commission adopted the legal effect which the statement was intended to produce as the criterion for distinguishing interpretative declarations from reservations. This criterion is acceptable provided it is based on the objective effects of the statement rather than the subjective intentions of the State making it, which are difficult to determine. Specifically, the use of such a criterion should be based on an objective comparison of the meaning of the statement with the meaning of the text to which the statement applies. France welcomes the Commission's decision to exclude the criterion of timing from its definition of interpretative declarations. However, for the sake of legal certainty it would be desirable for such declarations to be made except under highly unusual circumstances, within a limited period from the date when the State concerned was first bound.

2. See the comments on guideline 2.4.3, below.

Guideline 1.3.2 (*Phrasing and name*)

FRANCE

France questions the appropriateness of making the phrasing or name given to a unilateral statement a criterion for establishing the intended legal effect of its author. Besides the fact that such phrasing cannot be considered a reliable indicator of the intended legal effect, this criterion introduces a nominalism that has, with good reason, been eschewed elsewhere.

Guideline 1.4.1 (*Statements purporting to undertake unilateral commitments*)

FRANCE

See the comments on guideline 1.1.1, above.

Guideline 1.4.2 (*Unilateral statements purporting to add further elements to a treaty*)

MALAYSIA

With regard to guideline 1.4.2, Malaysia understands that under the guideline, a unilateral statement made by a State which purports to add further elements to a treaty merely constitutes a proposal to modify the content of the treaty and therefore is outside the scope of the present Guide to Practice. Thus, Malaysia wishes to emphasize that as long as such statement does not modify the content of the treaty in such a way as to modify or exclude the effects of the treaty or the provisions of the treaty altogether—in which case the statement may be regarded as a reservation—such statement could be effectively excluded from the present Guide to Practice.

Guideline 1.4.3 (*Statements of non-recognition*)

FRANCE

France is in favour of excluding statements of non-recognition from the scope of application of the Guide to Practice. Specifically, while it is true that a unilateral statement whereby a State expressly excludes application of the treaty as between itself and the entity that it does not recognize, is similar to a reservation in many ways, it nevertheless does not purport to exclude or to modify the legal effect of certain provisions of the treaty as they apply to that State. It purports to deny the entity in question the ability to be bound by the treaty and, consequently, purports to rule out any treaty relationship with that entity. The reservations regime is, moreover, completely unsuited to statements of non-recognition and their assessment on the basis of criteria such as the object and the purpose of the treaty would be meaningless.

Guideline 1.4.4 (*General statements of policy*)

FRANCE

In the absence of sufficiently close links to the treaty, it is appropriate that general statements of policy should lie outside the scope of the Guide to Practice.

Guideline 1.4.5 (*Statements concerning modalities of implementation of a treaty at the internal level*)

FRANCE

This guideline, as currently drafted, raises a significant problem. While it has been noted that such a statement

lies outside the scope of the Guide to Practice so long as it "does not purport as such to affect [the] rights and obligations [of its author] towards the other contracting parties" and is purely informative, no such information is provided regarding statements which, without purporting to have such an effect, are nevertheless likely to affect the rights and obligations of the State that formulates them *vis-à-vis* the other contracting parties. These declarations generally give rise to questions regarding their compatibility with article 27 of the 1969 Vienna Convention, which states that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Practice has shown that it is very difficult to assess the true scope of such statements as they require a solid understanding of the statement and extensive knowledge of both the internal law of the State and the treaty provisions in question. A statement made by a State concerning its implementation of a treaty at the internal level can constitute a genuine reservation even if the desire to modify or exclude the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects as they apply to that State is not immediately clear. To exclude such statements from the Guide to Practice and to consider so categorically that they are not reservations could, moreover, provide an incentive for States to not take the necessary steps in internal law before committing themselves at the international level. It would doubtless be prudent to consider that a statement concerning implementation of the treaty at the internal level is strictly informative if it does not, as such, purport to affect the rights and obligations of the State formulating the statement *vis-à-vis* the contracting parties and, in addition, is not likely to have such an effect.

United Kingdom

Guideline 1.4.5 excludes from the scope of the Guide statements indicating how the maker intends to implement a treaty within its internal legal order. This is intended to cover only a statement given to provide information on implementation. However, the words designed to achieve this are somewhat opaque, namely, "without purporting as such to affect its rights and obligations towards the other Contracting Parties". If the manner of implementation indicated in the statement showed something manifestly at odds with the treaty's requirements, the statement might not "purport" to affect the State's rights and obligations, but it would show an intent to implement a modified form of the treaty. The quoted words should therefore be deleted and at the end (after "outside the scope of the present Guide to Practice") the following added: "unless such manner of implementation could only conform to the provisions of the treaty by excluding or modifying the legal effect of those provisions".

Guideline 1.5.1 (*"Reservations" to bilateral treaties*)

France

This category of statement is not a reservation since it does not result in modification or exclusion of the legal effect of certain provisions of the treaty, but rather in a modification of these treaty provisions that constitutes a genuine amendment. The title of this guideline should therefore be changed in order to make it clear that the statements in question are those that purport to modify a bilateral treaty.

Guideline 1.7.1 (*Alternatives to reservations*)

Malaysia

On the proposed guideline 1.7.1, Malaysia notes that guideline 1.7.1 is restricted to provide for two procedures which are not mentioned elsewhere and are sometimes characterized as "reservations", although they do not by any means meet the definition contained in guideline 1.1. Malaysia's concern is that confusion may arise in differentiating these alternative procedures from reservations. Therefore, Malaysia is of the view that the mechanism for the formulation of such alternatives and the means to differentiate them from reservations will need to be clearly specified to avoid confusion.

Guidelines 1.7.1 (*Alternatives to reservations*) and 1.7.2 (*Alternatives to interpretative declarations*)

United Kingdom

The United Kingdom does not consider these guidelines to be useful as they go well beyond the current topic, and therefore suggests their deletion.

Guideline 2.1.1 (*Written form*)

France

This guideline reproduces the rule set out in article 23 of the 1969 Vienna Convention. It does not give rise to any special difficulties. The conditions that may be attached to the expression of consent to be bound must be formulated in writing, as this is the only way to ensure the stability and security of contractual relationships.

Guideline 2.1.2 (*Form of formal confirmation*)

France

Formal confirmation of a reservation, where needed, must also be made in writing.

Guideline 2.1.4 (*Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*)

France

The Commission is proposing a guideline that states, on the one hand, that procedure shall be determined by internal law and, on the other, that failure to follow it has no consequences at the international level. France supports this solution because it would be inappropriate to include a guideline, based on article 46 of the 1969 Vienna Convention, which would make it possible, in the event of a clear violation of a fundamental rule of internal law, to invoke conflict with domestic law as grounds for declaring a reservation invalid. Since the State still has the option of withdrawing its reservation, the only practical effect of such a provision would be to allow the State that made the reservation without respecting its own national procedure to retroactively require other States to implement, in its regard, the treaty provision that was the subject of the reservation. It is, to say the least, difficult to find a basis for such a situation in positive law.

Guideline 2.1.5 (*Communication of reservations*)

FRANCE

This guideline is based on article 23 of the Vienna Convention and is a valuable addition thereto since it also refers to reservations made to the constituent instruments of international organizations. The wording proposed by the Special Rapporteur is, on the whole, acceptable. In the second paragraph, however, the precise meaning of "an organ that has the capacity to accept a reservation" should be clarified.

Guideline 2.1.7 (*Functions of depositaries*)

MALAYSIA

With regard to guideline 2.1.7, Malaysia notes that this guideline purports to allow the depositaries to examine whether a reservation is in due and proper form. Furthermore, the guideline seems to widen the scope of functions of the depositaries by allowing them to examine whether a reservation is in due or proper form rather than confining them to examine whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form. Malaysia is concerned that this guideline would give the impression that a reservation formulated by a State needs to pass two stages, the depositary and then only the other contracting States, before it is established. This is also in view of Malaysia's observation on guideline 2.1.8, which recognizes the role of the depositary in determining impermissible reservations. Malaysia is of the view that this guideline could also be viewed as superseding the 1969 Vienna Convention by purporting to give an active role to the depositary in interpreting an impermissible reservation. As such, this guideline does not represent the general practice according to which the States usually decide whether a reservation constitutes an impermissible reservation. In this regard, Malaysia is of the opinion that this guideline would allow the depositary to intervene on the question of compatibility of the reservation, which may cause the State to respond. This situation will prolong the problem and would not be helpful for the resolution of the problem. As such, Malaysia is of the view that the function of depositary should be confined to the ambit of article 77 of the 1969 Vienna Convention. Malaysia considers that, in the event that the contracting party finds a reservation made by a party to be incompatible with that treaty, the right to make objections to such reservation should be demonstrated by the contracting parties themselves and circulated through the depositary. Thus, it is recommended that the guideline 2.1.7 should follow precisely the wording of article 77, paragraphs 1 (*d*) and 2 of the 1969 Vienna Convention so as to confine the scope of functions of the depositaries to matters involving examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form.

Guideline 2.1.8 (*Procedure in case of manifestly impermissible reservations*)

FRANCE

1. Guidelines 2.1.6 and 2.1.7 focus—in France's view, correctly—on the purely "administrative" role of the depositary. Guideline 2.1.8 nevertheless purports to grant depositaries a power foreign to their recording function: that of assessing, to some extent, the permissibility of reservations. The Commission's approach is not without legitimacy. However, at the current stage of international positive law, depositaries are not empowered to conduct even a summary assessment of permissibility. In the exercise of their administrative functions, depositaries must therefore limit themselves to recording and communicating a reservation even if they consider it to be manifestly impermissible.

2. Guideline 2.1.8, the text of which was adopted in 2002, was slightly modified in 2006. However, this new wording does not, in France's view, reflect current law and practice concerning the functions of the depositary. The guideline purports to grant depositaries the capacity to assess, to some extent, the permissibility of reservations and, where appropriate, to draw to the attention of interested parties reservations that, in their view, pose legal problems. In the absence of an express provision allowing them to perform such functions, depositaries cannot, however, be authorized to conduct even a summary assessment of the permissibility of reservations. In the exercise of their administrative functions, depositaries should therefore limit themselves to recording and communicating a reservation even if, to repeat the language used by the Commission, they consider it to be "manifestly impermissible".

MALAYSIA

See observations made in respect of guideline 2.1.7, above.

UNITED KINGDOM

1. There is insufficient clarity as to when a reservation is considered "manifestly impermissible", particularly as this provision purports to extend to all three categories of impermissible reservations in article 19 of the 1969 Vienna Convention. Does this provide the treaty depositary discretion? It is not evident to the United Kingdom why the depositary, rather than the States parties, is in a position to determine whether a particular reservation is incompatible with the object and purpose of the treaty.

2. The view of the United Kingdom is that, in principle, the function of the depositary is to communicate to the contracting States any act, notification or communication relating to the treaty. However, where a purported reservation is made in the face of a treaty provision prohibiting all reservations, or reservations of that type, there can be no doubt whatsoever as to the invalidity of such a reservation. In that situation it is permissible for the depositary in the first instance to query it with the reserving State. Only if the reserving State is still of the view that the reservation is valid would the depositary communicate it to the contracting States for their views.

3. The guideline also does not consider the possible implications of this change. In the view of many States, the role of the treaty depositary is to transmit the text of reservations to the treaty parties and to remain neutral and impartial. Moreover, there is no reference in the

commentary to the actual practice of treaty depositaries in this context, or any consideration of the practical and/or resource implications for treaty depositaries.

Guideline 2.2.1 (*Formal confirmation of reservations formulated when signing a treaty*)

FRANCE

This guideline does not give rise to any special difficulties as it is consistent with French practice.

Section 2.3 (*Late reservations*)

AUSTRIA

1. According to guidelines 2.3.1 and 2.3.2, a "late reservation" (that is, a reservation formulated after the expression of consent to be bound by that treaty) shall in principle be possible on the condition that no other contracting party objects to it within a period of 12 months. Austria remains concerned about guidelines that would render the whole regime of treaty reservations applicable also to so-called "late reservations". We must be aware of the fact that such late reservations do not fall under the definition of reservations, as it is reflected in article 2, paragraph 1 (*d*) and article 19 of the 1969 Vienna Convention. The Commission itself has elaborated a definition of reservations in guideline 1.1 with the clear intention not to deviate from the Vienna Convention. According to this definition, a "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, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to them. As this definition contains a clear reference to the point in time when a reservation can be made, it is evident that a so-called "late reservation" is in contrast to this basic definition.

2. Therefore, even if it is called a reservation, a "late reservation" really constitutes a different kind of declaration that should be distinguished from true reservations in order not to blur the quoted definition of reservations. Of course, the States parties to a given treaty have the possibility to agree to the application of the regime of reservations also to "late reservations" made in regard to that treaty, subject, however, to the limits defined in that treaty and in the applicable law of treaties. But, in Austria's view, declarations that do not meet the requirements of the definition should not be treated as reservations since ominous consequences would ensue that should not be encouraged. It must be pointed out that by accepting "late reservations" and by treating them in basically the same way as reservations, the basic principle of *pacta sunt servanda* as expressed in article 26 of the Vienna Convention would be undermined since a State could at any time unilaterally reduce the scope of its obligations under a treaty by means of a reservation. Apart from that, the application of the regime on "late reservations" as proposed in the guidelines would result in the creation of a system of treaty amendment that is contrary to the regime established by articles 39 to 41 of the Vienna Convention.

Guideline 2.3.1 (*Late formulation of a reservation*)

FRANCE

Guidelines 2.3.1 and 2.3.3 purport to establish two complementary rules. These two innovatory proposals contribute to the progressive development of law and do not therefore constitute a mere codification exercise. France welcomes the fact that neither guideline is designed to permit frequent or "normal" recourse to late reservations in the future because, on the one hand, just one objection by a State party to the treaty is enough to render the reservation inapplicable to all the States parties and, on the other, the State raising an objection to the reservation will not be obliged to state the reasons therefor, if it does not wish to do so, other than to note that the reservation was formulated late. Thus, the guidelines do not purport to establish a general derogation from the basic rule, commonly accepted by States, that reservations must be made, at the latest, when consent to be bound by a treaty is expressed; what is at stake is the security of legal undertakings voluntarily given by States, an issue to which France attaches great importance. Apart from the indisputable case where the formulation of reservations after the expression of consent to be bound is explicitly authorized by a treaty, the aim of the guidelines is therefore to cope with particular situations, which are not necessarily hypothetical but might be described as exceptional, where a State, acting in good faith, has no alternative other than to denounce the treaty in question for want of being able to formulate a late reservation.

UNITED KINGDOM

1. The United Kingdom reiterates its opposition in principle to reservations formulated late, because they depart from the definition of "reservations" under the 1969 Vienna Convention and would potentially cause disruption and uncertainty to treaty relations. The United Kingdom therefore believes that the guidelines must emphasize above all the need for proper discipline in the making of reservations. If the guidelines are to address the exceptional circumstances in which the late formulation of reservations is permissible, for example, where the treaty itself so permits, then such circumstances must be clearly set out. The United Kingdom would therefore prefer guideline 2.3.1 to be amended as follows:

> "If a State or international organization formulates a reservation after it has expressed its consent to be bound, the reservation shall have no effect unless the treaty provides otherwise or all of the other contracting parties expressly accept the late formulation of the reservation."

2. Accepting this proposal would entail consequential deletion of guideline 2.3.2.

Guideline 2.3.2 (*Acceptance of late formulation of a reservation*)

UNITED KINGDOM

See observations made in respect of guideline 2.3.1, above.

Guideline 2.3.3 (*Objection to late formulation of a reservation*)

FRANCE

See the comments on guideline 2.3.1, above.

Guideline 2.3.4 (*Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations*)

MALAYSIA

In connection with guideline 2.3.4 concerning subsequent exclusion or modification of the legal effect of a treaty by means other than reservations, it is unclear whose interpretation of a reservation this guideline intends to refer to in subparagraph (*a*). In the view of Malaysia, subparagraph (*a*) seems to suggest that the said interpretation may come from the other contracting States, or the reserving State. As such, Malaysia considers that subparagraph (*a*) needs clarity in terms of to whom it is addressed.

Guideline 2.3.5 (*Widening of the scope of a reservation*)

FRANCE

Widening of the scope of a reservation goes beyond the time limit set for the formulation of a reservation under article 19 of the 1969 and 1986 Vienna Conventions. France does not, however, consider that widening the scope of a reservation necessarily constitutes an abuse of rights that should not be authorized. It is therefore useful that the Guide to Practice mentions the possibility of widening and purports to clarify—in, moreover, a convincing manner—the legal uncertainties surrounding it. On the one hand, although fortunately unusual, attempts to enlarge the scope of a reservation exist in treaty practice. The commentary offers several examples that stem less from the abuse of rights than from a desire to take into consideration technical constraints or specific aspects of internal law. That does not mean, of course, that such enlargement is lawful. Furthermore and above all, the possibility of widening the scope of a reservation is still subject to very strict conditions: an attempt to widen the scope of a reservation will be unsuccessful with respect to all parties to the treaty if even one of them formulates an objection to the modification envisaged. Within this strict legal framework, the article appears to be part of the progressive development of law: it does not encourage this practice but does permit recourse to it, rarely and subject to conditions, in order to give a State acting in good faith an option besides denunciation of the treaty in question. France wonders whether it would be appropriate to move the definition of "widen", contained in paragraph (7) of the commentary, to an earlier point in the guidelines.

MALAYSIA

On the proposed guideline 2.3.5, Malaysia notes that the application of this guideline would arise in a situation whereby the reservation made amounts to the formulation of an entirely new reservation. However, Malaysia is of the view that any modification which would widen the scope of a reservation but does not touch on the substance of the commitments of the State to a treaty should not be defeated merely upon a single objection. As such, Malaysia is of the view that there is a need to have a proper mechanism to assess the "widened reservation" as it should not be determined solely by an objection received. In furtherance, Malaysia recommends that the permissibility test should be applied in determining such reservation.

Section 2.4 (*Procedure for interpretative declarations*)

FRANCE

It would be preferable to simplify the procedure by making it clear that the "guidelines" in relation to reservations would apply, *mutatis mutandis*, to conditional interpretative declarations.

Guideline 2.4.0 (*Form of interpretative declarations*)

FRANCE

This guideline is acceptable. Like reservations, interpretative declarations must be formulated in writing, even when they are "conditional".

MALAYSIA

See observations made in respect of guideline 2.4.9, below.

