

RESERVATIONS TO TREATIES

[Agenda item 2]

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

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Multilateral instruments cited in the present report

	<i>Source</i>
Covenant of the League of Nations (Versailles, 28 June 1919)	League of Nations, <i>Official Journal</i> , No. 1 (February 1920), p. 3.
Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 2 September 1947)	United Nations, <i>Treaty Series</i> , vol. 21, No. 324, p. 77.
Charter of the Organization of American States (Bogota, 30 April 1948)	<i>Ibid.</i> , vol. 119, No. 1609, p. 3.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.

Source

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 2000)	<i>Ibid.</i> , vol. 2465, No. 2889, p. 203.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
ILO Convention (No. 102) concerning minimum standards of social security (Geneva, 28 June 1952)	<i>Ibid.</i> , vol. 210, No. 2838, p. 131.
Convention on the Political Rights of Women (New York, 31 March 1953)	<i>Ibid.</i> , vol. 193, No. 2613, p. 135.
Convention on the Continental Shelf (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 499, No. 7302, p. 311.
Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 516, No. 7477, p. 205.
Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)	<i>Ibid.</i> , vol. 330, No. 4739, p. 3.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, No. 7310, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	<i>Ibid.</i> , vol. 596, No. 8638, p. 261.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	<i>Ibid.</i> , vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 993, No. 14531, p. 3.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Agreement on the international carriage of perishable foodstuffs and on the special equipment to be used for such carriage (ATP) (Geneva, 1 September 1970)	<i>Ibid.</i> , vol. 1028, No. 15121, p. 121.
Convention on wetlands of international importance especially as waterfowl habitat (Ramsar, 2 February 1971)	<i>Ibid.</i> , vol. 996, No. 14583, p. 245.
Charter of the Islamic Conference (Jeddah, 4 March 1972)	<i>Ibid.</i> , vol. 914, No. 13039, p. 103.
Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973)	<i>Ibid.</i> , vol. 1035, No. 15410, p. 167.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	<i>Ibid.</i> , vol. 1946, No. 33356, p. 3.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, No. 20378, p. 13.
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 10 October 1980)	<i>Ibid.</i> , vol. 1342, No. 22495, p. 137.
Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) (Geneva, 10 October 1980)	<i>Ibid.</i>
Convention on the transfer of sentenced persons (Strasbourg, 21 March 1983)	<i>Ibid.</i> , vol. 1496, No. 25703, p. 91.
Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)	<i>Ibid.</i> , vol. 1465, No. 24841, p. 85.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	United Nations, <i>Treaty Series</i> , vol. 1582, No. 27627, p. 95.
Convention on the Rights of the Child (New York, 20 November 1989)	<i>Ibid.</i> , vol. 1577, No. 27531, p. 3.
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)	<i>Ibid.</i> , vol. 2173, No. A-27531, p. 236.
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (New York, 25 May 2000)	<i>Ibid.</i> , vol. 2171, No. 27531, p. 227.

Source

Convention on environmental impact assessment in a transboundary context (Espoo, 25 February 1991)	<i>Ibid.</i> , vol. 1989, No. 34028, p. 309.
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995)	<i>Ibid.</i> , vol. 2167, No. 37924, p. 3.
International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997)	<i>Ibid.</i> , vol. 2149, No. 37517, p. 256
Pre-accession pact on organised crime between the Member States of the European Union and the applicant countries of Central and Eastern Europe and Cyprus (Brussels, 28 May 1998)	<i>Official Journal of the European Communities</i> , C 220, 15 July 1998, p. 1.
Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998)	United Nations, <i>Treaty Series</i> , vol. 2161, No. 37770, p. 447.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	<i>Ibid.</i> , vol. 2187, No. 38544, p. 3.
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 10 September 1998)	<i>Ibid.</i> , vol. 2244, No. 39973, p. 337.
International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)	<i>Ibid.</i> , vol. 2178, No. 38349, p. 197.
Constitutive Act of the African Union (Lomé, 11 July 2000)	<i>Ibid.</i> , vol. 2158, No. 37733, p. 3.
United Nations Convention against Corruption (New York, 31 October 2003)	<i>Ibid.</i> , vol. 2349, No. 42146, p. 41.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III) (Geneva, 8 December 2005)	<i>Ibid.</i> , vol. 2404, No. 43425, p. 261.
Convention on the Rights of Persons with Disabilities (New York, 13 December 2006)	<i>Ibid.</i> , vol. 2515, No. 44910, p. 3.
Charter of the Association of Southeast Asian Nations (Singapore, 20 November 2007)	<i>Ibid.</i> , vol. 2624, No. 46745, p. 223.
Convention on Cluster Munitions (Dublin, 30 May 2008)	<i>Ibid.</i> , vol. 2688, No. 47713, p. 39.

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Introduction*

1. The present report comprises three chapters. The first is devoted to the reservations dialogue and concludes with a draft annex to the Guide to Practice on Reservations to Treaties, which could take the form of “conclusions” or of a recommendation of the International Law Commission on this important topic. The second deals with dispute settlement and traces the broad outline of a consultative mechanism designed to help States settle any differences in assessment that

may arise with regard to reservations. If the Commission approves the principle of such a mechanism, the outline could be submitted to the General Assembly as a second annex to the Guide. Lastly, the third chapter attempts to clarify a number of points concerning the purpose and legal scope of the Guide to Practice and could lead to the adoption of an explanatory note that would be placed at the end or, preferably, the beginning, of the Guide to Practice.

CHAPTER I

The reservations dialogue

2. The reservations regime instituted by the Vienna Convention on the Law of Treaties (hereinafter the “1969 Vienna Convention”) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”) does not impose static solutions on contracting States or contracting organizations; rather, it leaves room for dialogue among the key players, namely, the author of the reservation, on the one hand, and the other contracting States or contracting organizations and any monitoring bodies established by the treaty, on the other. The possibility of this “reservations dialogue” is confirmed by the *travaux préparatoires* of the 1969 Vienna Convention and is reflected in the treaty practice of States (see chap. I, sect. A, below).

3. Nonetheless, no provision of the Vienna Conventions overtly concerns—or prohibits—the reservations dialogue, much less establishes a legal framework for it. For this reason, the present report includes a few reflections that may result in the adoption of flexible normative suggestions that would help guide the practice of States and international organizations on the topic (see chap. I, sect. B, below).

A. The reservations dialogue in practice

1. FORMS OF THE RESERVATIONS DIALOGUE UNDER THE UNANIMITY REGIME

4. While it might appear that the traditional regime of unanimous acceptance of reservations by all contracting States left no room for dialogue with the author of a reservation, that was not the case; the latter still had to convince the other contracting States that the reservation was in keeping with the spirit of the treaty and to convince them to accept it. However, dialogue among the key players was limited to the establishment or ultimate rejection of

the reservation. If a State had doubts in that regard, it could block the entry into force of the treaty for the author of the reservation.

5. This “upstream” dialogue is, moreover, reflected in practice in the context of the Vienna regime, particularly where the unanimous or collective acceptance of the contracting States or contracting international organizations is needed for the establishment of a reservation (art. 20, paras. 2 and 3, of the Vienna Conventions).¹ Where a State purports to formulate a reservation to a constituent instrument of an international organization, some dialogue must take place within the framework of the competent organ upstream of the acceptance, or refusal of acceptance, of the reservation.² The sometimes lively and confrontational nature of this dialogue was particularly clear in the case of the reservation that India sought to formulate when acceding to the Convention on the Inter-Governmental Maritime Consultative Organization (IMCO) (now IMO).³ Although the problem raised by India’s reservation had more to do with procedure than with the content of the reservation, it is nonetheless interesting to note that it was resolved after India assured the Sixth Committee of the United Nations General Assembly that the Indian declaration was not a reservation, but merely a declaration of policy.⁴ It

¹ See, in particular, guidelines 4.1.2 (Establishment of a reservation to a treaty which has to be applied in its entirety) and 4.1.3 (Establishment of a reservation to a constituent instrument of an international organization), *Yearbook ... 2010*, vol. II (Part Two), para. 105. 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 See, for example, Switzerland’s reservation to the Covenant of the League of Nations, which was accepted by the Council, whereas comparable reservations made by Liechtenstein and Germany were not accepted and had to be withdrawn (Mendelson, “Reservations to the constitutions of international organizations”, pp. 140–141). See also Argentina’s efforts to justify the reservation formulated in its instrument of accession to IAEA (*ibid.*, p. 160).

³ *Ibid.*, pp. 163–165.

⁴ In its resolution 1452 (XIV), adopted on 7 December 1959, the General Assembly took note of “the statement made on behalf of India at the 614th meeting of the Sixth Committee on 19 October 1959, explaining that the Indian declaration was a declaration of policy and that it does not constitute a reservation” and “express[ed] the hope that, in the light of the above-mentioned statement of India, an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India”.

* The Special Rapporteur wishes to thank Daniel Müller, researcher at the Centre de droit international de Nanterre (CEDIN), for his invaluable assistance with the drafting of this report, especially the chapter on the reservations dialogue. The Special Rapporteur would also like to thank Céline Folsché and Pablo Sandonato de Leon, who assembled all the necessary material for the drafting of an introduction comparable to that of the previous reports, which unfortunately could not be used, as they would have made this seventeenth and final report overly long. The Special Rapporteur also wishes to express his deep appreciation to Alina Miron, Ph.D. student at University of Paris West-Nanterre-La Défense, a researcher at the Centre for International Law at Nanterre; and Maria Alejandra Etchegorry, student of law from New York University.

was only following this declaration, and referring to it expressly, that the IMCO Council, in a resolution adopted on 1 March 1960, stated that it considered India a member of the Organization.⁵

6. Today, such upstream dialogue is still commonplace and fruitful, particularly in the context of regional organizations. The introduction of a more flexible reservations regime that makes it possible to break down a treaty into a multitude of different treaty relationships has made this dialogue among contracting States and the author of a reservation necessary, as seen quite remarkably in the context of the Pan American Union. In resolution XXIX, “Methods of Preparation of Multilateral Treaties”, the Eighth International Conference of American States (1938) resolved:

2. In the event of adherence or ratification with reservations, the adhering or ratifying State shall transmit to the Pan American Union, prior to the deposit of the respective instrument, the text of the reservation which it proposes to formulate, so that the Pan American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the treaty may do it or not, taking into account the observations which may be made with regard to its reservations by the signatory States.⁶

For example, Guatemala clarified the scope of the reservations that it intended to formulate in respect of the Inter-American Treaty of Reciprocal Assistance⁷ and the Charter of the Organization of American States⁸ when it saw that a number of States were not prepared to accept them.

7. Such forms of dialogue are ongoing in other forums, such as the Council of Europe.⁹

⁵ *Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009* (United Nations publication, Sales No. E.09.V.3), document ST/LEG/SER.E/26, chap. XII.1.

⁶ Eighth International Conference of American States, Final Act, Lima, 1938, p. 52, reproduced in *Yearbook ... 1965*, vol. II, p. 80, Depository practice in relation to reservations: Report by the Secretary-General, A/5687. See also the comments made by OAS, *ibid.*, p. 81–82.

⁷ “With respect to [Guatemala’s] reservation, the Pan American Union consulted the signatory governments, in accordance with the procedure established by paragraph 2 of Resolution XXIX of the Eighth International Conference of American States, to ascertain whether they found it acceptable or not. A number of replies being unfavourable, a second consultation was made accompanied, at the request of the Government of Guatemala, by a formal declaration of that Government to the effect that its reservation did not imply any alteration in the Inter-American Treaty of Reciprocal Assistance, and that Guatemala was ready to act at all times within the bounds of international agreements to which it was a party. In view of this declaration, the States that previously had not found the reservation acceptable now expressed their acceptance” (www.oas.org/juridico/english/signs/b-29.html, accessed 1 September 2016).

⁸ “With respect to [Guatemala’s] reservation, the General Secretariat consulted the signatory governments, in accordance with the procedure established by paragraph 2 of Resolution XXIX of the Eighth International Conference of American States, to ascertain whether they found it acceptable or not. At the request of the Government of Guatemala, this consultation was accompanied by a formal declaration of that Government to the effect that its reservation did not imply any alteration in the Charter of the Organization of American States, and that Guatemala is ready to act at all times within the bounds of international agreements to which it is a party. In view of this declaration, the States that previously did not find the reservation acceptable expressed their acceptance” (www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS_signatories.asp, accessed 1 September 2016).

⁹ See Spiliopoulou Åkermark, “Reservations: Breaking new ground in the Council of Europe”.

2. THE RESERVATIONS DIALOGUE IN THE CONTEXT OF AND THROUGH THE VIENNA REGIME

8. In the context of the Vienna regime, the dialogue between the author of a reservation and the other States or international organizations entitled to become parties to the treaty in question is conducted primarily through the two reactions to reservations envisaged in the Vienna Conventions: acceptance and objection.¹⁰ In this regard, the Vienna regime is clearly different from the traditional regime of unanimity, in which an objection, in itself, puts an end to the dialogue.¹¹

9. The consequences of objections—and, to a lesser extent, acceptances—are not necessarily limited to the legal effects which they produce in respect of permissible reservations and which are more or less clearly established by the Vienna Conventions. They do not necessarily constitute the end of a process; rather, they may mark the beginning of cooperation between the key players. More and more frequently, the author of an objection not only draws the reserving State’s attention to its reasons for considering the reservation as formulated to be impermissible, but also suggests that the author of the reservation should reconsider it. Thus, Finland made an objection to the reservation formulated by Malaysia when acceding to the Convention on the Rights of the Child by pointing out that the reservation

is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations.

Continuing, Finland declared the following:

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

The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention].¹²

¹⁰ See, *inter alia*, the commentaries to guidelines 2.6.1 (Definition of objections to reservations), *Yearbook ... 2005*, vol. II (Part Two), pp. 77–82; 2.8 (Forms of acceptance of reservations), *Yearbook ... 2008*, vol. II (Part Two), p. 103; and 4.3 (Effect of an objection to a valid reservation), *Yearbook ... 2010*, vol. II (Part Two), p. 87, para. (2).

¹¹ See paragraph 4 above. See also Tyagi, “The conflict of law and policy on reservations to human rights treaties”, p. 216.

¹² *Multilateral Treaties ...* (footnote 5 above), chap. IV.11. See also Finland’s identical objection to the reservation formulated by Qatar upon ratification (*ibid.*); Denmark’s objections to the reservations formulated by Mauritania and the United Arab Emirates (footnote 21) in respect of the Convention on the Elimination of All Forms of Discrimination against Women; and the (late) objections formulated by Denmark in respect of the reservations formulated by Kuwait (footnote 19) and Lebanon (footnote 21) to the same Convention (*ibid.*, chap. IV.8); and the “general” objection made by Denmark in respect of the reservations formulated by Djibouti, the Islamic Republic of Iran, Pakistan and the Syrian Arab Republic, on the one hand, and by Botswana and Qatar, on the other, to the Convention on the Rights of the Child (*ibid.*, chap. IV.11, footnote 25). By contrast, Denmark also suggested to Brunei Darussalam, Saudi Arabia and Malaysia that they should reconsider their reservations to the Convention on the Rights of the Child, although its declarations could not be considered true objections (*ibid.*). In that regard, see also paragraph 32 below.

Although the link cannot be clearly established, it is interesting to note that in 1999, the Malaysian Government informed the Secretary-General of its decision to partially withdraw its reservations.¹³

10. Under the flexible system, even an objection—whether it has minimum, intermediate¹⁴ or maximum effect¹⁵—does not exclude any form of dialogue between the author of the reservation and the author of the objection. On the contrary, a dialogue between the parties is necessary, if only to determine the content of their treaty relationship in accordance with article 21, paragraph 3, of the Vienna Conventions, the wording of which leaves the reader “rather puzzled” and the application of which remains difficult in practice.¹⁶

11. Furthermore, ICJ, in its 1951 advisory opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pointed out on the issue of reservations with minimum effect that such dialogue was inherent in the flexible system and was the corollary of the very principle of consensus:

It may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, *but that an understanding between the State and the reserving State** will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.¹⁷

12. Furthermore, practice shows that an objection with maximum effect, too, does not simply constitute refusal within the framework of the flexible system; it leaves open the possibility of a dialogue between the key players. The response of the United States—termed an objection by the Secretary-General of the United Nations—to the objections made by France and Italy in respect of the United States declaration regarding the Agreement on the international carriage of perishable foodstuffs and on the special equipment to be used for such carriage (ATP) provides a particularly telling example. France and Italy, which considered that only European States could make a declaration such as that formulated by the United States, made objections with maximum effect by declaring that they would “not be bound by the ATP Agreement in [their] relations with the United States of America”. The United States, in turn, stated:

Under the clear language of article 10 [of the Agreement], as confirmed by the negotiating history, any State party to the Agreement may file a declaration under that article. The United States therefore considers that the objections of Italy and France and the declarations that those nations will not be bound by the Agreement in their relations with the

United States are unwarranted and regrettable. The United States reserves its rights with regard to this matter and proposes that the parties continue to attempt cooperatively to resolve the issue.¹⁸

This United States reaction clearly shows that despite the maximum-effect objections of France and Italy, the reserving State may endeavour to pursue dialogue—an attitude which is, moreover, highly desirable.

