

Chapter III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

19. In response to paragraph 14 of General Assembly resolution 55/152 of 12 December 2000, the Commission would like to indicate the following specific issues for each topic on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work.

A. Reservations to treaties

1. CONDITIONAL INTERPRETATIVE DECLARATIONS

20. At its forty-ninth session, the Commission decided to include the study of interpretative declarations in its work on the topic of reservations to treaties.⁵ At its fifty-first session, it drew a distinction between “simple” interpretative declarations and conditional interpretative declarations, the definition of which is contained in guideline 1.2.1 [1.2.4].⁶ In moving ahead in its work, the Commission finds that the latter declarations are subject, *mutatis mutandis*, to the same legal regime as reservations themselves. Should this assimilation be confirmed in regard to the effects of reservations and of conditional interpretative declarations respectively, the Commission is considering the possibility of not including in its draft Guide to Practice guidelines specifically relating to conditional interpretative declarations.

21. The Commission would be particularly interested in receiving comments from States in this connection and would welcome any information on the practice followed by States and international organizations in connection with the formulation and the effects of conditional interpretative declarations.

2. LATE FORMULATION OF RESERVATIONS

22. In the case of the draft guidelines adopted at the present session (see chapter VI), the Commission would like to receive, in particular, comments from Governments on guideline 2.3.1, entitled “Late formulation of a reservation”.⁷

⁵ *Yearbook ... 1997*, vol. II (Part Two), p. 52, paras. 113–115.

⁶ *Yearbook ... 1999*, vol. II (Part Two), p. 103.

⁷ “Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.”

23. This guideline has been worded so that it is understood that this practice, which is a departure from the actual definition of reservations as contained in article 2, paragraph 1 (*d*), of the Vienna Convention on the Law of Treaties (hereinafter “the 1969 Vienna Convention”) and reproduced in guideline 1.1,⁸ should remain exceptional in view of the practice followed by depositaries and, in particular, by the Secretary-General of the United Nations.⁹ Nevertheless, some members of the Commission consider that including this practice in the Guide to Practice could unduly encourage the late formulation of reservations. The Commission would like to receive the views of Governments on this issue.

24. Moreover, still in connection with the same draft guideline, the Commission would like to have the views of States on the advisability of using the term “objection”, not within the meaning of article 20 of the 1969 Vienna Convention of a declaration whereby a State objects to the content of a reservation, but to signify opposition to its late formulation.¹⁰

3. ROLE OF THE DEPOSITARY

25. The Special Rapporteur on reservations to treaties devoted a section of his sixth report, entitled “Functions of depositaries”, to the role of the depositary in the communication of reservations. He proposed reproducing the provisions of articles 77 and 78 of the 1969 Vienna Convention in the Guide to Practice, by adapting them to the particular case of reservations. The problem nonetheless arises of whether it lies with the depositary to refuse to communicate to the States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of the treaty.

26. The Commission would like to receive the views of States on this point before adopting a draft guideline in this regard.

⁸ *Yearbook ... 1998*, vol. II (Part Two), p. 99.

⁹ See note verbale from the Legal Counsel (modification of reservations), 2000 (*Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2).

¹⁰ Possible alternatives such as “rejection” or “opposition” have been proposed.

B. Diplomatic protection

27. The Commission would welcome comments on the exceptions that may be made to the rule of continuous nationality, including the conditions under which such exceptions would apply. In particular, comments would be appreciated on those exceptions to the rule concerning situations of involuntary change of nationality arising out of State succession or out of marriage or adoption.

28. The Commission would also welcome comments on the following questions relating to diplomatic protection in the context of legal persons:

(a) Do States, in practice, exercise diplomatic protection on behalf of a company when the company is registered/incorporated in the State, irrespective of the nationality of the shareholders? Or, do States, in addition, require

that the majority, or a preponderance, of the shareholders of the company have the nationality of the protecting State before diplomatic protection will be exercised?

(b) May a State exercise diplomatic protection on behalf of shareholders that have its nationality when the company (registered/incorporated in another State) is injured by an act of the State of registration/incorporation?

C. Unilateral acts of States

29. The Commission draws attention to a questionnaire prepared by the Special Rapporteur which will be circulated to Governments. The Commission encourages Governments to reply to the questionnaire as soon as possible.