Guideline 2.4.3 (*Time at which an interpretative declaration may be formulated*)

FRANCE

It would be preferable to confine interpretative declarations to a limited period of time, which could be the same as that for formulating a reservation. As the term used is not always sufficient to distinguish between a reservation and an interpretative declaration, allowing States parties to a treaty to formulate interpretative declarations at any time, including after expressing their consent to be bound, might lead some of them to formulate, perhaps long after they had expressed their consent to be bound, interpretative declarations through which they purported to produce, in fact or in law, the same legal effects as reservations. Such a practice, should it emerge, might raise increasing doubts about the conditions under which reservations are formulated at the time of consenting to be bound. Moreover, removing any mention of a limited period of time from the definition of an interpretative declaration could ultimately weaken the time element characteristic of reservations; legal insecurity could result. It therefore seems insufficient for time limits on the formulation of interpretative declarations to be contingent on the will of States. It should be stated, either in the definition (guideline 1.2) or in a specific provision (guideline 2.4.3), that an interpretative declaration must be formulated not later than the time at which the author's consent to be bound is expressed.

Guideline 2.4.4 (*Non-requirement of confirmation of interpretative declarations made when signing a treaty*)

FRANCE

1. See the comments on guideline 2.4.3, above.

2. Since France considers it necessary to place time limits on the ability of States to formulate interpretative declarations, there is no reason to set out separate rules applicable to reservations.

[Guideline 2.4.5 (*Formal confirmation of conditional interpretative declarations formulated when signing a treaty*)][1]

FRANCE

As the legal regime for conditional interpretative declarations appears to be patterned on the one for reservations, France is in favour of deleting the guidelines on conditional interpretative declarations.

[1] The guidelines on conditional interpretative declarations have been placed by the Commission in square brackets, pending a final determination by the Commission on whether the legal regime of such declarations entirely follows that of reservations.

Guideline 2.4.6 (*Late formulation of an interpretative declaration*)

MALAYSIA

Malaysia understands that the guideline applies in the case where the treaty specifies the time limit for the formulation of interpretative declarations. Malaysia also takes note that reference must be made to guideline 2.4.3 on the general rule relating to the time to formulate interpretative declarations. Malaysia would like to seek clarification on the legal effect that guideline 2.4.6 has on a treaty. Malaysia is of the view that, based on the understanding of how guideline 2.4.6 is to work, the guideline will have the effect of overriding a treaty provision concerning the time limit required to formulate an interpretative declaration. Furthermore, Malaysia would like to request clarification on the application of this guideline in relation to the issue of succession of States. Malaysia understands that the application of the guideline would allow a successor State to formulate a new interpretative declaration when the interpretative declaration receives no opposition as to the late formulation thereof.

[Guideline 2.4.7 (*Formulation and communication of conditional interpretative declarations*)]

FRANCE

See the comments on guideline 2.4.5, above.

[Guideline 2.4.8 (*Late formulation of a conditional interpretative declaration*)]

FRANCE

See the comments on guideline 2.4.5, above.

Guideline 2.4.9 (*Modification of an interpretative declaration*)

MALAYSIA

Malaysia notes that by virtue of guideline 2.4.3, since an interpretative declaration may be formulated at any time, it follows that the modification thereof should also be allowed to be made at any time unless the treaty itself specifies the time for formulation and modification of an interpretative declaration. However, Malaysia is concerned about the application of guideline 2.4.0 in relation to guideline 2.4.9.

[Guideline 2.4.10 (*Limitation and widening of the scope of a conditional interpretative declaration*)]

FRANCE

See the comments on guideline 2.4.5, above.

Guideline 2.5.3 (*Periodic review of the usefulness of reservations*)

FRANCE

France has doubts about the usefulness of the proposal contained in this guideline, which seems out of place in a guide that is intended to set out the legal rules governing the identification, regime and effects of reservations.

Guideline 2.5.4 (*Formulation of the withdrawal of a reservation at the international level*)

FRANCE

This guideline should be revised in the light of guideline 2.1.3. The expression "is competent" should be replaced by "is considered as representing".

[Guideline 2.5.13 (*Withdrawal of a conditional interpretative declaration*)]

FRANCE

See the comments on guideline 2.4.5, above.

Guideline 2.6.1 (*Definition of objections to reservations*)

FINLAND

1. Finland agrees with the Commission on the point that, even though an analytical distinction can be made between the act of opposing a valid reservation and that of opposing an invalid one, both these acts should be referred to as "objections", since this is the consistent practice of States and there seems to be no real danger of confusion. However, Finland is less convinced by the Commission's reasoning according to which the definition of "objection" in guideline 2.6.1 is sufficiently wide to cover objections to invalid reservations in addition to those made to valid ones. According to guideline 2.6.1, an objection is

a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization *purports to** exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

The verb "purport", of course, would imply a purpose or intention on the part of the objecting State, in this case the specific purpose or intention of modifying or excluding the effects of the reservation. A State could not, however, have any such intention when it considers the reservation to lack any legal effects to begin with; the purpose of objecting is merely to point out the invalidity and consequent lack of legal effects of the reservation.

2. For these reasons, Finland proposes to the Commission that it consider the feasibility of refining the definition in guideline 2.6.1 so that it expressly includes both types of objections, perhaps by adding to it the phrase "or whereby the objecting State or international organization expresses its view that the reservation is invalid and without legal effect".

France

1. The search for a definition of objections addresses the need to fill a gap in the 1969 and 1986 Vienna Conventions, which do not contain such a definition. Nevertheless, it is possible to discern the principal elements of the definition of objections from the objectives pursued, as contemplated in articles 20 and 21 of the two Conventions. An objection is a reaction to a reservation, but it is a specific reaction, one that is intended to make the effects of the reservation inoperative. The intention of the party reacting to the reservation is therefore determinant for the legal characterization of that reaction. The evaluation of the intention of the objecting State takes place within a specific framework. For example, the reaction of a party seeking to modify the content of a reservation cannot be classified as an objection. The objection should be characterized by the declared intention of the State to produce one of the objective effects set out in the Vienna Conventions: it should either make the provision to which it refers inapplicable or prevent the entry into force of the treaty between the parties involved. In that perspective, it is useful to know the intentions of the objecting State. A narrow definition of objections to reservations has several advantages. In terms of form, it responds to the aim of the Guide to Practice, which seeks to supplement the provisions of the Vienna Conventions without fundamentally modifying their spirit. France stands by this approach. In terms of substance, a strict definition of objections leaves more room for what the Special Rapporteur refers to as "reservations dialogue"; in other words, the discussions between the author of a reservation and its partners, intended to encourage the former to withdraw the reservation.

2. France favours a narrow definition of objections to reservations that focuses on the effects of objections as defined in articles 20 and 21 of the 1969 and 1986 Vienna Conventions. However, the Commission appears to be seeking a broader definition, which does not seem satisfactory. The expression "purports to exclude or modify the effects of the reservation in relations between the author of the reservation and the author of the objection" appears to be particularly ambiguous. According to the Commission, the proposed definition would not prejudge the validity or invalidity of an objection; like the definition of reservations, it is neutral. Nonetheless, the problem here is very different depending on whether it involves the definition of a reservation or the definition of an objection. A reservation always has the same effect: it "purports to exclude or modify the legal effect of certain provisions of a treaty" (guideline 1.1.1). The incompatibility of a reservation with the object and purpose of a treaty stems not only from the effect of the reservation but also from the treaty provision(s) to which it relates. By contrast, in the case of an objection, the very effect it seeks to engender might render it invalid. Furthermore, the alleged invalidity of a reservation may be challenged by an objection, while the possibility of reacting to an objection, the effects of which may be considered as exceeding the right to object, appears doubtful. A narrow definition of an objection, specifying its effects, would remove the ambiguities concerning the admissibility of an objection which purports to have other effects.

3. With regard to so-called objections with "super maximum effect", whereby the objecting State purports to neutralize the effects of the reservation by considering that the treaty in its entirety must apply in full in its relations with the reserving State, such an objection would exceed the limits of the consensual framework underlying the Vienna Conventions and could not produce such an effect without compromising the basic principle of consensus underlying the law of treaties. In practice, recognition of the "super maximum effect" would inevitably discourage States from participating in some of the most important agreements and treaties. It is therefore preferable not to suggest in the definition that an objection could have "super maximum effect"; however, the phrase "exclude or modify the effects of the reservation" allows for this type of objection.

4. France is of the view that a compromise between a broad definition of objections to reservations and a narrow definition, referring expressly to the effects set forth in the Vienna Conventions, may be one that defines an objection as a reaction purporting to make the effects of the reservation non-opposable in relations between the objecting State and the reserving State. Such a definition would be flexible enough to meet the requirements of objections with "intermediate effect", which, while not preventing the entry into force of the treaty between the parties, seek to render inapplicable between the two parties not only the provision covered by the reservation but other provisions of the treaty as well. As the effect sought by the objection is less than the maximum effect allowed by the Vienna Conventions, the validity of this type of objection does not appear to raise any difficulties. A State may consider that the reservation affects other treaty provisions and, accordingly, decide not to be bound not only by the provision covered to the reservation, but also by these other provisions. A definition limiting the effect of the objection to the non-opposability of the effects of the reservation in respect of the objecting State would, however, exclude the so-called objections with "super maximum effect" mentioned above. Such an objection does not purport to render the effects of a reservation non-opposable, but simply to ignore the existence of the reservation as if it had never been formulated.

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

FRANCE

This guideline is undeniably useful because it clears up the potential ambiguity of the two usages of the term "objection" in the Guide to Practice: either an objection to the late formulation or widening of the scope of a reservation or an objection to the reservation itself. This definition should thus avoid the risk of confusion between the two types of objections, which have separate effects.

Guideline 2.6.3 (*Freedom to formulate objections*)

AUSTRIA

1. Guidelines 2.6.3 and 2.6.4 concern the freedom to formulate objections and the freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation, respectively. Of course, as is stated in guideline 2.6.3, an objection to any reservation should be possible. However, the effect of such objection remains unclear. What is the effect of an objection in the case of a reservation that is explicitly provided for in the treaty? One cannot assume that an objection to a specified reservation would nullify the reservation, especially since guideline 4.1.1 regulates the establishment of specified reservations without necessitating acceptance. Similarly, according to guideline 2.6.4, a State cannot exclude treaty relations with the reserving State by means of a qualified objection if the reservation is provided for in the treaty. In comparison thereto, guideline 4.3 deals generally with the effect of an objection to a valid reservation which precludes the reservation from having its intended effects as against the objecting State. There seems to be no specific rule concerning the effect of an objection to a specified reservation. Thus, an attempt to determine the effect of an objection to a specified reservation by reference to at least three different guidelines leads only to an ambiguous result.

2. See also the observations made below in respect of guideline 4.1, below.

PORTUGAL

1. In Portugal's view, guideline 2.6.3 (Freedom to formulate objections) deserves some refinement. First of all, in the title, the word "freedom" does not seem to be the most appropriate one. Portugal shares the view that it should be considered to replace it by the expression "right". The same applies to guideline 2.6.4.

2. On the other hand, Portugal noted with satisfaction the replacement in due time, in the title of this guideline as well as in other guidelines, of the term "make" by the term "formulate", thus harmonizing the terminology with that employed in the Guide to Practice.

Guideline 2.6.4 (*Freedom to oppose the entry into force of the treaty* vis-à-vis *the author of the reservation*)

AUSTRIA

See the observations made in respect of guideline 2.6.3, above.

PORTUGAL

See the observations made in respect of guideline 2.6.3, above.

Guideline 2.6.5 (*Author*)

PORTUGAL

Portugal maintains its doubts regarding the provision of guideline 2.6.5 conferring capacity to formulate objections on States and international organizations that are entitled to become a party to the treaty. Article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions stipulates that a State or an international organization may formulate an objection by the date on which it expresses its consent to be bound by the treaty. Thus, Portugal feels that it is neither accurate nor necessary to allow a State or an international organization to formulate objections at a moment when it is not yet a party to the treaty, even if it would produce effects only when it has expressed its consent to be bound by the treaty.

Guideline 2.6.10 (*Statement of reasons*)

PORTUGAL

1. Even if it is not mandatory, it is understood that it would be valuable to let the reasons for the objection be known, for the sake of clarity and certainty.

2. The adoption of the expression "to the extent possible" is progress over the expression "whenever possible". Nevertheless, Portugal suggests the simple deletion of that expression; the term "should" is enough for the purpose.

Guideline 2.6.14 (*Conditional objections*)

FRANCE

France doubts that these are objections in the true sense of the word. The risk of such a guideline is that it could encourage States, on the pretext of making pre-emptive objections, to increase the number of their declarations—with uncertain legal effects—when they become parties to a treaty.

PORTUGAL

Portugal fears that this solution could lead beyond the reservations dialogue provided for in the Vienna Conventions. Furthermore, in some cases, when standing before a given reservation, conditional objections may not have a sufficiently well-determined content and uncertainty may arise as to whether an objection was indeed formulated. Nevertheless, it is fair to say that the current version of this guideline was improved, offering additional consistency to the provision when compared with the former "pre-emptive objection" version of the guideline.

Guideline 2.6.15 (*Late objections*)

PORTUGAL

Since one is dealing with a mitigated concept, it would be prudent to be more certain in clarifying which legal effects a late objection produces, if any at all.

Section 2.8 (*Formulation of acceptances of reservations*)

PORTUGAL

1. In general, the guidelines on the subject follow the procedural lines traced by the Vienna Conventions and the practice of States. Nevertheless, Portugal would like to comment on some questions that arise.

2. See the observations made in respect of guidelines 2.8.0, 2.8.1, 2.8.7 and 2.8.8, below.

Guideline 2.8.0 (*Forms of acceptance of reservations*)

PORTUGAL

Portugal favours retaining the expressions "express acceptance" and "tacit acceptance" as enunciated in the twelfth report of the Special Rapporteur.[1] Portugal takes due note of the position of the Commission as reflected in the commentary to this guideline. Nevertheless, Portugal is of the opinion that this distinction may have some relevance in practice since it confers greater conceptual clarity on the subject.

[1] See *Yearbook … 2007*, vol. II (Part One), document A/CN.4/584, pp. 35–42, paras. 5–44.

Guideline 2.8.1 (*Tacit acceptance of reservations*)

FRANCE

France finds it hard to perceive a tacit acceptance, once 12 months have passed following the notification of a reservation, as a "presumption" of acceptance in the legal sense of the term. The texts of guidelines 2.8.1 and 2.8.2, which reflect that of article 20, paragraph 5, of the Vienna Convention, in that it applies to cases in which a reservation is "considered to have been accepted", do not seem to mean that an acceptance could, in itself, be "reversed".

PORTUGAL

Portugal welcomes the preference for the guideline 2.8.1 in a similar drafting as proposed in 2007, concurring with the Special Rapporteur in finding guideline 2.8.1 *bis* superfluous. Portugal also welcomes the retaining of the expression "unless the treaty otherwise provides", since article 20, paragraph 5, of the Vienna Convention also admits that a treaty can derogate the general rule on tacit acceptance of reservations.

Guideline 2.8.7 (*Acceptance of a reservation to the constituent instrument of an international organization*)

PORTUGAL

1. It is Portugal's opinion that acceptance is required not only from the competent organ of an international organization, but also from the members of the organization and therefore parties to the constituent instrument. When article 20, paragraph 3, of the Vienna Conventions states that a reservation requires the acceptance of the competent organ of the organization, it is including the competent organ rather than excluding the parties to the constituent instrument.

2. In 2007, there were two core problems concerning this matter that Portugal felt deserved further consideration by the Commission. Firstly, there was the question concerning the case in which a reservation is formulated before the constituent instrument enters into force and thus before any organ exists with competence to determine whether the reservation is permissible; these are the most frequent cases (article 19 and article 20, paragraph 5, of the Vienna Conventions). Secondly, concerning guideline 2.8.9 as initially proposed by the Special Rapporteur[1] (guideline 2.8.8 in the current version), the competence of an organ may have to be established in its constituent instrument, in accordance with the principle of conferred powers. Both questions seem to find a more adequate answer in the present drafting. Nevertheless, States and international organizations should not be put aside from the reservations dialogue.

[1] *Yearbook … 2007*, vol. II (Part Two), footnote 61.

Guideline 2.8.8 (*Organ competent to accept a reservation to a constituent instrument*)

PORTUGAL

See the observations made in respect of guideline 2.8.7, above.

Guideline 2.8.11 (*Reaction by a member of an international organization to a reservation to its constituent instrument*)

FRANCE

France doubts it is appropriate to include this guideline in the Guide to Practice. Although it concerns the more or less indisputable right of member States of an international organization to take an individual position on the validity of a reservation to the constituent instrument of that organization, there is a risk that such a guideline might, in practice, lead to interference with the exercise of the powers of the competent organ and respect for the proper procedures.

Section 2.9 (*Formulation of reactions to interpretative declarations*)

FRANCE

The classification of different reactions to interpretative declarations seems quite acceptable and encompasses the various scenarios encountered in practice: silence, approval, opposition and recharacterization. It is important to note that these different forms of reaction give rise to different difficulties, from the point of view of their effects.

PORTUGAL

1. As is clearly stated in the guidelines, reservations and interpretative declarations are two different legal concepts. If a "reservation" is intended to modify or exclude the legal effects of certain provisions of a treaty,

an "interpretative declaration" has the purpose of specifying or clarifying the meaning or the scope attributed by the declarant to a treaty or to certain of its provisions. Therefore, if a reservation has direct legal effects, an interpretative declaration is most of all related with the methodological problem of interpretation, although having associated legal consequences.

2. Since they are two different legal concepts, they should be treated separately except where they interrelate with each other. Recalling that the Vienna Conventions do not deal with interpretative declarations, Portugal has been advocating a cautious approach since the Commission is dealing with issues that fall out of their scope.

Guideline 2.9.1 (*Approval of an interpretative declaration*)

PORTUGAL

1. Portugal feels that the word "approval" has a strong legal connotation that is not coherent with the matter being dealt with. Portugal would prefer a softer expression like "consent". This expression would have to be used in a uniform manner in other guidelines, as appropriate.

2. See also the observations made in respect of guideline 3.6, below.

Guideline 2.9.2 (*Opposition to an interpretative declaration*)

EL SALVADOR

1. The Commission's stance as set out in this guideline is noteworthy, as it provides for the possibility that States and international organizations might react negatively to the formulation of an interpretative declaration through a statement of "opposition", which differs from an "objection", the latter being understood to refer only to reservations. In that light, El Salvador supports guideline 2.9.2 with regard to the definition of opposition.

2. However, El Salvador would like to refer to the last phrase of the guideline, namely, the possibility of "formulating an alternative interpretation".

