Chapter IV

RESERVATIONS TO TREATIES

A. Introduction

32. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission to include on its agenda the topic "The law and practice relating to reservations to treaties".

33. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.[8]

34. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[9]

35. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read "Reservations to treaties"; the form of the results of the study, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention"), the Vienna Convention on Succession of States in Respect of Treaties (hereinafter "the 1978 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").[10] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolution 48/31 and in resolution 49/51 of 9 December 1994. As far as the Guide to Practice was concerned, it would take the form of draft guidelines with commentaries which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

36. Also at its forty-seventh session, the Commission, in accordance with its earlier practice,[11] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties in order to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions.[12] The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and inviting States to answer the questionnaire.[13]

37. At its forty-eighth session, in 1996, the Commission had before it the Special Rapporteur's second report on the topic.[14] The Special Rapporteur had annexed to his report a draft resolution of the Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[15] Owing to lack of time, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next session.[16]

38. At its forty-ninth session, in 1997, the Commission again had before it the second report of the Special Rapporteur on the topic.

39. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[17]

40. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

41. At its fiftieth session, in 1998, the Commission had before it the Special Rapporteur's third report on the topic,[18] which dealt with the definition of reservations and interpretative declarations to treaties. At the same session, the Commission provisionally adopted six draft guidelines.[19]

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[8] See *Yearbook … 1994*, vol. II (Part Two), p. 179, para. 381.

[9] *Yearbook … 1995*, vol. II (Part One), document A/CN.4/470.

[10] *Ibid*., vol. II (Part Two), p. 108, para. 487.

[11] See *Yearbook … 1983*, vol. II (Part Two), p. 83, para. 286.

[12] See *Yearbook … 1995*, vol. II (Part Two), p. 108, para. 489. The questionnaires sent to Member States and international organizations are reproduced in *Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annexes II and III.

[13] As at 27 July 2000, 33 States and 24 international organizations had answered the questionnaires.

[14] *Yearbook … 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478.

[15] *Ibid*., vol. II (Part Two), p. 83, para. 136, and footnote 238.

[16] A summary of the debate appears in *ibid*., chap. VI, sect. B, especially para. 137.

[17] See footnote 4 above.

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

[19] *Ibid*., vol. II (Part Two), p. 99, para. 540.

42. At its fifty-first session, in 1999, the Commission had before it the part of the Special Rapporteur's third report which it had not had time to consider at its fiftieth session, as well as his fourth report on the topic.[20] Moreover, the revised bibliography on the topic, the first version of which the Special Rapporteur had submitted at the forty-eighth session attached to his second report, was annexed to the report. The fourth report also dealt with the definition of reservations and interpretative declarations. At the same session, the Commission provisionally adopted 17 draft guidelines.[21]

43. The Commission also, in the light of the consideration of interpretative declarations, adopted a new version of draft guideline 1.1.1 [1.1.4] (Object of reservations) and of the draft guideline without a title or number (which has become draft guideline 1.6 (Scope of definitions)).

44. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's fifth report on the topic,[22] dealing, on the one hand, with alternatives to reservations and interpretative declarations and, on the other hand, with procedure regarding reservations and interpretative declarations, particularly their formulation and the question of late reservations and interpretative declarations. At the same session, the Commission provisionally adopted five draft guidelines.[23] The Commission also deferred consideration of the second part of the fifth report of the Special Rapporteur to the following session.

45. At its fifty-third session, in 2001, the Commission initially had before it the second part of the fifth report, relating to questions of procedure regarding reservations and interpretative declarations, and then the sixth report,[24] relating to modalities for formulating reservations and interpretative declarations (including their form and notification) as well as the publicity of reservations and interpretative declarations (their communication, their addressees and obligations of depositaries).

46. At the same session the Commission provisionally adopted 12 draft guidelines.[25]

47. At the same session, at its 2692nd meeting, held on 19 July 2001, the Commission decided to refer to the Drafting Committee draft guidelines 2.1.1 (Written form), 2.1.2 (Form of formal confirmation), 2.1.3 (Competence to formulate a reservation at the international level), 2.1.3 *bis* (Competence to formulate a reservation at the internal level), 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations), 2.1.5 (Communication of reservations), 2.1.6 (Procedure for communication of reservations), 2.1.7 (Functions of depositaries), 2.1.8 (Effective date of communications relating to reservations), 2.4.1 (Formulation of interpretative declarations), 2.4.1 *bis* (Competence to formulate an interpretative declaration at the internal level), 2.4.2 (Formulation of conditional interpretative declarations) and 2.4.9 (Communication of conditional interpretative declarations).

B. Consideration of the topic at the present session

48. At the present session, the Commission had before it the Special Rapporteur's seventh report (A/CN.4/526 and Add.1–3) relating to the formulation, modification and withdrawal of reservations and interpretative declarations. It considered the report at its 2719th to 2721st and 2734th to 2739th meetings, held on 14 and 15 May, 17 May, 23 to 26 July, and 30 and 31 July 2002.

49. At its 2721st meeting, further to consideration of the first part of the seventh report, the Commission decided to refer to the Drafting Committee draft guideline 2.1.7 *bis* (Case of manifestly impermissible reservations).

50. At its 2733rd and 2734th meetings, on 22 and 23 July 2002, the Commission considered and provisionally adopted draft guidelines 2.1.1 (Written form), 2.1.2 (Form of formal confirmation), 2.1.3 (Formulation of a reservation at the international level), 2.1.4 [2.1.3 *bis*, 2.1.4] (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations),[26] 2.1.5 (Communication of reservations), 2.1.6 [2.1.6, 2.1.8] (Procedure for communication of reservations), 2.1.7 (Functions of depositaries), 2.1.8 [2.1.7 *bis*] (Procedure in case of manifestly [impermissible] reservations),[27] 2.4.1 (Formulation of interpretative declarations), [2.4.2 [2.4.1 *bis*] (Formulation of an interpretative declaration at the internal level)] and [2.4.7 [2.4.2, 2.4.9] (Formulation and communication of conditional interpretative declarations)].[28]

51. At its 2748th meeting, on 14 August 2002, the Commission adopted the commentaries to the aforementioned draft guidelines.

52. The text of these draft guidelines and the commentaries thereto are reproduced in section C.2 below.

1. Introduction by the Special Rapporteur of his seventh report

53. The Special Rapporteur drew attention to section C of his seventh report (paras. 48–55) and, in particular, to two new developments involving reservations to human rights treaties. The first was the important report prepared by the Secretariat in 2001 at the request of the Committee on the Elimination of Discrimination against Women at its twenty-fourth session, specifically the section entitled

[20] *Yearbook … 1999*, vol. II (Part One), documents A/CN.4/499 and A/CN.4/478/Rev.1.

[21] *Ibid*., vol. II (Part Two), p. 91, para. 470.

[22] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4.

[23] *Ibid*., vol. II (Part Two), p. 108, para. 663.

[24] *Yearbook … 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3.

[25] *Ibid*., vol. II (Part Two), p. 172, para. 114.

[26] The number between square brackets indicates the number of the draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

[27] The term will be reviewed by the Commission.

[28] The two draft guidelines are in square brackets pending a decision by the Commission on the fate of all of the draft guidelines on conditional interpretative declarations. Draft guideline 2.4.7 was numbered 2.4.3 in the report of the Drafting Committee, which was reviewed during the fifty-fourth session.

"Practices of human rights treaty bodies on reservations".[29] Those bodies had proved to be much more pragmatic, less dogmatic, than the text of General Comment No. 24 of the Commission on Human Rights[30] might suggest. They were more inclined to encourage States to withdraw certain reservations than to appreciate their validity, something that was relevant in the light of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, adopted by the Commission at its forty-ninth session.[31]

54. The second development was that, despite the continuing opposition of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights had, at its fifty-third session, by its resolution 2001/17 of 16 August 2001, renewed its earlier decision to entrust Ms. Françoise Hampson with the preparation of a working paper on reservations to human rights treaties.[32] The Special Rapporteur requested the members of the Commission to express their views on whether to contact Ms. Hampson in the hope that there would be fuller consultations between the International Law Commission, the Sub-Commission on the Promotion and Protection of Human Rights and other human rights treaty bodies with a view to the re-examination in 2004 of the preliminary conclusions adopted by the International Law Commission in 1997.

55. Referring to the draft guidelines in chapters II and III of his seventh report, the Special Rapporteur introduced draft guideline 2.5.1,[33] which reproduced article 22, paragraph 1, of the 1986 Vienna Convention, which itself was virtually identical to article 22, paragraph 1, of the 1969 Vienna Convention. The *travaux préparatoires* of article 22, paragraph 1, of the 1986 Vienna Convention adequately demonstrated that the withdrawal of a reservation was a unilateral act, thus ending a controversy as to the nature of that act. The argument that a reservation not provided for by a treaty was effective only if the parties to the treaty accepted it was overly formalistic and failed to take account of the fact that the provision of the Vienna Conventions had become a customary rule.

56. Draft guideline 2.5.2[34] reproduced the text of article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions. Its most important implication was that there could be no "implicit" or "tacit" withdrawal of reservations, despite the theory that the non-confirmation of a reservation could constitute its "withdrawal".

57. Similarly, withdrawal could not be confused with "expired" or "forgotten" reservations, the latter arising primarily from the amendment or repeal of the internal legislation of a State, which made the reservation unnecessary. Such a situation could give rise to legal problems relating to the issue of whether internal law or international law took precedence; the "forgotten" reservation was nevertheless not withdrawn.