13. This dialogue—which is framed and, in fact, encouraged by the Vienna rules through the reactions, whether acceptances or objections, that are regulated by the 1969 and 1986 Conventions—must not conceal the development, in the margins of those instruments, of modalities for a reservations dialogue which, while borrowing the system set out in articles 19 to 23, is not envisaged by them.

14. This is true for, *inter alia*, some categories of reactions that resemble objections but do not produce all their effects. These include:

- Objections formulated by non-contracting States (or organizations): while meeting the definition of objections contained in guideline 2.6.1,¹⁹ they do not immediately produce the legal effects envisaged in articles 20 and 21 of the Vienna Conventions.²⁰ Nonetheless, in this manner, “the reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before [ratification by the author of the reservation], have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation”;²¹

- Conditional objections²² to specified, but potential or future reservations²³ that are formulated in advance for preventive purposes; while guideline 2.6.14 specifies that such an objection “does not produce the legal effects of an objection”,²⁴ it nevertheless constitutes its author’s warning that it will not accept certain reservations; thus, it plays the same warning function as an objection formulated by a non-contracting State or organization;²⁵

- Late objections formulated after the end of the time period set out in guideline 2.6.13:²⁶ these objections also correspond to the definition contained in guideline 2.6.1²⁷ since they purport “to exclude or to modify the legal

¹³ *Multilateral Treaties ...* (footnote 5 above), chap. IV.11.

¹⁴ The Commission has, moreover, insisted on the need for some dialogue between the author of the reservation and the author of an objection with intermediate effect in guideline 4.3.6 (Effect of an objection on provisions other than those to which the reservation relates), *Yearbook ... 2010*, vol. II (Part Two).

¹⁵ See paragraph 12 below.

¹⁶ Commentary to guideline 4.3.5 (Effect of an objection on treaty relations), *Yearbook ... 2010*, vol. II (Part Two), p. 95, para. (23).

¹⁷ *I.C.J. Reports 1951*, p. 27. See also the wording of article 21, paragraph 3, proposed by Sir Humphrey Waldock in 1965: “Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States” (*Yearbook ... 1965*, vol. II, A/CN.4/177 and Add.1–2, p. 55).

¹⁸ *Multilateral Treaties ...* (footnote 5 above), chap. XI.B.22.

¹⁹ *Yearbook ... 2005*, vol. II (Part Two), pp. 77–82.

²⁰ See the commentary to guideline 2.6.5 (Author), *Yearbook ... 2008*, vol. II (Part Two), pp. 83–84, paras. (4)–(10).

²¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion, *I.C.J. Reports 1951*, p. 29. See also *ibid.*, p. 30, “On Question III”.

²² Concerning the language adopted by the Commission to designate these objections, see the commentary to guideline 2.6.14 (Conditional objections), *Yearbook ... 2008*, vol. II (Part Two), p. 95, para. (7).

²³ For an overview of State practice concerning conditional objections, see *ibid.*, p. 94, paras. (2)–(5).

²⁴ See *ibid.*, p. 94, para. (6).

²⁵ See *ibid.*

²⁶ See guideline 2.6.15 (Late objections) and the commentary thereto, *ibid.*, pp. 95–96.

²⁷ See footnote 19 above.

effects of the reservation or to exclude the application of the treaty as a whole"; however, owing to their lateness, they can no longer produce the legal effects of an objection as envisaged in the Vienna Conventions even though they retain their primary purpose of notifying the author of the reservation of the author of the objection's disagreement.²⁸

15. Also noteworthy in that connection are objections to an invalid reservation, which constitute the vast majority of objections in State practice. Guideline 4.5.3 [4.5.4] (Reactions to an invalid reservation) stresses:

The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization. Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.²⁹

An objection to an invalid reservation does not, in itself, produce any of the legal effects envisaged in the Vienna Conventions, which deal only with reservations that meet the criteria for permissibility and validity established therein. Under the Conventions, in such situations, acceptances and objections have a very specific function: determining the opposability of the reservation. They are also very important in determining the validity of a reservation.³⁰

16. All these objections—and they are indeed objections, even though they cannot produce all the legal effects envisaged in the Vienna Conventions—draw the attention of the author of the reservation to the latter's invalidity, or at least to the disagreement of the author of the objection with the proposed reservation. As such, they are part of a dialogue concerning the validity or appropriateness of the reservation. Even though, or precisely because, the Vienna Conventions did not establish mechanisms for assessing the validity of a reservation—that is, whether a reservation meets the criteria for permissibility set out in article 19 and the conditions for validity—each State and each international organization, individually and from its own standpoint, is responsible for assessing the validity of a reservation.³¹

17. An excellent example is provided by the (frequent) objections made by some States with respect to the general nature or impreciseness of a given reservation, explaining that these objections have been made in the absence of further clarification of the scope of the reservation in question. For example, Sweden made the following objection to a declaration made by Turkey in respect of the International Covenant on Economic, Social and Cultural Rights:

The Government of Sweden has examined the declarations and reservation made by the Republic of Turkey upon ratifying the International Covenant on Economic, Social and Cultural Rights.

²⁸ See also the commentary to guideline 2.6.15 (Late objections), *Yearbook ... 2008*, vol. II (Part Two), pp. 95–96, para. (3).

²⁹ For the text of the guideline and the commentary thereto, see *Yearbook ... 2010*, vol. II (Part Two), para. (106).

³⁰ See *ibid.*, paras. (10) and (11) of the commentary. See also Tyagi (footnote 11 above), p. 216.

³¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion, *I.C.J. Reports 1951*, p. 24.

The Republic of Turkey declares that it will implement the provisions of the Covenant only to the State Parties with which it has diplomatic relations. This statement in fact amounts, in the view of the Government of Sweden, to a reservation. The reservation of the Republic of Turkey makes it unclear to what extent the Republic of Turkey considers itself bound by the obligations of the Covenant. In absence of further clarification, therefore, the reservation raises doubt as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

The Government of Sweden notes that the interpretation and application of paragraphs 3 and 4 of article 13 of the Covenant is being made subject to a reservation referring to certain provisions of the Constitution of the Republic of Turkey without specifying their contents. The Government of Sweden is of the view that in the absence of further clarification, this reservation, which does not clearly specify the extent of the Republic of Turkey's derogation from the provisions in question, raises serious doubts as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

According to established customary law as codified by the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of all States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservations made by the Republic of Turkey to the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the Covenant between the Republic of Turkey and Sweden. The Covenant enters into force in its entirety between the two States, without the Republic of Turkey benefiting from its reservations.³²

Similarly, Denmark expressed its doubts regarding the interpretation of the reservation formulated by the United States when consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Consequently, Denmark made an objection while expressly proposing the initiation of a dialogue:

The Kingdom of Denmark notes the reservation made by the United States of America upon its consent to be bound by Protocol III. The reservation appears—with its broad and general formulation—to be contrary to the object and purpose of the Protocol. On this basis, the Kingdom of Denmark objects to the reservation.

³² *Multilateral Treaties ...* (footnote 5 above), chap. IV.3. For other examples, see Sweden's objections to Turkey's declaration in respect of the International Convention on the Elimination of All Forms of Racial Discrimination (*ibid.*, chap. IV.2); Bangladesh's declaration in respect of the International Covenant on Economic, Social and Cultural Rights (*ibid.*, chap. IV.3); Botswana's and Turkey's reservations to the International Covenant on Civil and Political Rights (*ibid.*, chap. IV.4); Bangladesh's declaration in respect of the Convention against torture and other cruel, inhuman or degrading treatment or punishment (*ibid.*, chap. IV.9); San Marino's declaration in respect of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (*ibid.*, chap. VI.19); Bangladesh's declaration in respect of the Convention on the Political Rights of Women (*ibid.*, chap. XVI.1); Turkey's and Israel's reservations to the International Convention for the Suppression of Terrorist Bombings (*ibid.*, chap. XVIII.9); and Israel's declaration in respect of the International Convention for the Suppression of the Financing of Terrorism (*ibid.*, chap. XVIII.11). See also Austria's objection to the reservation formulated by Botswana in respect of the International Covenant on Civil and Political Rights (*ibid.*, chap. IV.4); Estonia's objection to the Syrian Arab Republic's reservation to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid.*, chap. IV.8) and the objections of the Netherlands and Sweden to the reservation formulated by Peru in respect of the 1969 Vienna Convention (*ibid.*, chap. XXIII.1).

The United States has represented that the reservation is intended to only address the highly specific circumstances such as where the use of incendiary weapons is a necessary and proportionate means of destroying counter-proliferation targets, such as biological weapon facilities requiring high heat to eliminate biotoxins, and where the use of incendiary weapons would provide greater protection for the civilian population than the use of other types of weapons.

The Kingdom of Denmark welcomes this narrowing of the scope of the reservation and the humanitarian considerations underlying the reservation of the United States of America. The Kingdom of Denmark further expresses its willingness to engage in any further dialogue, which may serve to settle differences in interpretation.³³

While these reactions do indeed constitute objections, they clearly invite the author of the reservation to modify or clarify its reservation in order to bring it into line with what the author of the objection considers to be the requirements of treaty law.

18. Of course, such dialogue does not always ensue³⁴ and is often prevented by silence on the part of the author of the reservation. State practice shows, however, that initiation of the reservations dialogue in cases where States or international organizations deem a reservation to be invalid can be useful and that the author of the reservation often takes the warnings of other contracting States or contracting organizations into account.

19. For example, in ratifying the Convention against torture and other cruel, inhuman or degrading treatment or punishment, Chile formulated a reservation to article 2, paragraph 3, of the Convention. Australia, Austria, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, Greece, Italy, Luxembourg, the Netherlands, Norway, New Zealand, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom objected to Chile's reservation; all these objections³⁵ were made on the grounds that the reservation was "impermissible" with respect to the object and purpose of the Convention.³⁶ On 7 September 1990, less than two years after ratification with the disputed reservation, Chile notified the depositary of its decision to withdraw the reservation. While the many objections to the reservation are certainly not

³³ *Ibid.*, chap. XXVI.2.

³⁴ See, for example, the reservation to the Convention on Environmental Impact Assessment in a Transboundary Context (the "Espoo Convention") formulated by Canada (*ibid.*, chap. XXVII.4). In a note received by the Secretary-General on 21 January 2001, faced with several objections by European States, Canada reaffirmed its position, stating that "Canada's reservation to the Espoo Convention is an integral part of Canada's ratification of the Convention and is not severable therefrom. Canada can only accept treaty relations with other states on the basis of the reservation as formulated and in conformity with Article 21 of the Vienna Convention on the Law of Treaties" (*ibid.*, footnote 7).

³⁵ *Ibid.*, chap. IV.9, footnote 17. Australia, Austria, Bulgaria, Canada, Finland, Greece, the Netherlands, Portugal, Switzerland, Turkey and the United Kingdom made their objections after the end of the time period established in article 20, paragraph 5, of the Vienna Convention.

³⁶ Despite this agreement among the authors of the objections concerning the impermissibility of the reservation, the effects that these States attached to their objection vary widely. While some of them simply stated that the reservation was impermissible while explaining that their objections were not an obstacle to the entry into force of the Convention with regard to Chile, others, including Sweden, deemed it appropriate to state that their objections "cannot alter or modify, in any respect, the obligations arising from the Convention" (an objection with "super-maximum effect") (*ibid.*); see also the objections made by Australia and Austria.

the only reason for its withdrawal.³⁷ they certainly drew the reserving State's attention to the impermissibility of the reservation and thus played a significant role in the reservations dialogue and in restoration of the integrity of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

20. The interpretative declaration made by Uruguay when acceding to the Rome Statute of the International Criminal Court,³⁸ for its part, was the subject of objections by Denmark, Finland, Germany, Ireland, Norway, the Netherlands, Sweden and the United Kingdom. All these States stressed that the objection was, in reality, a reservation prohibited under article 120 of the Rome Statute. Uruguay, in turn, justified its position in a communication sent to the Secretary-General:

The Eastern Republic of Uruguay, by Act No. 17.510 of 27 June 2002, ratified by the legislative branch, gave its approval to the Rome Statute in terms fully compatible with Uruguay's constitutional order. While the Constitution is a law of higher rank to which all other laws are subject, this does not in any way constitute a reservation to any of the provisions of that international instrument.

It is noted for all necessary effects that the Rome Statute has unequivocally preserved the normal functioning of national jurisdictions and that the jurisdiction of the International Criminal Court is exercised only in the absence of the exercise of national jurisdiction.

Accordingly, it is very clear that the above-mentioned Act imposes no limits or conditions on the application of the Statute, fully authorizing the functioning of the national legal system without detriment to the Statute.

The interpretative declaration made by Uruguay upon ratifying the Statute does not, therefore, constitute a reservation of any kind.

Lastly, mention should be made of the significance that Uruguay attaches to the Rome Statute as a notable expression of the progressive development of international law on a highly sensitive issue.³⁹

Uruguay withdrew this interpretative declaration in 2008, having taken the necessary legislative steps.⁴⁰

21. Other reservations have also given rise to numerous objections and have ultimately—often much later—been withdrawn or modified by their authors. Such is the case, for example, of several reservations to the Convention on the Elimination of All Forms of Discrimination against

³⁷ In 1989, when considering the initial report of Chile (CAT/C/7/Add.2), the members of the Committee against Torture also expressed concern regarding the reservation to article 2, paragraph 3, and requested clarification of the relevant provisions of Chilean law, which, according to the Committee, "appeared to be incompatible with the Convention" (Report of the Committee against Torture, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 44 (A/45/44)*, para. 349; see also *ibid.*, para. 375. The political changes that took place in Chile in the early 1990s probably encouraged withdrawal of the reservation formulated in 1988 (see *ibid.*, *Forty-sixth Session, Supplement No. 46 (A/46/46)*, para. 239).

³⁸ This interpretative declaration read :

"As a State party to the Rome Statute, the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic.

"Pursuant to the provisions of part 9 of the Statute entitled 'International cooperation and judicial assistance', the Executive shall within six months refer to the Legislature a bill establishing the procedures for ensuring the application of the Statute."

(United Nations, *Treaty Series*, vol. 2189, No. A-38544, p. 504)

³⁹ *Multilateral Treaties...* (footnote 5 above), chap. XVIII.10, footnote 15.

⁴⁰ *Ibid.*, footnote 16.

Women. One such reservation, made by the Libyan Arab Jamahiriya,⁴¹ was the subject of seven objections owing to its general and imprecise nature.⁴² On 5 July 1995, five years after that country's accession to the Convention, its Government informed the Secretary-General that it had decided "to modify, making it more specific, the general reservation it had made upon accession".⁴³ While this "new" reservation is not above reproach,⁴⁴ it is nevertheless true that Libyan Arab Jamahiriya obviously took the criticisms expressed by other States parties with regard to the wording of the initial reservation into account. Similarly, it is probable that Bangladesh, Egypt, Malaysia, the Maldives and Mauritania modified, or even withdrew in whole or in part, their initially formulated reservations in the light of the objections made by other States parties.⁴⁵

22. While an objection might in itself be deemed to constitute one aspect of the reservations dialogue, the number and consistency of the objections also play a significant role: the author of the reservation, any other interested State and any interpreter whatsoever certainly pay more attention to a large number of objections than to an isolated objection.⁴⁶ The more consistent the practice of objections to certain reservations, the greater their impact on assessment and determination of the validity of these reservations and of any other comparable reservation, including in the future. In 1996, China, having formulated two reservations when acceding to the Convention against torture and other cruel, inhuman or degrading treatment or punishment without giving rise to any objection, informed the Committee against Torture that

several government departments were currently undertaking a comprehensive review of the issue, with particular attention to the views of the other States parties concerning reservations and the impact of reservations on the Committee's work.⁴⁷

⁴¹ The reservation formulated by the Libyan Arab Jamahiriya upon accession read: "[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic *Shariah*" (*ibid.*, chap. IV.8, footnote 33).