3. The stance of the State or international organization in expressing its opposition may vary significantly, as pointed out by the Special Rapporteur:

> A negative reaction to an interpretative declaration can take varying forms: it can be a refusal, purely and simply, of the interpretation formulated in the declaration, a counterproposal of an interpretation of the contested provision(s), or an attempt to limit the scope of the initial declaration, which was, in turn, interpreted.[1]

4. With regard to the specific case of a counterproposal—referred to as an "alternative interpretation"[2] in the Guide to Practice—it is the understanding of El Salvador that such an interpretation can also take different forms, depending on the wording used and the intentions of the State formulating it. Thus, the intention behind an alternative interpretation might be a refusal, accompanied by an interpretation seeking merely to make a recommendation to the State which formulated the initial interpretative declaration; on the other hand, it might be a refusal through which the opposing State or international organization seeks to formulate its own interpretative declaration. El Salvador considers that in the latter case we would be faced with an entirely new declaration formulated by a State other than the State which formulated the initial interpretative declaration, and which therefore should be subject to the entire set of rules on interpretative declarations in general.

5. The potential scenarios referred to above are not covered in the relevant guideline or its commentary. It may be that no reference has been made to them because the issues involved are not relevant to simple statements of opposition, which are a mere rejection of the interpretation formulated. Nevertheless, it would be useful to clarify, in the guideline or its commentary, the way in which alternative declarations and their corresponding effects should be handled, in order to avoid any possible gaps in its practical application.

PORTUGAL

Portugal welcomes the improvement made in comparison with the 2008 version[1] by deleting the expression "excluding or limiting its effect". This expression could be misleading when trying to make a clear distinction between reservations and interpretative declarations. However, Portugal questions if the proposition of an alternative interpretation would not be in fact a new interpretative declaration with a rejection effect rather than mere opposition.

[1] See *Yearbook … 2008*, vol. II (Part Two), p. 66, footnote 212.

Guideline 2.9.3 (*Recharacterization of an interpretative declaration*)

EL SALVADOR

1. El Salvador recognizes the importance of this guideline, which arose primarily out of the need to regulate the fairly common practice of States and international organizations of formulating a unilateral statement the content of which does not conform to the name given it, in other words, to regulate the tendency to label reservations "interpretative declarations" and vice versa.

2. Even more complicated are situations in which a statement is given the name "declaration" without expressing or providing any indication of its true nature. This, as pointed out by the Special Rapporteur in his third report, "focuses attention on the actual content of declarations and on the effect they seek to produce".[1]

[1] *Yearbook … 2008*, vol. II (Part One), document A/CN.4/600, p. 8, para. 22.

[2] See *Yearbook … 2009*, vol. II (Part Two), para. (13) to the commentary to guideline 2.9.2: "The Commission considered how it could most appropriately qualify oppositions that reflected a different interpretation than the one contained in the initial interpretative declaration. It rejected the adjectives 'incompatible' and 'inconsistent', choosing instead the word 'alternative' in order not to constrict the definition to oppositions to interpretative declarations unduly."

[1] *Yearbook … 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 264, para. 253.

3. With regard to this crucial aspect, El Salvador supports the position of the Special Rapporteur on the establishment of "indifference to the nominalism"[2] as an element of the definitions of reservations and interpretative declarations, as set out in guidelines 1.1 and 1.2, respectively. El Salvador understands it to mean the absence of any connection between the name given to a declaration and its actual nature, implying that a declaration retains its nature independently of the name and title under which it is formulated. 4. The guideline as a whole is complemented by guidelines 2.9.4 to 2.9.7, which seek to establish rules on when a recharacterization may be formulated and state that it should preferably be formulated in writing and should, to the extent possible, indicate the reasons why it is being made. However, El Salvador notes with concern the absence of one element which is of great importance, in its view: that of stipulating the practical implementation of the recharacterization once formulated.

5. El Salvador is concerned that no guideline has been drafted on the course of action to follow when a State recharacterizes a declaration; there are no specific provisions on when its status may be considered to have been modified, although it is understood, pursuant to the commentary to this guideline, that "a 'recharacterization' does not in and of itself determine the status of the unilateral statement in question". Accordingly, one might ask what effect can in fact be generated by such an attempt at or proposal for recharacterization, if it clearly "does not bind either the author of the initial declaration or the other contracting or concerned parties".[3]

6. It should be noted that the commentaries to this guideline in the relevant report of the Commission as well as the thirteenth report of the Special Rapporteur[4] establish that "A divergence of views between the States or international organizations concerned can be resolved only through the intervention of an impartial third party with decision-making authority".[5] While they do therefore provide some indication of how the situation could be resolved, they nevertheless provide too little clarity on the degree to which the arrangements for reservations actually apply in such cases.

[2] *Ibid.*, p. 269, para. 291.

[3] *Yearbook … 2009*, vol. II (Part Two), para. (6) of the commentary to guideline 2.9.3.

[4] *Yearbook … 2008*, vol. II (Part One), document A/CN.4/600, p. 3.

[5] See footnote 3 above.

PORTUGAL

1. Portugal has doubts regarding the provisions of guideline 2.9.3 (Recharacterization of an interpretative declaration) giving the idea that a State or an international organization can recategorize through a unilateral statement the nature of the declaration to which they respond. This may be just a question of semantics, but Portugal believes it would be convenient to clearly set aside any voluntarist approach in this matter. Moreover, understanding that a "disguised reservation" is in fact a reservation and not an interpretative declaration, Portugal feels that the Commission should reflect further if this chapter is the correct place for such a provision.

2. Nevertheless, Portugal recognizes the evolution in the drafting of the guideline itself when comparing it with its initial version. For instance, the use of the term "recharacterization" instead of "reclassification" is welcome.

Guideline 2.9.4 (*Freedom to formulate approval, opposition or recharacterization*)

FRANCE

France considers that, for purposes of legal security, it would be preferable for States to have the power to formulate an approval, opposition or recharacterization in respect of an interpretative declaration only within 12 months following the date on which they were notified of the interpretative declaration.

PORTUGAL

Portugal has some concerns regarding the simple statement that an interpretative declaration can be formulated at any time. For instance, a State or international organization should not be able to formulate an interpretative declaration in regard to a treaty or certain of its provisions in a context of a dispute settlement process involving their interpretation. Hence, a reference to the principle of good faith would be a prudent solution.

Guideline 2.9.6 (*Statement of reasons for approval, opposition and recharacterization*)

MALAYSIA

With regard to guideline 2.9.6, Malaysia understands that the guideline does not require States to give reasons for their responses. It is noted that guideline 4.7.1 provides that an approval of or opposition to an interpretative declaration can be considered in treaty interpretation in order to determine the weight to be given to the said interpretative declaration. Thus, given the fact that such responses will have an effect on States' interpretative declarations, it is only for the responding States to state their reasons for approval and opposition. Although recharacterization does not affect the permissibility or the effect of an interpretative declaration, it would also be useful for any act of recharacterization to be accompanied by a statement of reasons, which would prevent States from approving, opposing or recharacterizing an interpretation proposed by other States without any valid reasons. Furthermore, Malaysia is of the view that States should be granted the right to know why their interpretative declarations are being approved, opposed or recharacterized. Thus, Malaysia proposes that the requirement to state reasons for approval, opposition and recharacterization be made mandatory.

Guidelines 2.9.8 (*Non-presumption of approval or opposition*) and 2.9.9 (*Silence with respect to an interpretative declaration*)

PORTUGAL

1. Portugal agrees that guidelines 2.9.8 and 2.9.9 deal with two different though related questions.

2. There seems to be no doubt that, contrary to what happens with reservations, in this case neither approval nor opposition can be presumed. Furthermore, it is a principle of law that silence cannot be considered as a declaratory means unless it can be clearly inferred otherwise. Regarding interpretative declarations, there is no general rule on the value of silence as a declaratory mean, nor is there a general legitimate expectation of an express reaction to such a declaration. As such, so far as interpretative declarations are concerned, silence should only have a meaning when its value can be clearly inferred from a treaty provision.

3. Having this in mind, Portugal finds the second paragraph of guideline 2.9.9 in need of some refinement in order to clarify what meaning the expression "exceptional cases" could have. Paragraph (5) of the commentary thereto could be further elaborated to provide additional guidance.

Guideline 2.9.9 (*Silence with respect to an interpretative declaration*)

France

France considers that there could be circumstances where silence could constitute acquiescence to an interpretative declaration. Nonetheless, the principle adopted must, of course, be that acceptance of an interpretative declaration cannot be presumed and cannot be inferred from mere silence. The key is the circumstances, and even the unique and even exceptional circumstances in which the silence or conduct of a State with a direct and substantial interest in the detail or clarification provided by the interpretative declaration of another contracting State will inevitably be taken into account for the purposes of interpretation of the treaty, for example, in the event of a dispute between two contracting States. When it does not constitute acquiescence to an interpretative declaration, silence does not appear to play a role in the legal effects that the declaration can produce. In any case, the option open to contracting States to clarify or specify the meaning of a treaty or of certain provisions thereof should not be overlooked.

New Zealand

New Zealand considers that silence should not necessarily mean acquiescence to an interpretative declaration and acquiescence should be determined according to general international law. The second sentence of guideline 2.9.9 appears to alter this by placing an onus on States to respond to an interpretative declaration in order to avoid being bound by it. The possibility of being bound by such declarations, even if limited to exceptional circumstances, would simply place too large an administrative burden on States, especially smaller States, to consider each interpretative declaration and provide a response in order to protect their position. New Zealand therefore does not support the second sentence of guideline 2.9.9.

United Kingdom

The United Kingdom does not agree that silence as a response to an interpretative declaration necessarily constitutes acquiescence. The second paragraph of guideline 2.9.9 should be deleted, thus leaving the issue of acquiescence to be ascertained by reference to international law. The commentary provides no examples of where exceptionally silence can or has been taken as acquiescence. Given that an interpretative declaration lacks formal legal status, The United Kingdom is doubtful that firm conclusions can be drawn from the silence of existing States parties.

[Guideline 2.9.10 (*Reactions to conditional interpretative declarations*)][1]

France

See the comments on guideline 2.4.5.

Portugal

Portugal shares the view that conditional interpretative declarations cannot be regarded as simple interpretative declarations. However, they also cannot be considered as reservations since they make participation in the treaty conditional on a particular interpretation, whereas reservations are intended to exclude or to modify the legal effects of the treaty. Their unclear legal position can bring uncertainty to the treatment of this subject, thus harming the reservations dialogue, which should be carefully preserved.

[1] The guidelines on conditional interpretative declarations have been placed by the Commission in square brackets, pending a final determination by the Commission on whether the legal regime of such declarations entirely follows that of reservations.

Section 3 (*Permissibility of reservations and interpretative declarations*)

France

1. France is of the view that a distinction must be made between two concepts: permissibility and opposability. A permissible legal act is one that meets all the conditions of form and substance needed to produce legal effects. A reservation that does not comply with the provisions of article 19 of the Vienna Conventions would therefore be non-permissible. In international law, the permissibility of a reservation is assessed subjectively by each State for its own benefit. As a consequence of this well-known characteristic of international law, the same reservation may be considered non-permissible by some States and permissible by others. Under these circumstances, nullity, which is the penalty for non-permissibility in domestic law, does not appear to be an appropriate outcome of the non-permissibility of a reservation in international law. "Opposability", or more precisely "non-opposability", makes for a more appropriate characterization of the penalty for such non-permissibility, as subjectively assessed. In this regard, a State which deems a reservation to be non-permissible could declare its effects non-opposable to it.

2. France wishes to reiterate its preference for the expression "opposability of reservations". On the one hand, the concept of "permissibility" does not seem truly neutral; it seems to refer to a form of objective examination that does not square with the well-known practice in international

law of subjective assessments by individual States. On the other hand, and more crucially, the concept of "opposability" seems to better reflect the reality of relations as between the reserving State and the other contracting parties arising from the formulation of a reservation. Much will depend on the latter's reactions. By focusing too much on the permissibility of reservations, the Commission might encourage the questionable idea that the parties to a treaty could deny the very existence of a reservation which, in their view, is non-permissible. Nevertheless, France welcomes the general thrust of the guidelines dealing with the "permissibility of reservations".

Guideline 3.1 (*Permissible reservations*)

France

France endorses the Commission's decision to reproduce the text of article 19 of the Vienna Conventions on the Law of Treaties in guideline 3.1 without attempting to change its wording substantially. Changing the wording of this well-known provision would undoubtedly result in harmful and unnecessary confusion.

Guideline 3.1.1 (*Reservations expressly prohibited by the treaty*)

France

Guidelines 3.1.1 to 3.1.4 seem quite relevant as they bring needed clarity to the issues of interpretation raised by article 19.

Guidelines 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*)

France

See the comments on guideline 3.1.1, above.

United Kingdom

1. Guideline 3.1.2 attempts to clarify what is meant by the term "specified reservations". While the United Kingdom welcomes the flexible approach adopted by the Commission, it remains concerned that the definition may not capture all the circumstances in which a reservation may be "specified". A key feature of the problem is the lack of precision in the provision over what degree of detail makes a treaty provision one which indicates "specified reservations". If a treaty provision is precise as to the exact nature of the reservation (see, for example, Additional Protocol No. 2 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955), and a reservation is formulated exactly in line with it, it seems inappropriate to superimpose an assessment of whether the reservation is compatible with the object and purpose of the treaty. If, however, the treaty provision simply authorizes reservations to enumerated articles and excludes other enumerated articles, the content of any reservation formulated with regard to an article in the permitted list may nevertheless be objectionable.

2. The United Kingdom also agrees with guidelines 3.1.3 and 3.1.4, which provide that any reservation that is not prohibited by the treaty, or not a "specified" reservation, must be compatible with the object and purpose of the treaty. However, we query the reference in the commentary concerning the applicability of article 20, paragraphs 2 and 3, of the Vienna Convention;[1] it is the view of the United Kingdom that this article does not apply, or applies only by analogy, to impermissible reservations.

3. The United Kingdom notes, however, that the incompatibility of a reservation with the object and purpose of a treaty may only become apparent, or established, many years from such a reservation being formulated, perhaps only in the context of litigation. It therefore does not accept the suggestion in the commentary to guideline 4.5.2 that declarations made subsequently by the author of a reservation, or in the context of judicial proceedings, should necessarily be "treated with caution".[2]

[1] See *Yearbook … 2006*, vol. II (Part Two), p. 143, para. 159.

[2] See *Yearbook … 2010*, vol. II (Part Two), para. (43) of the commentary to guideline 4.5.2.

Guideline 3.1.5 (*Incompatibility of a reservation with the object and purpose of the treaty*)

France

The definition proposed in this guideline is useful, particularly as it continues to treat the object and the purpose of a treaty as one. It would undoubtedly be possible to make a theoretical distinction between the object of a treaty and its purpose. However, apart from the difficulty of making such distinction in each individual case, this appears inconsistent in practice; contracting parties tend to assess the opposability or, to use the term employed in the Guide, the "permissibility" of a reservation in the light of its object and purpose, taken as one. France welcomes the amendments to this guideline made by the Commission in 2006. The new definition of the "object and purpose of a treaty" is a marked improvement from the original version. The addition of a reference to the "general thrust" of the treaty addresses the concerns raised by France in its 2005 comments. The mere reference to essential elements of the treaty is not sufficient since it may prove difficult to determine indisputably the nature of those elements, which, if affected, could impair the *raison d'être* of the treaty. For example, some parties to a treaty may, unlike others, consider that the substantive provisions of the treaty are indissociable from the clauses relating to implementation mechanisms and that a reservation to such clauses would remove the *raison d'être* of the treaty. Furthermore, associating the purpose and object of the treaty with essential elements thereof could make reservations to provisions that, while perhaps less important, contribute fully to the balance of the treaty, less questionable. The final definition chosen associates the key elements of the treaty with its "general thrust", thereby maintaining the spirit, letter and balance of the treaty.

Guideline 3.1.6 (*Determination of the object and purpose of the treaty*)

France

This guideline is a valuable addition to guideline 3.1.5, which defines "object and purpose of the treaty". France considers it important for the object and purpose of the treaty to be determined not only by the wording of the treaty, but also by its "general thrust".

Guideline 3.1.7 (*Vague or general reservations*)

France

France welcomes the Commission's efforts, in paragraph (4) of the commentary to this guideline,[1] to establish a link between this guideline and the one that deals with reservations relating to internal law (guideline 3.1.11, which states that a reservation by which a State purports to "preserve the integrity of specific norms of the internal law of that State may be formulated only insofar as it is compatible with the object and purpose of the treaty"). In practice, reservations relating to the application of internal law are frequently formulated in vague and general terms. France takes the position that such reservations may give rise to significant problems since they often do not allow the other parties to determine the true extent of the reserving State's commitment to the treaty and may lead to fear among these parties that, as the internal law of the reserving State develops, its commitment may wane.

[1] See *Yearbook … 2007*, vol. II (Part Two), p. 40.

Guideline 3.1.8 (*Reservations to a provision reflecting a customary norm*)

United Kingdom

The first paragraph of this guideline provides that the fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation. The United Kingdom is not convinced by this. As the United Kingdom said in its observations on the Human Rights Committee's general comment No. 24,[1] "there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law". The United Kingdom does, however, agree with the second paragraph of that guideline, which states that such a reservation does not affect the binding nature of the relevant customary norm, which shall continue to apply.

[1] Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), general comment No. 24, annex VI, para. 7.

Guideline 3.1.9 (*Reservations contrary to a rule of* jus cogens)

France

The reference to peremptory norms of general international law (*jus cogens*) raises the issue of the scope of that notion, the content of which remains to be clarified.

Guideline 3.1.11 (*Reservations relating to internal law*)

France

See the comments on guideline 3.1.7, above.

Guideline 3.1.12 (*Reservations to general human rights treaties*)

El Salvador

See the observations made in respect of guideline 4.2.5, below.

United Kingdom

With respect to guideline 3.1.12, the United Kingdom does not agree that human rights treaties should be treated any differently from other international agreements. It is the firmly held view of the United Kingdom that reservations to normative treaties, including human rights treaties, should be subject to the same rules as reservations to other types of treaties. The United Kingdom sees no legal or policy reason for treating human rights treaties differently. Any suggestion that special rules on reservations may apply to treaties in different fields, such as human rights, would not be helpful. It is important to remember that the law on reservations to treaties owes its origin to the Advisory Opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime* of 28 May 1951.[1] The United Kingdom therefore suggests that this guideline be deleted. The United Kingdom notes, in fact, that the Special Rapporteur's second report on the topic of reservations to treaties[2] is in line with the views expressed above.

[1] *I.C.J. Reports 1951*, p. 15.