58. Draft guideline 2.5.3[35] corresponded to the need to include in the Guide to Practice, particularly in view of its non-binding nature as a "code of recommended practice", a guideline that would encourage States to undertake a periodic review of their reservations precisely in order to see if these were no longer justified in view of developments in the States' internal legislation. That corresponded to the practice of the General Assembly and the Council of Europe and that of the bodies established by certain treaties.

59. Draft guideline 2.5.4[36] was an attempt to provide an answer to the difficult question of what the effect should be if a monitoring body found a reservation to be impermissible.[37] Obviously, such a finding could not constitute withdrawal *per se*. It should, however, have consequences: either it could be considered to have "neutralized" the reservation, or, in conformity with the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, adopted by the Commission at its forty-ninth session, it would be the responsibility of the reserving State to draw conclusions from the finding. If full withdrawal might sometimes seem too radical, partial withdrawal remained an option. Draft guideline 2.5.X[38] was a combination of the two alternatives.

[29] CEDAW/C/2001/II/4, paras. 20–56.

[30] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V, p. 119.

[31] See footnote 4 above.

[32] E/CN.4/Sub.2/2001/40.

[33] The draft guideline reads as follows:

"2.5.1 *Withdrawal of reservations*

"Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal."

[34] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.5.2 *Form of withdrawal*

"The withdrawal of a reservation must be formulated in writing."

[35] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.5.3 *Periodic review of the usefulness of reservations*

"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 answer their purpose.

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

[36] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.5.4 *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*

"1. The fact that a reservation is found impermissible by a body monitoring the implementation of a treaty to which the reservation relates does not constitute the withdrawal of that reservation.

"2. Following such a finding, the reserving State or international organization must act accordingly. It may fulfil its obligations in that respect by withdrawing the reservation."

[37] This term will have to be re-examined in the light of future reports by the Special Rapporteur and discussions in the Commission.

[38] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.5.X *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*

"1. The fact that a reservation is found impermissible by a body monitoring the implementation of a treaty to which the reservation relates does not constitute the withdrawal of that reservation.

"2. Following such a finding, the reserving State or international organization must take action accordingly. It may fulfil its obligations in that regard by totally or partially withdrawing the reservation."

60. Draft guidelines 2.5.5 to 2.5.5 *ter*[39] related to the procedure for the withdrawal of reservations, on which the 1969 and 1986 Vienna Conventions were silent. The Special Rapporteur thought that they could be modelled on the procedure for the formulation of reservations, to the extent that it could apply to withdrawal. In view of the amendments that the Commission had already made to the guidelines relating to the formulation of reservations, it would be appropriate to make similar amendments to those relating to the withdrawal of reservations. Another possibility would be to include a single draft guideline 2.5.5,[40] reproducing, *mutatis mutandis*, the guidelines relating to the procedure for the formulation of reservations. The Special Rapporteur did not, however, favour the latter option, partly because it did not address the practical needs that the Guide to Practice was meant to meet and partly because the two procedures—formulation and withdrawal—were not identical. As for the guidelines relating to the communication of the withdrawal of reservations (2.5.6, 2.5.6 *bis* and 2.5.6 *ter*),[41] the Special Rapporteur recalled that the *travaux préparatoires* of the 1969 Vienna Convention showed that the members of the Commission at that time had thought that the same procedure should be applied by the depositary to the communication both of reservations and of their withdrawal. That was confirmed by practice, which the guidelines reflected.

61. Draft guidelines 2.5.7 and 2.5.8[42] dealt with the effect of the withdrawal of a reservation and appeared

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[39] The draft guidelines proposed by the Special Rapporteur read as follows:

"[2.5.5 *Competence to withdraw a reservation at the international level*

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

"[2.5.5 *Competence to withdraw a reservation at the international level*

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

"(*a*) That person produces appropriate full powers for the purposes of that withdrawal; or

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

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

"(*a*) Heads of State, Heads of Government and ministers for foreign affairs;

"(*b*) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

"[(*c*) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization].

"2.5.5 *bis Competence to withdraw a reservation at the internal level*

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

"2.5.5 *ter Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

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

[40] The draft guideline proposed by the Special Rapporteur reads as follows:

"[2.5.5 *Competence to withdraw a reservation*

"The determination of the competent body and the procedure to be followed for withdrawing a reservation are governed, *mutatis mutandis*, by the rules applying to the formulation of reservations given in guidelines 2.1.3, 2.1.3 *bis* and 2.1.4.]"

[41] The draft guidelines proposed by the Special Rapporteur read as follows:

"[2.5.6 *Communication of withdrawal of a reservation*

"The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.]

"[2.5.6 *Communication of withdrawal of reservations*

"1. The withdrawal of a reservation must be communicated [in writing] to the contracting States and contracting organizations and other States and other international organizations entitled to become parties to the treaty.

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

"2.5.6 *bis Procedure for communication of withdrawal of reservations*

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

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

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

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

"2.5.6 *ter Functions of depositaries*

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

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

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

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

[42] The draft guidelines proposed by the Special Rapporteur read as follows:

"2.5.7 *Effect of withdrawal of a reservation*

"The withdrawal of a reservation entails the application of the treaty as a whole in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted or objected to the reservation.

"2.5.8 *Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization*

"The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the

in the section of the Guide to Practice relating to procedure simply for reasons of convenience. With regard to draft guideline 2.5.7, the Special Rapporteur said that it was not altogether accurate to say "The withdrawal of a reservation entails the application of the treaty as a whole …", inasmuch as there could be other reservations which would not be withdrawn and would continue to prevent the application of the treaty as a whole. It would therefore be better to reword the first sentence to read: "The withdrawal of a reservation entails the application in its entirety of the treaty provision to which the reservation related …".

62. With regard to the date on which the withdrawal of a reservation took effect (draft guideline 2.5.9[43]), the Special Rapporteur drew attention to article 22, paragraph 3, of the 1986 Vienna Convention but said that such a date could cause problems for the adaptation of internal law to the new situation, although there was always the possibility of adopting express clauses to deal with the problem. That was why he had found it useful to include in the Guide to Practice some model clauses[44] which States could include in treaties into which they entered. If the model clauses were referred to the Drafting Committee, a decision would have to be taken on whether they should be reproduced following the text of draft guideline 2.5.9 or should appear in an annex to the Guide to Practice, a solution that seemed more appropriate to him.

63. Nothing would prevent the State or the international organization that withdrew its reservation from setting the effective date of that withdrawal at a date later than the one on which it received notification, as was recalled in draft guideline 2.5.10.[45] The draft guideline also dealt with the case where the withdrawal did not affect the obligations of the contracting States or international organizations when those were "integral" obligations. In that case, the withdrawal had an immediate or even a retroactive effect.

64. Draft guidelines 2.5.11 and 2.5.12[46] related to the partial withdrawal[47] of reservations, which was very similar to the total withdrawal of reservations because by "diminishing" or reducing the scope of a reservation the State (or the international organization) "increased" its treaty obligations.

65. The definition of partial withdrawal proposed in draft guideline 2.5.11[48] showed that such withdrawal was a modification of an existing reservation and not a total withdrawal followed by a new reservation, as seemed implicit in some theory and case law, such as the decision of the Swiss Federal Supreme Court in the *F.* v. *R. and State Council of the Canton of Thurgau* case[49] and the occasionally inconsistent practice of the Secretary-General of the United Nations acting as depositary. The same procedure should be used for the partial or total withdrawal of a reservation. (Draft guidelines 2.5.6 to 2.5.10 could thus easily be transposed to partial withdrawal.) On the other hand, draft guidelines 2.5.7 and 2.5.8 could not be transposed because, in the case of a partial withdrawal, the reservation remained in force and did not *ipso facto* affect the objections made to it. Draft guideline 2.5.11 defined the consequences of a partial withdrawal, while draft guideline 2.5.11 *bis*[50] was the "counterpart" of draft guideline 2.5.4 and could perhaps be merged with it.

66. In concluding his introduction, the Special Rapporteur said he hoped that all the draft guidelines and model

entry into force of the treaty between itself and the reserving State or international organization."

[43] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.5.9 *Effective date of withdrawal of a reservation*

"Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization."

[44] The model clauses proposed by the Special Rapporteur read as follows:

"A. *Deferment of the effective date of the withdrawal of a reservation*

"A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [depositary].

"B. *Earlier effective date of withdrawal of a reservation*

"A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [depositary]. The withdrawal shall take effect on the date of receipt of such notification by [depositary].

"C. *Freedom to set the effective date of withdrawal of a reservation*

"A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [depositary]."

[45] The draft guideline proposed by the Special Rapporteur reads:

"2.5.10 *Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation*

"The withdrawal of a reservation takes effect on the date set by the withdrawing State where:

"(*a*) That date is later than the date on which the other contracting States or international organizations received notification of it; or

"(*b*) The withdrawal does not alter the situation of the withdrawing State in relation to the other contracting States or international organizations."

[46] The draft guidelines proposed by the Special Rapporteur read:

"2.5.11 *Partial withdrawal of a reservation*

"1. The partial withdrawal of a reservation is subject to respect for the same formal and procedural rules as a total withdrawal and takes effect in the same conditions.

"2. The partial withdrawal of a reservation is the modification of that reservation by the reserving State or international organization for the purpose of limiting the legal effect of the reservation and ensuring more completely the application of the provisions of the treaty, or of the treaty as a whole, to that State or that international organization.

"2.5.12 *Effect of a partial withdrawal of a reservation*

"The partial withdrawal of a reservation modifies the legal effects of the reservation to the extent of the new formulation of the reservation. Any objections made to the reservation continue to have effect as long as their authors do not withdraw them."