⁴² Objections were made by Denmark, Finland, Germany, Mexico, the Netherlands, Norway and Sweden (*ibid.*, chap. IV.8). On the question of vague or general reservations, see guideline 3.1.7 and the commentary thereto, *Yearbook ... 2007*, vol. II (Part Two), p. 39.

⁴³ The Libyan Arab Jamahiriya's "new" reservation reads:

"1. Article 2 of the Convention shall be implemented with due regard for the peremptory norms of the Islamic *Shariah* relating to determination of the inheritance portions of the estate of a deceased person, whether female or male.

"2. The implementation of paragraph 16 (c) and (d) of the Convention shall be without prejudice to any of the rights guaranteed to women by the Islamic *Shariah*."

(*Multilateral Treaties ...* (footnote 5 above), chap. IV.8)

⁴⁴ Finland made an objection to the reservation modified by the Libyan Arab Jamahiriya:

"A reservation which consists of a general reference to religious law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfil its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of the observance of treaties according to which a Party may not invoke the provisions of its internal law as justification for failure to perform a treaty" (*ibid.*).

⁴⁵ *Ibid.*

⁴⁶ See Tyagi (footnote 11 above), p. 216.

⁴⁷ Committee against Torture, CAT/C/SR.252/Add.1, 8 May 1996, para. 12. To date, however, China has neither withdrawn nor modified its reservations.

23. In the same spirit, in *Loizidou v. Turkey*, the European Court of Human Rights noted:

The subsequent reaction of various Contracting Parties to the Turkish declarations...⁴⁸ lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46)—the latter subsequent to the statements by the Contracting Parties referred to above—indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.⁴⁹

24. It has also been suggested that, in the light of the history of the objections already made in the context of a given treaty, some States refrain from acceding to the instrument owing to the high risk that the reservations they consider necessary will give rise to numerous objections.⁵⁰

25. Furthermore, even if the objection is a unilateral statement,⁵¹ there is nothing to prevent several States or international organizations from making their objections collectively⁵² or, at least, in a concerted manner in order to give them greater weight. There has not, of course, been a great deal of practice in this area as yet. Nonetheless, efforts made within the framework of European regional organizations, including the EU and the Council of Europe, are beginning to bear fruit and the States members of these organizations are coordinating their reactions to reservations with increasing frequency.⁵³

26. Within the framework of the EU, cooperation on reservations has emerged within the Council of the European Union Working Party on Public International Law (COJUR), which is composed of the legal counsels of member States and meets periodically. The purpose of this cooperation is, *inter alia*, to establish a forum for a pragmatic exchange of views concerning reservations that present legal or political problems. The goal of COJUR activity is to coordinate the national positions of States members of the EU and, if necessary, to take a common position so that these States can act in the same manner and make

⁴⁸ Turkey's first declaration, made on 28 January 1987 in respect of article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms, had been the subject of an exchange of views between Turkey and the Secretary General of the Council of Europe in its capacity as depositary (see *Loizidou v. Turkey*, Preliminary Objections, 23 March 1995, *Series A*, No. 310, paras. 16–17) of an objection made by Greece and of a reaction highlighting various issues of a legal nature concerning the scope of Turkey's recognition, made by Sweden, Luxembourg, Denmark, Norway and Belgium (*ibid.*, paras. 18–24). For its part, Turkey stated, in a letter addressed to the Secretary General of the Council of Europe that its declaration was not to be considered a reservation.

⁴⁹ *Ibid.*, para. 95. See also *ibid.*, para. 81.

⁵⁰ Tyagi believes that the Islamic Republic of Iran has yet to accede to the Convention on the Elimination of All Forms of Discrimination against Women because it fears that the large number of reservations needed in order to bring the Convention into line with domestic and Islamic law would prompt a particularly negative response from the international community (footnote 11 above), p. 199, footnote 65.

⁵¹ See guideline 2.6.1 (Definition of objections to reservations), *Yearbook ... 2005*, vol. II (Part Two), p. 77, para. (5) of the commentary.

⁵² See guideline 2.6.6 (Joint formulation) and the commentary thereto, *Yearbook ... 2008*, vol. II (Part Two), pp. 84–85.

⁵³ For a recent example, see the objections made by the Czech Republic, Estonia, France, Hungary, Ireland, Italy, Latvia, Slovakia, Spain and the United Kingdom in respect of the reservation formulated by Yemen when acceding to the International Convention for the Suppression of the Financing of Terrorism (*Multilateral Treaties ...* (footnote 5 above), chap. XVIII.11).

concerted diplomatic efforts to convince the author of the reservation to reconsider it.⁵⁴ More often, however, the exchange of views leads to a harmonization of the objections that the States members remain free to make in respect of a reservation that is considered impermissible.⁵⁵

27. With respect to the Council of Europe, the Special Rapporteur has, on several occasions, drawn the Commission's attention to the initiatives taken and results achieved within the framework of this regional organization in co-operation on reservations-related matters.⁵⁶ In its recommendation No. R (99) 13 on responses to inadmissible reservations to international treaties, of 18 May 1999, the Committee of Ministers stated that it was "concerned by the increasing number of inadmissible reservations to international treaties, especially reservations of a general character" and "aware that ... a common approach on the part of the member States as regards such reservations may be a means to improve that situation". In order to assist member States and encourage them to exchange views concerning reservations formulated in respect of multilateral treaties drafted within the Council of Europe, a European Observatory of Reservations to International Treaties was established by the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI). Since 2002, the Observatory's functions have been expanded to include multilateral counter-terrorism treaties concluded outside the Council of Europe.⁵⁷ In its work, the Observatory attempts, *inter alia*, to draw member States' attention to reservations that are likely to give rise to objections, a list of which is prepared by its secretariat, and to encourage exchanges of views among member States in order to examine the possibility of making objections in a concerted manner. In that regard, it is interesting to note that the Observatory considers not only reservations formulated by third States, but also those made by Council of Europe member States. In many cases, the latter do not hesitate to provide the necessary explanation or justification so that their reservations can be removed from the list.⁵⁸

⁵⁴ See also paragraph 51 below.

⁵⁵ See Cede, "European responses to questionable reservations", p. 30.

⁵⁶ Third report on reservations to treaties, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1-6, p. 233, paras. 28 and 29; fourth report on reservations to treaties, *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/499, p. 135, paras. 42 and 43; eighth report on reservations to treaties, *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 36, para. 23; eleventh report on reservations to treaties, *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, pp. 193-194, para. 56; and fourteenth report on reservations to treaties, *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614, p. 16, para. 64. On measures taken within the Council of Europe, see also Spiliopoulou Åkermark, "Reservations: Breaking new ground in the Council of Europe", particularly pp. 511-515.

⁵⁷ Eighth report on reservations to treaties, *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 36, para. 23; see also Council of Ministers of the Council of Europe decision CM/Del/Dec (2001) 765 bis of 21 September 2001, item 2.1.

⁵⁸ See, for example, Monaco's explanation of the interpretative declaration that the country had formulated when acceding to the Convention on the Rights of Persons with Disabilities, provided at the 39th meeting of CAHDI, held in Strasbourg on 18 and 19 March 2010 (CAHDI (2010) 14, para. 87), as well as the explanation provided by the observer for Israel when ratifying the Additional Protocol to the Geneva Conventions of 1949 and relating to the adoption of an additional distinctive emblem (Protocol III), and the reaction by the representative of Switzerland at the 35th meeting of CAHDI, held in Strasbourg on 6 and 7 March 2008 (CAHDI (2008) 15, paras. 93-94). See also paragraph 49 below.

3. THE RESERVATIONS DIALOGUE OUTSIDE THE VIENNA SYSTEM

28. In his eighth report, which is devoted to the definition of objections to reservations, the Special Rapporteur has already noted the diversity of States' reactions to a reservation formulated by a State or another international organization.⁵⁹ In many cases, States do not simply purport to "exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in [their] relations with the reserving State or organization", where their reactions cannot be considered equivalent to either an acceptance or an objection *stricto sensu*. These reactions nevertheless purport to establish a reservations dialogue (see subsection (a) below).

29. Moreover, the reservations dialogue is not limited to exchanges between the States and international organizations that are parties to the treaty in question or have the right to accede to it. Of course, the Vienna Conventions deal only with acceptances and objections by contracting States or contracting organizations (or, in the very specific context of article 20, paragraph 3, of the competent organ of the international organization). But the circle of participants in the reservations dialogue is wider and includes all the monitoring bodies of the treaty in question and international organizations that are not entitled to become parties to the treaty (see subsection (b) below).

(a) *Reactions, other than objections and acceptances, of contracting States and contracting organizations*

30. In the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, the arbitral tribunal noted, concerning article 12 of the Convention on the Continental Shelf:

Article 12, as the practice of a number of States... confirms, leaves contracting States free to react in any way they think fit to a reservation made in conformity with its provisions, including refusal to accept the reservation. Whether any such action amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned.⁶⁰

States and international organizations are thus free to comment on, and even criticize, a reservation formulated by another State or another international organization without making objections within the meaning of the Vienna Conventions. Since these reactions, however well founded, are not objections, they cannot rebut the presumption established in article 20, paragraph 5, of the Vienna Conventions: in the absence of an objection *per se* made within the specified time limit, the author of a reaction, even a critical one, shall be deemed to have accepted the reservation even though the majority of its reactions express doubt as to its validity.⁶¹ It is true that if

⁵⁹ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, pp. 45-46, paras. 85-89.

⁶⁰ Arbitral award of 30 June 1977, UNRIAA, vol. XVIII (United Nations publication, sales No.E/F.80.V.7), pp. 161-162, para. 39, p. 32.

⁶¹ See guideline 4.5.3 [4.5.4] (Reactions to an invalid reservation), the first paragraph of which provides clarification: "The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization", *Yearbook ... 2010*, vol. II (Part Two).

the reservation is impermissible, the presumption established in article 20, paragraph 5, has no practical effect.

31. Undefined reactions that do not reveal their purpose and complaints about reservations serve little purpose. For example, the legal regime of a reservation was not specified when the Netherlands “reserve[d] all rights regarding the reservations made by Venezuela on ratifying” the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf.⁶² It is doubtful that such a reaction, which purports to be neither an objection nor an acceptance, would lead the author of the reservation to reconsider, withdraw or modify it. But State practice has changed a great deal in recent years and reactions other than acceptances or objections have a real place in the reservations dialogue without, however, producing a legal effect as such.

32. A particularly telling example is Mexico’s declaration in respect of the reservation to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Malawi:⁶³

The Government of the United Mexican States hopes that the process of eradication of traditional customs and practices referred to in the first reservation of the Republic of Malawi will not be so protracted as to impair fulfilment of the purpose and intent of the Convention.⁶⁴

Mexico’s declaration does not constitute an objection to Malawi’s reservation; on the contrary, it demonstrates an understanding of it. It nevertheless focuses on the necessarily transitory nature of the reservation and on the need to reconsider and withdraw it in a timely manner. This is an excellent example of “soft diplomacy”; moreover, Malawi withdrew its reservation in 1991, slightly more than four years after acceding to the Convention.⁶⁵

33. Full or partial withdrawal of a reservation that is considered invalid is unquestionably the primary purpose of the reservations dialogue. Some States do not hesitate to draw the author of the reservation’s attention, through declarations that are often well reasoned, to the legal problems that the reservation raises in order to request the author to take the necessary steps. Denmark’s reaction to the reservations to the Convention on the Rights of the Child formulated by Brunei Darussalam, Malaysia and Saudi Arabia are examples of this:

The Government of Denmark finds that the general reservation with reference to the Constitution of Brunei Darussalam and to the beliefs and principles of Islamic law is of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservation as being incompatible with the object and purposes of the Convention and accordingly inadmissible and without effect under international law. Furthermore, it is a general principle of international law that national law may not be invoked as justification for failure to perform treaty obligations.

The Convention remains in force in its entirety between Brunei Darussalam and Denmark. ...

⁶² *Multilateral Treaties ...* (footnote 5 above), chap. XXI.1 and 4.

⁶³ The reservation stated: “Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices” (*ibid.*, chap. IV.8, footnote 34).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

The Government of Denmark recommends the Government of Brunei Darussalam to reconsider its reservation to the Convention.⁶⁶

34. Austria reacted to the same reservations and to those formulated by Kiribati and the Islamic Republic of Iran. While these reactions cannot be termed objections within the meaning of the Vienna Conventions, they cast doubt on the admissibility of the reservations in question without claiming to have any particular legal effect:

Under article 19 of the Vienna Convention on the Law of Treaties, which is reflected in article 51 of the [Convention on the Rights of the Child], a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with the object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.

The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations a final assessment as to its admissibility under international law cannot be made without further clarification.

Until the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].

Austria, however, objects to the admissibility of the reservations in question if the application of this reservation negatively affects the compliance of Malaysia ... with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

Austria could not consider the reservation made by Malaysia ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties unless Malaysia ..., by providing additional information or through subsequent practice, ensure[s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention].⁶⁷

Austria’s reaction might conceivably be considered an objection or a conditional acceptance subject to the condition that the reservation be withdrawn, modified or, at a minimum, interpreted in a certain manner. However, in the absence of the information needed to determine the permissibility of the reservations, Austria did not make a formal objection;⁶⁸ it chose to give the reserving States the option of reassuring it as to the permissibility of their reservations.⁶⁹

35. Of course, some States do not hesitate to propose an interpretation of the reservation that, in their view, would make it acceptable. The United Kingdom’s position concerning the reservation formulated by the United States upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects is an example; the interpretation of the reservation seems potentially to change the objection into an acceptance:

⁶⁶ *Ibid.*, chap. IV.11.

⁶⁷ *Ibid.* See also Belgium’s reaction to the reservation formulated by Pakistan upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women.

⁶⁸ This is quite a common practice; see paragraph 17 above.

⁶⁹ See also the reaction of the United Kingdom to the reservation to the International Covenant on Civil and Political Rights formulated by the Republic of Korea, in which the former stated that it “reserve[d] its rights under the Covenant in their entirety” pending “a sufficient indication of [the] intended effect” of the reservation (*ibid.*, chap. IV.4).

This reservation appears to be contrary to the object and purpose of the Protocol insofar as the object and purpose of the Protocol is to prohibit/restrict the use of incendiary weapons *per se*. On this reading, the United Kingdom objects to the reservation as contrary to the object and purpose of the Protocol.

The United States has, however, publicly represented that the reservation is necessary because incendiary weapons are the only weapons that can effectively destroy certain counter-proliferation targets, such as biological weapons facilities, which require high heat to eliminate the biotoxins. The United States has also publicly represented that the reservation is not incompatible with the object and purpose of the Protocol, which is to protect civilians from the collateral damage associated with the use of incendiary weapons. The United States has additionally stated publicly that the reservation is consistent with a key underlying principle of international humanitarian law, which is to reduce risk to the civilian population and civilian objects from harms flowing from armed conflict.