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

Guideline 3.1.13 (*Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty*)

United Kingdom

The United Kingdom observes that this guideline may be redundant. This is because it merely confirms that such reservations as described in the guideline are to be assessed in accordance with their compatibility with the object and purpose of the treaty in question, which should already be apparent from the content of guidelines 3.1.5 and 3.1.6.

Guideline 3.2 (*Assessment of the permissibility of reservations*)

Austria

1. The multitude of competent actors listed in guideline 3.2 entails the risk of divergent evaluations. All the actors listed in this guideline are, under given conditions, entitled to an assessment of permissibility, but its effects differ from actor to actor. While an assessment by a party to the treaty can take effect only for the party itself, the evaluation of a treaty body may affect all parties, provided

the body possesses the necessary competence (which, however, may only rarely be beyond doubt). A judgment by a dispute settlement body has effect only for the parties to the dispute. If the various actors disagree in their assessment a rather complicated situation may arise. As already indicated in the commentary, such disagreement is not very conducive to the application of the treaty itself. Obviously, there is still a need for further clarifications in this matter.

2. Regarding the time limit, it must be questioned why a party should be bound by a 12-month rule whereas a dispute settlement body can conduct its assessment at any time. Of course, the need for stabilized treaty relations requires a certain time limit. But does this time limit imply that a party to the treaty is precluded from invoking the impermissibility of a reservation before a dispute settlement body after 12 months have elapsed? It seems that a party can circumvent this time limit by bringing the matter before a dispute settlement body, which it is free to do at any moment. Such proceedings are, however, undoubtedly connected with higher costs.

France

The creation of monitoring bodies by many human rights treaties poses particular problems, notably with regard to assessment of the "permissibility" of reservations formulated by States. Although these problems were not envisaged when the 1969 Vienna Convention was drafted, it does not seem impossible today to set up such bodies, which can, moreover, prove very useful and effective. However, monitoring bodies can only assess the "permissibility" of reservations formulated by States if this was expressly envisaged in the treaty. The common desire of States to endow these bodies with such competence must be expressed in the text of the treaty. The European human rights system clearly illustrates this possibility and this requirement. Absent such mechanisms, the reserving State must determine the consequences of the incompatibility of its reservation with the object and purpose of the treaty, just as the objecting State must determine the consequences of its decision for its continued treaty relations with the reserving State. The monitoring body is a judicial or analogous body which exists solely by virtue of the treaty. It cannot assume competencies other than those endowed to it explicitly by the States parties. If the States wish to confer on the monitoring body certain competencies to assess or determine the "permissibility" of a reservation, it is indispensable that such clauses should be explicitly spelled out in multilateral treaties, particularly those related to human rights. If the treaty is silent on the matter, only the States alone can amend the treaty, supplement it, if necessary, with a protocol in order to set up an appropriate and often useful and effective monitoring body, or react to a reservation they consider incompatible with the object and purpose of the treaty.

Guidelines 3.2.1 (*Competence of the treaty monitoring bodies to assess the permissibility of reservations*), 3.2.2 (*Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations*), 3.2.3 (*Cooperation of States and international organizations with treaty monitoring bodies*), 3.2.4 (*Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body*) and 3.2.5 (*Competence of dispute settlement bodies to assess the permissibility of reservations*)

United Kingdom

1. In relation to the competence of treaty monitoring bodies, as set out in guidelines 3.2.1 to 3.2.5, the United Kingdom believes that any role performed by a treaty monitoring body to assess the validity of reservations (or any other role) should derive principally from the legally binding provisions of any given treaty, and that these same provisions are the product of free negotiation between States and other subjects of international law. The United Kingdom therefore questions the wisdom of attempting to create a very high-level permissive framework for such activity when it is best left to the negotiating States to decide what powers should be assigned to any treaty monitoring body on a case-by-case basis. Similarly, the legal effect of any assessment of the validity of reservations made by a monitoring body should be determined by reference to the functions it derives under the treaty articles.

2. Absent an express treaty provision, the United Kingdom does not accept that treaty monitoring bodies are "competent to rule on the validity" of reservations. We refer to the observations of the United Kingdom on the Human Rights Committee's general comment No. 24,[1] which sets out the position of the United Kingdom in full. Any comments or recommendations from a treaty monitoring body should be taken into account by a State in the same way as other recommendations and comments on their periodic reports. The United Kingdom does, however, accept that a treaty monitoring body may have to take a view on the status and effect of a reservation where necessary to permit a treaty monitoring body to carry out its substantive functions.

[1] Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), general comment No. 24, annex VI.

Guideline 3.2.1 (*Competence of the treaty monitoring bodies to assess the permissibility of reservations*)

France

Contrary to the suggestion in this guideline, France wishes to point out that in order for a treaty monitoring body to be able to assess the "permissibility" of a reservation, it must be endowed with that competence by the States or international organizations involved. It would therefore be preferable to find a formulation that does not establish such an automatic link between the possibility of monitoring the implementation of a treaty and assessing the permissibility of reservations. The second competence does not flow from the first.

Guideline 3.2.2 (*Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations*)

France

France considers that this guideline should establish more clearly the fundamental nature of the clauses in a

treaty or additional protocol that confer on bodies the competence to assess the permissibility of reservations, thereby allowing States and international organizations to spell out the competence that they grant to a treaty monitoring body regarding assessment of the "permissibility" of reservations.

United Kingdom

The United Kingdom considers that where there is an express intention on behalf of negotiating States to endow a treaty monitoring body with such a role, they will act appropriately to ensure treaty provisions reflect this. The absence of any specific reference in treaty provisions to powers to assess the validity of reservations should not under any circumstances be interpreted as permitting a legally binding role in this respect.

Guideline 3.2.3 (*Cooperation of States and international organizations with treaty monitoring bodies*)

United Kingdom

This guideline is formulated as an obligation to cooperate. This is clearly de *lege ferenda*; while cooperation is desirable, an obligation to cooperate must come from an express treaty obligation. In addition, the requirement to "cooperate" with a treaty monitoring body, and to give "full consideration to that body's assessment of the permissibility of reservations that they have formulated" does not specify the extent or limits of such cooperation or consideration. It is open to question, therefore, to what extent this requirement could be deemed to be satisfied under this guideline.

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

France

This guideline assumes a lack of competition among monitoring bodies, but it does not address the scenario of a difference in assessment between the different bodies and parties that can assess the permissibility of a reservation. France considers that this point needs to be clarified.

Guideline 3.3 (*Consequences of the non-permissibility of a reservation*)

France

1. This is clearly a difficult question which the Vienna Conventions did not resolve. For that very reason, the Commission should try to clarify the questions of the consequences of "non-permissibility" of a reservation and the effect of an objection to a reservation. If it fails to do so, the Guide to Practice would not fully meet the expectations that it has legitimately aroused. The principle contained in this guideline is entirely acceptable, although its title ("consequences of the non-permissibility of a reservation") does not truly reflect the content of the guideline, which relates rather to the causes of non-permissibility.

2. The question of the consequences of "non-permissible" reservations is one of the most difficult problems raised by the 1969 Vienna Convention. No provision of the Convention relates to the link between the rules on prohibited reservations and the rules on the mechanism of acceptance of or objections to reservations. France continues to have misgivings about the use of terms such as the "permissibility" or "impermissibility" of reservations, which take no account of the wide range of reactions by States to reservations by other States. Despite the term used, issues relating to the consequences of non-permissible reservations should be resolved primarily through the objections and acceptances communicated by States to the reserving State. A reservation may be found to be non-permissible by a monitoring body, but the consequences of such a finding inevitably depend on the recognized authority of that body. The "opposability" of a reservation between States parties depends on the acceptances or objections by those parties.

Germany

See the observations made in respect of guideline 4.5.1, below.

Guideline 3.3.1 (*Non-permissibility of reservations and international responsibility*)

France

1. This guideline usefully points out that reservations fall under the law of treaties, not the law of international responsibility.

2. See the comments on section 3, above.

Guideline 3.3.2 (*Effect of individual acceptance of an impermissible reservation*)

El Salvador

1. Guidelines 3.3.2 (Effect of individual acceptance of an impermissible reservation) and 3.3.3 (Effect of collective acceptance of an impermissible reservation) are examined together in this paragraph because the comments of El Salvador relate to issues contained in both guidelines.

2. First, it should be noted that the content of both guidelines is fully consistent with the basic principles and underpinnings of reservations. Guideline 3.3.2 is based on the widely recognized premise that acceptance of a reservation cannot cure its impermissibility, because the reasons for that impermissibility—express prohibition of the reservation or its incompatibility with the object and purpose of the treaty—apply *ipso facto* and cannot be reversed by mere acceptance by a State or by an international organization.

3. The situation is different when, as reflected in guideline 3.3.3, all States and international organizations—not just one State or one international organization—accept the reservation. This would constitute unanimous agreement which, following the logic used in the case of an amendment to a treaty by a general agreement between

the parties, would be permitted pursuant to article 39 of the 1969 Vienna Convention.[1]

4. El Salvador now wishes to comment on the difference which it has noted between the scope of guideline 3.3.2 and that of guideline 3.3.3, and specifically on the implications of including the concept of "permissibility" in guideline 3.3.2, for a consistent interpretation of the Guide to Practice.

5. It should be pointed out that guideline 3.1 establishes three specific conditions limiting the scope of the "permissibility of a reservation":

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

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

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

6. The same scope can be inferred from the content of guideline 3.3.2, which includes the concept of permissibility, thereby incorporating the three conditions referred to in guideline 3.1. However, unlike guidelines 3.1 and 3.3.2, which encompass three conditions limiting the scope of permissibility, guideline 3.3.3 only covers two of those conditions. This, in the view of El Salvador, limits the effect and hence the scope of the "collective acceptance of an impermissible reservation".

7. In the light of the foregoing, El Salvador feels that it is extremely useful to include in the commentaries an explanation of the difference mentioned above and, in the event that this difference is not substantial, proposes that similar language should be found to show the equivalence of the concepts.

[1] Article 39 of the 1969 Vienna Convention says the following: "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide."

Germany

See the observations made in respect of guideline 4.5.1, below.

Guideline 3.3.3 (*Effect of collective acceptance of an impermissible reservation*)

Australia

1. Guidelines 3.3.3 and 3.4.1 appear to create two separate regimes regarding the permissibility of acceptance of an impermissible reservation: one regime for an express acceptance and another for a tacit acceptance. This is not found within the existing Vienna Convention regime. It is unclear why guideline 3.4.1 should prohibit the express acceptance of impermissible reservations, yet guideline 3.3.3 should allow for a collective tacit acceptance of impermissible reservations. Guideline 3.3.3 does not specify a time limit for contracting States to object, but presumably the 12-month period in guideline 2.6.13 applies. This could be clarified. Moreover, if collective acceptance of impermissible reservations is allowed under guideline 3.3.3, this should be allowed for in guideline 3.4.1.

2. The underlying premise of guideline 3.3.3 set out in the Commission's commentaries is also questionable, namely that a tacit acceptance of the impermissible reservation could constitute a subsequent agreement among the parties modifying the original treaty. Australia queries whether a subsequent agreement could arise among the contracting parties through mere silence or inaction. Furthermore, it is unlikely that guideline 3.3.3 would ever operate in practice, given that a State would be unlikely to ask the depositary to bring the reservation to the attention of other contracting States and then fail to object to it. Further clarification of these provisions would be desirable.

3. The interaction between these provisions regarding the acceptance of impermissible reservations and section 4.5 relating to the consequences of an invalid reservation is even less clear. The commentary to the guidelines indicates that section 4.5 establishes an objective regime for assessing the invalidity of a reservation which is not dependent upon the reactions of other States. This appears inconsistent alongside guideline 3.3.3 and makes guideline 3.4.1 redundant.

Austria

1. Austria still has major concerns regarding guideline 3.3.3 on the effect of collective acceptance of an impermissible reservation. This guideline seems to invite States to make reservations prohibited by a treaty, since they can formulate the reservation and then wait for the reaction of other States. Is it really intended that, in the case of non-objection or silence by other States, the reservation is deemed permissible? Should the contracting States really have the power to override the object and purpose of a treaty irrespective of the attempt of an objective definition of object and purpose? This is certainly not in conformity with the idea of the 1969 Vienna Convention.

2. Also, the question of an evaluation of the effect of silence is certainly still unanswered. The commentary[1] seems to indicate that silence cannot be equated with acceptance of the reservation. This conclusion would be in accordance with guideline 3.3.2, according to which the nullity cannot be remedied by unilateral acceptance. However, it remains doubtful whether there exists something like the collective position of States parties in general multilateral treaties, in particular in view of the fact that no moment is indicated when this collective attitude must be established and that the States parties vary in time. Which States, therefore, are decisive for silent approval to exist?

3. Moreover, the time element also remains unclear, since no reference is made to the time limit in guideline 2.6.13. Although the commentary explains that the time period was left open on purpose, practical problems nevertheless call for it. For instance, what happens if a State accedes to a treaty 10 years after its entry into force and, after being informed by the depositary of the existence of an impermissible reservation, objects to this reservation as the only State party? Should the reservation be deemed impermissible only after this objection? The present wording of the guidelines seems to warrant such a conclusion. This raises another problem: Would the reservation become null and void *ex nunc* or only *ex tunc*?

[1] *Yearbook…2010*, vol. II (Part Two), p. 52, para. (5) of the commentary.

4. More generally, this guideline seems to contradict guidelines 4.5.1 and 4.5.3 since, according to these guidelines, the nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization. Austria is of the view that, particularly regarding reservations contrary to the object and purpose of a treaty, collective acceptance by silence does not reflect established rules of international treaty relations.

El Salvador

See the observations made in relation to guideline 3.3.2, above.

France

See the comments on guideline 3.4.1, below.

New Zealand

New Zealand has a concern with guideline 3.3.3. New Zealand does not believe that an invalid reservation can become permissible simply because no contracting State or organization has recorded an objection to it.

Switzerland

1. Guideline 3.3.3 provides a procedure whereby an impermissible reservation may be deemed permissible. Switzerland is aware of the advantages of such a proposal, but a basic question arises: would such a text not be in conflict with the provision of article 19 of the 1969 Vienna Convention, which embodies the principle that impermissible reservations should not be formulated to start with ("A State may… formulate a reservation unless: …")? Proposing such a procedure might risk encouraging the deposit of impermissible reservations, including reservations that would be incompatible with the object and purpose of the treaty as noted under subparagraph (*c*) of that article.

2. Moreover, the proposed procedure would allow an impermissible reservation to be deemed permissible simply by tacit acceptance. Article 20, paragraph 5, of the Vienna Convention, which provides that a reservation is considered to have been accepted in the absence of an objection to it, does not provide that such a silence should have for effect the acceptance of an impermissible reservation. Does the solution adopted for late reservations, which the Commission drew upon in drafting this directive, apply as well to impermissible reservations? In the case of late reservations, it is only the reservation's characteristic of lateness that is "cured" by the tacit acceptance of the Parties. Could a late reservation that was materially impermissible also be deemed permissible by such tacit consent?

3. This proposed guideline raises another fundamental question. The proposed procedure would also permit the material alteration of the treaty itself, by means of the treaty reservation mechanism, as recognized in the commentary.[1] Switzerland doubts whether it would be appropriate to create, within a reservation system that is already complex, a new amendment procedure applicable to all treaties. Would it not be preferable, especially for purposes of legal security, for the Parties wishing to modify a treaty to be constrained to follow the paths provided in the final clauses of the treaty itself?

4. Finally, the absence of a deadline for objections raises many questions and could put the depositary in a very difficult position. In addition to increasing the burden on the depositary, the proposed procedure would result in the depositary (and by extension all other Parties) having to wait for a long time, not to say indefinitely, to find out if the reservation had been rendered permissible or not.

5. Switzerland is therefore of the view that there are still several issues to be clarified before committing to the principle that an impermissible reservation can be deemed permissible by tacit acceptance, whether collectively or with the artifices provided under directive 3.3.3. At the very least, the problem of the absence of a deadline for objections must be resolved.

[1] See, for example, pp. 52–53, paras. (8) and (11) (*Yearbook … 2010*, vol. II (Part Two)).

United Kingdom

This guideline provides for the possibility of an impermissible reservation being deemed permissible if no contracting State objects to it. The United Kingdom does not think that a lack of objections can in fact cure the nullity of an impermissible reservation, and we note that the commentary suggests that in any event such a lack of objection would not prevent the assessment of the permissibility of the reservation by a treaty monitoring body or ICJ. It would seem therefore that this guideline can, at most, only set up a presumption, as a matter of practice, that in the absence of objection by any contracting party to an impermissible reservation, the reserving party should be considered a party to the treaty with the benefit of its reservation. The United Kingdom does not agree with this. The guideline also seems at odds with guideline 3.3.2 which confirms that acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation. Nor does it seem reconcilable with the suggestion noted in the commentary to guideline 4.5.1[1] that the 12-month period for objections set out in article 20, paragraph 5, of the Vienna Convention is not applicable in relation to invalid reservations. The United Kingdom believes that there needs to be greater consistency in the treatment of nullity of invalid reservations in the guidelines.

[1] *Yearbook … 2010*, vol. II (Part Two), p. 108, para. (12) of the commentary.

United States

1. Proposed guideline 3.3.3 provides that a reservation that is impermissible (prohibited by the treaty or incompatible with its object and purpose), "shall be deemed permissible" if no party objects to it after having been expressly informed of its invalidity by the depositary at the request of a party. The theory behind this guideline, the commentary explains, is that such tacit acceptance of the reservation can constitute a subsequent agreement among the parties modifying the original treaty and enabling the particular reservation to be made.

2. There are two points worth noting regarding the guideline's approach. First, the practicality of this guideline is questionable. The circumstances under which another State would ask the depositary to bring attention to the fact that the reserving State's reservation is invalid, but not object to it, are not apparent. The commentary cites as State practice the unanimous acceptance by parties to the Covenant of the League of Nations of a neutrality reservation by Switzerland despite the prohibition on reservations in the Covenant.[1] However, the commentary provides no indication that this acceptance occurred according to the process envisioned by guideline 3.3.3.