[47] The Special Rapporteur explained that the last part of his report on the aggravation of reservations could not be introduced at the fifty-fourth session.

[48] The Special Rapporteur considered that the order of the paragraphs of draft guideline 2.5.11 could be reversed.

[49] Swiss Federal Supreme Court, decision of 17 December 1992, *Journal des Tribunaux*, 1995, p. 536.

[50] The draft guideline proposed by the Special Rapporteur reads:

"2.5.11 *bis Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*

"Where a body monitoring the implementation of the treaty to which the reservation relates finds the reservation to be impermissible, the reserving State or international organization may fulfil its obligations in that respect by partially withdrawing that reservation in accordance with the finding."

clauses relating to draft guideline 2.5.9 would be referred to the Drafting Committee.

2. Summary of the debate

67. With regard to the Special Rapporteur's question about the future of contacts between the International Law Commission and the Sub-Commission on the Promotion and Protection of Human Rights, several members supported the idea that the Commission should be available and open to bodies that dealt with the same questions, and should even ask for their views. According to one opinion, the Commission should even take the initiative in respect of an informal meeting with the interested parties at the next session. In the light of the Special Rapporteur's explanations on the current situation, the Commission decided to contact the human rights bodies. A letter co-signed by the Chair and the Special Rapporteur would therefore be sent to the Chair of the Sub-Commission and to Ms. Hampson with an official request that opportunities for consultation should be organized during the Commission's next session in Geneva.

68. Attention was drawn to the usefulness of the set of draft guidelines, which were designed to give States practical guidance, particularly in view of the absence or scarcity of indications concerning the procedure to be followed in the event of the withdrawal or modification of reservations in the 1969 and 1986 Vienna Conventions and other conventions. It was also noted that emphasis should be placed on general treaty practice rather than on certain sectors or regions.

69. Several members expressed their support for guidelines 2.5.1 and 2.5.2, while noting that they basically repeated the relevant provisions of the 1969 and 1986 Vienna Conventions (art. 22, para. 1, and art. 23, para. 4). Some members expressed doubts about including them in the Guide to Practice rather than referring to the provisions of the Conventions. However, other members stated that they were in favour of reproducing the provisions of the Conventions in the Guide to Practice, which was comprehensive in nature. Guideline 2.5.2 confirmed the need for the withdrawal of a reservation to be made in writing; that ruled out implicit withdrawals and ensured legal certainty in relations between the States parties. Consideration was also given to the fact that a reservation might fall into abeyance as a result of the subsequent practice of a reserving State. According to one opinion, other forms of withdrawal should be dealt with, such as a declaration concerning an imminent formal withdrawal, on the understanding that the relations of the reserving State with the other parties to the treaty would be modified only when the latter had received written notification of the withdrawal of the reservation. However, the reserving State would be bound from the moment it announced its intention to withdraw its reservation. It was stressed that such a declaration might have an effect at the internal level, but not in relation to the other parties. According to another opinion, great care must be taken on the question of implicit withdrawal because a withdrawal took legal effect only when it was formulated in writing. For example, in 1929 and 1931, the parliaments of Czechoslovakia and Poland adopted, and their Heads of State signed, a declaration accepting the jurisdiction of PCIJ,[51] which was never deposited with the depositary; the declaration therefore had no legal effect. Other members referred to the case where States made reservations and then did not insist on maintaining them in their bilateral or multilateral relations, or even abandoned them for different reasons (such as a change in their internal legislation); they questioned whether States could claim that they had not withdrawn their reservation in writing in order to avoid any estoppel effect. Moreover, if the other States applied to a State the provision to which that State had made the "abandoned" reservation, that would create a *de facto* situation that went beyond the treaty framework. It was also pointed out that a reservation which was not formally withdrawn remained legally valid, even though it was "dormant", thereby giving the reserving State greater latitude to re-amend its internal legislation along the lines of the reservation, if necessary.

70. According to one opinion, draft guideline 2.5.3 was a creative approach to the problem of obsolete reservations. It was noted that it would also be useful to mention the appeals made by bodies monitoring the implementation of treaties, since internal legislation was at times vague and inconsistent. According to another opinion, that draft guideline could give rise to difficulties because the review of the usefulness of reservations did not relate to procedure, but basically raised problems relating to conditions of withdrawal and the role of the obsolescence of reservations. Moreover, the result of the review of the development of internal legislation seemed rather doubtful. The nature of draft guideline 2.5.3 as a recommendation should be further emphasized so as not to give the impression that States were obliged to carry out such a review. The guideline should also not be restricted to referring to internal legislation because there could be other circumstances which would prompt a reserving State to withdraw its reservation.

71. With regard to draft guideline 2.5.4 (which several members discussed in conjunction with draft guidelines 2.5.11 *bis* and 2.5.X, given the close relationship between those provisions), it was pointed out that paragraph 1 stated the obvious, whereas paragraph 2 highlighted a case which had as its starting point the fact that a finding of impermissibility might have the effect of obliging the reserving State to withdraw the reservation. But it was far from certain that the monitoring body had the implicit power to oblige the reserving State to withdraw the reservation. It was pointed out that the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, adopted by the Commission at its forty-ninth session[52] were much more guarded: there was no need to specify the consequence of the finding of impermissibility, at least in respect of the withdrawal of reservations. The question also arose whether the finding of impermissibility in the case of a mere recommendation was binding on the reserving State, and it was pointed out that the State was not obliged to follow the recommendations of a monitoring body. Several members were of the opinion that careful consideration should be given to the nature of the monitoring body formulating the finding,

[51] *Collection of Texts Governing the Jurisdiction of the Court, PCIJ, Series D, No. 6*, 4th ed. (Leiden, Sijthoff, 1932), pp. 47, 48 and 54.

[52] See footnote 4 above.

given that the bodies fell into several types (political bodies, jurisdictional bodies, *sui generis* bodies, etc.).

72. Furthermore, there was a great difference between a decision of a jurisdictional body and findings by a monitoring body, which could entail either the "automatic" nullity of the reservation or the obligation for the State to take measures, or could simply constitute a recommendation to the State in question to take appropriate measures. The example was cited of the former European Commission of Human Rights, whose findings created a "moral duty" for States to reconsider their position. Even if a monitoring body had binding powers, it was not clear whether they were "self-executing". The question even arose whether a judicial body constituted a monitoring body within the meaning of the draft guideline. Furthermore, some members had doubts concerning the composition and the motivation of the findings of the monitoring bodies, the possibility of conflicting assessments by those bodies and States parties and, last, the possible effects of the draft guideline for the monitoring bodies themselves. The question also arose as to the source, in international law, of any "obligations" of States to act in consequence of the findings of the monitoring bodies. A distinction should be drawn between, on the one hand, the finding of impermissibility by a monitoring body and the effects of that finding and, on the other, the impermissibility of the reservation *per se*. The withdrawal of the reservation found to be "impermissible" was not the only solution: there were others (withdrawal from the treaty, modification of the reservation), as was pointed out in the preliminary conclusions adopted by the Commission at its forty-ninth session. One solution should not be isolated at the expense of the others, nor should just one element of paragraph 10 of the preliminary conclusions be singled out.

73. One view expressed was that the unduly peremptory and general wording of the draft guideline, which sought to combine several disparate elements and implied that the findings of all monitoring bodies had binding force, without seeking to draw any distinction between them, was a source of confusion or misunderstanding: that could be rectified by more flexible drafting. It was even suggested that paragraph 2 could be deleted in its entirety. Furthermore, the fundamental role of consent must not be overlooked. A State wishing to become a party to a treaty subject to a reservation found to be impermissible could simply maintain its offer to become a party to the treaty. The claim that rejection of the reservation obliged the State to withdraw it was very different from the claim that objection to the reservation indicated that no treaty relations were entered into with the reserving State.

74. The real question was who had the power to decide on the permissibility of reservations. The regime established by the 1969 and 1986 Vienna Conventions left that task to the States parties. However, recent developments in another direction, such as the case of the reservation formulated by Iceland to the International Convention for the Regulation of Whaling and the position taken by the International Whaling Commission, which conflicted with that of several States parties, would raise doubts in that regard. Reference was also made to the possibility of including a restrictive clause specifying that the Guide to Practice was without effects on the monitoring bodies' power to determine relations between the States parties to the treaty.

75. Another view expressed was that draft guideline 2.5.4 was a mere recommendation included in the Guide to Practice and the problems of its wording could be resolved by the Drafting Committee. The "composite" version in draft guideline 2.5.X seemed useful and clear.

76. Other members thought that the draft guideline belonged not in the section on procedure but in another chapter of the Guide to Practice, given that the question of impermissibility of reservations had not yet been taken up. It would also be useful to envisage a draft guideline specifying the relationship between the finding by a monitoring body that the reservation was impermissible and the withdrawal of the reservation by the State or international organization concerned.

77. With respect to draft guidelines 2.5.5 and 2.5.6, lacunae were noted in the 1969 and 1986 Vienna Conventions on the subject of withdrawal of reservations. It was also pointed out that the procedure concerning withdrawal of reservations should be simpler than the procedure for their formulation. Several members expressed their preference for the longer version, in the interests of ease of reference and consistency, although the view was also expressed that the shorter version might have advantages. However, it was pointed out that, once the adoption of the Guide to Practice on first reading was completed, the draft guidelines should be reviewed in their entirety in order to determine whether it might be desirable to use cross-references in the case of provisions that were identical or applicable *mutatis mutandis*. It was also noted that some draft guidelines (such as guideline 2.5.6 *bis*) should be harmonized in similar situations with the draft guidelines already adopted by the Commission.