On the basis that (a) the United States reservation is correctly interpreted as a narrow reservation focused on the use of incendiary weapons against biological weapons, or similar counter-proliferation, facilities that require high heat to eliminate the biotoxins, in the interests of preventing potentially disastrous consequences for the civilian population, (b) the United States reservation is not otherwise intended to detract from the obligation to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising incidental loss of civilian life, injury to civilians and damage to civilian objects, and (c) the object and purpose of the Protocol can properly be said to be to protect civilians from the collateral damage associated with the use of incendiary weapons, the United Kingdom would not object to the reservation as contrary to the object and purpose of the Protocol.⁷⁰

36. While recorded practice provides few examples, a genuine dialogue can indeed develop between the author of a reservation and the author of such a conditional objection/acceptance. Such a dialogue took place between the Netherlands and Yemen with respect to the reservation made by the latter State when acceding to the Vienna Convention on Consular Relations. The reservation states (para. 2):

The Yemen Arab Republic understands the words “members of their families forming part of their households” in article 46, paragraph 1, and article 49 as being restricted to members of the consular posts and their wives and minor children for the purpose of the privileges and immunities enjoyed by them.⁷¹

The Netherlands formulated what appears to be a conditional acceptance in the following language:

The Kingdom of the Netherlands accepts the reservation made by the Yemen Arab Republic concerning the articles 46, paragraph 1, and 49 of the Convention only in so far as it does not purport to exclude the husbands of female members of the consular posts from enjoying the same privileges and immunities under the present Convention.⁷²

Several months after the deposit of the Netherlands’ objection, Yemen sent the following communication to the Secretary-General:

[The Government of Yemen] should like to make clear in this connection that it was our country’s intention in making that reservation that the expression “family of a member of the consular post” should, for the purposes of enjoyment of the privileges and immunities specified in the Convention, be understood to mean the member of the consular post, his spouse and minor children only.

[The Government of Yemen] should like to make it clear that this reservation is not intended to exclude the husbands of female members

of the consular posts, as was suggested in the Netherlands interpretation, since it is natural that husbands should in such cases enjoy the same privileges and immunities.⁷³

Thus, this dialogue allowed Yemen to explain the scope of its reservation and allowed the two other States to find common ground concerning the application of articles 46 and 49 of the 1963 Vienna Convention.

37. In much the same manner, the Netherlands formulated conditional acceptances of the reservations made by Bahrain⁷⁴ and Qatar⁷⁵ in respect of article 27, paragraph 3, to the Vienna Convention on Diplomatic Relations concerning the inviolability of the diplomatic bag. The Netherlands’ reaction to Bahrain’s reservation reads (para. 2):

The Kingdom of the Netherlands does not accept the declaration by the State of Bahrain concerning article 27, paragraph 3 of the Convention. It takes the view that this provision remains in force in relations between it and the State of Bahrain in accordance with international customary law. The Kingdom of the Netherlands is nevertheless prepared to agree to the following arrangement on a basis of reciprocity: If the authorities of the receiving State have serious grounds for supposing that the diplomatic bag contains something which pursuant to article 27, paragraph 4 of the Convention may not be sent in the diplomatic bag, they may demand that the bag be opened in the presence of the representative of the diplomat mission concerned. If the authorities of the sending State refuse to comply with such a request, the diplomatic bag shall be sent back to the place of origin.⁷⁶

While neither Bahrain nor Qatar appears to have reacted to the proposal made by the Netherlands, the latter’s approach is clearly based on the desire to engage in dialogue regarding the content of the treaty relations between the States parties to the Vienna Convention on Diplomatic Relations. It must, however, be stressed that the Netherlands’ reaction goes beyond a mere interpretation of Bahrain’s reservation and—to a lesser extent—of Qatar’s; it is, rather, a counterproposal.⁷⁷ Regardless of the consequences of such a counterproposal (and of its potential acceptance by

⁷³ *Ibid.*, footnote 21.

⁷⁴ Bahrain’s reservation reads (para. 1): “The Government of the State of Bahrain reserves its right to open the diplomatic bag if there are serious grounds for presuming that it contains articles the import or export of which is prohibited by law” (*Multilateral Treaties ...* (footnote 5 above), chap. III.3).

⁷⁵ In its reservation, Qatar states: “The Government of the State of Qatar reserves its right to open a diplomatic bag in the following two situations:

“1. The abuse, observed in *flagrante delicto*, of the diplomatic bag for unlawful purposes incompatible with the aims of the relevant rule of immunity, by putting therein items other than the diplomatic documents and articles for official use mentioned in para. 4 of the said article, in violation of the obligations prescribed by the Government and by international law and custom.

“In such a case both the foreign Ministry and the Mission concerned will be notified. The bag will not be opened except with the approval by the Foreign Ministry. The contraband articles will be seized in the presence of a representative of the Ministry and the Mission.

“2. The existence of strong indications or suspicions that the said violations have been perpetrated.

“In such a case the bag will not be opened except with the approval of the Foreign Ministry and in the presence of a member of the Mission concerned. If permission to open the bag is denied it will be returned to its place of origin” (*ibid.*).

⁷⁶ *Ibid.*

⁷⁷ See, *inter alia*, Greig, “Reservations: equity as a balancing factor?”, pp. 42–45. Concerning the same example, the author suggests that “[s]uch a proposal would amount ... to a standing offer to the reserving State to modify the treaty between the two parties concerned in accordance with Article 41 (1) (b) of the Vienna Convention” (*ibid.*, p. 44).

⁷⁰ *Ibid.*, chap. XXVI.2.

⁷¹ *Ibid.*, chap. III.6.

⁷² *Ibid.* See also the well-argued objection/acceptance made by the United States in respect of the same reservation (*ibid.*).

the other party), these effects occur outside the reservations regime as established by the Vienna Conventions. Such a dialogue can, however, lead to a solution which is mutually acceptable to the key players and which, like the entire Vienna regime, makes it possible to find a balance between the goal of universality and the integrity of the treaty.

38. The Special Rapporteur is, moreover, convinced that the examples given constitute only a small part of this reservations dialogue, which extends beyond the formality of the Vienna regime and is conducted bilaterally through the diplomatic channel⁷⁸ rather than through the intermediary of the depositary.

(b) *The reservations dialogue with treaty monitoring bodies and within international organizations*

39. The essential role⁷⁹ played by monitoring bodies in assessing the permissibility of reservations has already been examined and confirmed by the Commission.⁸⁰ While not parties to treaties, they play an important role not only in assessing the permissibility of reservations, but also in fostering dialogue with the authors of reservations on the permissibility and appropriateness of their reservations.

40. Human rights treaty monitoring bodies have played a leading role in this regard and one that is growing over time.⁸¹ Even though—or perhaps because—they do not have decision-making powers in that area, monitoring bodies do not hesitate to draw the attention of States

⁷⁸ For example, Sweden informed CAHDI that the Swedish authorities had contacted the authorities of Botswana with regard to the latter's reservation to the International Covenant on Civil and Political Rights in order to obtain further information on its scope given that the reservation referred to domestic legislation. As it had not received a satisfactory reply, the Swedish Government intended to object to the reservation. (CAHDI, 21st meeting, held in Strasbourg on 6 and 7 March 2001 (CAHDI (2001) 4, para. 23); see also *Multilateral Treaties ...* (footnote 5 above), chap. IV.4).

⁷⁹ ICJ has, moreover, stressed the importance of these monitoring bodies, particularly with regard to human rights treaties. In its judgment of 30 November 2010 in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, it noted (*Merits*, Judgment of 30 November 2010, *I.C.J. Reports 2010*, p. 639, para. 66):

“Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its ‘General Comments’.

“Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.”

⁸⁰ See guidelines 3.2 (Assessment of the permissibility of reservations), 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations), 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations), 3.2.3 (Cooperation of States and international organizations with treaty monitoring bodies), and 3.2.4 (Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body), *Yearbook ... 2009*, vol. II (Part Two), para. 83.

⁸¹ See Pellet and Müller, “Reservations to human rights treaties: not an absolute evil...”, pp. 542–544 and p. 551.

parties to reservations that they find dubious or outdated in order to encourage the reserving State to modify or withdraw the reservation in question. This reservations dialogue—which is often quite extensive—is conducted, for instance, during reviews of periodic reports.

41. The role of monitoring bodies in the reservations dialogue was fostered by the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, which urged States to “avoid, as far as possible, the resort to reservations”⁸² to human rights instruments. The Conference also encouraged States

to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them.⁸³

In particular, the Conference emphasized the role of the Committee on the Elimination of Discrimination against Women in this regard.⁸⁴

42. In recent years, the various human rights treaty monitoring bodies⁸⁵ have largely harmonized their practices, notably by better coordinating their activities. The need for dialogue between States parties and monitoring bodies was stressed by the Working Group on Reservations to Treaties, established by the fourth inter-committee meeting and the seventeenth meeting of chairpersons of the human rights treaty monitoring bodies in order to examine the report on the practice of human rights treaty bodies with respect to reservations to such treaties. To that end, the Working Group noted in 2006 that States must include in their periodic reports information on reservations to the instruments in question in order to allow the monitoring bodies to take a position and initiate a dialogue with the States parties.⁸⁶ In order to enable States to benefit fully from this exchange

with regard to concluding observations and comments, members of the working group agreed on a certain number of recommendations which broadly reflect the current practice of all treaty bodies. Members of the working group felt that treaty bodies should explain to reserving States the nature of their concerns with respect to the effects of the reservations on the treaty. In particular, it is important for States to understand how treaty bodies read the provisions of the treaty concerned and the reasons why some reservations are incompatible with its object and purpose. So far, the practice of treaty bodies has been to recommend the withdrawal of reservations without necessarily providing reasons for such recommendations. There was disagreement as to whether the

⁸² A/CONF.157/24, Part I, chap. III, sect. I, para. 26.

⁸³ *Ibid.*, sect. II, para. 5.

⁸⁴ *Ibid.*, para. 39 (“*Inter alia*, the Committee on the Elimination of Discrimination against Women should continue its review of reservations to the [1979] Convention. States are urged to withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law”). In its Decision No. 41/1, the Committee confirmed that “Determination of [the issue of the compatibility of reservations with the object and purpose of the Convention], and thus of the permissibility of reservations, not only falls within its function in relation to the reporting procedure under article 18 of the Convention, but also in relation to the individual communication and inquiry procedures under the Optional Protocol”, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 38 (A/63/38)*, p. 88.

⁸⁵ For a summary of the practice of the various monitoring bodies, see HRI/MC/2005/5, paras. 8–21. See also Tyagi (footnote 11 above), pp. 219–236.

⁸⁶ HRI/MC/2007/5, para. 16.

justifications for recommending the withdrawal of reservations should be provided in the concluding observations. Several members of the working group felt that this process did not have to be so formalised as long as treaty bodies explain their recommendations during the dialogue with the State. While all treaty bodies should encourage the complete withdrawal of reservations, the review of the need for them or the progressive narrowing of scope through partial withdrawals of reservations, it was not felt necessary to set a precise deadline for States to implement such recommendations since treaty bodies had different practices in this regard.⁸⁷

43. In 2006, the Working Group adopted the following recommendation:

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

- (i) The nature and scope of reservations or interpretative declarations;
- (ii) The reason why such reservations were considered to be necessary and have been maintained;
- (iii) The precise effects of each reservation in terms of national law and policy;
- (iv) Any plans to limit the effects of reservations and ultimately withdraw them within a specific time frame.

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

(c) Treaty bodies should in their concluding observations:

- (i) Welcome the withdrawal, whether total or partial, of a reservation;
- (ii) Acknowledge ongoing reviews of reservations or expressions of willingness to review;
- (iii) Express concern for the maintenance of reservations;
- (iv) Encourage the complete withdrawal of reservations, the review of the need for them or the progressive narrowing of scope through partial withdrawals of reservations.

(d) Treaty bodies should highlight the lack of consistency among reservations formulated to certain provisions protected in more than one treaty and encourage the withdrawal of a reservation on the basis of the availability of better protection in other international conventions resulting from the absence of a reservation to comparable provisions.⁸⁸

44. Although practice is not necessarily uniform, it shows that monitoring bodies strive to engage in a constructive dialogue with States parties when reviewing periodic reports. The compilation of human rights treaty monitoring bodies' practices with regard to reservations to these instruments,⁸⁹ prepared by the Working Group on Reservations to Treaties, provides numerous examples. Monitoring bodies react critically to some reservations, without ever condemning them outright, and recommend that States parties should reconsider or withdraw them. For example, the Human Rights Committee, while welcoming with satisfaction the announcement by

Italy that it was withdrawing some of its reservations to the International Covenant on Civil and Political Rights, expressed regret that the reservations to article 14, paragraph 3; article 15, paragraph 1; and article 19, paragraph 3, were not part of that process. The Committee therefore encouraged Italy to "pursue the in-depth review process it started in May 2005 to assess the status of its reservations to the Covenant, with a view to withdrawing them all".⁹⁰ For its part, the Committee on Economic, Social and Cultural Rights did not hesitate to recommend that the United Kingdom should withdraw its reservations to ILO Convention (No. 102) concerning minimum standards of social security,⁹¹ a treaty other than the one establishing the Committee. However, the idea is not just to criticize, but also to encourage and commend States that have stated their intention to withdraw their reservations or have already done so, as well as those that have acceded to human rights instruments without reservations.

45. At present, this pragmatic and non-confrontational dialogue on human rights instruments is undoubtedly the example *par excellence* of the reservations dialogue. It is interesting to note that here again, the dialogue is conducted outside the Vienna system. Rather than being "judged" by their peers, States report on their efforts and on the difficulties they face in withdrawing certain reservations. Rather than "condemning" reservations as impermissible and setting them aside, monitoring bodies try to better understand the reservations and the reasons for their formulation, and to convince their authors to modify or withdraw them.

46. The reservations dialogue concerning human rights instruments was, moreover, strengthened with the establishment of the Human Rights Council; its role is to "serve as a forum for dialogue on thematic issues on all human rights" and one of its tasks is to "promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits".⁹² Apart from appeals by the Council⁹³ and the

⁹⁰ Human Rights Committee, Eighty-fifth Session, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations, Italy, CCPR/C/ITA/CO/5, 24 April 2006, para. 6.

⁹¹ E/C.12/GBR/CO/5, para. 43.

⁹² General Assembly resolution 60/251 of 15 March 2006, paras. 5 (b) and (d).

⁹³ See, for example, Human Rights Council resolution 4/1 on the question of the realization in all countries of economic, social and cultural rights, 23 March 2007, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 53 (A/62/53)*, para. 3 (a); resolution 6/21 on the elaboration of international complementary standards to the International Convention on the Elimination of All Forms of Racial Discrimination, 28 September 2007, *ibid.*, *Sixty-third Session, Supplement No. 53 (A/63/53)*, sixth preambular paragraph; resolution 6/30 on integrating the human rights of women throughout the United Nations system, 14 December 2007, *ibid.*, para. 10; resolution 7/29 on rights of the child, 28 March 2008, *ibid.*, para. 2; resolution 10/7 on the human rights of persons with disabilities: national frameworks for the promotion and protection of the human rights of persons with disabilities, 26 March 2009, *ibid.*, *Sixty-fourth Session (A/64/53)*, para. 3; resolution 10/14 on the implementation of the Convention on the Rights of the Child and the Optional Protocols thereto, 26 March 2009, *ibid.*, para. 2; resolution 13/11 on the human rights of persons with disabilities: national implementation and monitoring and

⁸⁷ *Ibid.*, para. 17.

⁸⁸ *Ibid.*, Recommendations, point 9. See also the report of the chairpersons of the human rights treaty bodies on their nineteenth meeting (A/62/224), para. 48 (v).

⁸⁹ See HRI/MC/2009/5, annex I; HRI/MC/2008/5, annex I; HRI/MC/2007/5/Add.1, annex II; HRI/MC/2005/5, annex I; and HRI/MC/2005/5/Add.1, annex I.

General Assembly⁹⁴ for States to withdraw reservations that are incompatible with the object and purpose of these instruments, the reservations dialogue has been established primarily through the universal periodic review, “an intergovernmental process, United Nations Member-driven and action-oriented”.⁹⁵

47. As a case in point, the report of the Working Group on the Universal Periodic Review on France refers to several requests for information concerning reservations formulated by France in respect of various international instruments, as well as the following recommendations addressed to France during the discussion:⁹⁶

– To remove reservations and interpretative statements to the International Covenant on Civil and Political Rights (Russian Federation);

– To consider the possibility of withdrawing its reservations to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (Cuba);

– To withdraw the declaration under article 124 of the Rome Statute of the International Criminal Court (Mexico).⁹⁷

The report also mentions the following voluntary commitment:

– To examine the possibility of withdrawing or modifying reservations made by the Government to article 14, paragraph 2 (c) of the Convention on the Elimination of All Forms of Discrimination against Women.⁹⁸

48. In their replies, the Governments of States under review respond quite scrupulously to these recommendations. For example, France replied to Cuba’s recommendation concerning its reservations to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination as follows:

The Government agrees to review its interpretative statement concerning article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

Comments: This statement will be reviewed in the context of the current preparation of France’s seventeenth and nineteenth periodic

introducing as the theme for 2011 the role of international cooperation in support of national efforts for the realization of the rights of persons with disabilities, 25 March 2010, *ibid.*, *Sixty-fifth Session, Supplement No. 53* (A/65/53), para. 2; and resolution 13/20 on the rights of the child: the fight against sexual violence against children, 26 March 2010, *ibid.*, para. 14.