3. Second, and more importantly, if a subsequent agreement can be made among the parties through a tacit acceptance of the invalid reservation in order to "deem" the reservation permissible, it appears as though this should be true regardless of whether the depositary had separately circulated a second notice at the request of a contracting State indicating that the reservation is invalid. In other words, the logic of this guideline appears to lead to the conclusion that any reservation that is invalid, which has been circulated and not objected to by the parties, has been "collectively accepted" and thus "shall be deemed permissible". The Commission's commentary moreover fails to support the distinction it advocates in its guidelines. The commentary rejects the contention that an invalid reservation can be deemed permissible if no parties object to it after an initial depositary notice on the grounds that (*a*) silence in the first instance does not mean that a State is taking a position on the permissibility of the reservation, and (*b*) monitoring bodies are still able to assess the permissibility of the reservation.[2] Yet in justifying why the same invalid reservation may be "deemed" permissible after a second depositary notice, the commentary favourably cites the same factors. It relies on the absence of objections after a second notice as evidence of unanimous acceptance of the reservation. Further, it later explains that reservations addressed by guideline 3.3.3 are "deemed" permissible rather than made permissible, in part because competent monitoring bodies can assess such a reservation later in time. In short, if the reservations contemplated by guideline 3.3.3 are only deemed permissible and are still "impermissible in principle", it appears that such a rationale should apply to any reservation that is suspected of being invalid, not just those reservations that are subject to a second depositary notice.[3] 4. See also the observations made concerning guideline 3.4.1, below.

[1] *Yearbook … 2010*, vol. II (Part Two), p. 52. para. (6) of the commentary.

[2] See *ibid.*, para. (5).

[3] The commentary raises a related issue as well. If the legal theory underlying this proposal is that the parties have agreed, at least tacitly, to a subsequent amendment modifying the original treaty, then it is not clear why the reservation would continue to be "impermissible in principle". Rather, amending the treaty and tacitly accepting the reservation should cause the original restrictions on making such a reservation, i.e. the restrictions that would make a reservation impermissible, to fall away.

Guideline 3.4.1 (*Permissibility of the acceptance of a reservation*)

Australia

See the observations made in respect of guideline 3.3.3, above.

France

1. France has misgivings about this guideline. The wording suggests the possibility that the acceptance of a "non-permissible" reservation may itself be "non-permissible", but that would not always be the case. Based on the purely objective logic of "permissibility" used in this article—about which France continues to have very serious doubts—if the reservation is "non-permissible", should its acceptance not also be automatically "non-permissible"? In reality, the question should not be framed in these terms, but rather in terms of the effects that the acceptance should be deemed to produce. It is difficult to understand the justification for asserting that the express acceptance of a non-permissible reservation is "non-permissible". In that case, why should it not be said that implicit acceptance of a "non-permissible" reservation is also "non-permissible"? Nonetheless, the crux of the matter is that to affirm that an acceptance, whether express or not, of a "non-permissible" reservation is also "non-permissible" would directly undermine the ability of States, even collectively, to accept a reservation that some might deem non-permissible.

2. As regards the connection between guidelines 3.3.3 and 3.4.1, it is strange that the consequences of a collective acceptance of a non-permissible reservation are not taken into account in guideline 3.4.1. Thus, individual acceptance of a "non-permissible" reservation may itself be "non-permissible", but this would not always be the case, depending on whether this acceptance is express or tacit. Similarly, a "non-permissible" reservation could be "deemed to be permissible" if accepted by all the States. In this regard, it is difficult to understand justification of the affirmation that the express acceptance of a "non-permissible" reservation is "non-permissible". Does not such a statement undermine the possibility for States, albeit only collectively, to accept a reservation said to be "non-permissible"? As for this latter possibility, does not it also run directly counter to the purely objective logic of the concept of permissibility retained here and regarding which, incidentally, France still has misgivings?

Germany

See the observations made in respect of guideline 4.5.1, below.

United States

To the extent that 3.3.3 remains in the guidelines, the United States believes that its relationship to guideline 3.4.1 may merit further clarification. As discussed above, guideline 3.3.3 permits invalid reservations to be "deemed permissible" when no parties object to the reservation after a second notice from the depositary. Guideline 3.4.1 in turn provides that the express acceptance of an impermissible reservation is itself impermissible. The commentary leaves unclear whether an express acceptance could have some legitimate effects on the later assessment of a reservation's permissibility.[1] To the extent a competent third party is charged with assessing

[1] See *Yearbook … 2010*, vol. II (Part Two), pp. 53–54, commentary to guideline 3.4.1.

permissibility, it seems that such State practice towards the subject reservation should be taken into consideration. Also, the United States would like to better understand the legal theory underlying guideline 3.4.1. The commentary reaffirms that collective tacit acceptance creates agreement among the parties to modify the treaty, but article 41, paragraph 1 of the Vienna Convention also permits two parties to modify the treaty as between themselves. While the Commission may believe that express acceptance of an impermissible reservation would fail to meet the requirements of article 41, it would be helpful to be able to understand the Commission's analysis in this regard.

Guideline 3.4.2 (*Permissibility of an objection to a reservation*)

France

France sees little merit in subjecting objections to conditions for permissibility. The real problem lies in the effects of reservations and objections. Objections with so-called "intermediate effect" give rise to special problems, since they purport not only to exclude the effects sought by the reserving State, but also to modify the effect of other provisions of the treaty. In this regard, the question of the compatibility of the modification with the object and purpose of the treaty may arise. The analysis of practice in the matter would have to be approved, however. It demonstrates that the treaty provisions which the objecting State seeks to modify often are closely related to the provisions to which the reservation applies. The practice in respect of objections with intermediate effect has developed in a very unique context. Other scenarios involving objections could also be envisaged: the reserving State may consider that the treaty provisions that the objecting State seeks to modify are not closely related to the reservation, or are even contrary to the object and purpose of the treaty, and may oppose the objection. Although this guideline does not resolve the question of the effects that such objections might produce, France considers it useful to emphasize that a State should not be able to take advantage of an objection to a reservation which it has formulated outside the allowable time period for formulating reservations to modify other provisions of the treaty which bear little or no relation to the provisions to which the reservation applies.

Guideline 3.5 (*Permissibility of an interpretative declaration*)

France

For France, the assertion that a State "may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty" appears sufficient. On the one hand, the reference to peremptory norms of general international law (*jus cogens*) raises the issue of the scope of such a notion, the content of which is not defined and remains to be clarified. On the other hand, it appears that little more could be said about interpretative declarations and reactions to such declarations under the heading of permissibility; the subject has more to do with the specifics of the execution and implementation of treaty obligations, with all the attendant specificities in international relations, than with an objective fact that would govern the introduction and formulation of these obligations.

[Guidelines 3.5.2 (*Conditions for the permissibility of a conditional interpretative declaration*) and 3.5.3 (*Competence to assess the permissibility of a conditional interpretative declaration*)][1]

France

See the comments on guideline 2.4.5, above.

Portugal

One should be aware of the unclear legal nature of conditional interpretative declarations, which may bring uncertainty to the analysis, thus harming the "reservations dialogue" which should be carefully preserved. Portugal would favour further comprehensive analysis of this matter in order to clearly establish the legal nature of conditional interpretative declarations as well as to identify the legal effects and procedures associated with it and also to decide on the opportunity to deal with them in this context. Portugal took note that the Commission's report still mentions guideline 2.9.10 (Reactions to conditional interpretative declarations) within brackets.

United States

One of the substantive concerns of the United States relates to the treatment of interpretative declarations, and in particular conditional interpretative declarations. Regarding interpretative declarations generally, the United States does not support the creation of a rigid structure along the lines of what has been proposed, as it believes it is likely to undermine the flexibility with which such declarations are currently employed by States. Further, with regard to conditional interpretative declarations, which already have been the subject of considerable debate, the United States notes that guidelines 3.5.2 and 3.5.3 address this issue by placing the entire issue of conditional interpretative declarations under the legal regime of reservations. The United States continues to have serious concerns regarding this treatment. If the content of a conditional interpretative declaration purports to modify the treaty's legal effects with regard to the declarant then it is a reservation. If the content of a conditional interpretative declaration merely clarifies a provision's meaning, then it cannot be a reservation, regardless of whether it is conditional. The United States disagrees with the view that an interpretative declaration that would not otherwise qualify as a reservation could be considered a reservation simply because the declarant makes its consent to be bound by the treaty subject to the proposed interpretation. Subjecting conditional interpretative declarations, regardless of whether they are in fact reservations, to a reservations framework is inappropriate and could lead to overly restrictive treatment of such issues as temporal limits for formulation, conditions of form, and subsequent reactions regarding such declarations.

[1] The guidelines on conditional interpretative declarations have been placed by the Commission in square brackets, pending a final determination by the Commission on whether the legal regime of such declarations entirely follows that of reservations.

Guideline 3.6 (*Permissibility of reactions to interpretative declarations*)

France

With regard to the consequences of an interpretative declaration for a State which expressly approves or opposes it, a general reference to customary rules on the interpretation of treaties should be sufficient. Generally speaking, reactions to interpretative declarations cannot be straitjacketed in formal or substantive rules. Except in cases where one or several other contracting States reclassify an interpretative declaration as a reservation, which shifts the debate towards the effects of reservations, there is an inherent flexibility in the system of interpretative declarations and the reactions that they produce, in accordance with the essential role played in the life of a treaty by the intention of the parties and their interpretation of the treaty.

Portugal

1. As already stated in its comments on guideline 2.9.1 (Approval of an interpretative declaration), in Portugal's view the word "approval" has a specific legal meaning that is not coherent with the matter being dealt with. It could even be misleading in suggesting that an interpretative declaration may have to fulfil the same domestic legal requirements for the formulation of a reservation.

2. Portugal would welcome a clearer explanation for the use of this term to be included in the commentary to guideline 2.9.1.

Guideline 3.6.1 (*Permissibility of approvals of interpretative declarations*)

France

See the comments on guideline 3.6, above.

Guideline 3.6.2 (*Permissibility of oppositions to interpretative declarations*)

France

See the comments on guideline 3.6, above.

Section 4 (*Legal effects of reservations and interpretative declarations*)

France

France considers that a clear distinction should be drawn between the effect of interpretative declarations and that of reservations, and that the distinction should be borne in mind when considering the question of reactions to declarations and reservations and their respective effects.

Guideline 4.1 (*Establishment of a reservation with regard to another State or organization*)

Austria

The procedure concerning the establishment of reservations as provided in guideline 4.1 cannot relate to reservations that are explicitly authorized by the treaty as defined in guideline 4.1.1. Accordingly, guideline 4.1 needs a clarification to this effect.

France

See the comments on section 3, above, and guideline 4.2.1, below.

Section 4.2 (*Effects of an established reservation*)

Australia

Australia notes that section 4.2 builds upon the regime of the Vienna Conventions, particularly article 20, paragraph 4 (*c*) of the 1969 Vienna Convention, and seeks to provide some further certainty on when a reserving State may be considered among the contracting parties.

Bangladesh

The guidelines on the effects of an established reservation (section 4.2) are logical and based on actual State practices and understanding. It should not be difficult for any party to follow these guidelines in order to apply the relevant provisions of the Conventions.

Guideline 4.2.1 (*Status of the author of an established reservation*)

Australia

The effect of this guideline is that the author of a reservation does not become a contracting party until at least one other contracting State has accepted the reservation either expressly or tacitly (through the expiration of the 12-month time period in guidelines 2.6.13 and 2.8.1). At the same time, the guidelines could define with greater precision the status of the reserving State during the period between the formulation of its reservation, and up to and in the event of its reservation being established.

El Salvador

1. As can be seen, this guideline is based on the provisions of article 20, paragraph 4, of the 1969 Vienna Convention, which sets out a general rule that:

> (*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*) An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
>
> (*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 of the contracting States has accepted the reservation.

2. In practice, this provision has not been applied uniformly, a fact which created considerable difficulty for the Commission in taking a specific stance as to the status of the author of an established reservation. Nonetheless, it should be acknowledged that although the final formulation of the guideline is based on the Vienna Convention, it does not merely repeat the language of that Convention, but adopts a broader approach by referring to the "establishment of a reservation", thereby, as the Commission pointed out, covering situations in which reservations do not require acceptance as well as those in which they do.

3. It is also worth noting that the language concerning the status of the author of a reservation has been reformulated, such that the author is classified as a "contracting" entity, in general terms, and a distinction is drawn as to the effects of the reservation depending on whether the treaty has entered into force or not. In that connection, a State will be classified as a "contracting" State when the treaty has not yet entered into force, and a "party"—as originally set out in the Vienna Convention—when the treaty has entered into force.

France

The conditions for the entry into force of the agreement in respect of the reserving State or organization, envisaged in guidelines 4.2.1 to 4.2.3, need to be clarified. Article 2, paragraph 1 (*f*), of the 1969 Vienna Convention provides:

> "Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.

In its current formulation, guideline 4.2.1 appears to contradict this provision, since it implies that a reserving State does not become a contracting State until its reservation is established (in other words, that it is valid and permissible and has been accepted within the meaning of guideline 4.1). France has serious doubts about this provision. The establishment of a reservation affects the applicability of the treaty only between the reserving State and the accepting State; it has no effect on the entry into force of the treaty. The system of reservations, acceptances and objections is subject to the rules of treaty law, the legal technicality of which is illustrated by the Commission's work.

Portugal

1. In Portugal's view, the Guide could provide a more precise definition of the moment when the author becomes a contracting State or organization. Should that moment coincide with the establishment or with the formulation of the reservation? In other words, is there a retroactivity of effects to the earlier moment of formulation of the reservation? These are some questions that may arise in daily practice and could receive clearer guidance from the commentaries.

2. See also the observations made in respect of guideline 4.2.2, below.

Guideline 4.2.2 (*Effect of the establishment of a reservation on the entry into force of a treaty*)

Australia

As noted by the Commission, a divergent practice exists concerning the practice adopted by the Secretary-General, in his capacity as depositary of multilateral treaties, whereby all States that have deposited instruments (whether or not accompanied by reservations) are included in the number of instruments required for entry into force. States retain the discretion to draw their own legal consequences from any reservations, including whether or not the treaty enters into force between itself and the reserving State. To avoid further divergent practice and with a view to providing further certainty, the Commission could adopt a view on the practice taken by the Secretary-General.

El Salvador

1. This guideline is similar to the rule set out above in guideline 4.2.1, but is formulated here for the specific case of a treaty which has not yet entered into force.

2. In the view of El Salvador, the most significant part of guideline 4.2.2 is paragraph 2, which recognizes the common practice adopted by depositaries to give effect to the final deposit of the instrument of ratification or accession containing a reservation before any other State has accepted the reservation, without giving consideration to the validity or invalidity of the reservation. Adapting this guideline to reality is therefore a highly important element which reinforces a well-established and well-accepted practice among States and international organizations.

France

See the comments on guideline 4.2.1, above.

Portugal

1. As regards guideline 4.2.2, the 1969 and 1986 Vienna Conventions both state that the author of a reservation does not become a contracting State or organization until at least one other contracting State or contracting organization accepts the reservation, either expressly or tacitly. That could represent a 12-month delay. However, the depository practice often does not go in this direction. For instance, the Secretary-General of the United Nations does not wait for any acceptance to be received before accepting the definitive deposit of an instrument of ratification or accession accompanied by a reservation.[1]

2. There are other specific examples of divergent practice of depositaries regarding reservations that can be provided. For instance, Portugal submitted its instrument of accession to the Convention on the privileges and immunities of the specialized agencies, adopted in New York on 21 November 1947, for deposit with the Secretary-General on 20 March 2007, formulating a reservation to section 19.B (on tax exemptions) of the Convention. However, on 24 April 2007 the depositary notified that in accordance with "established practice", the instrument would only be deposited with the Secretary-General upon receipt of the approval of the reservation by the concerned specialized agencies. The deposit of the instrument of accession was suspended, thus lacking the last international act necessary for Portugal to become bound by the Convention. However, the Secretary-General is guided in the performance of depository functions mainly by relevant provisions of the Convention, customary international law and article 77 of the 1969 Vienna Convention. Thus, the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* is not a source for the performance of depository functions by the Secretary-General, but rather a relevant record of practice. The Guide to Practice itself states that the permissibility of reservations may be assessed only by contracting States or contracting organizations, dispute settlement bodies

[1] See *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1) (United Nations publication, Sales No. E.94.V.15).

or treaty monitoring bodies. Neither the depositary nor the specialized agencies are included in any of those categories.

3. These observations intend to underline that the guidelines could indeed take a stance on the correctness of the depository practice (contrary to the intention of the Commission as stated in paragraph (11) of the commentary to guideline 4.2.1[2]). It would be important not to void the effects of the Vienna Conventions in favour of divergent practices.

4. See also the observations made in relation to guideline 4.2.1, above.

[2] *Yearbook … 2010*, vol. II (Part Two), p. 77.

Guideline 4.2.3 (*Effect of the establishment of a reservation on the status of the author as a party to the treaty*)

EL SALVADOR

This guideline, which indicates the establishment of treaty relations between the author of a reservation and the State that has accepted it, has been recognized on several occasions by all special rapporteurs, from J. L. Brierly to Alain Pellet. This is why the Commission has taken the view that it makes good sense. Given the exhaustiveness of the Guide to Practice, its inclusion stands as acknowledgement of a basic principle in the area of reservations.

FRANCE

See the comments on guideline 4.2.1, above.

Guideline 4.2.4 (*Effect of an established reservation on treaty relations*)

EL SALVADOR

While El Salvador does not see the need to make any formal or substantive comments concerning this guideline, it recognizes the wisdom of including in the guideline other elements which are not found in the Vienna Conventions. This helps to improve understanding of the effects of reservations on treaty relations, including consideration of reservations with exclusionary effects and their corresponding contraregularity effect; the stipulation that a reservation does not modify the provisions of a treaty, except its legal effects; and recognition that these effects could apply not only to certain provisions of the treaty, but also to the treaty as a whole in respect of certain aspects.

Guideline 4.2.5 (*Non-reciprocal application of obligations to which a reservation relates*)

EL SALVADOR

1. This guideline recognizes that the principle of reciprocity is not absolute, based on an increasingly well-established trend in legal writings and jurisprudence, which has determined that not all treaties involve the exchange of obligations between States. The clearest example of this exception is human rights treaties, which, in contrast to other types of treaty, are primarily intended to benefit persons within their jurisdiction.