78. It was noted that draft guidelines 2.5.7 to 2.5.10 conformed with the relevant provisions of the 1969 and 1986 Vienna Conventions. On draft guideline 2.5.7, the opinion was expressed that it should reflect the case in which other reservations remained in force, so that the treaty would not be applied in its entirety as between the withdrawing State and the other States parties.

79. It was also considered that the model clauses related to draft guideline 2.5.9 were useful and should be referred to the Drafting Committee.

80. On draft guideline 2.5.11, several members supported the oral revision by the Special Rapporteur reversing the order of the guideline's paragraphs. Concern was expressed that a partial withdrawal might be used to effectively enlarge the scope of the reservation. Consequently, a clarification explaining that a partial withdrawal did not eliminate the initial reservation and did not constitute a new reservation seemed indispensable. Furthermore, it would be preferable to assimilate partial withdrawal to simple withdrawal, given the complications resulting from two separate procedures and the diverging ways in which the other States parties could interpret them. The question was raised whether the States parties to a treaty that had not objected to the initial reservation could object to its partial withdrawal. On that question, the view was expressed that there could be no general rule

and that everything depended on the effects of the partial withdrawal, which might, for example, be discriminatory. In that case, the partial withdrawal almost amounted to a new reservation. The question also arose whether the partial withdrawal of the reservation in fact constituted a modification of it rather than, as the practice of the Secretary-General of the United Nations as depositary seemed to imply, a withdrawal followed by a new reservation. The term "modification" was used by the Secretary-General in that context to indicate the aggravation of the reservation. Accordingly, it went without saying that a partial withdrawal constituted a modification. Reference was also made to the possibility of withdrawing one among several reservations made by a State (in which case the objections to that reservation had no further purpose) and the possibility whereby the reservation depended on the internal legislation, which might result (if the latter were amended) in a limitation of the reservation. In that case, any objections to the reservation could continue to exist inasmuch as the reservation continued to exist, albeit in a limited form.

81. With regard to draft guideline 2.5.12, the view was expressed that reference should be made to a situation in which an objection related to the part of the reservation that had been withdrawn, for in such a case the objection automatically became superfluous.

3. Conclusions of the Special Rapporteur

82. At the end of the debate, the Special Rapporteur noted that all the draft guidelines relating to the formulation of reservations *lato sensu* would no doubt be extremely useful to the international community, as their purpose was to codify technical rules that responded to a real need. Furthermore, with the exception of draft guidelines 2.5.4, 2.5.11 *bis* and 2.5.X, which he proposed to treat separately, none of the draft guidelines had given rise to any doctrinal dispute. The debate had focused on specific points without raising problems of principle. His conclusion had been that the general sentiment was in favour of referring all the draft guidelines (except for guidelines 2.5.4, 2.5.11 *bis* and 2.5.X) to the Drafting Committee.

83. The Special Rapporteur reiterated that the Guide to Practice would not be a set of binding rules, but rather a "code of recommended practices", a fact that might eventually even be reflected in its title. That characteristic did not mean that the Guide to Practice should not be drafted rigorously and carefully, with a view to guiding State practice. Furthermore, it was clear that some rules contained in the draft guidelines were binding, not because they were included in the Guide to Practice but because they were customary rules or were transposed from the 1969 and 1986 Vienna Conventions. That illustrated the difference between the legal value of a norm and of a source. As to the question whether the provisions of the Conventions should be incorporated word for word in the Guide to Practice, his reply was categorically in the affirmative. The value of the Guide would be seriously compromised if users did not find the answers to their questions in the Guide itself. Albeit incomplete and sometimes ambiguous, the Conventions inevitably constituted the starting point for any practice in the matter of reservations, and a Guide that ignored them would have little practical value. Furthermore, mere reference or referral to the Conventions would inevitably pose technical and legal problems (particularly for States and organizations that were not parties to the Conventions). Accordingly, it was simpler, more useful, more logical and more convenient to incorporate the relevant treaty provisions in the Guide in their entirety.

84. That position responded to certain proposals by members concerning drafting changes to some of the draft guidelines. The Special Rapporteur recalled that the wording of several draft guidelines reproduced word for word that of the corresponding provisions of the 1969 and 1986 Vienna Conventions and that consequently it would be unnecessary and potentially dangerous to rewrite them. He agreed in substance with members who had called for the withdrawal of reservations to be facilitated, but he could see no intermediate solution.

85. Draft guidelines 2.5.1 and 2.5.2 required the written form, thereby ensuring legal security and also reflecting the principle of parallelism of forms.

86. With particular regard to draft guideline 2.5.2, a formulation had been suggested that would oblige the State that had submitted a written notification of withdrawal of its reservation to act in line with that withdrawal even before such notification was received by the other States parties. He was not in favour of that formulation because any treaty presupposed the meeting of two or more minds on a *single* text at a given point in time. That formulation would lead to situations in which there would be a divergence of obligations in time, if only for a brief period; that would lead to unnecessary complications.

87. As to the question raised concerning the situation in which a State applied in practice the provision with regard to which it had formulated a reservation, the Special Rapporteur thought that the problem transcended the sphere of reservations to treaties and came closer to the topic of the fragmentation of international law or of unilateral acts. He was not convinced that the problem should be addressed in the Guide to Practice, although he would have no objection if the Commission felt that a draft guideline along those lines should be included in the Guide.

88. The Special Rapporteur was pleased to note the Commission's favourable reaction to draft guideline 2.5.3, which had met with unanimous approval. As for the wish expressed that a specific reference should be included to the treaty-monitoring bodies, he wondered whether, in that case, mention should not also be made of the General Assembly and regional bodies. In any case, that proposal seemed to him unlikely to gain wide acceptance, particularly in the light of the debate in the Commission on the monitoring bodies. On the suggestion to stress the recommendatory aspect of the draft guideline, his view was that the entire Guide to Practice was a set of recommendations. As for the proposal to delete the reference to internal legislation, he thought that it was precisely such developments in internal legislation resulting in obsolete reservations that usually made a periodic review so essential.

89. He had noted the clear preference for the longer versions of draft guidelines 2.5.5 and 2.5.6. In the interests of facilitating the task of future users of the Guide to

Practice, the latter should treat each subject separately and comprehensively, even at the expense of some repetition. It would be better to wait until the draft was considered on second reading before taking a position on whether or not it would be desirable to merge some of the draft guidelines or make them more concise.

90. The Special Rapporteur noted that draft guidelines 2.5.7 and 2.5.8 had attracted few comments; those that had been made mainly concerned matters of drafting. In the case of draft guideline 2.5.7, he supported the suggestion that it should specify that the withdrawal of a reservation resulted in the application of those provisions of the treaty referred to by the reservation as between the withdrawing State or organization and all other parties to the treaty.

91. In connection with draft guidelines 2.5.9 and 2.5.10, the Special Rapporteur said, with regard to a comment on draft guideline 2.5.9 concerning the effective date of a notification in international law, that in his view there was no general rule: even in the 1969 and 1986 Vienna Conventions, article 20 contained rules different from those in article 22, paragraph 3.

92. As for draft guideline 2.5.10, the Special Rapporteur concurred with the comment that the withdrawal should have no effect on the obligations of the reserving State *vis-à-vis* the other contracting States or organizations, rather than their "situation", as the guideline currently stated.

93. With regard to draft guideline 2.5.11, the Special Rapporteur did not underestimate the risk mentioned by some members that States might try to portray an aggravated reservation as a partial withdrawal. The function of jurists, however, was precisely to establish classifications and provide definitions. In that context, the word "modification" was essential, since a withdrawal related to an existing reservation that would continue to exist. The subject at issue was not the withdrawal of a reservation followed by the formulation of a new reservation, as the inconsistent practice of the Secretary-General might suggest.

94. As for draft guideline 2.5.12, he endorsed the suggestion that it should include a reference to a situation in which an objection stood, if it was justified by the opposition of its author to the part of the reservation that had not been withdrawn. It would be sufficient to add a phrase at the end, such as "so long as the objection does not relate exclusively to the part of the reservation that has been withdrawn". The Special Rapporteur also fully appreciated the significance of the example given of the withdrawal of a reservation that had left the remaining part of the reservation discriminatory *vis-à-vis* a particular State or group of States. In that case, it would be legitimate for States which had fallen foul of such discrimination to formulate an objection. It was doubtful, however, whether other cases of the same kind existed; if they did, they might be covered by adding a new paragraph to draft guideline 2.5.12 or drafting a guideline 2.5.12 *bis*.[53]

95. Finally, the Special Rapporteur took up draft guidelines 2.5.4, 2.5.11 and 2.5.X, pointing out that his comments would focus on draft guideline 2.5.X, which was a combination of the other two. He recalled that several members had said that paragraph 1 stated the obvious. It had seemed important to him to make it clear that monitoring bodies could never determine the treaty commitment of a State: in other words, they could neither withdraw nor nullify a reservation. The most they could do was to find it inadmissible, even though the European Court of Human Rights had—wrongly, in his view—claimed for itself the power to nullify a reservation in the *Belilos* case.[54] All that even ICJ might be able to do was to decline to apply an inadmissible reservation, but in that case it would need to determine whether the reservation could be detached from the treaty, so that the treaty could apply without the reservation, or whether the inadmissibility of the reservation prevented the treaty from being applied as a whole. Either way, the authority of the Court's judgement would be restricted to the case in hand, and, in relations between the reserving State and the States other than the defendant, the reservation would continue to exist, although still inadmissible or impermissible[55] (*illicite* or *non valide*).