⁹⁴ See, for example, General Assembly resolution 61/143, Intensification of efforts to eliminate all forms of violence against women, of 19 December 2006, para. 8 (b); resolution 63/243, International Convention on the Elimination of All Forms of Racial Discrimination, of 24 December 2008, para. 25; resolution 64/141, Follow-up to the Fourth World Conference on Women and full implementation of the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session of the General Assembly, of 18 December 2009, para. 5; and resolution 64/152, International Covenants on Human Rights, of 18 December 2009, para. 8.

⁹⁵ See Human Rights Council resolution 5/1 of 18 June 2007, annex, para. 3 (d), *Official Records of the General Assembly, Sixty-second Session, Supplement No. 53* (A/62/53), endorsed by General Assembly resolution 62/219 of 22 December 2007.

⁹⁶ In some cases, the recommendations concerning reservations are more substantial. For example, the report of the Working Group on the United States of America (A/HRC/16/11) contains 12 recommendations concerning reservations.

⁹⁷ A/HRC/8/47, para. 60 (3)–(5).

⁹⁸ *Ibid.*, para. 63 (9).

reports under the International Convention on the Elimination of All Forms of Racial Discrimination, due in October 2008.⁹⁹

49. This informal dialogue concerning reservations is not limited to human rights treaty monitoring bodies and to the Human Rights Council. Within the framework of COJUR and CAHDI, States strive not only to exchange views on the permissibility of certain reservations, but also to harmonize their objections thereto;¹⁰⁰ these bodies also encourage constructive dialogue with authors of reservations.

50. With regard to reservations formulated by States represented in CAHDI,¹⁰¹ for example, there is real discussion of the difficulties that some delegations have with the interpretation or permissibility of a reservation. Often, a solution can be found once the author of the reservations provides explanations and clarifications.¹⁰² For example, at the 26th meeting of CAHDI, Austria and Switzerland asked about the admissibility of the United Kingdom’s declaration in respect of the Optional Protocol to the Convention on the rights of the child on the involvement of children in armed conflict.¹⁰³ The United Kingdom provided explanations and emphasized the admissibility and legitimacy of its declaration. At the 27th meeting of CAHDI:

The delegation of Austria expressed reservations concerning the interpretative declaration of the United Kingdom..., although it had no objection. It understood the reasons, stated in explicit detail at the previous meeting, which had prompted the United Kingdom to make the declaration, but had not been convinced and thus considered the declaration problematic. On this point, the delegation of Switzerland notified that it had been convinced by the arguments which the United Kingdom had adduced at the previous meeting.¹⁰⁴

⁹⁹ A/HRC/8/47/Add.1, paras. 15–16. To date, France has not withdrawn its declaration in respect of article 4 of the Convention.

¹⁰⁰ See paragraphs 25–27 above.

¹⁰¹ This does not mean that the Ad Hoc Committee of Legal Advisers on Public International Law, through its members, does not engage in dialogue with non-member States.

¹⁰² This is, moreover, one of the reasons that CAHDI decided to fulfil its responsibilities concerning the European Observatory on its own and to stop discussing reservations only within the group of experts on reservations. The absence of certain delegations from the group made discussion much more difficult. See CAHDI, 19th meeting, held in Berlin on 13 and 14 March 2000 (CAHDI (2000) 12 rev., paras. 73–76 and 82; and 20th meeting, held in Strasbourg on 12 and 13 September 2000 (CAHDI (2000) 21, para. 27). At the 27th meeting, the Chair of CAHDI drew the attention of delegations to the importance of this exercise and the need to participate in it: “Moving to a more general matter, the Chair asked the Ad Hoc Committee of Legal Advisers on Public International Law members what they considered the most appropriate way to increase the effectiveness of the Committee’s work as a European observatory. He drew attention to a number of States to the importance of going through the whole document prepared by the Secretariat and of not restricting their discussion to reservations or declarations against which an objection might be raised. The delegations might change their approach and their policy with regard to treaties as a result of the Ad Hoc Committee of Legal Advisers on Public International Law’s discussions. Failure to respond should therefore not be interpreted as a lack of interest” (CAHDI, 27th meeting, held in Strasbourg on 18 and 19 March 2004 (CAHDI (2004) 11, para. 42)).

¹⁰³ CAHDI, 26th meeting, held in Strasbourg on 18 and 19 September 2003 (CAHDI (2003) 14, paras. 26–28).

¹⁰⁴ CAHDI, 27th meeting, held in Strasbourg on 18 and 19 March 2004 (CAHDI (2004) 11, para. 21). For another example, see the discussion on the reservation to the Convention on the transfer of sentenced persons, CAHDI, 22nd meeting, held in Strasbourg on 11 and 12 September 2001 (CAHDI (2001) 10, paras. 51–54); and 23rd meeting, held in Strasbourg on 4 and 5 March 2002 (CAHDI (2002) 8, para. 27).

The European States do not hesitate to explain the reasons for formulating a given reservation¹⁰⁵ and, where applicable, to withdraw reservations.¹⁰⁶

51. Through its members, CAHDI also pursues dialogue with third States. For example, the report on the 38th meeting indicates that CAHDI was engaged in a dialogue with the Bahamas regarding its reservation to the International Covenant on Civil and Political Rights.¹⁰⁷

52. Within COJUR, the member States of the EU also endeavour not only to coordinate any objections that they make but, above all, to enter into a dialogue with the author of a reservation, including through the traditional diplomatic channels, in order to obtain additional information on the reservation.¹⁰⁸

53. The Vienna Conventions—with their well-known gaps that the Guide to Practice has endeavoured to fill—are only the tip of the iceberg of the reservations dialogue; it has become an undisputed practical reality and an integral part of the reservations regime, to which it brings a degree of flexibility while increasing its effectiveness.

B. A legal framework for the reservations dialogue?

54. Articles 19 to 23 of the Vienna Conventions establish the conditions for the validity of reservations and their legal effects on treaties by seeking to strike a satisfactory balance between the capacity of States to formulate reservations to a treaty, on the one hand, and the possibility of other States to accept or reject the proposed modification of the effects of the treaty in their relations with the author of the reservation. In this specific legal context, acceptances and objections do not appear to be elements of a dialogue between the authors of the acceptance or objection and the author of the reservation.

55. Furthermore, the Vienna Conventions completely ignore all other forms of the reservations dialogue, as is logical in a treaty that is binding on States and international organizations.

56. The reservations dialogue, for its part, does not purport to produce a legal effect in the strict sense of the word. It does not seek to modify, as such, the content of the treaty relationship that has—or has not—been established

¹⁰⁵ See the examples given in footnote 58 above. See also the explanations provided by Georgia concerning its reservation to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (*ibid.*, para. 30 and footnote 10).

¹⁰⁶ See the explanations provided by the Netherlands concerning its reservation to the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents: “The Netherlands delegation informed the Committee that its authorities intended to withdraw the reservation in respect of the 1973 Convention because it was in fact incompatible with the object and purpose of the treaty” (CAHDI, 27th meeting, held in Strasbourg, 18–19 March 2004 (CAHDI (2004) 11, para. 39)).

¹⁰⁷ CAHDI, 38th meeting, Strasbourg, 10–11 September 2009 (CAHDI (2009) 16, para. 74)).

¹⁰⁸ Thus, the Swedish delegation to CAHDI informed the Committee that the declarations and reservations made by the Republic of Moldova in respect of the Convention relating to the Status of Refugees had been considered by COJUR, which had decided to enter into a dialogue with the author of the reservation (CAHDI, 24th meeting, held in Bratislava, 9–10 September 2002 (CAHDI (2002) 16, para. 18).

between the author of a reservation and the author of an objection. On the contrary, although it is designed to encourage States to formulate only permissible reservations and to reconsider and withdraw reservations (and even objections) that are impermissible or that have simply become useless or inappropriate, the reservations dialogue in itself never produces these results. In order for these results to be achieved, the reserving State must formally withdraw its reservation or modify it in accordance with the rules of the Vienna Convention, and the author of an objection must withdraw its objection according to the procedures prescribed by the Vienna rules. The reservations dialogue accompanies implementation of the legal regime of reservations, without being a part of it and operates largely outside the Vienna law.

57. The reservations dialogue can nonetheless contribute to the smooth functioning of the Vienna regime, which is itself based on the principle of dialogue and discussion.¹⁰⁹ Moreover, the Commission has confirmed this on many occasions in its work on the Guide to Practice and has established the consequences thereof in several guidelines that recommend to States and international organizations certain practices that are not required under the Vienna regime but are very useful in ensuring harmonious application of the rules relating to reservations. These are, in fact, part of the reservations dialogue.

58. One example is guideline 2.1.9:

2.1.9 Statement of reasons¹¹⁰

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

No provision of the Vienna Conventions requires States to indicate the reasons for their reservation. Nonetheless, in order to allow other States to determine whether a reservation is valid and whether they are prepared to accept it, it is essential for them to know the reasons why the author formulated it. Moreover, practice shows that a reservations dialogue with the author of a reservation is often pursued precisely in order to clarify the meaning of a reservation and to understand the reasons why the reservation is, in the eyes of its author,¹¹¹ necessary.

59. Similarly, guideline 2.6.10 concerning the reasons for objections is an important element of a properly functioning reservations dialogue, even though it cannot be considered a mandatory legal rule for States and organizations:

2.6.10 Statement of reasons¹¹²

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

Although an objection that is not reasoned is perfectly capable of producing the legal effect ascribed to it by

¹⁰⁹ See paragraph 11 above.

¹¹⁰ For the commentary to this guideline, see *Yearbook ... 2008*, vol. II (Part Two), pp. 80–82.

¹¹¹ See, for example, the position of the human rights treaty bodies on this topic (para. 42 above) and the recommendations adopted in 2006, cited in paragraph 43 (in particular, subpara. (a)) above.

¹¹² For the commentary to this guideline, see *Yearbook ... 2008*, vol. II (Part Two), pp. 88–89.

the Vienna Conventions, without a statement of reasons it loses its impact as an element of the reservations dialogue.¹¹³ If the reasons are not given, it is difficult for the author of a reservation, the other contracting States and contracting organizations or the judge who has to rule on the reservation to benefit from the assessment made by the author of the objection. It is practically impossible to know whether the author of an objection considers the reservation incompatible with the object and purpose of the treaty, or whether it simply deems the reservation inappropriate. If the reasons are not given, the author of an objection has no basis for urging the author of the reservation to withdraw or modify it.¹¹⁴

60. Guideline 4.5.3 shows even more clearly the relationship between the legal regime of reservations and the reservations dialogue:

4.5.3 Reactions to an invalid reservation¹¹⁵

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

2. Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.

Although an objection to a valid reservation is, as such, not covered in the Vienna regime, which ascribes no concrete legal effect to it, it nevertheless has an important role to play in implementation of the Vienna rules, including in assessment of the validity of a reservation, and is therefore part of the reservations dialogue. The fact that the Vienna Conventions are silent on the subject does not mean that States should not make such objections, which are still relevant.

61. Lastly, guideline 2.5.3 captures perfectly the ultimate goal of the reservations dialogue:

2.5.3 Periodic review of the usefulness of reservations¹¹⁶

1. States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

2. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

62. However, the Special Rapporteur does not believe that the Commission should endeavour to establish a specific legal regime for the reservations dialogue, even as part of a non-binding legal instrument such as the Guide to Practice. Any attempt to systematize practice in this field—which while quite abundant, is extremely

diverse—is bound to fail and will undermine the flexibility of the modalities of the reservations dialogue. It does not appear desirable to favour one form of dialogue over another or to shut the door on new practices that might develop over time and might produce results beneficial to implementation of the Vienna rules. The Commission should encourage all forms of reservations dialogue.

63. One of the major advantages of the reservations dialogue is precisely its highly pragmatic nature. It is intended to influence the decisions and actions of players in the field of reservations without hamstringing them. Thus, the practice will clearly not be enhanced by being locked into procedural rules that would reduce its effectiveness by making it more cumbersome.

64. It is nonetheless useful to recommend that States and international organizations should, to the extent possible, not only engage in some form of dialogue with the authors of reservations and, more generally, with all the key players and stakeholders, but also adopt certain practices and attempt to follow certain basic principles which, without constituting legal obligations under the Vienna regime, are factors in making the dialogue useful and effective. To that end, the Special Rapporteur suggests not only that the Commission should establish guidelines—even if they are merely recommendations (as it has already done)—but that it should also adopt a recommendation or general conclusions on the reservations dialogue.

65. The draft proposed by the Special Rapporteur and reproduced in paragraph 68, below, of the present report stems in part from the recommendations of the Working Group on Reservations to Treaties established to examine the report on the practice of human rights treaty bodies, adopted in 2006, while supplementing them in order to reflect other forms of reservations dialogue found in State practice. Although this instrument concerns a specific form of the reservations dialogue, the principles that it establishes can easily be applied to the phenomenon as a whole, regardless of the context in which the dialogue unfolds.

66. Those recommendations, which are intended to increase the effectiveness and transparency of the reservations dialogue during the review of periodic reports, nonetheless pertain to the reservations dialogue conducted directly with the author of a reservation, as practised by human rights treaty bodies. They do not cover the fruitful practices of exchange of views, cooperation and coordination that may develop between other contracting States and contracting organizations in order to make reactions to problematic reservations more consistent and more effective. It is therefore appropriate to supplement the recommendations in order to encourage States and international organizations to adopt these practices.

67. The Special Rapporteur also proposes to incorporate into the draft recommendation or conclusions other elements of the reservations dialogue which, although originally developed in order to address an issue that was wrongly depicted as specific to reservations to human rights treaties, are useful and relevant to all other categories of reservations to all types of treaties. This is the case, for example, of the 1993 World Conference on

¹¹³ See also paragraphs 42 and 43 above, and particularly subparagraph (b) of the recommendation quoted in paragraph 43.

¹¹⁴ See also guideline 2.9.6 (Statement of reasons for approval, opposition and recharacterization), *Yearbook ... 2009*, vol. II (Part Two), p. 92.

¹¹⁵ For the commentary to this guideline, see *Yearbook ... 2010*, vol. II (Part Two), pp. 121–123.

¹¹⁶ For the commentary to this guideline, see *Yearbook ... 2003*, vol. II (Part Two), p. 76.

Human Rights appeal for States to make reasonable and reasoned use of reservations.¹¹⁷

68. In the light of these observations, the draft recommendation or conclusions that the Commission is invited to adopt might be worded as follows:

“Draft recommendation or conclusions of the International Law Commission on the reservations dialogue

“The International Law Commission,

“Recalling the provisions on reservations to treaties contained in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,

“Bearing in mind the need to safeguard the integrity of multilateral treaties while ensuring the universality of those for which universal accession is envisaged,

“Recognizing the usefulness of reservations to treaties formulated within the limits imposed by the law of treaties, including article 19 of the Vienna Conventions and concerned at the large number of reservations that appear incompatible with these requirements,

“Aware of the difficulties that States and international organizations face in assessing the validity of reservations,

“Convinced of the usefulness of a pragmatic dialogue with the author of a reservation and of cooperation among all reservations stakeholders,

“Welcoming the efforts made in recent years, including within the framework of human rights treaty bodies and certain regional organizations,

“1. Calls upon States and international organizations wishing to formulate reservations to ensure that they are not incompatible with the object and purpose of the treaty to which they relate, to consider limiting their scope, to formulate them as clearly and concisely as possible, and to review them periodically with a view to withdraw them if appropriate;

“2. Recommends that in formulating a reservation, States and international organizations should indicate, to the extent possible, the nature and scope of the reservation, why the reservation is deemed necessary, the effects of the reservation on fulfilment by the author of the reservation of its treaty obligations arising from the instrument in question, and whether it plans to limit the reservation’s effects, modify it or withdraw it according to a specific schedule and modalities;

“3. Recommends also that States and international organizations should state the reason for any modification or withdrawal of a reservation;

“4. Recalls that States, international organizations and monitoring bodies may express their concerns about a reservation and stresses the usefulness of such reactions for assessment of the validity of a reservation by all the key players;

“5. Encourages States, international organizations and monitoring bodies to explain to the author of a reservation the reasons for their concerns about the reservation and, where appropriate, to request any clarification that they deem useful;

“6. Recommends that States, international organizations and monitoring bodies should, if they deem it useful, call for the full withdrawal of reservations, reconsideration of the need for a reservation and gradual reduction of the scope of a reservation through partial withdrawals, and should encourage States and international organizations that formulate reservations to do so;

“7. Encourages States and international organizations to welcome the concerns and reactions of other States, international organizations and monitoring bodies and to address those concerns and take them duly into account, to the extent possible, with a view to reconsidering, modifying or withdrawing a reservation;

“8. Calls on all States, international organizations and monitoring bodies to cooperate as closely as possible in order to exchange views on problematic reservations and to coordinate the measures to be taken; and

“9. Expresses the hope that States, international organizations and monitoring bodies will initiate, undertake and pursue such dialogue in a pragmatic and transparent manner.”