2. The view has been expressed that the current system of reservations is entirely inadequate to treaties whose ultimate beneficiaries are human beings, not Contracting Parties.[1] ICJ said much the same over half a century ago in its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pointing out:

> The contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[2]

3. Therefore, in view of the importance of recognizing the *sui generis* nature of human rights treaties, and considering that, with regard to the issue of reservations, the Commission does not intend to draft a Convention, but rather a Guide to Practice for illustrative purposes, El Salvador would propose the inclusion of an explicit reference to such treaties in this guideline, as an example not intended to be exhaustive. As the Commission pertinently indicates in its report:

> Reciprocity is also absent from treaties establishing obligations owed to the community of contracting States. Examples can be found in treaties on commodities, in environmental protection treaties, in some demilitarization or disarmament treaties and also in international private law treaties providing for uniform law.[3]

4. Furthermore, it would be worth considering the inclusion in guideline 3.1.12, on reservations to human rights treaties, of a direct reference to the guideline in question, which would successfully provide explicit recognition of the non-reciprocal application of obligations in human rights treaties. Such recognition, while not intended to minimize the non-reciprocal application of other treaties, is needed for the special case of human rights treaties, given the emergence of both regional and international human rights treaties, which, despite signifying a momentous achievement in the protection of the individual with regard to State power, are regrettably often attended by declarations by some States that modify or annul a basic right recognized in the treaty, or that render their fulfilment of the treaty contingent on the actions of another State, with the intention of protecting their own interests rather than those of the persons under their jurisdiction.

REPUBLIC OF KOREA

Regarding guideline 4.2.5, it is better to exemplify feasible cases to which guideline 4.2.5 can be applied by including them in the commentary of the Commission on this guideline. Guideline 4.2.5 is an exception to

[1] Inter-American Court of Human Rights, *Blake v. Guatemala* (reparations), *Series C*, No. 48, 22 January 1999, Separate opinion of Judge Cançado Trindade, para. 15.

[2] *I.C.J. Reports 1951*, p. 23.

[3] *Yearbook … 2010*, vol. II (Part Two), para. (6) of the commentary to guideline 4.2.5.

guideline 4.2.4. The exceptional clause should be provided in a restrictive and concrete manner. However, because of ambiguous expressions in guideline 4.2.5 such as "nature of the obligations", "object and purpose of the treaty", and "content of the reservation", it is uncertain whether the reservation cannot be applied to other parties of the treaty. Moreover, this uncertainty leads to legal instability concerning the application of reservations.

Guideline 4.3 (*Effect of an objection to a valid reservation*)

United States

Guideline 4.3 provides that "unless a reservation has been established with regard to an objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or organization". This guideline appears to reaffirm the relatively straightforward proposition that an objection counters a reservation's intended effects. However, the initial clause in this guideline seems unnecessary and could cause confusion as to the operation of the guidelines. If a reservation must be accepted by a State to be established with regard to that State, as guideline 4.1 expressly provides, then it would not seem possible for a reservation to have been established *vis-à-vis* an objecting State. Thus, the United States would recommend the deletion of the initial clause of guideline 4.3 or that the commentary further explain the intent behind this clause.

Guideline 4.3.1 (*Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation*)

France

According to this guideline, an objection to a "valid" reservation by a contracting State does not preclude the entry into force of the treaty as between the objecting State and the reserving State. In reality, France considers that the issue is not one of effects on the entry into force of the treaty, but of effects on the applicability of the treaty as between the reserving State and the objecting State.

Guideline 4.4.3 (*Absence of effect on a peremptory norm of general international law* (jus cogens))

France

The reference to peremptory norms of general international law (*jus cogens*) raises the issue of the scope of that notion, the content of which has yet to be determined.

Section 4.5 (*Consequences of an invalid reservation*)

Australia

1. Australia welcomes the formulation of section 4.5. This will provide important clarity and guidance for States given that this is a significant lacuna within the treaty regime established by the Vienna Conventions. Australia agrees with the objective regime established by guidelines 4.5.1 and 4.5.3, whereby reservations that do not meet the conditions of formal validity and permissibility are null and void, independent from the reactions of other contracting States. This is consistent with the conditions set out in the Vienna Conventions and builds on existing State practice.

2. However, Australia is particularly concerned with the current rebuttable presumption in guideline 4.5.2, namely that a reserving State will become a party to the treaty without the benefit of the invalid reservation absent a contrary intention.

3. See also the observations made in respect of guideline 4.5.2, below.

Bangladesh

1. The effects of an invalid reservation are more problematic than the question addressed in section 4.2 of the Guide to Practice. The provisions of the Convention are not very clear on this. Therefore, the guidelines of the Commission are more useful for understanding the impact and consequences of the invalid reservations. The guidelines have been drafted based on serious research and analysis of numerous State practices and views of authoritative individuals and institutions. It is quite understandable and acceptable that the main thrust of the guidelines is not towards excluding the reservation-making parties from treaty relations but to limit the relations. This position is closer to the views and approaches of the overwhelming majority of the States.

2. The provision for reservations promotes the goal of maximum participation of the States in the multilateral treaties. However, this must not undermine the very object and essence of the treaty. While the decision to make reservation rests with the reservation-making State, other States' reactions and responses are immensely significant for the establishment of treaty relations with the reserving States, this being especially important in the cases of impermissible and invalid reservation and any special mention about reservations in the text of the treaty. The guidelines of the Commission are based on the rational understanding of the spirit and idea of the provisions on reservations in the Conventions. To follow these guidelines would mean to promote a better realization of the objectives of the treaties and healthy treaty relations.

Finland

1. According to article 19 of the 1969 Vienna Convention, States may not make a reservation to a treaty when such a reservation is prohibited by the treaty; or when the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or if, in any other case, the reservation is incompatible with the object and purpose of the treaty.

2. But what happens when a State puts forward an impermissible reservation? As the Special Rapporteur has correctly argued, we must distinguish between two analytically separate questions: (*a*) what are the legal effects, if any, of an impermissible reservation, and (*b*) what are the consequences of the act of making an impermissible reservation on the existence or non-existence of a contractual relationship between the reserving State and others.

3. See also the observations made below in respect of guidelines 4.5.1, 4.5.2 and 4.5.3.

Guideline 4.5.1 (*Nullity of an invalid reservation*)

Australia

See the observations made in respect of section 4.5, above.

El Salvador

1. Despite the fact that this guideline and the section on invalid reservations as a whole constitute a critical aspect of the issue of reservations, the consequences of an invalid reservation were not stipulated in the Vienna Conventions, creating a gap that caused serious practical problems. While the assumption existed that an invalid reservation could not have the same effects as a valid reservation, there was no consistent position as to how such effects should be handled.

2. Thus, the Guide to Practice in the view of El Salvador rightly indicates that the consequences of this type of reservation should be governed by the objective criterion of whether a reservation is "null and void", implying that the reservation's consequences, or lack thereof, are not governed by the opinions of States or international organizations.

3. See also the observations made in respect of guideline 4.5.3, below.

Finland

1. As to the legal effects of an impermissible reservation, the Vienna Convention itself offers no specific guidance. Article 21 of the Convention explicitly deals with permissible reservations only. However, Finland finds it easy to agree with the argumentation of the Commission that an impermissible reservation, as well as a reservation which does not fulfil the criteria of formal validity as codified in article 23 of the Convention, must be considered null and void. This is a consequence of the impermissibility of the reservation by definition; as the Commission notes, "nullity" is the defining characteristic of a legal act which would have certain legal effects but for the lack of its conformity with formal or substantial requirements placed upon such acts.

2. A reservation, again by definition, is a legal act which purports to have the legal effect of modifying the extent or content of an obligation a treaty would, in the absence of such a reservation, place upon the State. It would seem reasonable, then, to argue that when a reservation does not conform with the substantial requirements (as listed in article 19 of the Vienna Convention) or with the formal requirements (article 23 of the same) placed upon reservations as legal acts, the reservation is null and void. The consequence of this nullity is that the reservation is incapable of having the legal effects it purports to have, i.e. to alter the extent or content of the reserving State's contractual obligations.

3. Finland, therefore, wishes to express its continued support for guideline 4.5.1.

France

1. In practice, when faced with an "invalid" reservation, States may stipulate in their objection that the reservation is not opposable to them but still agree to recognize the existence of treaty relations with the reserving State. This midway position may seem paradoxical: how could a State object to a reservation that is incompatible with the object and purpose of the treaty—the essential elements that constitute its *raison d'être*—without concluding that the treaty cannot be binding on it in its relations with the reserving State? The paradox may be less profound than it appears; the objecting State may consider that while the reservation in question may undermine the object and purpose of the treaty, it will not prevent the application of important provisions as between itself and the reserving State.

2. It may also hope that its objection, as a sign of its opposition, will allow it to engage in a "reservations dialogue" and will encourage the reserving State to reconsider the necessity or the content of its reservation. It appears, however, that the objecting State cannot simply ignore the reservation and act as if it had never been formulated. Such an objection would create the so-called "super maximum effect", since it would allow for the application of the treaty as a whole without regard to the fact that a reservation has been entered, and would compromise the basic principle of consensus underlying the law of treaties.

3. For France, it is possible, in accordance with both the Vienna Convention and practice, that States that have objected to a reservation they consider incompatible with the object and purpose of the treaty (or prohibited by a reservation clause) would not oppose the entry into force of the treaty between them and the reserving State. The scenario according to which a reservation incompatible with the object and purpose of the treaty could completely invalidate the consent of the reserving State to be bound by the treaty seems to run counter to both the will expressed by the reserving State and the freedom of the objecting State to choose whether the treaty should enter into force between itself and the reserving State. The latter may well be bound by some important provisions of the treaty, even though it has formulated a reservation to other provisions relating to the general thrust of the treaty, and hence incompatible with its object and purpose. France's practice is that, when it objects to a reservation prohibited by the treaty but does not oppose the entry into force of the treaty *vis-à-vis* the reserving State, it respects the intention expressed by that State. Moreover, in expressly recognizing that the objection does not prevent the entry into force of the treaty—which is not strictly necessary under the system envisaged by the Vienna Convention—the State means to emphasize the importance of the treaty relationship thus established and to contribute to the "reservations dialogue". It is true that the effects of such an entry into force may be extremely limited in practice, particularly for so-called "normative" treaties or in cases where the reservation is so general that few of the treaty's provisions have been truly accepted by the reserving State. France still believes that, unsatisfactory as such a solution might sometimes be, it is the one that best respects the characteristics of the international legal system and the only one to offer a practical response to questions that might prove to be insoluble in theory. A reservation might be

"invalid", but the law of treaties can neither deprive a reservation of all its effects by recognizing the possibility of objections with "super-maximum" effect, nor deprive the consent of a State to be bound by a treaty of any scope on the grounds that its reservation is incompatible with the treaty from the moment that the objecting State consents to maintain a treaty relationship with it.

Germany

1. The following comments focus on what is probably the most important aspect of the Commission's Guide to Practice, the Commission's conclusions with regard to the permissibility of reservations and, in particular, to the legal effects and consequences of non-permissible reservations on treaty relations. The issue has been much discussed by legal experts. This issue of international law remains unresolved.

2. With regard to the question of the permissibility of a reservation, the guidelines propose to settle an ongoing legal debate.

3. Guideline 4.5.1 establishes that "a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect". Guideline 3.3.2 clarifies that "acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation". According to guideline 3.4.1, "the express acceptance of an impermissible reservation is itself impermissible". Guideline 3.3 finally makes it clear that the legal consequences of an impermissible reservation are the same, whatever the reason for such impermissibility. The guidelines specify impermissibility with guideline 3.1 being a verbatim quote of article 19 of the Vienna Convention.

4. The relationship of the different grounds for impermissibility of a reservation as defined in article 19 of the Vienna Convention and the consequences thereof is the object of discussion in legal literature and a matter of concern for any pragmatic approach by contracting States. It is the criterion of impermissibility under article 19 (*c*) of the Vienna Convention (guideline 3.1 (*c*)), which is at the core of this discussion. Incompatibility with the object and purpose of a treaty is a complex matter and generally more difficult to assess than the other criteria for impermissibility established in article 19 of the Vienna Convention. And while the compatibility requirement in article 19 (*c*) of the Vienna Convention is an objective criterion, it is undisputed that it is up to the individual contracting States to assess—with possibly diverging results—whether a particular reservation meets the test or not. The difficulty of determining the compatibility or incompatibility of a reservation has led to a differentiated State approach to dealing with those reservations that do not meet the compatibility test. States still seem to be following the guidance of ICJ in its opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[1] when they—in finding that a particular reservation is incompatible with the object and purpose of a treaty—say so by objecting to the reservation, while others, that do not find such incompatibility, may expressly or tacitly accept it.

5. The Commission's guidelines as referred to above would represent a radical change in this approach, since it would leave no room for differing results of the compatibility test. How radical and problematic such a change in approach would be becomes clear when one takes a closer look at the Commission's conclusions with regard to the legal consequences of an impermissible reservation and its severability, and the resulting "positive presumption".

6. See also the observations made in relation to guideline 4.5.2, below.

Norway

Experience shows that the 1969 and 1986 Vienna Conventions have a number of lacunae and ambiguities to be found in their articles 20 and 21. Guideline 4.5.1, which concerns in part the nullity of an impermissible reservation, aims to fill one of the major gaps in the Vienna Conventions. It is firmly grounded in State practice and is, moreover, in line with the logic of the Vienna regime.

Portugal

Guideline 4.5.1 is important since it fills an existing gap in the Vienna Conventions. Another gap that the Commission could fill in relation to the latter is connected to the consequences of acts having nevertheless been performed in reliance on a null reservation.

Republic of Korea

Concerning guideline 4.5.1, the validity and permissibility of reservations should be evaluated by an independent administrative body. However, the author of the evaluation is none other than the author of the reservation. It is desirable that for each treaty, an impartial evaluator such as an implementation committee or a contracting parties meeting should be established, which can decide upon the validity and permissibility of reservations.

Guideline 4.5.2 (*Status of the author of an invalid reservation in relation to the treaty*)

Australia

1. Australia is particularly concerned with the current rebuttable presumption in guideline 4.5.2, namely that a reserving State will become a party to the treaty without the benefit of the invalid reservation absent a contrary intention. Notwithstanding the factors set out in guideline 4.5.2 for ascertaining that intention, Australia envisages practical difficulties for States other than the reserving State determining the extent of the reserving State's consent to be bound. This is particularly so in the absence of a third-party adjudicative body providing a determination that is binding for all the contracting States. This could lead to the situation whereby the reserving State considers its reservation valid, whereas an objecting State does not but nevertheless considers that the presumption applies, with the result that there would be no consensus as to whether the reserving State was bound to the treaty and, if so, whether the reservation applied. Consequently the presumption may be difficult to apply in practice and could lead to uncertainty among States in their treaty relations.

[1] *I.C.J. Reports 1951*, p. 24.

2. Australia would prefer a reversal of the presumption in guideline 4.5.2, whereby a reserving State would not be considered a party to the treaty unless it indicated to the contrary. This would ensure that the intention of the reserving State remains the key determinant as to whether it becomes a party to the treaty, provides greater certainty for States and preserves the voluntary nature of the regime of treaties. Reversing the presumption also appropriately leaves the responsibility for taking action with the reserving State—either to modify or withdraw its reservation to remove its inadmissibility, or to forgo becoming a party to the treaty. A further advantage of this approach enables objecting States to maintain a treaty relationship with the reserving State, even with the invalid reservation, rather than have no treaty relationship at all.

Austria

Guideline 4.5.2 is undoubtedly the heart of the matter of invalid reservations. According to this guideline the author of an invalid reservation becomes a party to the treaty without the benefit of the reservation, "unless a contrary intention of the said State or organization can be identified". Austria fully concurs with the general rule expressed in paragraph 1 of this guideline, but would suggest a further look into its exceptions. Austria is of the view that the intention of the author of the reservation cannot be ascertained from the list of factors contained in paragraph 2. To take just one example: how can subsequent reactions of other contracting States express or reflect the intention of the author of the reservation? Moreover, it is not clear who shall "identify" the author's intention as required in paragraph 1. These problems could be avoided simply by requiring that the author of the reservation clearly expresses his intention not to be bound if the reservation is null and void. Austria therefore proposes to delete the second paragraph of guideline 4.5.2 and replace the words "unless a contrary intention of the said State or organization can be identified" by the expression "unless the said State or organization expresses a contrary intention". Austria is of the view that it would not be appropriate to force the author of a reservation to become bound by the terms of a treaty when the reservation is null and void.

El Salvador

1. El Salvador expresses its support for the contents and phrasing of this guideline for the following reasons.

2. With regard to the status of the author of an invalid reservation, it is indisputable that the nullity of a reservation does not affect the consent of a State or an international organization to be bound by the treaty. The author of such a reservation is therefore fully subject to the treaty obligations and is considered a "party" to the treaty, or, if the treaty is not yet in force, a "contracting party".

3. This was precisely the position expressed by the European Court of Human Rights in *Belilos v. Switzerland*: "It is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration".[1] This position was subsequently reiterated in *Loizidou v. Turkey*.[2] At the regional level, the Inter-American Court of Human Rights continued that trend by indicating, in the case of *Hilaire v. Trinidad and Tobago*:

> Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American Convention, because this limitation is incompatible with the object and purpose of the Convention. Consequently, the Court considers that it must dismiss the second and third arguments in the preliminary objection submitted by the State insofar as they refer to the Court's jurisdiction.[3]

[1] ECHR, *Belilos v. Switzerland*, judgment of 29 April 1988, *Series A*, No. 132, para. 60: "In short, the declaration in question does not satisfy two of the requirements of Article 64 (art. 64) of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. Moreover, the Swiss Government recognised the Court's competence to determine the latter issue, which they argued before it. The Government's preliminary objection must therefore be rejected."

[2] ECHR, *Loizidou v. Turkey*, Preliminary Objections, judgment of 23 March 1995, *Series A*, No. 310, paras. 97 and 98:

> 97. The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Article 25 and 46 (art. 25, art. 46) declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.
>
> 98. It follows that the declarations of 28 January 1987 and 22 January 1990 under Articles 25 and 46 (art. 25, art. 46) contain valid acceptances of the competence of the Commission and Court.

[3] Inter-American Court of Human Rights, *Hilaire v. Trinidad and Tobago*, Preliminary Objections, judgment of 1 September 2001, *Series C*, No. 80, para. 98.

Finland

1. The fact that an impermissible reservation cannot have its intended legal effect does not as such determine whether the State or the international organization which has made the impermissible reservation becomes a party to the treaty in question. As the Commission points out, two opposite outcomes are consistent with the lack of legal effects of the reservation: either the reserving State or organization becomes a party to the treaty without benefiting from its reservation, in which case the reservation of course does not have its purported effect; or the State or organization does not become a party to the treaty at all, in which case the reservation also lacks its intended effects, since no treaty relation exists in the first place. The Vienna Convention is silent on this crucial matter.