96. The Special Rapporteur recalled that the first sentence of paragraph 2 of draft guideline 2.5.X was taken from the first sentence of paragraph 10 of the preliminary conclusions adopted by the Commission at its forty-ninth session, preceded by the phrase "Following such a finding". He was still of the view that, unless it acted in bad faith, a State that was concerned to observe the law should certainly take some action to deal with an inadmissible reservation, whether or not the latter had been found inadmissible by a particular body. It might be possible to change the wording, if necessary, in accordance with one suggestion, to read "it is the reserving State that has the responsibility", thus reproducing a sentence that appeared in the preliminary conclusions.

97. The Special Rapporteur also noted that monitoring bodies established under human rights treaties often had far wider and more binding powers than simply those of making comments and recommendations. As for ICJ, he thought that, when it was called on to decide on the application of a treaty, its role was almost that of a monitoring body, contrary to what had been stated. It might, nonetheless, be better to use such wording as "bodies having competence to find a reservation inadmissible". Nor did he consider that monitoring bodies were always or exclusively political, as some had claimed.

98. The Special Rapporteur emphasized once more that he had never said that a State that had made a reservation that a body competent to do so had found inadmissible was under an obligation to withdraw that reservation. Draft guideline 2.5.X reproduced paragraph 10 of the preliminary conclusions adopted by the Commission at its forty-ninth session, with its statement that a State could (among other possible options) fulfil its legal obligations by totally or partially withdrawing a reservation. The Special Rapporteur also noted that the categorization, submitted by one member, of the various powers held by the monitoring bodies should appear in the commentary rather than in the draft guidelines themselves.

[53] The Special Rapporteur read out the following wording: "No new objection may be formulated in the case of partial withdrawal of a reservation, unless the resulting reservation gives rise to new questions and the objection relates to such a question."

[54] European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132, *Belilos* v. *Switzerland, judgment of 29 April 1988*.

[55] The Special Rapporteur did not wish to make a final decision on the terminological problem for the time being.

99. The Special Rapporteur concluded by saying that, although he was not convinced by the criticisms of the substance of the draft guidelines in question (2.5.4, 2.5.11 *bis* and 2.5.X), he would not, for the time being, request their referral to the Drafting Committee, for the question of withdrawal was ultimately of secondary importance.

100. The major elements in the draft guidelines were, on the one hand, the powers of treaty-monitoring bodies and, on the other hand, the consequences of the inadmissibility of a reservation. That being so, he intended to submit some amended versions, either at future debates on the admissibility of reservations or during the review of the preliminary conclusions adopted by the Commission at its forty-ninth session. With regard to the other draft guidelines, including the draft model clauses, he believed the Commission had no objection to their being referred to the Drafting Committee.

101. At its 2739th meeting, the Commission decided to refer to the Drafting Committee draft guidelines 2.5.1 (Withdrawal of reservations), 2.5.2 (Form of withdrawal), 2.5.3 (Periodic review of the usefulness of reservations), 2.5.5 (Competence to withdraw a reservation at the international level), 2.5.5 *bis* (Competence to withdraw a reservation at the internal level), 2.5.5 *ter* (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations), 2.5.6 (Communication of withdrawal of a reservation), 2.5.6 *bis* (Procedure for communication of withdrawal of reservations), 2.5.6 *ter* (Functions of depositaries), 2.5.7 (Effect of withdrawal of a reservation), 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization), 2.5.9 (Effective date of withdrawal of a reservation) (including the related model clauses), 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation), 2.5.11 (Partial withdrawal of a reservation) and 2.5.12 (Effect of a partial withdrawal of a reservation).

C. Draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. Text of the draft guidelines

102. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.[56]

[56] See the commentaries to guidelines 1.1, 1.1.2, 1.1.3 [1.1.8], 1.1.4 [1.1.3] and 1.1.7 [1.1.1] in *Yearbook ... 1998*, vol. II (Part Two), pp. 99–108; the commentaries to guidelines 1.1.1 [1.1.4], 1.1.5 [1.1.6], 1.1.6, 1.2, 1.2.1 [1.2.4], 1.2.2 [1.2.1], 1.3, 1.3.1, 1.3.2 [1.2.2], 1.3.3 [1.2.3], 1.4, 1.4.1 [1.1.5], 1.4.2 [1.1.6], 1.4.3 [1.1.7], 1.4.4 [1.2.5], 1.4.5 [1.2.6], 1.5, 1.5.1 [1.1.9], 1.5.2 [1.2.7], 1.5.3 [1.2.8] and 1.6 in *Yearbook ... 1999*, vol. II (Part Two), pp. 93–126; the commentaries to guidelines 1.1.8, 1.4.6 [1.4.6, 1.4.7], 1.4.7 [1.4.8], 1.7, 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] and 1.7.2 [1.7.5] in *Yearbook ... 2000*, vol. II (Part Two), pp. 108–123; and the commentaries to guidelines 2.2.1, 2.2.2 [2.2.3], 2.2.3 [2.2.4], 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.4.3, 2.4.4 [2.4.5], 2.4.5 [2.4.4], 2.4.6 [2.4.7] and 2.4.7 [2.4.8] in *Yearbook ... 2001*, vol. II (Part Two), pp. 180–195. The commentaries to guidelines 2.1.1, 2.1.2, 2.1.3, 2.1.4 [2.1.3 *bis*, 2.1.4], 2.1.5, 2.1.6 [2.1.6, 2.1.8], 2.1.7, 2.1.8 [2.1.7 *bis*], 2.4, 2.4.1, 2.4.2 [2.4.1 *bis*] and 2.4.7 [2.4.2, 2.4.9] are given in section 2 below.

RESERVATIONS TO TREATIES

Guide to Practice

1 ***Definitions***

1.1 ***Definition of reservations***

“Reservation” means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 [1.1.4][57] ***Object of reservations***

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

1.1.2 ***Instances in which reservations may be formulated***

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of 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.

1.1.3 [1.1.8] ***Reservations having territorial scope***

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 [1.1.3] ***Reservations formulated when notifying territorial application***

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] ***Statements purporting to limit the obligations of their author***

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 ***Statements purporting to discharge an obligation by equivalent means***

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 [1.1.1] ***Reservations formulated jointly***

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

[57] The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

1.1.8 *Reservations made under exclusionary clauses*

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

1.2 *Definition of interpretative declarations*

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

1.2.1 [1.2.4] *Conditional interpretative declarations*

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 [1.2.1] *Interpretative declarations formulated jointly*

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 *Distinction between reservations and interpretative declarations*

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

1.3.1 *Method of implementation of the distinction between reservations and interpretative declarations*

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 [1.2.2] *Phrasing and name*

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 [1.2.3] *Formulation of a unilateral statement when a reservation is prohibited*

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 *Unilateral statements other than reservations and interpretative declarations*

Unilateral statements formulated in relation to a treaty which are not reservations or interpretative declarations are outside the scope of the present Guide to Practice.

1.4.1 [1.1.5] *Statements purporting to undertake unilateral commitments*

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 [1.1.6] *Unilateral statements purporting to add further elements to a treaty*

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] *Statements of non-recognition*

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 [1.2.5] *General statements of policy*

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] *Statements concerning modalities of implementation of a treaty at the internal level*

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other contracting parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

1.4.6. [1.4.6, 1.4.7] *Unilateral statements made under an optional clause*

1. A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] *Unilateral statements providing for a choice between the provisions of a treaty*

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 *Unilateral statements in respect of bilateral treaties*

1.5.1 [1.1.9] *"Reservations" to bilateral treaties*

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

1.5.2 [1.2.7] ***Interpretative declarations in respect of bilateral treaties***

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] ***Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party***

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 ***Scope of definitions***

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

1.7 ***Alternatives to reservations and interpretative declarations***

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] ***Alternatives to reservations***

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

(*a*) The insertion in the treaty of restrictive clauses purporting to limit its scope or application;

(*b*) The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

1.7.2 [1.7.5] ***Alternatives to interpretative declarations***

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

(*a*) The insertion in the treaty of provisions purporting to interpret the same treaty;

(*b*) The conclusion of a supplementary agreement to the same end.

2 ***Procedure***

2.1 ***Form and notification of reservations***

2.1.1 ***Written form***

A reservation must be formulated in writing.

2.1.2 ***Form of formal confirmation***

Formal confirmation of a reservation must be made in writing.

2.1.3 ***Formulation of a reservation at the international level***

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

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

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

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(*a*) Heads of State, Heads of Government and ministers for foreign affairs;

(*b*) Representatives accredited by States to an international conference, for the purpose of formulating a reservation to a treaty adopted at that conference;

(*c*) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(*d*) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 ***bis*****, 2.1.4]** ***Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations***

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

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

2.1.5 ***Communication of reservations***

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

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

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

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

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

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

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

3. The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

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

2.1.7 ***Functions of depositaries***

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

2. In the event of any difference appearing between a State or an international organization and the depositary as to the perform-

ance of the latter's functions, the depositary shall bring the question to the attention of:

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

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

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

1. Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

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

2.2.1 *Formal confirmation of reservations formulated when signing a treaty*

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when the State or organization expresses its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3] *Instances of non-requirement of confirmation of reservations formulated when signing a treaty*

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature its consent to be bound by the treaty.

2.2.3 [2.2.4] *Reservations formulated upon signature when a treaty expressly so provides*

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when the State or organization expresses its consent to be bound by the treaty.

... [58]

2.3.1 *Late formulation of a reservation*

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.