¹¹⁷ See paragraph 41 above.

CHAPTER II

Dispute settlement in the context of reservations

69. The 1969 and 1986 Vienna Conventions contain no general dispute settlement clause¹¹⁸ and part V, section 4, of those instruments provides only for the “procedure to be

followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty”.¹¹⁹ These

¹¹⁸ Dupuy, “Codification et règlement des différends: Les débats de Vienne sur les procédures de règlement”; Rosenne, “The settlement of treaty disputes under the Vienna Convention”; Hayashi, “The dispute settlement clause of the 1986 Vienna Convention on the Law of Treaties”; and Ruiz Fabri, “Article 66”; see also the 3 February 2006 judgment of ICJ on jurisdiction and admissibility, *Armed activities on the Territory*

of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), I.C.J. Reports 2006, paras. 120–125.

¹¹⁹ This is the title of article 65. Article 66, which is worded differently in the two Conventions in order to take into account the fact that international organizations cannot submit applications to ICJ, concerns the compulsory procedures for judicial settlement, arbitration (for disputes concerning the application or interpretation of articles 53 or 64

provisions do not deal with disputes concerning the validity or the effects of reservations. They are therefore subject to the “common law” of dispute settlement and the parties must seek a solution primarily through one of the means set out in Article 33 of the Charter of the United Nations.

70. It nevertheless remains to be determined whether, in light of the frequency with which States (and, to a lesser extent, international organizations) are faced with reservations-related problems and the complexity of some of those problems, it would be appropriate to consider the manner in which differences of opinion that arise between the States (and international organizations) concerned should or could be resolved (see section A below). In the light of the key principle of consent that governs such matters and the role that States wish to retain in that regard, such a mechanism should be as flexible and as easy to use as possible and should help them find a solution rather than offering an additional dispute settlement mechanism (see section B below). Final adoption of the Guide to Practice might provide an opportunity to make recommendations along those lines to States and international organizations, either directly or through the General Assembly.¹²⁰

A. The issue

71. Although the Commission is not in the habit of providing the draft articles that it elaborates with clauses relating to the settlement of disputes and although, in the Special Rapporteur’s opinion, this is usually undesirable¹²¹ and might appear incompatible with the non-compulsory nature of the Guide to Practice, specific reasons seem to justify an exception in the present case; however, this should be only a flexible, optional mechanism.

1. DISADVANTAGES OF A RIGID, COMPULSORY DISPUTE SETTLEMENT MECHANISM

72. The recent note by the Secretariat on the settlement of dispute clauses¹²² shows that the Commission’s practice regarding the inclusion in its draft articles of proposals regarding the settlement of potential disputes arising from their application has varied.¹²³ In the Special Rapporteur’s view, the question is, for the most part, improperly framed, asking not whether the inclusion of such clauses in a potential future convention would be likely to increase

on *ius cogens*) and conciliation (for disputes concerning other causes of nullity, termination, suspension of the application of a treaty or withdrawal of a party thereof). See also the annex to the Convention concerning conciliation procedures.

¹²⁰ On this point, see paragraph 100 below.

¹²¹ In his second report on reservations to treaties, the Special Rapporteur said that in his view, “the discussion of a regime for the settlement of disputes [in the draft articles prepared by the Commission] diverts attention from the topic under consideration strictly speaking, gives rise to useless debates and is detrimental to efforts to complete the work of the Commission within a reasonable period. It seems to him that, if States deem it necessary, the Commission would be better advised to draw up draft articles which are general in scope and could be incorporated, in the form of an optional protocol, for example, in the body of codification conventions” (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 50, para. 47).

¹²² *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/623.

¹²³ The note by the Secretariat mentions nine drafts in which the Commission included one or more dispute settlement clauses and eight drafts for which such inclusion was discussed but ultimately rejected; to these should be added a number of other drafts not mentioned in the note, for which the question does not appear to have arisen (such as the draft articles on consular relations and the draft articles on special missions).

its effectiveness, but whether it is the Commission’s role to consider, for each set of draft articles, the final clauses that might accompany it;¹²⁴ it is clear that such provisions are not, *stricto sensu*, codification and while the practice in the peaceful settlement of disputes doubtless contributes to the progressive development of international law, it is difficult to see how their inclusion in the Commission’s drafts facilitates this. Furthermore, as a general rule, the General Assembly has not adopted or followed the Commission’s proposals when the latter, usually after long and repeated discussions, has included settlement clauses in drafts adopted on first or second reading.¹²⁵

73. Also worthy of mention are the specific objections to the inclusion of dispute settlement provisions in a document such as the Guide to Practice, since it was decided at the outset that it would not be compulsory in nature.¹²⁶ It might initially seem strange to accompany such an instrument with dispute settlement clauses; since it is not binding on States and international organizations, it might be assumed that it could not provide a basis for a compulsory solution where a dispute on its implementation arises.

74. It is true that there is nothing to prevent States or international organizations, if they so desire, from undertaking unilaterally to apply the provisions of the Guide to Practice, either generally or for purposes of settlement of a specific dispute concerning reservations. The technique of referring to “soft” instruments included in binding instruments has become more common in the context of procedural norms (for example, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules¹²⁷ or the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States¹²⁸) or substantive rules (see, for example, the Financial Action Task Force (FATF), recommendations

¹²⁴ Dispute settlement provisions are usually included in the final clauses.

¹²⁵ See, in general, the note by the Secretariat, paras. 16–44.

¹²⁶ See *Yearbook ... 1995*, vol. II (Part Two), p. 108, paras. 484 and 487; see also chapter III, below, of this report.

¹²⁷ Bilateral investment treaties often refer to these Rules. For example, the case of *HICEE B.V. v. The Slovak Republic*, conducted under the aegis of the Permanent Court of Arbitration, was brought in application of the Agreement on Encouragement and Reciprocal Protection of Investments between the Netherlands and the Czech and Slovak Federal Republic, which refers to the UNCITRAL Arbitration Rules. See, among many examples, the case of *European American Investment Bank AG v. The Slovak Republic*, conducted under the UNCITRAL Rules pursuant to the Agreement between the Republic of Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments (United Nations, *Treaty Series*, vol. 1653, No. 28433, p.19). See also article 18 of the Agreement of 6 March 2007 between the Government of the Republic of France and the Government of the United Arab Emirates relating to the Abu Dhabi Universal Museum, of 6 March 2007.

¹²⁸ The arbitration compromise between Belgium and the Netherlands in the case concerning the *Iron Rhine* railway (available from www.pca-cpa.org/) was based largely on the Optional Rules, as are the rules of procedure of the Eritrea–Ethiopia Boundary Commission and the Eritrea–Ethiopia Claims Commission (see arts. 4.11 and 5.7 of the Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia for the resettlement of displaced persons, as well as rehabilitation and peacebuilding in both countries of 12 December 2000 (United Nations, *Treaty Series*, vol. 2138, No. 37274, p.93)). See also article 16 of the August 2003 Treaty between the Government of the Republic of Namibia and the Government of the Republic of South Africa on the establishment of the [Ai-]Ais/Richtersveld] Transfrontier Park.

on money-laundering¹²⁹ and the financing of terrorism¹³⁰. This technique met a need and, in any event, is available to interested States and international organizations, which are free to employ it, as needed, by mutual consent. There is no particular reason to provide for it expressly in the Guide to Practice or in an annex thereto.

75. Moreover, generally speaking, any “compulsory” mechanism—in the two meanings of the word: either the parties to the dispute are required to use it, or a solution that is legally binding on the parties can be adopted—appears, *a priori*, to be inconsistent with the reservations regime as adopted in Vienna and, in any event, as interpreted by the majority of States. While the essential function of reservations is to find a balance between the universality requirements of open treaties and the integrity of their content, it is clear that States wish to retain broad discretionary power to assess the permissibility of reservations and even, while this appears more debatable, to determine the effects of a reservation, regardless of whether it is permissible.¹³¹ The Sixth Committee’s discussion of guideline 4.5.2 [4.5.3] (Status of the author of an invalid reservation in relation to the treaty)¹³² at the sixty-fifth session of the General Assembly is a particularly telling example of the reluctance of many States to agree that an invalid reservation could produce objective effects in the name of a rigid—and debatable¹³³—concept of consensus.¹³⁴

¹²⁹ See, for example, principle 13 of the Pre-Accession Pact on Organized Crime between the Member States of the European Union and the Applicant Countries of Central and Eastern Europe and Cyprus and Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (*Official Journal of the European Union* L 319, 5 December 2007, pp. 1–36).

¹³⁰ See Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (*ibid.*, L 309, 25 November 2005, pp. 15–36).

¹³¹ For consideration of objections with intermediate effect, see para. (23) of the commentary to guideline 2.6.1 (Definition of objections to reservations) in *Yearbook ... 2005*, vol. II (Part Two), p. 81; guideline 3.4.2 (Permissibility of an objection to a reservation) and the commentary thereto in *Yearbook ... 2010*, vol. II (Part Two), para. 106; and guideline 4.3.6 [4.3.7] (Effect of an objection on provisions other than those to which the reservation relates) and the commentary thereto (*ibid.*) and, above all, objections with “maximum” effect (see *Yearbook ... 2005*, vol. II (Part Two), p. 81, para. (22) of the commentary to guideline 2.6.1 (Definition of objections to reservations)); and guideline 4.3.4 [4.3.5] (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect) and the commentary thereto in *Yearbook ... 2010*, vol. II (Part Two), para. 106. On objections with “super-maximum” effect, see para. (24) of the commentary to guideline 2.6.1 (Definition of objections to reservations) in *Yearbook ... 2005*, vol. II (Part Two), p. 81; guideline 4.3.7 [4.3.8] (Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation) and the commentary thereto in *Yearbook ... 2010*, vol. II (Part Two), para. 106; para. (23) of the commentary to guideline 4.5.1 (Nullity of an invalid reservation) (*ibid.*); and paras. (3)–(5) and (49) of the commentary to guideline 4.5.2 [4.5.3] (Status of the author of an invalid reservation in relation to the treaty) (*ibid.*).

¹³² The numbers (and, in some cases, the titles) in brackets refer to the numbers and titles of the guidelines adopted by the Working Group on Reservations to Treaties during the first part of the sixty-third session of the Commission, in 2011. For the commentary to guideline 4.5.2 [4.5.3], see *Yearbook ... 2010*, vol. II (Part Two), para. 106.

¹³³ See *ibid.*, vol. II (Part One), document A/CN.4/624 and Add.1–2.

¹³⁴ *Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee*, 19th meeting (A/C.6/65/SR.19), 20th meeting (A/C.6/65/SR.20) and 21st meeting (A/C.6/65/SR.21). It is true that,

76. It must, moreover, be recognized that, like treaty law as a whole, reservations law is heavily influenced by the principle of consensus.¹³⁵ And clearly, in the absence of treaty monitoring bodies¹³⁶ or dispute settlement bodies with competence to assess the permissibility of reservations,¹³⁷ according to a general principle of international law,¹³⁸ each State (or international organization)—including the authors of reservations and objections to reservations—is responsible for assessing, from its own perspective, the permissibility (and, to some extent, the effects) of a reservation. Many States remain committed to this interactive system (which, while it may be regrettable, is not, in the Special Rapporteur’s view, incompatible with the “Vienna regime” for reservations).

77. It therefore seems fruitless to develop a sophisticated, compulsory dispute settlement regime for reservations.¹³⁹ Of course, such a regime might please a few “virtuous” States that have long preferred this form of settlement, but there is every reason to believe that it would target many other States that might view it as a veiled attempt to give the Guide to Practice a legally binding value that it is not intended to have.

2. ADVANTAGES OF A FLEXIBLE ASSISTANCE MECHANISM FOR THE RESOLUTION OF DISPUTES CONCERNING RESERVATIONS

78. It is true that there are various mechanisms for the peaceful settlement of international disputes and that they

conversely, a similar number of delegations expressed support for a more objective approach.

¹³⁵ See *Yearbook ... 2010*, vol. II (Part Two), para. (8) of the commentary to guideline 2.6.3 [2.6.2] (Freedom to formulate objections) [Right to formulate objections]; para. (2) of the commentary to guideline 4.3 (Effect of an objection to a valid reservation); and para. (3) of the commentary to guideline 5.1.7 [5.1.6] (Territorial scope of reservations of the successor State in cases of succession involving part of a territory).

¹³⁶ And, within the limits of their competence, see guideline 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations) and the commentary thereto in *Yearbook ... 2009*, vol. II (Part Two), para. 84.

¹³⁷ See guideline 3.2.5 (Competence of dispute settlement bodies to assess the permissibility of reservations) and the commentary thereto in *ibid.*

¹³⁸ See the advisory opinion of ICJ of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1951, p. 24: “[E]ach State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint”. See also paragraph 6 of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties: “The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the...provisions of the Vienna Conventions of 1969 and 1986 [on reservations] and, where appropriate, by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties” (*Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157).

¹³⁹ In para. 50 of his second report on reservations to treaties, the Special Rapporteur, after expressing his reluctance, on principle, to include dispute settlement clauses in the Commission’s drafts (see footnote 121 above), nevertheless stated that the problem arose in a particular manner with regard to the topic of reservations: “Under these conditions, it may be useful to consider the establishment of mechanisms for the settlement of disputes in this specific area since, in the view of the Special Rapporteur, these mechanisms could be provided for, either in standard clauses that States could insert in future treaties to be concluded by them, or in an additional optional protocol that could be added to the 1969 Vienna Convention” (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 51, para. 50). He now believes that such a solution would be inappropriate as it would be too cumbersome and formal.

do not necessarily result in legally binding solutions. Those set out in Article 33 of the Charter of the United Nations—negotiation, enquiry, mediation and conciliation—are not contrary to the will of the parties, even though the latter undertake in advance to have recourse to them, since the resulting solutions are not legally binding.

79. International conventions¹⁴⁰ and General Assembly and Security Council¹⁴¹ resolutions frequently recommend that States have recourse to one or another of these forms of settlement. On the basis of these precedents, the Commission may wish to recommend that States and international organizations¹⁴² should settle disputes concerning reservations by one of these means (and, moreover, through the “compulsory” settlement mechanisms: arbitration and judicial settlement).

80. However timely such a recommendation might appear, it must be acknowledged that it does not meet any need specific to disputes concerning reservations that arise between States. While such disputes almost always have underlying political or even ideological motives, they nevertheless have certain overall characteristics:

¹⁴⁰ See, *inter alia*, article 65, paragraph 3, of the 1969 Vienna Convention, which refers to Article 33 of the Charter of the United Nations. The charters of some international organizations envisage non-compulsory dispute settlement mechanisms: for example, article 10 of the Charter of the Association of Southeast Asian Nations, article 26 of the Constitutive Act of the African Union, and the Charter of the Islamic Conference. For recent examples of conventions with more limited subject matter, see article 10 of the Convention on Cluster Munitions; article 66 of the United Nations Convention against Corruption and article 16 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which allow States to choose among several proposed forms of settlement.