2. It is well known that Finland, together with an increasing number of other States, has favoured what has been called the "severability" approach. As noted in the report of the Commission, an objection based on this approach would first acknowledge that the reservation is impermissible and then go on to state that the objection does not preclude the entry into force of the treaty between X and Y and that the treaty enters into force without Y benefiting from its reservation. Although in increasing use, not all States have adopted this approach—as evidenced in the Commission's report, some States prefer merely to state that the treaty in question will enter into force regardless of the objection, and say nothing about what effect the reservation

and the subsequent objection have on the extent and content of their treaty obligations, if any. As the Commission points out, however, these approaches seem to have little or no difference as to their ultimate outcome: surely a State using the latter formulation would not be of the opinion that, despite the objection and the impermissibility of the reservation itself, the reserving State has still in fact succeeded in modifying the treaty obligations in question.

3. The other solution would be to determine that in cases where a State makes an invalid reservation, it does not in fact become a party to the treaty at all. Most supporters of this approach would likely argue that any other solution would contradict the consensual foundation of treaty law: no State may become bound by contractual obligations against its will. There is no doubt that any solution to the problem at hand must respect this fundamental principle.

4. Indeed, any difference of opinion surrounding the subject matter of guideline 4.5.2 will surely not stem from disagreement as to this fundamental principle; rather, the question is what should be the legal presumption in cases where the actual intent of the reserving State or organization is unclear. There are, obviously, two alternative presumptions from which to choose: first, that in case of uncertainty, we should assume that any reservation is an integral part of that State's acceptance of the treaty obligations in question, and therefore, should the reservation be deemed not to have the desired effects, the State would not wish to be bound. The second possible presumption is, of course, the opposite one: that in the lack of clear evidence to the contrary, we presume that the State is willing to be bound nevertheless.

5. Some have argued that the second approach would make a mockery of the principle of consent and that it would in fact lessen States' interest in becoming parties to multilateral treaties for fear of inadvertently becoming bound by obligations that they would not voluntarily accept. The force of this argument is lessened, however, by the fact that the reserving State may easily refute this presumption by making it known that the reservation forms an integral part of its willingness to become a party to the treaty. On the whole, Finland fully agrees with the Commission that the second presumption will yield far superior practical benefits compared with the first one. The Commission explains these benefits in a laudable manner,[1] and draws deserved attention to the widespread State practice in support of this presumption; neither argument needs to be repeated here in detail. However, Finland wishes to make one additional point in favour of the second presumption: that of effectiveness.

6. Where a State makes to a multilateral treaty a reservation the permissibility of which can reasonably be questioned, the reservation inevitably leads to some degree of legal uncertainty with regard to the contractual relations of the reserving State and the States parties to the treaty. This uncertainty is, presumably, unwanted and harmful, so it is in the interest of the States parties to reduce this uncertainty the best they can. Finland is of the opinion that, other things being equal, the preferable solution to such an issue is to place the responsibility for the uncertainty on the party who can resolve it with the least effort, that is to say, most efficiently.

7. The generally accepted principle of consent means that the only relevant factor as to whether a State becomes bound by the treaty in case of an invalid reservation is its own intent; that is to say, whether its consent to be bound was, at the time it was given, conditional on the validity of its reservation. This being the case, the only entity capable of resolving the issue beyond any doubt is, in the absence of an outside arbitrator, the reserving State itself. It alone has access to its intentions, while others can only conjecture. Therefore, the most efficient solution is to place the responsibility for any uncertainty resulting from a potentially impermissible reservation on the reserving State.

8. To require the reserving State to make it clear when a reservation is a *sine qua non* of its consent, in order to avoid the risk of being bound by the entire treaty, would create a powerful incentive for States to produce more reasoned reservations, and therefore reduce future uncertainty.

9. For all these reasons, Finland remains firmly supportive of guideline 4.5.2 and is of the opinion that it is the best compromise available.

France

France reiterates the position it has expressed on many occasions as to the crucial importance of the principle of consensus underlying the law of treaties. It is not possible to compel a reserving State to comply with the provisions of a treaty without the benefit of its reservation, unless it has expressed a clear intention to that effect. In this respect, only the reserving State can clarify exactly how the reservation affects its consent to be bound by the treaty. It is difficult for France to imagine how a State other than the reserving State could assess the extent of the latter's consent.

Germany

1. The following comments focus on what is probably the most important aspect of the Commission's Guide to Practice, the Commission's conclusions with regard to the permissibility of reservations and, in particular, to the legal effects and consequences of non-permissible reservations on treaty relations. The issue has been much discussed by legal experts. This issue of international law remains unresolved.

2. Guideline 4.5.2 introduces a general presumption that—in case of an impermissible reservation—the reserving State becomes a party to the treaty without the benefit of the reservation that it has submitted unless there is clear indication that the State in question did not want to be bound by the treaty under these circumstances.

3. This positive presumption is based on the Commission's finding in guideline 4.5.1, stating that "a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect", and that it thus can be severed from a State's consent to be bound by a treaty.

[1] *Yearbook … 2010*, vol. II (Part Two).

4. The positive presumption represents, in Germany's view, a proposal for a new rule in international treaty law. It clearly goes beyond a mere guideline to existing practice within the framework of existing international law.

5. And while the Commission's proposal is an intriguing attempt to resolve the issue of the legal consequences of impermissible reservations which was not addressed by the Vienna Conventions, Germany is not convinced by the Commission's conclusions on this issue and would be hesitant if not opposed to introducing such a new rule in the guidelines.

6. It is Germany's position that the Commission's proposal of a positive presumption cannot be deduced from existing case law or State practice—certainly not as a general rule equally valid for all cases of reservations impermissible under article 19 of the Vienna Convention or with respect to all treaties.

7. State practice remains ambiguous in this area; it would be difficult to identify a consistent State approach even in the more specific field of human rights treaties.

8. Upon closer examination of the cases most often referred to in support of the Commission's proposal of the positive presumption (the *Belilos*[1] and *Loizidou*[2] cases before the European Court of Human Rights), it becomes clear that these need to be evaluated within their specific context, which is the Council of Europe: a rather close regional group of States sharing and upholding common social and political values, most prominently formulated in the European Convention on Human Rights. Its member States are willing to subject themselves to the scrutiny and authoritative interpretation of a mandatory judicial system that even allows for individual claims. In its decisions to consider member States bound to their contractual commitment without the benefit of their reservations, the Court refers to this "special character of the Convention as an instrument of European public order". It stresses "the consistent practice of the Contracting Parties" and the States' active participation within this system which imply "the inherent risk" (for a member State making a reservation) that "Convention organs might consider the reservation impermissible" and that it will be bound anyhow.

9. There may be other very special treaty settings or treaties of fundamental significance where similar conclusions as to the possibility of a positive presumption as suggested by the Commission in its guidelines may be drawn. However, it is Germany's position that this is not the case in general.

10. In Germany's view, in the case of an impermissible reservation it cannot be assumed that the State in question is then fully bound by a treaty. Such an interpretation would not take into account the State's evident intention that it does not intend to be fully bound.

11. Germany would like to express its concern that the proposed positive presumption in section 4.5 of the guidelines may actually harm treaty law development in the long run and could hamper contractual relations between States.

12. The Guide's proposed positive presumption claims that an impermissible reservation is devoid of legal effect (guideline 4.5.1) and that, as a result, the reserving State is considered a contracting party without the benefit of its reservation unless a contrary intention of the said State can be identified.

13. Germany fears that a broad positive presumption would make States more reluctant to adhere to treaties. Numerous States make reservations for constitutional reasons, such a reservation being a condition for parliamentary approval. These States, Germany included, would be forced—as a matter of routine—to expressly clarify that their consent to be bound by a treaty is dependent on their reservations. Chances are that over time most reservations would be accompanied by such a clarification. In case of the impermissibility of such a reservation, such a State thus would not become a party to the international agreement in question.

14. This gives rise to a number of questions and uncertainties: first, how to determine the impermissibility of a reservation in these cases, especially with regard to the compatibility test. The guidelines state the obvious in guideline 3.2 by allowing contracting States, dispute settlement bodies or treaty monitoring bodies to assess a reservation's permissibility. Among the contracting States, however—and this would not be unusual—there may exist diverging views in this regard. One objection alone, on the grounds that a reservation did not meet the compatibility test (article 19 (*c*) of the Vienna Convention), would suffice to cast doubt on the reserving State's status as a party to the treaty. Individual acceptance of the reservation by other States—tacitly or express—would and could not settle the matter, as acceptance of an impermissible reservation also is impermissible (guideline 3.3.2). An option might be to resort to the collective acceptance as proposed in guideline 3.3.3. That procedure, however, requires unanimity, which could be difficult to reach, considering the objection already made. The procedure also presupposes that the reservation is impermissible, which is the question under dispute. The matter of whether a reserving State had become a party to a treaty or not would need to be taken before a dispute settlement body in these cases. The individual States, or even a majority of them, would no longer be in a position to define the contractual relations for themselves and/or remedy the situation.

15. Whether a reserving State has become a Party to a treaty or not is of particular interest in cases where it is that State's consent to be bound which would allow the treaty to enter into force or not. Yet another matter is to consider the resulting implications for the treaty relations while the reservation is in limbo.

16. Germany is concerned that, instead of contributing to legal clarity, a general positive presumption as proposed in the guidelines would create uncertainty in treaty relations and in fact hamper the development of treaty

[1] ECHR, *Belilos v. Switzerland*, judgment of 29 April 1988, *Series A*, No. 132.

[2] ECHR, *Loizidou v. Turkey*, judgment of 23 March 1995, *Series A*, No. 310.

relations. States might refrain from making objections at all, for fear of the consequences, although they are entitled to making objections to reservations they do not wish to accept, whatever the reason.

17. Germany is fully aware that it is not offering a solution to the issue. However, at this point in time Germany is not willing to accept the solution offered by the Commission with regard to the impermissibility of a reservation and the consequences thereof as a rule under public international law.

Norway

Guideline 4.5.2 does not purport to identify and codify a consistent practice. Nor is it an attempt to generalize a specific European treaty context, based on Strasbourg standards, although the guidance should not run counter to it, in its specific context. Rather, it proposes a middle solution that takes into account existing sources and practices. It subtly bridges a divergence of views. It does so in a spirit of intellectual honesty, in seeking to promote legal certainty. A careful reading shows, moreover, that it does so in keeping with the logic of the Vienna regime. States will, on the basis of such guidance, be motivated to clarify their intentions, as appropriate, when issuing a reservation. A combination of factors combined with a rebuttable presumption may, at the same time, serve as a guide to authorities based on enhanced clarity. If relevant, they may express the premises for their consent to be bound.

Portugal

1. As regards guideline 4.5.2, Portugal tends to concur with the view that the nullity of a reservation also affects its author's consent to be bound by the treaty.

2. This conclusion derives from the Vienna Conventions in the sense of it stating that the author of a reservation does not become a contracting State or contracting organization until at least one other contracting State or organization accepts the reservation. The reservation is thus presumed to be an essential condition for the consent to be bound.

3. Therefore, the starting point should be the assumption that a treaty does not enter into force for the author of a null reservation. The principle of consent (and consequently intention) remains the cornerstone of this subject matter. In any case, we would arrive at a conclusion similar to the one proposed by the Commission. It would, however, be more consistent with the options taken in the Vienna Conventions.

Republic of Korea

Guideline 4.5.2 is mainly based upon the rulings of the European Court of Human Rights. However, the principle of separating the validity of a reservation and the contracting parties' status may not necessarily be applied to treaties other than those on human rights. Therefore, it is desirable to exemplify possible treaties that can follow the rulings of the European Court of Human Rights, even though these treaties are not characteristic of those on human rights.

Switzerland

1. Switzerland will focus its observations more briefly on proposed guideline 4.5.2, as follows.

2. The question of knowing whether the author of a reservation can be considered, when the reservation proves impermissible, as bound by the treaty without the benefit of the reservation, or if on the contrary that author must be considered as entirely unbound by the treaty, is one for which an answer is needed. It would be regrettable to allow it to remain unresolved simply because of the difficulty of the problem it presents.

3. It would seem indisputable that the intention of the author of the reservation must serve as the basis, and that this issue arises only in the event that such intention cannot be established. The converse argument that if the intention of the author of a reservation cannot be established, that author is not bound by the treaty, does not appear desirable and could even raise additional issues. Switzerland also wonders whether a solution could be found in maintaining the presumption of proposed guideline 4.5.2, but at the same time reducing the degree of plausibility required for considering that the intention of the reservation's author has been established. A guideline on the topic that included such a presumption would have, *inter alia*, the certain advantage, in the case of an impermissible reservation, of strongly encouraging the author of the reservation to reveal his intentions rather than staying silent or continuing to insist, without further explanation, on the validity of that reservation.

United Kingdom

1. In its comments at the Commission debate in 2010, the United Kingdom reiterated its long-standing view that if a State has made an invalid reservation, it has not validly expressed its consent to be bound and therefore treaty relations cannot arise. The United Kingdom committed to reflect on comments made by others during the debate and return to the issue with further views.

2. The issue of the status of an invalid reservation is central to the work of the Commission. In the view of the United Kingdom, the current situation arising from the "permissive" approach of the 1969 Vienna Convention has certain advantages in encouraging wider treaty participation. However, it also brings with it risks of divergences in practice and *opinio juris* between States and thus raises concerns as to the integrity of treaties and legal certainty. The United Kingdom is firmly of the view that the current guidelines offer an important opportunity to seek to resolve the ambiguities and uncertainties that may arise from the current situation, which will prove acceptable to all States.

3. The United Kingdom continues to believe that "strict" position previously espoused, most notably in our observations to the Human Rights Committee's general comment No. 24,[1] is *lex lata*. However, it accepts that this position is challenged by the practical difficulties as to where, when or by whom the impermissibility or

[1] Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), general comment No. 24, annex VI.

invalidity of a reservation is established. Invalidity cannot always be readily ascertained objectively, particularly where the doubt is whether the reservation is consistent with the object and purpose of the treaty.

4. While the United Kingdom commends the Commission for the skilful way in which, through guideline 4.5.2, it has tried to strike a compromise between the "strict" position espoused by, among others, the United Kingdom, and the "super-maximum" effect of invalid reservations, it maintains the concerns previously expressed on the issue. The "rebuttable presumption" as set out in the guideline contains what appears to be an important safeguard for the reserving State in that it can rebut the presumption if it can show a contrary intention. The result of such rebuttal would be that the reserving State simply does not become a party to the treaty. However, it is not clear what evidence will be sufficient to establish that "the reservation is deemed to be an essential condition for the author's consent to be bound by the treaty". The United Kingdom remains unconvinced by the non-exhaustive but ultimately restrictive factors set out in the guidelines. Would, for example, a simple statement in an instrument of ratification that a State consents to be bound subject to a certain reservation constitute sufficient evidence? If not, what would be the standard of assessment?

5. For the purposes of encouraging progressive development of practice in this area, and in the spirit of seeking to inject greater legal certainty as to the legal consequences of what the Special Rapporteur has described as the "reservations dialogue", the United Kingdom would therefore propose as an alternative to guideline 4.5.2 the following:

> "The reserving State or international organization must within 12 months of the making of an objection to a reservation on grounds of invalidity indicate expressly whether it either wishes to withdraw the reservation or its consent to be bound. In the absence of an express response, the reserving State or international organization will be considered to be a contracting State or a contracting organization without the benefit of the reservation."

6. In the case of an express response, this would be considered on a case-by-case basis. This proposal results in a better chance of clarity over treaty relations. It achieves a fair balance between the interests of the reserving and other States. It gives the author of the reservation an incentive to enter into a dialogue with the objecting State or international organization and revisit its reservation. It puts the onus on the author of the reservation to make clear its intention as to whether or not it wishes to be a party to the treaty if the reservation proves invalid. Finally, it gives the proponent of the reservation sufficient latitude to encourage it to consider remaining a party.

United States

1. The chief concern of the United States regarding the guidelines, which also was highlighted by a number of States during Sixth Committee discussions last year, relates to the consequences of making an invalid reservation that is not collectively accepted by the parties to a treaty. Guideline 4.5.2 provides that when an invalid reservation has been formulated, the reserving State is considered a party to the treaty without the benefit of the reservation, unless the reserving State has expressed a contrary intent. After having studied this provision and the related commentary more closely, the United States fundamentally disagrees with the conclusion reached by the Commission on this guideline.

2. In examining the Commission's reasoning more closely, the United States concurs with the statements made by both Germany and Hungary during the Sixth Committee that the Commission places far too much reliance on State practice and tribunal precedents that are limited both substantively and regionally. The tribunal precedents cited by the Commission come almost exclusively from the area of human rights[1] and, in terms of State practice, the Commission only appears to rely on a handful of European States that have lodged objections with so-called "super-maximum" effect.[2] Regardless of the character of other State practice, it is insufficient in the view of the United States to rely on limited practice in one area of international law and from one geographic region to propose such an important generally applicable guideline.

3. The commentary also too quickly rejects the opposite approach for dealing with invalid reservations. Namely, the commentary describes the approach in which an invalid reservation prevents a State from becoming a party as a "radical solution",[3] even though it is based on the relatively uncontroversial proposition that a reservation is a reflection of the extent to which a State consents to be bound. Further, the commentary asserts legal conclusions that are not necessarily justified by State practice. Specifically, the commentary expressly acknowledges that "in virtually all cases" States objecting to a reservation as invalid "have not opposed the treaty's entry into force".[4] Because an invalid reservation is null and void, the Commission arrives at the legal conclusion that it "can only mean that the reserving State is bound by the treaty as a whole without benefit of the reservation".[5] However, the commentary's admission that there is "no agreement" among States on the approach to this issue[6] seems to undermine such a conclusion. Indeed, such varied State practice is not sufficient to support this conclusion.

4. Even though the Commission arrives at what it considers to be a compromise approach—establishing a rebuttable presumption that a reserving State is bound without the benefit of its invalid reservation—such an approach is nevertheless inconsistent with the bedrock principle of consent. It is the long-standing view of the United States that any attempt to assign an obligation expressly not undertaken by a country, even if based on an invalid reservation, is inconsistent with the fundamental principle of consent, which is the foundation upon which the law of treaties is based, as the Special Rapporteur himself has recognized. Moreover, when the principle of consent is combined with a good-faith assumption that States do not make reservations lightly and should be presumed to do

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[1] See *Yearbook … 2010*, vol. II (Part Two), pp. 113–115, paras. (6)–(13) of the commentary to guideline 4.5.2.

[2] *Ibid.*, pp. 112–113, paras. (3)–(5).

[3] *Ibid.*, p. 115, para. (16).

[4] *Ibid.*, p. 112, para. (2); see also p. 116, para. (19).

[5] *Ibid.*, p. 112, para. (2).

[6] *Ibid.*, p. 116, para. (19).

so only when such reservations are an essential condition of the reserving State's consent to be bound by the treaty, the presumption in the proposed guidelines should point in the opposite direction. In other words, when an invalid reservation has been formulated, the reserving State should only be considered a party to the treaty without the benefit of the reservation if the reserving State has expressly indicated that upon objection, the reserving State would effectively withdraw the reservation and thus be a party without the benefit of the reservation.