2.3.2 *Acceptance of late formulation of a reservation*

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

2.3.3 *Objection to late formulation of a reservation*

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

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

A contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(*a*) Interpretation of a reservation made earlier; or

(*b*) A unilateral statement made subsequently under an optional clause.

2.4 *Procedure for interpretative declarations*

2.4.1 *Formulation of interpretative declarations*

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 bis] *Formulation of an interpretative declaration at the internal level*

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

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

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

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

2.4.4 [2.4.5] *Non-requirement of confirmation of interpretative declarations made when signing a treaty*

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.5 [2.4.4] *Formal confirmation of conditional interpretative declarations formulated when signing a treaty*

If a conditional interpretative declaration is formulated during the signing of a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when the State or organization expresses its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

2.4.6 [2.4.7] *Late formulation of an interpretative declaration*

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not subsequently formulate an interpretative declaration concerning that treaty except if none of the other contracting parties objects to the late formulation of the interpretative declaration.

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

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

[58] Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

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

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

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

2.4.8 ***Late formulation of a conditional interpretative declaration***[59]

A State or an international organization may not formulate a conditional interpretative declaration concerning 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 conditional interpretative declaration.

2. Text of the draft guidelines with commentaries thereto provisionally adopted by the Commission at its fifty-fourth session

103. The text of the draft guidelines with commentaries thereto provisionally adopted by the Commission at its fifty-fourth session is reproduced below.

2 *Procedure*

2.1 *Form and notification of reservations*

2.1.1 *Written form*

A reservation must be formulated in writing.

Commentary

(1) Under article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, a reservation "must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty". Draft guideline 2.1.1 covers the first of these requirements; the second is dealt with in draft guideline 2.1.5.

(2) Although it is not included in the actual definition of a reservation[60] and the word "statement", which is included, refers to both oral and written statements, the need for a reservation to be in writing was never called into question during the *travaux préparatoires* for the Vienna Conventions. The Commission's final commentary on what was then the first paragraph of draft article 18 and was to become, without any change in this regard, article 23, paragraph 1, of the 1969 Vienna Convention, presents it as self-evident that a reservation must be in writing.[61]

(3) That was the opinion expressed in 1950 by Special Rapporteur J. L. Brierly, who, in his first report on the law of treaties, suggested the following wording for article 10, paragraph 2, of the draft convention on the law of treaties:

> Unless the contrary is indicated in a treaty, the text of a proposed reservation thereto must be authenticated together with the text or texts of that treaty or otherwise formally communicated in the same manner as an instrument or copy of an instrument of acceptance of that treaty.[62]

(4) This suggestion elicited no objections (except to the word "authenticated") during the discussions at the Commission's second session,[63] but the question of the form that reservations should take was not considered again until the first report on the law of treaties by Special Rapporteur Sir Gerald Fitzmaurice in 1956; under draft article 37, paragraph 2, which he proposed and which is the direct precursor of current article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions: "Reservations must be formally framed and proposed in writing, or recorded in some form in the minutes of a meeting or conference."[64]

(5) In 1962, after the issuance of the first report on the law of treaties by Special Rapporteur Sir Humphrey Waldock,[65] the Commission elaborated on this theme:

> Reservations, which must be in writing, may be formulated:
>
> (i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connection with the adoption of the treaty;
>
> (ii) Upon signing the treaty at a subsequent date; or
>
> (iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it.[66]

This provision was hardly discussed by the members of the Commission.[67]

(6) In conformity with the position of two Governments,[68] which had suggested "some simplification of the procedural provisions",[69] Waldock made a far more restrained drafting proposal on second reading, namely: "A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States."[70] This draft is the direct

[59] This draft guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new draft guidelines at the fifty-fourth session.

[60] See draft guideline 1.1 of the Guide to Practice, which combines the definitions in art. 2, para. 1 (*d*), of the 1969 and 1986 Vienna Conventions and art. 2, para. 1 (*j*), of the 1978 Vienna Convention; see also *Yearbook … 1998*, vol. II (Part Two), pp. 99–100.

[61] See *Yearbook … 1966*, vol. II, p. 208.

[62] *Yearbook … 1950*, vol. II, document A/CN.4/23, p. 239.

[63] *Ibid.*, vol. I, 53rd meeting, pp. 91–92.

[64] *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 115.

[65] *Yearbook … 1962*, vol. II, document A/CN.4/144.

[66] *Ibid.*, document A/5209, draft art. 18, para. 2 (*a*), p. 176; for the commentary on this provision, see p. 180; see also paras. (4) and (5) of the commentary to draft guideline 2.2.1 in *Yearbook … 2001*, vol. II (Part Two), p. 180.

[67] See the summary records of the 651st to 656th meetings, *Yearbook … 1962*, vol. I, pp. 139–179. See also the fifth report on reservations to treaties by Special Rapporteur Alain Pellet, *Yearbook … 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–3, para. 237; however, see para. (8) of this commentary.

[68] Denmark and Sweden (see the fourth report on the law of treaties by Special Rapporteur Sir Humphrey Waldock, *Yearbook … 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, pp. 46 and 47).

[69] *Ibid.*, p. 53, para. 13.

[70] *Ibid.*, draft art. 20, para. 1.

source of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions.

(7) While the wording was changed, neither the Commission[71] nor the United Nations Conference on the Law of Treaties of 1968–1969[72] ever called into question the need for reservations to be formulated in writing. And neither Paul Reuter, Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations, nor the participants in the United Nations Conference on the Law of Treaties of 1986 added clarifications or suggested any changes in this regard. The *travaux préparatoires* thus show remarkable unanimity in this respect.

(8) This is easily explained. It has been written:

> Reservations are formal statements. Although their formulation in writing is not embraced by the terms of the definition, it would according to article 23 (1) of the Vienna Convention seem to be an absolute requirement. It is less common nowadays that the various acts of consenting to a treaty occur simultaneously, therefore it is not possible for an orally presented reservation to come to the knowledge of all contracting parties. In the era of differentiated treaty-making procedures it becomes essential for reservations to be put down in writing in order to be registered and notified by the depository, so that all interested states would become aware of them. A reservation not notified cannot be acted upon. Other states would not be able to expressly accept or object to such reservations.[73]

(9) Nonetheless, during the discussions at the Commission's fourteenth session, in 1962, Waldock, replying to a question raised by Mr. Tabibi, did not totally exclude the idea of "oral reservations". He thought, however, that the question "belonged rather to the question of reservations at the time of the adoption of the treaty, which was dealt with in paragraph 2 (a) (i)", and that, in any case, the requirement of a formal confirmation "should go a long way towards disposing of the difficulty".[74]

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

(*a*) When a treaty is being signed which makes express provision for this,[75] or if signing is tantamount to definitive expression of consent to be bound (agreement in simplified form);[76] and

(*b*) In all other cases, where the State or international organization expresses its definitive consent to be bound.[77]

(11) The Commission is nevertheless of the opinion that the question whether a reservation may initially be formulated orally can be left open. As Waldock so rightly pointed out, the answer has no practical impact: a contracting party can in any event formulate a reservation up to the date of its expression of consent to be bound; thus, even if its initial oral statement could not be regarded as a true reservation, the "confirmation" made in due course would serve as a formulation.[78]

2.1.2 *Form of formal confirmation*

Formal confirmation of a reservation must be made in writing.

Commentary

(1) Article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions on "Procedure regarding reservations" does not expressly require reservations to be confirmed in writing. However, this provision, which is reproduced in draft guideline 2.2.1,[79] does require that a reservation must be formally confirmed by the reserving State [or international organization] when the State or organization expresses its consent to be bound by the treaty. The word "formally" must without any doubt be understood as meaning that this formality must be completed in writing.

(2) This interpretation is also in conformity with the *travaux préparatoires* for article 23 of the 1969 and 1986 Vienna Conventions: specifically because the confirmation must be made in writing, the Commission and its Special Rapporteurs on the law of treaties took the view that the question whether a reservation may initially be formulated orally could be left open.[80]

(3) The requirement of a written confirmation of a reservation is also a matter of common sense: a reservation could not be notified with any certainty to the other States and international organizations concerned, in accordance with the provisions of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, if there were no formal text. This is, moreover, in keeping with a consistent practice to which there is, to the Commission's knowledge, no exception.

(4) It should, however, be pointed out that draft guideline 2.1.2 does not take a position on the question whether the

[71] See the final text of the draft articles on the law of treaties in *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 208, draft art. 18, para. 1.

[72] *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March—24 May 1968 and 9 April—22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, pp. 138–139, paras. 190–196, .

[73] F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties, Studies in International Law*, vol. 5 (The Hague, T.M.C. Asser Instituut, 1988), p. 44; see also L. Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin*? (Dordrecht, Martinus Nijhoff, 1995), p. 50.

[74] *Yearbook … 1962*, vol. I, 663rd meeting, p. 223, para. 34. See also a remark made by Brierly at the Commission's second session in 1950: "Mr. Brierly agreed that a reservation must be presented formally, but it might be announced informally during negotiations" (*Yearbook … 1950*, vol. I, 53rd meeting, p. 91, para. 19).

[75] See draft guideline 2.2.3[2.2.4], *Yearbook … 2001*, vol. II (Part Two), p. 179.

[76] See draft guideline 2.2.2[2.2.3], *ibid.*

[77] See draft guideline 2.2.1, *ibid.*

[78] See para. (8) of this commentary.

[79] See the text of this guideline and the commentary thereto in *Yearbook … 2001*, vol. II (Part Two), pp. 180–183.