¹⁴¹ See, *inter alia*, the General Assembly’s recommendations on the criminal accountability of United Nations officials and experts on mission (resolutions 63/119 of 11 December 2008 and 64/110 of 16 December 2009); on sustainable fisheries, including through the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments (resolution 63/112 of 5 December 2008); on follow-up to the advisory opinion of ICJ on the *Legality of the Threat or Use of Nuclear Weapons* (resolution 60/76 of 8 December 2005); and in the 2005 World Summit Outcome document (resolution 60/1 of 16 September 2005). The Security Council has had occasion to recall these obligations in general terms in its resolution on the maintenance of international peace and security: nuclear non-proliferation and nuclear disarmament of 24 September 2009 (Security Council resolution 1887 (2009)) and in considering specific situations (Security Council resolutions 1862 (2009) and 1907 (2009) of 14 January and 23 December 2009, respectively, on peace and security in Africa). See also the Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, annex II). Within the framework of the Council of Europe, a series of recommendations have been made on the subject of the uniform interpretation of Council of Europe conventions. Initially, they referred only to non-binding mechanisms (see Parliamentary Assembly recommendation 454 (1966) of 27 January 1966, cited by Wiebringhaus, “L’interprétation uniforme des Conventions du Conseil de l’Europe”, p. 456); more recently, the establishment of a judicial mechanism has been proposed (see Parliamentary Assembly recommendation 1458 (2000) of 6 April 2000 (Towards a uniform interpretation of Council of Europe conventions: creation of a general judicial authority)).

¹⁴² Unless the Commission prefers to make its recommendations to the General Assembly so that the latter can “relay” them to States and international organizations; see paragraph 100 below.

– They are highly technical, as seen by the technical nature of the entire Guide to Practice;

– They imply a balance—always difficult to assess—between the contradictory requirements of opening the treaty to the broadest possible participation and preserving its integrity; and

– For this reason, they often call for nuanced solutions that do not imply a total rejection of the position of either party (or of any of the parties), but a balance or, in any event, a middle ground that specifically involves making adjustments to challenged reservations rather than simply abandoning or maintaining them.¹⁴³

81. The reservations dialogue¹⁴⁴ is a response that is adapted to these nuanced requirements. It is, in a sense, a specific manifestation of negotiations on reservations. However, it is far from capable of producing a satisfactory solution in every case.¹⁴⁵ Just as a stalemate in direct negotiations between the parties to a dispute, whatever its nature, calls for recourse to an impartial third party, so an impasse in the reservations dialogue should lead States and international organizations that disagree as to the interpretation, the permissibility or the effects of a reservation or an objection (or acceptance) to seek the assistance of a third party.

82. In the light of the highly technical nature of most such problems,

– The third party in question should have the necessary technical competence to resolve them (or to contribute to their resolution);

– Its intervention would be particularly useful for small States with administrations that are ill-equipped to consider the often-complex questions raised by the formulation of reservations or reactions thereto and cannot devote the necessary time to the matter;

– This means that in addition to its role of assisting with the resolution of disputes arising in connection with reservations, it might be useful for a third-party mechanism to have a joint function: the provision of assistance with the settlement of disputes concerning reservations, and of technical assistance to States that felt the need to refer to it questions relating to the drafting of reservations that they planned to formulate or to the position that they should take with respect to the reservations made by other States or international organizations;

– These functions do not necessarily preclude other, more classic, dispute resolution functions *stricto sensu*, such as compulsory judicial settlement, at the request and with the consent of all parties concerned.

¹⁴³ See the commentary to guideline 2.1.9 [2.1.2] (Statement of reasons [for reservations]) (*Yearbook ... 2008*, vol. II (Part Two), pp. 80–82) and the commentary to guideline 2.6.10 [2.6.9] (Statement of reasons [for objections]) (*ibid.*, pp. 88–89); see also the examples given in para. (16) of the commentary to guideline 2.6.1 (Definition of objections to reservations) (*Yearbook ... 2005*, vol. II (Part Two), p. 79; see also paras. (14)–(19)); in the commentary to guideline 2.6.15 [2.6.13] (Late objections) (*Yearbook ... 2008*, vol. II (Part Two), pp. 95–96); guideline 4.5.2 [4.5.3] (Status of the author of an invalid reservation in relation to the treaty) (*Yearbook ... 2010*, vol. II (Part Two), para. (36) of the commentary). See also paragraphs 4–17 above.

¹⁴⁴ See chapter I of this report.

¹⁴⁵ See paragraphs 18–21 above.

B. The proposed mechanism

83. In the light of the foregoing considerations, it appears possible to outline the elements of a reservations and objections to reservations assistance mechanism (subsect. 2, below) by referring to existing precedents and, specifically, to the one established by CAHDI (subsect. 1, below).

1. THE PRECEDENT SET BY THE COUNCIL OF EUROPE

84. Many bodies, as part of their mandate to monitor the treaty (usually a human rights treaty) under which they were established, are called upon to rule on the question of the permissibility of reservations formulated by States parties and on the consequences of the potential impermissibility thereof when considering either the periodic reports submitted by States parties or complaints submitted by individuals.¹⁴⁶ As a general rule, these bodies' views are not binding on the States in question.¹⁴⁷ This is not the case with the binding decisions of international courts,¹⁴⁸ particularly the European Courts¹⁴⁹ and the Inter-American Court of Human Rights.¹⁵⁰ But these judgments (a) do not, generally speaking, resolve disputes between States and (b) are binding on the State in question; therefore, they do not fall within the scope of this section.

85. Only the provisions for the systematic consideration of certain reservations that exist within the framework of the Council of Europe (under the auspices of CAHDI) and the EU (COJUR) constitute useful precedents for the establishment of a flexible, specialized mechanism.¹⁵¹

¹⁴⁶ See guideline 3.2 (Assessment of the permissibility of a reservation) and the commentary thereto (*Yearbook ... 2009*, vol. II (Part Two), para. 84).

¹⁴⁷ See guideline 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations): "1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization. 2. The conclusions formulated by such a body in the exercise of this competence shall have the same legal effect as that deriving from the performance of its monitoring role." See also the commentary to this guideline (*ibid.*).

¹⁴⁸ International courts may also issue advisory opinions on legal problems relating to reservations, as seen from several famous cases: advisory opinion of ICJ of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1951, p. 15; Inter-American Court of Human Rights, advisory opinion OC-2/82 of 24 September 1982, *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (arts. 74 and 75)* and advisory opinion OC-3/83 of 8 September 1983, *Restrictions to the death penalty (arts. 4(2) and 4(4) of the American Convention on Human Rights)*, Series A, No. 3.

¹⁴⁹ ECHR, *Belilos v. Switzerland*, judgment of 29 April 1988, Series A, No. 132; *Weber v. Switzerland*, judgment of 22 May 1990, Series A, No. 177; and *Loizidou v. Turkey*, Preliminary Objections, judgment of 23 March 1995, Series A, No. 310.

¹⁵⁰ Inter-American Court of Human Rights, *Hilaire v. Trinidad and Tobago*, Preliminary Objections, judgment of 1 September 2001, Series C, No. 80, para. 98. See also *Benjamin et al. v. Trinidad and Tobago*, Preliminary Objections, judgment of 1 September 2001, Series C, No. 81; and *Radilla Pacheco v. United Mexican States*, judgment of 23 November 2009, Series C, No. 209.

¹⁵¹ On the basis of drafts prepared by the Inter-American Juridical Committee, the General Assembly of OAS adopted resolution AG/RES. 888 (XVII-O/87) of 14 November 1987 on standards on reservations to the Inter-American multilateral treaties and rules for the General Secretariat as depositary of treaties, available online from www.oas.org/DIL/resolutionsgeneralassembly_AG-RES888.htm; see also the report of the Committee on Juridical and Political Affairs on Standards

86. Cede, who played a key role in the establishment of these mechanisms, gave the following explanation:

Pending the final conclusions to be drawn from the work of the ILC it is noteworthy how greatly the consideration and study of the law and practice on reservations by the ILC has already influenced the worldwide discussion of this matter. Against the backdrop of increased sensitivity about reservations to human rights treaties and the heightened interest in the legal complexities of reservations, the international community now devotes considerable attention to the problem and to the issue of how to respond to questionable reservations, in particular to those which give rise to doubts as to their compatibility with the object and purpose of the relevant treaty.¹⁵²

87. Little is known of the work of COJUR in this area, which consists primarily of periodic exchanges of information and in-depth exchanges of views among members of the EU in order to coordinate their reactions to reservations that are deemed to be impermissible. This coordination may result in model objections that participating States are encouraged to make on their own behalf.¹⁵³

88. The functions and activities of CAHDI in its capacity as the European Observatory of Reservations to International Treaties, which publishes most of its records, are better known.

89. This special mandate of CAHDI was preceded, at the initiative of Austria, by the December 1997 establishment of the Group of Specialists on Reservations to International Treaties,¹⁵⁴ which was called upon to:

(a) Examine and propose ways and means and, possibly, guidelines to assist member States in developing their practice regarding their response to reservations and interpretative declarations actually or potentially inadmissible under international law; and

(b) Consider the possible role of the CAHDI as an "observatory" of reservations to multilateral treaties of significant importance to the international community raising issues as to their admissibility under

on Reservations to Inter-American Multilateral Treaties and Rules for the General Secretariat as Depositary of Treaties, OAS Permanent Council, 19 August 1987 (OAS Ser. G, CP/Doc. 1830/87). This resolution has two parts; one reproduces, *mutatis mutandis*, the Vienna Conventions' rules on reservations while the other sets out rules (based on those contained in article 78 of the 1986 Vienna Convention, which corresponds to article 77 of the 1969 Vienna Convention) to be followed by the secretariat in fulfilling its functions as a depositary; it does not establish a mechanism for considering issues raised by reservations. In this resolution, article II of the Rules for the General Secretariat as Depositary of Treaties, which is a slightly adapted version of article 78, paragraph 2, of the 1986 Vienna Convention, reads: "In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the Organization or of the Inter-American Specialized Organization concerned" (the italics indicate the wording that differs from that of article 78).

¹⁵² Cede (footnote 55 above), p. 25.

¹⁵³ These exchanges of views do not lead to published documents that can be consulted; it is a little-known mechanism. See, however, the "insider" description provided by Cede (footnote 55 above), pp. 28–30; and Jean-Paul Jacqué in his presentation to the Group of Specialists on Reservations to International Treaties on the subject of COJUR (D-S-RIT (98) 1, Strasbourg, 2 February 1998), "Consideration of reservations to international treaties in the context of the EU: the COJUR", paras. 137–147; see also Spiliopoulou Åkermark, "Reservations Issues in the Mixed Agreements of the European Community", p. 387; and Lammers, "The Role of the Legal Adviser of the Ministry of Foreign Affairs: The Dutch Approach and Experience", pp. 193–194.

¹⁵⁴ The Group's mandate, established at the 14th meeting of CAHDI (resolution (97) 4, September 1997) was approved by the Committee of Ministers of the Council of Europe on 16 December 1997. The title "Group of Specialists" (DI-S-RIT) was replaced by "Group of Experts" (DI-E-RITST) in 1998.

international law, and as an observatory of reactions by Council of Europe member States Parties to these instruments.

90. In accordance with the recommendations of the Group of Experts,¹⁵⁵ CAHDI has acted since 1998 as the European observatory of reservations to multilateral treaties that play an important role in the international community, and of the reactions of States parties that are members of the Council of Europe.¹⁵⁶

91. Since then, the agenda of every meeting of CAHDI has included an item entitled “Law and practice relating to reservations and interpretative declarations concerning international treaties: European Observatory of Reservations to International Treaties”, and a “List of outstanding reservations and declarations to international treaties” and a “Table of objections” are prepared by the secretariat for consideration.¹⁵⁷ During those meetings, the participants (Council of Europe member States and a number of observer States and international organizations) exchange views concerning the permissibility of problematic reservations and, where appropriate, coordinate their reactions and even their actions. It should be noted that CAHDI functions as an observatory both of reservations and objections to treaties concluded under Council of Europe auspices and of global treaties.

92. In its 2010 report, CAHDI stated:

As regards the issue of reducing the use of reservations, derogations and restrictive declarations, the CAHDI has conducted two specific recent activities in its capacity as European Observatory of reservations to international treaties. Since 1998, the CAHDI regularly considers a list of outstanding reservations to international treaties, concluded within and outside the Council of Europe. Members of the CAHDI are therefore regularly called upon to consider outstanding reservations and declarations and to exchange views on national positions. A table of objections to these clauses is regularly presented to the Committee of Ministers together with abridged reports of the CAHDI meetings. This activity constitutes one of the core activities of the CAHDI.¹⁵⁸

93. It is certain that this mechanism, which appears fruitful, offers an interesting precedent. For the following reasons, however, it could not simply be universalized:

– The Council of Europe is a regional organization with 47 member States, whereas the United Nations has 192 Member States; coordination on technical issues of this type is doubtless more difficult in a global context;

– Alliances among Council of Europe member States, their many cultural similarities and their representatives’ habit of meeting and working together constitute a coordination framework that is, *a priori*, more effective than what could be anticipated at the global level;

¹⁵⁵ It was also pursuant to a proposal of the Group of Experts that the Committee of Ministers adopted recommendation R (99) 13 of 18 May 1999 on responses to inadmissible reservations to international treaties.

¹⁵⁶ The work of CAHDI in its capacity as the European Observatory of Reservations to International Treaties is discussed in footnotes 56–57 above. See also the description of the Observatory by the Observer for CAHDI in paragraph 3 of his statement to the Commission on 16 July 1999 at its 2604th meeting (*Yearbook ... 1999*, vol. I, pp. 268–269).

¹⁵⁷ For the most recent session of CAHDI (41st meeting, Strasbourg, 17–18 March 2011), see CAHDI (2011) 3 and Add. prov.

¹⁵⁸ CAHDI, abridged report on the 40th meeting, held in Tromsø on 16–17 September 2010 (CM (2010) 139, 21 October 2010), annex 4, para. 5.

– Generally speaking, the Council’s members are rich countries with legal bodies that have the necessary technical competence, whereas one of the primary arguments for establishing a reservations assistance mechanism is to compensate for the lack of resources and competence that handicaps many United Nations Member States;

– Lastly, and perhaps most importantly, whereas the objective of the (European) Observatory of Reservations to International Treaties is to present as united a “front” as possible with respect to reservations formulated by other States, this would obviously not be the function of the assistance mechanism envisaged here; it will be clear from the preceding section that its purpose would be rather to provide technical assistance to States that wished to receive it; to help States (and international organizations) with differing views concerning reservations to resolve their differences by finding common ground; and to provide those countries or international organizations with specific information on the applicable legal rules.

94. The Council of Europe’s experience can nevertheless offer a rich source of inspiration, particularly on the following points:

– From an external perspective,¹⁵⁹ it appears that CAHDI, in its capacity as the European Observatory of Reservations to International Treaties, combines technical rigor with political realism;

– This satisfactory situation is doubtless a consequence of the fact that the members of CAHDI are both highly qualified technicians, and practitioners with an understanding of the political and administrative constraints that States may face in implementing the treaties by which they are bound,¹⁶⁰ and

– This precedent suggests that a cooperation mechanism that does not culminate in a binding or even formal decision may produce satisfactory and effective results.

2. THE RESERVATIONS AND OBJECTIONS TO RESERVATIONS ASSISTANCE MECHANISM

95. In the light of the foregoing considerations, the Commission might recommend the establishment of a reservations and objections to reservations assistance mechanism with the following characteristics.

96. First, it should be a flexible mechanism; referral to it and recommendations made by it should not, in principle, be compulsory (on the understanding, however, that States and international organizations with a dispute concerning the interpretation, permissibility or effects of a reservation to a treaty should be free to resort to it and, if appropriate, agree to consider the guidelines contained in the Guide to Practice as compulsory in resolving their dispute).

¹⁵⁹ See Cede (footnote 55 above), pp. 30–34.

¹⁶⁰ According to Cede, “Whereas judicial decisions or ‘views’ taken by supervisory treaty bodies generally do not attach great significance to the political circumstances of a concrete treaty obligation, the examination of the problems which a particular reservation may raise is regularly placed in a comprehensive context by legal advisers who are representing their respective governments” (*ibid.*, p. 34).