5. Indeed, none of the factors cited by the Commission to support its proposed presumption is persuasive. The Commission first notes that because a reserving State is taking the significant action of becoming a party to the treaty, the importance of the reservation itself should not be overestimated.[7] But this view of reservations ignores the crucial role they often play for a State. For example, a reservation may arise from domestic restrictions in a State's fundamental law, which a treaty provision cannot override as a domestic law matter. Further, many States must obtain the approval of their legislative bodies to become party to a treaty and such entities can play a role in determining what reservations are necessary. Thus, if a reservation is formulated to take into account the limits of a State's Constitution or the concerns of the State's legislature, a State's desire to become a treaty party does not automatically outweigh reservations tailored to address domestic concerns. In fact, such reservations are critical to the State's consent. Second, the Commission argues that it is better to presume a reserving State to be part of the circle of contracting parties in order to resolve problems with the invalid reservation within the context of the treaty regime.[8] Again, however, this assumes that such reservations can be resolved by discussions among parties. While this might be the case with some types of reservations, if a reservation is made to accommodate a basic constitutional limitation or address a serious concern of the legislature, the reserving State likely will not be in a position to work with other countries to alter its reservation.

6. Third, the Commission argues that its proposed presumption will provide legal certainty. The commentary states that the presumption can resolve uncertainty

> between the formulation of the reservation and the establishment of its nullity; during this entire period (which may last several years), the author of the reservation has conducted itself as a party and has been deemed to be so by the other parties.[9]

7. The proposed presumption arguably would provide little clarity during the potentially long period between the formulation of the reservation and establishment of its nullity. Indeed, the presumption, as currently set forth, would be difficult to apply in practice and could undermine the stability of treaty obligations that the Vienna Conventions were designed to foster. For example, given the subjectivity inherent in assessing a reservation's validity and the good-faith assumption that a reserving State intends to make permissible reservations, it is quite likely that a reserving State would consider its reservation valid, despite an objecting State's view that it is not permissible. If the objecting State does not find the presumption rebutted, both States would agree that they have a treaty relationship, but the scope of that relationship would be disputed. Alternatively, if the objecting State decided on its own that the presumption had been overcome by the reserving State based on the factors listed in the guideline, there would be no consensus between these two States regarding whether the reserving State was bound at all to the treaty. The reserving State would continue to maintain that the reservation was valid and therefore that it remains a party to the treaty, while the objecting State would take the view that the reserving State cannot be party to the treaty.

8. The proposed presumption also arguably would do little to facilitate certainty for the period after an invalid reservation is established, unless the presumption is particularly difficult to overcome. Improved legal certainty would seem to come, at least in part, from the application of a strong presumption and anticipated continued treaty relations without the benefit of the reservation. If, however, the presumption can be easily rebutted once invalidity is established, or States can take action in advance to ensure that they can rebut it, treaty relations between the reserving State and objecting State would end. Thus, if the presumption is easy to rebut, States could not have reasonable certainty in advance that whatever the ultimate characterization of the reservation, treaty relations would continue.

9. Furthermore, the presumption proposed by the Commission arguably creates undesirable incentives in the treaty practice of States. In order to most effectively rebut the presumption, the reserving State would presumably indicate when making a reservation whether it is willing to be bound without benefit of the reservation if it turns out that the reservation is considered invalid. Yet, to do so would suggest that the reserving State is concerned that the reservation is invalid. Thus, to most effectively rebut the presumption, a State is, in a sense, forced to concede that its actions may be impermissible. It is not obvious to us that this approach is practical or would improve the process for clarifying the effect of reservations in treaty relations among States.

10. It also is worth noting that the guidelines leave the reserving State that has made an invalid reservation with only two choices: to become a party without the benefit of the reservation consistent with the presumption, or to refrain from becoming party to the treaty at all. This does not allow for the possibility that the objecting State may prefer to have a treaty relationship even with the invalid reservation than to have no treaty relationship at all, assuming the reserving State has overcome the presumption. The commentary explains that such treatment would amount to giving impermissible reservations the same effect as permissible reservations.[10] Whether or not the negotiators of the Vienna Convention would have anticipated this result, it should not be rejected out of hand. Because there is an element of subjectivity in judging the compatibility of a reservation with a treaty's object and purpose, as the United Kingdom has accurately pointed out in its Sixth Committee statement, and because "the vast majority of objections are based on the invalidity of

[7] *Ibid.*, p. 118, para. (35).

[8] *Ibid.*, pp. 118–119, para. (36).

[9] *Ibid.*, p. 119, para. (37).

[10] *Ibid.*, p. 109, para. (16) of the commentary to guideline 4.5.1.

the reservation to which the objection is made",[11] it seems that the system for dealing with reservations characterized as invalid should be as flexible as possible. From a practical perspective, there are times when it may be better to continue to have a treaty relationship with a State, despite the existence of an impermissible reservation.[12]

11. It is also worth echoing a point articulated by the United Kingdom in its Sixth Committee statement regarding the threshold for triggering the presumption. Namely, to the extent any presumption is retained, the commentary should make clear that one party's objection cannot initiate the presumption such that it applies for all parties, an outcome that could be inferred from the current guidelines and commentary. Judging the permissibility of a reservation can be a very subjective exercise and, as a result, the guidelines or commentary should clarify that one objection does not erect any presumption applicable to all parties.

12. In addition to concerns regarding the existence and direction of the presumption, the United States has concerns with the Commission's approach to determining the intent of the author of a reservation. The Commission acknowledges that determining the intention of the author may be challenging and sets forth a non-exhaustive list of factors to be considered.[13] That list includes several factors: the reservation's wording, the reserving State's statements at the time it consents to be bound, subsequent conduct of the reserving State, the reactions of other contracting States, the provisions to which the reservation relates, and the treaty's object and purpose. However, it is not clear why the express views of a reserving State made at the time it expresses consent to be bound would not always trump other factors. The United States also questions the relevance of the subsequent conduct of the reserving State to the intent determination. As discussed above, the reserving State presumably formulates its reservation to be valid. Thus, the fact that a reserving State engages in treaty relations with other parties should not be taken as evidence that the State desires to be bound without the benefit of the reservation, as it is equally if not more likely that such engagement is simply a reflection that the State assumes it has a valid reservation. Further, even actions by a reserving State to act consistently with a treaty provision on which it has formulated a reservation do not necessarily validate the proposed presumption, as States may take a reservation for certain reasons related to their internal allocation of authorities, but in practice still generally act consistently with the relevant obligations.

13. As the United States explained in its 2010 Sixth Committee statement, the questions being addressed in these guidelines are of fundamental importance. Proposed guideline 4.5.2 addresses an issue not clearly articulated in the Vienna Conventions and on which, as is noted in the commentary, there are widely varying views and thus no customary international law rules to codify. Under such circumstances, The United States believes this issue deserves more discussion before final adoption occurs.

[11] *Ibid.*, p. 121, para. (3) of the commentary to guideline 4.5.3.

[12] One alternative approach may be for an invalid reservation simply to drop out of treaty relations between the reserving State and the objecting States, which arguably creates greater certainty than either of the presumptions discussed by the Commission. In such a case, the reserving State can retain treaty relations with other parties and, in the event its reservation is found to be impermissible, the provisions to which the reservation relate fall out of the treaty relations between the reserving State or other parties.

[13] See *ibid.*, pp. 119 *et seq.*, paras. (41) *et seq.*, of the commentary to guideline 4.5.2.

Guideline 4.5.3 (*Reactions to an invalid reservation*)

Australia

See the observations made in respect of section 4.5, above.

El Salvador

1. As noted by the Commission itself, the first paragraph of this Guideline is "a reminder… of a fundamental principle… according to which the nullity of an invalid reservation depends on the reservation itself and not on the reactions it may elicit", and "is perfectly consistent with guideline 3.1…, guideline 3.3.2 and guideline 4.5.1".[1]

2. Therefore, El Salvador considers the first paragraph of the guideline to be superfluous, as it reiterates the contents of guideline 4.5.1, on the nullity of an invalid reservation. The subsequent commentary highlights the point that that nullity does not depend on the objection or acceptance of a contracting State or organization.

3. While the second paragraph of guideline 4.5.3 likewise follows the same logic as preceding guidelines, it does add something new by establishing the deterrent requirement for States and international organizations to state their reasons for considering a reservation to be invalid, thus enhancing the stability and transparency of the legal positions of States and international organizations in their treaty relations. However, this paragraph could be moved to become the second paragraph in guideline 4.5.1, given that, as already noted, the first paragraph of guideline 4.5.3 is superfluous.

[1] *Yearbook … 2010*, vol. II (Part Two), p. 121, paras. (1) and (2) of the commentary to guideline 4.5.3.

Finland

1. As guideline 4.5.3 rightly explains, the lack of conformity with the formal and/or substantial requirements placed on the act is in itself sufficient to render the reservation null and devoid of legal effect. Nothing further, such as objection or any other opposing reaction by other contracting parties, is required. Finland supports, however, the Commission's view that it may often be beneficial for contracting States, if appropriate, to make it officially known that they consider a reservation to be impermissible or formally invalid. While such a declaration is not legally speaking necessary, a reasoned opinion will draw wider attention to the issue and may contribute towards clarifying the existing legal situation.

2. Finland, therefore, wishes to express its continued support for guideline 4.5.3.

3. See also the observations made in relation to guideline 4.5.1, above.

4. Finland also agrees with the Commission also on the point that, even though an analytical distinction can be made between the act of opposing a valid reservation and that of opposing an invalid one, both these acts should be referred to as "objections", since this is the consistent practice of States and there seems to be no real danger of confusion. However, Finland is less convinced by the Commission's reasoning according to which the definition of "objection" in guideline 2.6.1 is sufficiently wide to cover objections to invalid reservations in addition to those made to valid ones. According to guideline 2.6.1, an objection is

> a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization *purports to** exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

The verb "purport", of course, would imply a purpose or intention on the part of the objecting State, in this case the specific purpose or intention of modifying or excluding the effects of the reservation. A State could not, however, have any such intention when it considers the reservation to lack any legal effects to begin with; the purpose of objecting is merely to point out the invalidity and consequent lack of legal effects of the reservation.

5. For these reasons, Finland proposes to the Commission that it consider the feasibility of refining the definition in guideline 2.6.1 so that it expressly includes both types of objections, perhaps by adding to it the phrase "or whereby the objecting State or international organization expresses its view that the reservation is invalid and without legal effect".

PORTUGAL

1. Portugal welcomes the reminder in guideline 4.5.3. Portugal also welcomes the willingness of the Commission to be pedagogic by encouraging States and international organizations to react to invalid reservations.

2. Nevertheless, it is known that such a reaction would not be a real objection since an invalid reservation is void of legal effects. Hence, the reaction to it would not have any direct legal effects. Furthermore, the wording compels the Contracting States and international organizations to a reaction in a rather imposing manner which is not consistent with the complete freedom of making such a reaction. Portugal therefore suggests changing the wording from "should […] formulate a reasoned objection" to "may react […] by making a corresponding reasoned statement".

REPUBLIC OF KOREA

Guideline 4.5.3 seems redundant. Following article 20, paragraph 5, of the 1969 Vienna Convention, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation. Other parties may raise objections based on this clause of the Vienna Convention.

UNITED STATES

Guideline 4.5.3 encourages States to formulate reasoned objections to invalid reservations as soon as possible, and the commentary explains that it is not indispensable that objections to impermissible reservations be formulated within 12 months, the time frame set forth in the Vienna Convention for objections to permissible reservations.[1] However, to the extent an impermissible reservation may have an even greater effect on treaty relations than a permissible reservation—i.e. by binding a reserving State without the benefit of its reservation or by preventing the reserving State from becoming party to the treaty—then it would appear to be quite important to establish a concrete time frame in which objections on such grounds should be made. As a result, the Commission might consider adding to the end of paragraph 2 of guideline 4.5.3 the phrase "and preferably within 12 months of notification of the reservation".

[1] See *Yearbook … 2010*, vol. II (Part Two), para. (14) of the commentary to guideline 4.5.3.

Section 4.7 (*Effect of an interpretative declaration*)

FRANCE

The effects of an interpretative declaration and possible reactions to it must be distinguished from the effects of a reservation, since interpretative declarations sometimes form part of a broader context than the single treaty to which they relate and touch generally on the way in which States interpret their rights and obligations in international law. It is also important to differentiate between approval of an interpretative declaration and agreement between the parties on the interpretation of the treaty.

Guideline 4.7.1 (*Clarification of the terms of the treaty by an interpretative declaration*)

MALAYSIA

1. Malaysia wishes to seek clarification on the intended function of an approval of or opposition to an interpretative declaration in interpreting a treaty in the second paragraph of guideline 4.7.1, i.e. whether it plays a role in determining how much weight and value should be given to the interpretation proposed by the interpretative declaration, or merely functions as an aid to interpret a treaty without having any implication on the interpretation proposed by the declaration. Malaysia is of the view that the approval of or opposition to an interpretative declaration should not determine the weight to be given to the interpretative declaration but should be regarded merely as an aid to interpret a treaty. In expressing consent to be bound by a treaty, States have in their mind a certain understanding of the terms used in that treaty. Besides, a treaty calls upon its contracting parties to implement its provisions in their international relations between each other as well as in their own domestic affairs. Thus, it is necessary for the States to interpret the treaty in order to apply the provisions and meet their obligations. To have approval and opposition determine the admissibility of the interpretation proposed by the author State will hinder the implementation of treaty obligations by that State in its

domestic and international affairs. For that reason, Malaysia is of the view that approval of or opposition to interpretative declarations should not determine the weight to be given to the interpretation proposed.

2. Malaysia notes that under guideline 2.9.1 and 2.9.2 the terms "approval" and "opposition" refer to express approval and opposition. However, under guideline 2.9.8 and 2.9.9, approval and opposition can also be inferred from the "silence" of contracting parties. Malaysia understands that the terms "approval" and "opposition" in guideline 4.7.1 should only include the definitions stipulated in guideline 2.9.1 and 2.9.2. If, however, the rules laid down in guideline 2.9.8 and 2.9.9 are also to be made applicable to guideline 4.7.1, it would follow that an interpretative declaration may be accepted or rejected simply on the basis that silence of contracting States may be inferred as an approval of or opposition to the declaration. The uncertainty of the legal status of silence on a specific interpretive declaration could consequently lead to an undesirable result. For this reason, Malaysia is of the view that this inference should not be simply drawn from the inaction of States, as it will have an effect on treaty interpretation, and that the terms "approval" and "opposition" in guideline 4.7.1 should refer to express approval and opposition.

Guideline 4.7.2 (*Effect of the modification or the withdrawal of an interpretative declaration in respect of its author*)

Malaysia

On the proposed guideline 4.7.2, Malaysia understands that the guideline is based on the principle that a State should not be allowed to "blow hot and cold". It cannot declare that it interprets certain provisions in one way and then take a different position later. Thus, States have to be cautious in proposing an interpretation to a treaty. This would mean that States must be fully ready to comply with the obligations stipulated in the treaty before becoming a party, and be able to consider the possibility of future development such as a change of national policy before formulating any interpretative declaration. This is because the withdrawal or modification mechanism, though it is available, may not produce the effect intended by the States. Having said this, however, since the application of the guideline in relation to guideline 4.7.1 depends on whether the other States have relied on the interpretative declaration made by the declarant State, Malaysia is of the view that it may be necessary for the Commission to provide explanations in the commentary to the guideline on the extent to which reliance by States on an interpretative declaration can prevent the withdrawal or modification of that declaration from producing the effects provided for under guideline 4.7.1.

Section 5 (*Reservations, acceptances of and objections to reservations, and interpretative declarations in the case of succession of States*)

Australia

In relation to section 5, Australia notes that these provisions involve both codification and the progressive development of international law.

Austria

The guidelines concerning reservations and State succession seem to present, in Austria's view, a glass bead game as they refer to concepts which only partly reflect the current state of international law. They are based on the 1978 Vienna Convention, which has only very few parties and is generally seen as only partly reflecting customary international law. This convention—as well as the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts[1]—distinguishes between newly independent States and other successor States. Austria wonders whether the use of the category of "newly independent States" is still appropriate in present times, as the process of decolonization and the need to consider special circumstances arising therefrom in the context of State succession lie in the past. The Commission itself has ceased using this distinction: its articles on the nationality of natural persons in relation to the succession of States (annex to General Assembly resolution 55/153 of 12 December 2000)[2] no longer contain a reference to "newly independent States".

[1] Not yet in force.

[2] *Yearbook … 1999*, vol. II (Part Two), p. 20, para. 47.

France

Section 5, which deals with "reservations, acceptances of and objections to reservations, and interpretative declarations in the context of succession of States", is a complex one involving both codification and the progressive development of international law. On this point, the lack of well-established practice on which to base such guidelines makes any attempt at systematization on the matter particularly difficult, given that succession of States is not governed by clear rules in international law. For example, it may be noted that the practice of States with regard to succession of States to treaties, and in particular that of France, shows that the principle that treaties continue in force in cases of separation of States, contained in article 34 of the 1978 Vienna Convention, does not reflect the state of customary law on the topic. On the contrary, it appears that treaties do not continue to apply as between the successor State and the other State party unless these States agree expressly or implicitly thereto. While concern for legal security and the day-to-day requirements of international relations would suggest that to the extent possible, treaties concluded with the predecessor State should continue in force, it is difficult to assume more than a rebuttable presumption of continuity in case of succession.

Malaysia

See the observations made in respect of guideline 2.4.6, above.

Portugal

Portugal maintains its doubts on whether it is suitable to deal, in the Guide to Practice, with the question of reservations to treaties in the context of succession of States. The 1978 Vienna Convention, which has only 22 States parties, deals with this question in a superficial manner. Portugal fully acknowledges the practical

relevance of dealing with the issue in the Guide to Practice. However, it should not be forgotten that the Commission has no mandate to enter into the progress of international law while developing this Guide to Practice.

United Kingdom

The view of the United Kingdom is that there is insufficient clear practice on which to base such guidelines that purport to set out international law either as it is or as it should be. The lack of practice in this area is apparent from the small number of cases referred to in the commentary. The United Kingdom therefore does not see the merit in extending the Guide to succession of States and does not believe that omission of section 5 will have any sort of detrimental effect on the work as a whole. The United Kingdom thinks that energies should instead be focused on the preceding chapters, which represent the main focus of the topic and the work of the Commission in this area over the past 15 years.