[80] See the commentary to draft guideline 2.1.1, paras. (8) and (10), above.

formal confirmation of a reservation is always necessary. This is decided by draft guidelines 2.2.1 to 2.2.3, which show that there are cases that do not lend themselves to such a confirmation.[81]

2.1.3 *Formulation of a reservation at the international level*

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

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

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

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(*a*) Heads of State, Heads of Government and ministers for foreign affairs;

(*b*) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(*c*) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(*d*) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

Commentary

(1) Draft guideline 2.1.3 defines the persons and organs which are authorized, by virtue of their functions, to formulate a reservation on behalf of a State or an international organization. Its text is based closely on that of the 1986 Vienna Convention.[82]

(2) The Vienna Conventions of 1969 and 1986 contain no explanation in this regard. In his first report on the law of treaties in 1962, however, Waldock proposed a draft article which read:

> Reservations shall be formulated in writing either:
>
> (i) On the face of the treaty itself, and normally in the form of an adjunct to the signature of the representative of the reserving State;
>
> (ii) In a Final Act of a conference, protocol, *procès-verbal* or other instrument related to the treaty and executed by a duly authorized representative of the reserving State;
>
> (iii) In the instrument by which the reserving State ratifies, accedes to or accepts the treaty, or in a *procès-verbal* or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the reserving State.[83]

(3) As Sweden noted, with regard to the corresponding article adopted by the Commission on first reading,[84] such "procedural rules … would fit better into a code of recommended practices",[85] which is precisely the function of the Guide to Practice. The Commission has nevertheless concluded that it is not useful to include all of these clarifications in the Guide: the long list of instruments in which reservations may appear does not add much, particularly since the list is not restrictive, as is indicated by the reference in two places to an instrument other than those expressly mentioned.

(4) Clarification is needed only with regard to the author of the instrument in question. The 1962 text is nevertheless not entirely satisfactory in this regard. The reservation must probably be formulated by "a representative of the reserving State" or by "the competent authority of the reserving State".[86] The question is, however, whether there are rules of general international law to determine in a restrictive manner which authority or authorities are competent to formulate a reservation at the international level or whether this determination is left to the domestic law of each State.

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

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

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

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

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[81] For the text of these draft guidelines and the commentaries thereto, see *Yearbook … 2001*, vol. II (Part Two), pp. 180–184.

[82] Article 7 of the 1969 Vienna Convention is drafted in much the same way, but, unlike the present Guide to Practice, relates only to treaties between States.

[83] *Yearbook … 1962*, vol. II, document A/CN.4/144, p. 60, draft art. 17, para. 3 (*a*). In his comments Waldock restricts himself to saying that this provision "does not appear to require comment" (*ibid.*, p. 66).

[84] See *ibid.*, document A/5209, draft art. 18, para. 2 (*a*), p. 176.

[85] Fourth report on the law of treaties by Special Rapporteur Sir Humphrey Waldock (see note 68 above), p. 47.

[86] See para. (2) of this commentary.

(*a*) That person produces appropriate full powers; or

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

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

(*a*) Heads of State, Heads of Government and ministers for foreign affairs, for the purpose of performing all acts relating to the conclusion of a treaty...;

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

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

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

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

(*a*) That person produces appropriate full powers; or

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

(8) *Mutatis mutandis*, these rules, for the reasons indicated above, may certainly be transposed to the competence to formulate reservations, on the understanding, of course, that the formulation of reservations by a person who cannot "be considered ... as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization".[87]

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

(10) In an *aide-mémoire* of 1 July 1976, the United Nations Legal Counsel said:

> A reservation must be formulated in writing (article 23, paragraph 1, of the [1969 Vienna] Convention), and both reservations and withdrawals of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally (article 7 of the Convention).[88]

(11) Similarly, the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* prepared by the Treaty Section of the United Nations Office of Legal Affairs confines itself to noting that "the reservation must be included in the instrument or annexed to it and must emanate from one of the three qualified authorities" and to referring to general developments concerning the deposit of binding instruments.[89] Likewise, according to this document, "Reservations made at the time of signature must be authorized by the full powers granted to the signatory by one of the three qualified authorities or the signatory must be one of these authorities".[90]

(12) These rules seem to be strictly applied; all the instruments of ratification (or equivalents) of treaties containing reservations for which the Secretary-General is depositary are signed by one of the "three authorities", or, if they are signed by the permanent representative, the latter has attached full powers emanating from one of these authorities. Moreover, where this is not the case, the permanent representative is requested, informally but firmly, to make this correction.[91]

(13) The Commission nevertheless questioned whether this practice, which transposes to reservations the rules contained in article 7 of the 1969 and 1986 Vienna Conventions (see para. (7) above), is not excessively rigid. It may be considered, for example, whether it would be legitimate to accept that the accredited representative of a State to an international organization which is the depositary of the treaty to which the State that he or she represents wishes to make a reservation should be authorized to make that reservation. The issue is particularly relevant because this practice is accepted in some international organizations other than the United Nations.

(14) Thus, it seems, for example, that the Secretary-General of OAS and the Secretary-General of the Council of Europe accept reservations recorded in letters from permanent representatives.[92]

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

(16) It may legitimately be considered that the recognition of such limited extensions to competence for the pur-

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[87] Art. 8 of the 1969 and 1986 Vienna Conventions.

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

[89] United Nations publication (Sales No. E.94.V.15), document ST/LEG/7/Rev.1, p. 49, para. 161; the passage refers to paras. 121 and 122 of that document.

[90] *Ibid.*, p. 62, para. 208; refers to chapter VI of the *Summary of Practice* ("Full powers and signatures").

[91] This is confirmed, by analogy, by the procedural incident between India and Pakistan that came before ICJ in *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, ICJ Reports, 2000*, p. 12. Oral pleadings revealed that in an initial communication dated 3 October 1973, the Permanent Mission of Pakistan to the United Nations gave notification of that country's intent to succeed British India as a party to the General Act of Arbitration (Pacific Settlement of International Disputes). In a note dated 31 January 1974, the Secretary-General requested that such notification should be made "in the form prescribed", in other words, that it should be transmitted by one of the three authorities mentioned above; this notification took the form of a new communication (formulated in different terms than that of the preceding year), dated 30 May 1974 and signed this time by the Prime Minister of Pakistan (see the pleadings by Sir Elihu Lauterpacht on behalf of Pakistan, 5 April 2000, CR/2000/3, and by Alain Pellet on behalf of India, 6 April 2000, CR/2000/4). While this episode concerned a notification of succession and not the formulation of reservations, it testifies to the great vigilance with which the Secretary-General applies the rules set forth above (para. (11)) with regard to the general expression by States of their consent to be bound by a treaty.

[92] See the reply by OAS in the report of the Secretary-General on depositary practice in relation to reservations, submitted pursuant to General Assembly resolution 1452 B (XIV), reproduced in *Yearbook … 1965*, vol. II, document A/5687. See also the *European Treaty Series*, No. 24 (reservations).

pose of formulating reservations would constitute a limited but welcome progressive development. The Commission, supported by a large majority of States, has nevertheless consistently been careful not to change the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[93] However, even if the provisions of article 7 of the 1969 and 1986 Conventions do not expressly deal with competence to formulate reservations, they are nonetheless rightfully[94] regarded as transposable to this case.

(17) As a compromise between these two requirements, the Commission adopted a sufficiently flexible draft guideline which, while referring to the rules in article 7 of the 1969 and 1986 Conventions, maintains the less rigid practice followed by some international organizations other than the United Nations as depositaries.[95] The need for flexibility is reflected in the inclusion, at the beginning of draft guideline 2.1.3, of the expression "Subject to the customary practices in international organizations which are depositaries of treaties". This expression should, incidentally, be understood as applying both to the case where the international organization itself is the depositary and to the more usual case where this function is exercised by the organization's most senior official, the secretary-general or the director-general.

(18) It should also be noted that the expression "for the purposes of adopting or authenticating the text of the treaty", as contained in draft guideline 2.1.3, paragraph 1 (*a*), covers signature, since the two (alternative or joint) functions of signature are precisely the authentication of the text of the treaty (see art. 10 of the 1969 and 1986 Vienna Conventions) and the expression of consent to be bound by the treaty (art. 12).

2.1.4 [2.1.3 *bis*, 2.1.4] *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

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

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

[93] *Yearbook … 1995*, vol. II (Part Two), p. 108, para. 487 (*d*).

[94] See para. (6) of this commentary.

[95] See para. (14) of this commentary. ITU is also a special case in this regard, but in a different sense and for different reasons, since reservations to texts equivalent to treaties adopted by that body "can be formulated only by delegations, namely, *during conferences**" (reply by ITU to the Commission's questionnaire on reservations—see footnote 12 above).

Commentary

(1) Draft guideline 2.1.3 relates to the formulation of reservations at the international level, while draft guideline 2.1.4 deals with their formulation in the internal legal system of States and international organizations.

(2) It is self-evident that the international phase of formulating reservations is only the tip of the iceberg; as is true of the entire procedure whereby a State or an international organization expresses its consent to be bound; this procedure is the outcome of an internal process that may be quite complex. Like the ratification procedure (or the acceptance, approval or accession procedure), from which it is indissociable, the formulation of reservations is a kind of "internal parenthesis" within an overwhelmingly international process.[96]

(3) As Reuter has noted, "national constitutional practices with regard to reservations and objections change from one country to the next".[97] It may be noted, for example, that, of the 23 States which replied to the Commission's questionnaire on reservations to treaties and whose answers to questions 1.7, 1.7.1, 1.7.2, 1.8, 1.8.1 and 1.8.2[98] are utilizable, competence to formulate a reservation belongs to the executive branch alone in six cases[99] and to the parliament alone in five cases,[100] while it is shared between them in 12 cases.