97. Second, such a mechanism should have a dual function: it should both assist in the resolution of differences of opinion on reservations and provide technical advice on matters relating to reservations and reactions thereto.

98. Third, such assistance should be provided by government experts selected on the basis of their technical competence and their practical experience in public international law and, specifically, treaty law. The mechanism should be a small body (no more than 10 members who serve only at need) with a very small secretariat.

99. Fourth, there should be no question of requiring the mechanism simply to impose either the Vienna Convention rules on States that are not parties to the Convention, or the non-compulsory guidelines in the Guide to Practice. It should, however, be understood that it will give due consideration to these provisions and guidelines.

100. It might, however, be asked whether the Commission should make such a recommendation to States and international organizations directly, or to the General Assembly. Whereas the Special Rapporteur opted for the first solution in the case of the reservations dialogue,¹⁶¹ it appears to him that in the case of this recommendation, there is no need to choose between the two; neutral wording could be used and it could be left to the General Assembly to decide how to proceed.

101. Thus, the draft recommendation that the Commission is invited to adopt might read as follows:

“Draft recommendation of the International Law Commission on technical assistance and assistance in the settlement of disputes concerning reservations

“The International Law Commission,

“Having completed preparation of the Guide to Practice on Reservations to Treaties,

“Aware of the difficulties faced by States and international organizations in the interpretation, assessment of the permissibility, and implementation of reservations and objections thereto,

“Attaching great importance to the principle that States should resolve their international disputes by peaceful means,

“Convinced that adoption of the Guide to Practice should be supplemented by the establishment of a

flexible assistance mechanism for States and international organizations that face difficulties in implementation of the legal rules applicable to reservations,

“1. *Recalls* that States and international organizations that disagree as to the interpretation, permissibility or effects of a reservation or an objection to a reservation must, first of all, as with any international dispute, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice;

“2. *Recommends* that a reservations and objections to reservations assistance mechanism should be established; and

“3. *Suggests* that this mechanism should take the form described in the annex to this recommendation.

“Annex

“1. A reservations and objections to reservations assistance mechanism is hereby established.

“2. The mechanism shall consist of 10 government experts, who shall be selected on the basis of their technical competence and their practical experience in public international law and, specifically, treaty law.

“3. The mechanism shall meet, as needed, to consider problems related to the interpretation, permissibility and effects of reservations, or objections to and acceptances of reservations, that are submitted to it by concerned States and international organizations. To that end, it may suggest that States trust it to find solutions for the resolution of their disputes. States or international organizations that are parties to a dispute concerning a reservation may undertake to accept the mechanism’s proposals for its resolution as compulsory.

“4. The mechanism may also provide a State or international organization with technical assistance in formulating reservations to a treaty or objections to reservations formulated by other States or international organizations.

“5. In making such proposals, the mechanism shall take into account the provisions on reservations contained in the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties and the guidelines contained in the Guide to Practice.”

¹⁶¹ See paragraph 68 above.

CHAPTER III

Guide to Practice—Instructions

102. In his first report, the Special Rapporteur noted that it was not inevitable for the Commission’s work to culminate in draft articles that were intended to become true conventions; he stated his preference for a more flexible instrument that would be easier to coordinate with the

existing provisions of the Vienna Conventions.¹⁶² In its discussion of this first report, the Commission approved

¹⁶² See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 154–155, paras. 170–182.

that approach and endorsed the Special Rapporteur's conclusions on the matter:

487. At the end of his statement, the Special Rapporteur summarized as follows the conclusions he had drawn from the Commission's discussion of the topic under consideration:

...

(b) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;^[163]

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

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

3. GENERAL CONCLUSIONS

488. These conclusions constitute, in the view of the Commission, the result of the preliminary study requested by General Assembly resolutions 48/31 and 49/51.¹⁶⁴

These conclusions have never been called into question by the ILC and have been approved by virtually all delegations to the Sixth Committee of the General Assembly.¹⁶⁵

103. However, the Sixth Committee's discussions on the topic of reservations to treaties have often shown that representatives of States did not have a clear idea of the Commission's goal or of the exact purpose of the Guide to Practice. And in the Commission itself, it has sometimes appeared that certain members, without ever calling into question the initial decisions on the form and purpose of the Guide, did not understand the general concept in the same way as the majority of the members and the Special Rapporteur.

104. In an attempt to dispel such misunderstandings, it is proposed that the following explanation of form, purpose and use should be added at the beginning of the Guide to Practice.

105. It is proposed that an introduction should be added to the Guide to Practice in order to provide an overview and to facilitate its use. This introduction, which would resemble the commentaries to guidelines or the introductions to the various parts or sections of the Guide, might read:¹⁶⁶

¹⁶³ The inclusion of model clauses in the Guide to Practice was ultimately rejected.

¹⁶⁴ *Yearbook ... 1995*, vol. II (Part Two), p. 108, paras. 487–488.

¹⁶⁵ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session (A/CN.4/472/Add.1), para. 147; and General Assembly resolution 50/45 of 11 December 1995, para. 4.

¹⁶⁶ If the Commission deems it necessary, this draft introduction could be referred to the Working Group on Reservations to Treaties, established by the Commission at its sixth-third session, in 2011; if not, it will be included in the report of the Commission on the work of its sixty-third session and considered by the plenary when the report is adopted.

“Introduction

“1. The Guide to Practice on Reservations to Treaties consists of guidelines that have been adopted by the International Law Commission and are reproduced below, accompanied by commentaries. The commentaries are an integral part of the Guide and an indispensable supplement to the guidelines, which they expand and explain. No summary, however long, could cover all the questions that may arise on this highly technical and complex subject or provide all useful explanations for practitioners.¹⁶⁷

“2. As its name indicates, the purpose of the Guide to Practice is to provide assistance to practitioners of international law—decision-makers, diplomats and lawyers (including those who plead cases before national courts and tribunals), who are often faced with sensitive problems concerning the permissibility and effects of reservations to treaties, a matter on which the rules contained in the 1969, 1986 and 1978 Vienna Conventions have gaps and are often unclear, and, to a lesser extent, interpretative declarations in respect of treaty provisions, of which these Conventions make no mention whatsoever. Despite frequent assumptions to the contrary, its purpose is not—or, in any case, not only—to offer the reader a guide to past (and often uncertain) practice in this area, but rather to direct the user towards solutions that are consistent with existing rules (where they exist) or to the solutions that seem the most likely to result in the progressive development of such rules.

3. In that connection, it should be stressed that while the Guide to Practice, as an instrument—or “official source”—is by no means binding, the extent to which the various norms set out in the guidelines and the various legal norms embodied therein are compulsory in nature varies widely:¹⁶⁸

“– Some of them simply reproduce provisions of the Vienna Conventions which set out norms that were either uncontroversial¹⁶⁹ at the time of their inclusion in the Conventions¹⁷⁰ or have since become so; as such, while not compulsory in nature,¹⁷¹ they are nevertheless required of all States or international organizations, whether or not they are parties to the Conventions;

¹⁶⁷ The present Guide contains 199 [180] guidelines.

¹⁶⁸ This range is too great, and the distribution of guidelines among the various categories is too imprecise, to make it possible to follow a frequent suggestion—made, *inter alia*, during discussions in the Sixth Committee of the General Assembly—that a distinction should be made between guidelines reflecting *lex lata* and those based on *lege ferenda*.

¹⁶⁹ This is the case, for example, of the fundamental rule that a State or international organization may not formulate a reservation that is incompatible with the object and purpose of the treaty; it is set out in article 19 (c) of the 1969 and 1986 Vienna Conventions and reproduced in guideline 3.1.

¹⁷⁰ See, for example, guideline 2.5.1 (Withdrawal of reservations), which reproduces the rules set out in article 22, paragraph 1, and article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions, respectively.

¹⁷¹ The rule set out in guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), which reproduces, *mutatis mutandis*, article 23, paragraph 2, of the Vienna Conventions, appears to have acquired customary status since the adoption of the 1969 Convention.

“– Other rules contained in the Vienna Conventions are binding on the parties thereto, but their customary nature is open to question;¹⁷² reproducing them in the Guide to Practice should help establish them as customary rules;

“– In some cases, guidelines included in the Guide supplement Convention provisions that are silent on modalities for their implementation but these rules are, in themselves, indisputably customary in nature¹⁷³ or are required for obvious logical reasons;¹⁷⁴

“– In other cases, the guidelines address issues on which the Conventions are silent but set out rules that are clearly customary in nature;¹⁷⁵

“– At times, the rules contained in the guidelines are clearly set out *de lege ferenda*¹⁷⁶ and, in some cases, are based on practices that have developed in the margins of the Vienna Conventions;¹⁷⁷

“– Other rules are simply recommendations and are meant only to encourage.”¹⁷⁸

“4. This last category of the guidelines highlights one of the key characteristics of the Guide to Practice. Such provisions would not have been included in a traditional set of draft articles intended to be transformed, if appropriate, into a treaty: treaties are not drafted in the conditional tense.¹⁷⁹ But the problem here is somewhat different: as the title and the word “guidelines” indicate, it is not a binding instrument but a *vade mecum*, a “toolbox” in which the negotiators of treaties and those responsible for implementing them should find answers to the practical questions raised by reservations, reactions to reservations and interpretative

declarations on the understanding that under positive law, these answers may be more or less correct, depending on the question, and that the commentaries indicate doubts that may exist as to the correctness or appropriateness of a solution.

“5. In light of these characteristics, it goes without saying that the rules set out in the Guide to Practice in no way prevent States and international organizations from setting aside, by mutual agreement, those that they consider inappropriate to the purposes of a given treaty. Like the Vienna rules themselves, those set out in the Guide are, at best, residual and voluntary. In any event, since none of them has a binding or *jus cogens* nature, a derogation to which all interested States (or international organizations) consent is always an option.

“6. In a consensus decision reached in 1995 and never subsequently challenged, the Commission considered that there was no reason to modify or depart from the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions¹⁸⁰ in drafting the Guide to Practice, which incorporates all of them. But this also had implications for the very concept of the Guide and, in particular, for the commentaries to the guidelines.

“7. Insofar as the intent is to preserve and apply the Vienna rules, it was necessary to clarify them. For this reason, the commentaries reproduce extensively the *travaux préparatoires* to the three Conventions, which help clarify their meaning and explain the gaps contained therein.

“8. Generally speaking, the commentaries are long and detailed. In addition to an analysis of the *travaux préparatoires* to the Vienna Conventions, they include a description of the relevant jurisprudence, practice and doctrine¹⁸¹ and explanations of the wording that was ultimately adopted; these commentaries provide numerous examples. Their length, which has often been criticized, appears necessary in light of the highly technical and complex nature of the issues raised. The Commission hopes that practitioners will indeed find answers to any questions that arise.¹⁸²

“9. However, reading the commentaries will be useful only where the answer to a question is not provided in the text of the guidelines (or where, in a specific case, the guideline is difficult to interpret). For this reason, the guidelines appear, without commentary, at the beginning of the Guide to Practice and the user should refer first to their titles, which are designed to give as clear as possible an idea of their content.¹⁸³

¹⁷² This is largely true of guidelines 2.1.3 [Formulation of a reservation (Representation for the purpose of formulating a reservation at the international level)]; 2.1.5 (Communication of reservations), which reproduces, *mutatis mutandis*, the wording of articles 7 and 23 of the 1986 Vienna Convention; or 2.6.13 [2.6.12] (Time period for formulating an objection).

¹⁷³ The definition of reservations “specified” by guideline 3.1.2 may be said to have acquired customary status. See also guideline 3.1.13 [3.1.5.7] (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty).

¹⁷⁴ See, for example, guideline 2.8.2 [2.8.7] (Unanimous acceptance of reservations), which draws the obvious conclusion from article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions.

¹⁷⁵ See, for example, guideline 4.4.2 (Absence of effect on rights and obligations under customary international law).

¹⁷⁶ See, for example, guidelines 1.2.2 [1.2.1] (Interpretative declarations formulated jointly) or 3.4.2 (Permissibility of an objection to a reservation).

¹⁷⁷ See, for example, guidelines 4.2.2 (Effect of the establishment of a reservation on the entry into force of the treaty) or 4.3.6 [4.3.7] (Effects of an objection on provisions other than those to which the reservation relates—objections with intermediate effect).

¹⁷⁸ These are always drafted in the conditional tense; see, for example, guidelines 2.1.9 [2.1.2] (Statement of reasons) [Statement of reasons for reservations] or 2.5.3 (Periodic review of the usefulness of reservations).

¹⁷⁹ There may be exceptions to this; see article 7 of the Convention on wetlands of international importance especially as waterfowl habitat, concluded in Ramsar (Islamic Republic of Iran), and article 16 of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; they are rarely justified.

¹⁸⁰ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487.

¹⁸¹ As considerable time had passed between the inclusion of the topic in the Commission’s agenda and the final adoption of the Guide to Practice, the commentaries were reviewed and, to the extent possible, updated as at 31 December 2010.

¹⁸² It is also for this reason that the Commission did not hesitate to allow a certain amount of repetition to remain in the commentaries in order to facilitate consultation and use of the Guide to Practice.

¹⁸³ The Working Group on Reservations to Treaties, which met during the first part of the sixty-third session of the Commission in 2011, paid particular attention to this matter.

“10. The Guide to Practice is divided into five parts (numbered 1 to 5), which follow a logical order:

“– Part 1 is devoted to the definition of reservations and interpretative declarations and to the distinction between these two types of unilateral statement; it also includes an overview of various unilateral statements, made in connection with a treaty, that are neither reservations nor interpretative declarations and possible alternatives to both; as expressly stated in guideline 1.6 [1.8], “The[se] definitions ... are without prejudice to the validity and [legal] effects” of the statements covered by Part 1;

“– Part 2 sets out the form and procedure to be used in formulating reservations and interpretative declarations and reactions thereto (objections to and acceptances of reservations and approval or recharacterization of, or opposition to, interpretative declarations);

“– Part 3 concerns the permissibility of reservations and interpretative declarations and reactions thereto and sets out the criteria for the assessment of permissibility; these are illustrated by examples, with commentary, of the types of reservations that most often give rise to differences of opinion among States regarding their permissibility. Some guidelines also specify the modalities for assessing the permissibility of reservations and the consequences of their impermissibility;

“– Part 4 is devoted to the legal effects produced by reservations and interpretative declarations, depending on whether they are valid (in which case a reservation is “established” if it has been accepted) or not; this part also analyses the effects of objections to and acceptances of reservations;

“– Part 5 supplements the only provision of the 1978 Vienna Convention on Succession of States in respect of Treaties that deals with reservations—article 20 on the fate of reservations in the case of succession of States by a newly independent State—and extrapolates and adapts solutions for cases of uniting or separation of States; this last part also covers the issues raised by objections to or acceptances of reservations and by interpretative declarations in relation to succession of States;

“– Lastly, two annexes reproduce the text of the recommendations adopted by the Commission on the subject of, on the one hand, the reservations dialogue and, on the other, technical assistance and assistance with the settlement of disputes concerning reservations.”

“11. Within each part, the guidelines are divided into sections (introduced by a two-digit number where the first represents the part and the second the section within that part).¹⁸⁴ In principle, the guidelines carry a three-digit number within each section.”¹⁸⁵

¹⁸⁴ For example, section 3.4 deals with the “Permissibility of reactions to reservations”; the number 3 indicates that it falls under part 3 and the number 4 refers to section 4 of that part. Where a section is introduced by a guideline of a very general nature that covers its entire content, that guideline has the same title and the same number as the section itself (this is true, for example, of guideline 3.5 (Permissibility of an interpretative declaration).

¹⁸⁵ In the rare case of the guidelines designed to illustrate, through examples, the manner of determining a reservation’s compatibility with the object and purpose of the treaty (the subject of guideline 3.1.6 [3.1.5]), these illustrative guidelines have a four-digit number. Thus, in the case of guideline 3.1.6.1 [3.1.5.2] (Vague and general reservations), the number 3 refers to Part 3; the first number 1 refers to section 1 of this part (Permissible reservations); the number 6 [5] refers to the more general guideline 3.1.6 [3.1.5] (Determination of the object and purpose of the treaty) and the second number 1 indicates that this is the first example illustrating that general guideline.