(4) In this last hypothesis, there are various modalities for collaboration between the executive branch and the parliament. In some cases, the parliament is merely kept informed of intended reservations[101]—although not always systematically.[102] In others, it must approve all

[96] See Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit international public*, 6th ed. (Paris, Librairie générale de droit et de jurisprudence, 1999), p. 144.

[97] P. Reuter, *Introduction au droit des traités,* 3rd ed., revised and enlarged by P. Cahier (Paris, Presses Universitaires de France, 1995), para. 133*, pp. 84–85.

[98] Question 1.7: "At the internal level, which authority or authorities decide(s) that the State will formulate a reservation: The Head of State? The Government or a government body? The parliament?"; question 1.7.1: "If it is not always the same authority which has competence to decide that a reservation will be formulated, on what criteria is this competence based?"; question 1.7.2: "If the decision is taken by the Executive, is the Parliament: Informed of the decision? *A priori* or *a posteriori*? Invited to discuss the text of the intended reservation(s)?"; question 1.8: "Is it possible for a national judicial body to oppose or insist on the formulation of certain reservations?"; question 1.8.1: "If so, which authority and how is it seized of the matter?"; question 1.8.2: "What reason(s) can it invoke in taking such a decision?" (see footnote 12 above, annex II).

[99] Bolivia (the Parliament can suggest reservations), Colombia (for certain treaties), Croatia (the Parliament can oppose a proposed reservation, which would imply that it is consulted), Denmark, the Holy See and Malaysia. See also the States mentioned in footnotes 101–104 below.

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

[101] Kuwait since 1994 (consultation of an *ad hoc* commission); New Zealand "until recently" (system provisionally established).

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

reservations before their formulation[103] or, where only certain treaties are submitted to the parliament, only those which relate to those treaties.[104] Moreover, a judicial body may be called upon to intervene in the internal procedure for formulating reservations.[105]

(5) It is interesting to note that the procedure for formulating reservations does not necessarily follow the one generally required for the expression of the State's consent to be bound. Thus, in France, only recently was the custom established of transmitting to the parliament the text of reservations which the President of the Republic or the Government intends to attach to the ratification of treaties or the approval of agreements, even where such instruments must be submitted to the parliament under article 53 of the 1958 Constitution.[106]

(6) The diversity which characterizes the competence to formulate reservations and the procedure to be followed for that purpose among States seems to be mirrored among international organizations. Only two of them[107] answered questions 3.7, 3.7.1 and 3.7.2 of the questionnaire on reservations:[108] FAO states that such competence belongs to the Conference, whereas ICAO, while emphasizing the lack of real practice, believes that if a reservation were formulated on its behalf, it would be formulated by the Secretary-General as an administrative matter and, as the case might be, by the Assembly or the Council in their respective areas of competence,[109] with the stipulation that it would be "appropriate" for the Assembly to be informed of the reservations formulated by the Council or the Secretary-General.

(7) In the view of the Commission, the only conclusion that can be drawn from these observations is that international law does not impose any specific rule with regard to the internal procedure for formulating reservations. This, to be frank, seems so obvious that some members of the Commission questioned whether it was worthwhile to stipulate it expressly in a draft guideline. According to the viewpoint that prevailed, however, it should be expressly stated in the light of the pragmatic character of the Guide to Practice. This is the object of paragraph 1 of draft guideline 2.1.4.

[103] Argentina and Mexico.

[104] Finland, the Republic of Korea, Slovakia and Spain.

[105] Colombia, Finland and Malaysia.

[106] See A. Pellet, commentary on art. 53, in F. Luchaire and G. Conac, editorial directors, *La Constitution de la République française*, 2nd ed. (Paris, Economica, 1987), pp. 1047–1050.

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

[108] Question 3.7: "At the internal level, which organ(s) decide(s) that the State will formulate a reservation: The chief executive officer? The general assembly? Another organ?"; question 3.7.1: "If it is not always the same organ that has competence to decide that a reservation will be formulated, on what criteria is this competence based?"; question 3.7.2: "If the decision is taken by the chief executive officer, is the general assembly: Informed of the decision? *A priori* or *a posteriori*? Invited to discuss the text of the intended reservation(s)?" (see footnote 12 above, annex III).

[109] See Arts. 49 and 50 of the Convention on International Civil Aviation, which established ICAO.

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

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

> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.
>
> 3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

(10) In the absence of practice, it is difficult to take a categorical position on the transposition of these rules to the formulation of reservations. Some elements argue in its favour: as was discussed above (para. (2)), the formulation of reservations cannot be dissociated from the procedure for expressing definitive consent to be bound; it occurs or must be confirmed at the moment of expression of consent to be bound and, in almost all cases, emanates from the same authority. These arguments are, however, not decisive. Whereas the internal rules on competence to conclude treaties are laid down in the constitution, at least in broad outline, that is not the case for the formulation of reservations, which derives from practice, and practice not necessarily in line with that followed in expressing consent to be bound.

(11) It is therefore unlikely that a violation of internal provisions can be "manifest" in the sense of article 46 of the Vienna Conventions cited above, and one must fall back on international rules such as those set forth in draft guideline 2.1.3. The conclusion to be drawn is that a State or an international organization should not be allowed to claim that a violation of the provisions of internal law or of the rules of the organization has invalidated a reservation that it has formulated, if such formulation was the act of an authority competent at the international level.

(12) Since this conclusion differs from the rules applicable to "defective ratification" as set forth in article 46, it seems essential to state it expressly in a draft guideline. This is the object of paragraph 2 of draft guideline 2.1.4.

(13) Some members of the Commission pointed out that this provision is superfluous because the author of the reservation can withdraw it "at any time".[110] However, since it is far from having been established that such withdrawal

[110] Art. 22, para. 1, of the 1969 and 1986 Vienna Conventions.

may have a retroactive effect, the question of the validity of a reservation formulated in violation of the relevant rules of internal law may arise in practice, thereby justifying the inclusion of the rule stated in paragraph 2 of draft guideline 2.1.4.

2.1.5 *Communication of reservations*

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

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

Commentary

(1) Once it has been formulated, the reservation must be made known to the other States or international organizations concerned. Such publicity is essential for enabling them to react, either through an acceptance or through an objection. Article 23 of the Vienna Conventions of 1969 and 1986 specifies the recipients of reservations formulated by a State or an international organization, but is silent on the procedure to be followed in effecting such notification. The object of draft guidelines 2.1.5 to 2.1.8 is to fill that gap, with draft guideline 2.1.5 referring more specifically to its recipients.

(2) Under article 23, paragraph 1, of the 1986 Vienna Convention, a reservation must be communicated "to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty". In addition, article 20, paragraph 3, which stipulates that a reservation to a constituent instrument requires "the acceptance of the competent organ" of the organization in order to produce effects, implies that the reservation must be communicated to the organization in question, as is stated in paragraph 2 of draft guideline 2.1.5.

(3) The first group of recipients (contracting States and contracting organizations) does not pose any particular problem. These terms are defined in article 2, paragraph 1 (*f*), of the 1986 Vienna Convention[111] as meaning, respectively:

(i) a State, or

(ii) an international organization,

which has consented to be bound by the treaty, whether or not the treaty has entered into force.

(4) Much more problematic are the definition and, still more, the determination in each specific case of the "other States and international organizations entitled to become parties to the treaty". As has been noted: "Not all treaties are wholly clear as to which other States may become parties."[112]

(5) In his 1951 report on reservations to multilateral treaties, Brierly suggested the following provision:

> The following classes of States shall be entitled to be consulted as to any reservations formulated after the signature of this convention (or after this convention has become open to signature or accession):
>
> (a) States entitled to become parties to the convention,
>
> (b) States having signed or ratified the convention,
>
> (c) States having ratified or acceded to the convention.[113]

(6) In conformity with these recommendations, the Commission suggested that, "in the absence of contrary provisions in any multilateral convention ... [t]he depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention".[114]

(7) More vaguely, Special Rapporteur Sir Hersch Lauterpacht, in his first report on the law of treaties, in 1953, proposed in three of the four alternative versions of draft article 9 on reservations a provision stating: "The text of the reservations received shall be communicated by the depositary authority to all the interested States." [115] But he does not comment on this phrase,[116] which is reproduced in the first report on the law of treaties by Fitzmaurice in 1956,[117] who in draft article 39 clarifies the phrase by writing that these are "all the States which have taken part in the negotiation and drawing up of the treaty or which, by giving their signature, ratification, accession or acceptance, have manifested their interest in it".[118]

(8) Conversely, in 1962, Sir Humphrey Waldock in his first report on the law of treaties reverted to the 1951 formulation[119] and proposed that any reservation formulated "by a State signing, ratifying, acceding to, or accepting a treaty subsequently to the meeting or conference at which it was adopted … be communicated to all other States which are, or are entitled to become, parties".[120] This was also the formula adopted by the Commission after the Drafting Committee had considered it and made mi-

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[111] See also art. 2, para. 1 (*f*), of the 1969 Vienna Convention and art. 2, para. 1 (*k*), of the 1978 Vienna Convention, which define the term "contracting State" in the same way.

[112] *Oppenheim's International Law*, 9th ed., vol. I, *Peace*, R. Jennings and A. Watts, eds. (Harlow, Longman, 1992), p. 1248, footnote 4.

[113] *Yearbook ... 1951*, vol. II, document A/CN.4/41, annex E, p. 16.

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

[115] *Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 92, alternatives B, C and D; oddly enough, this requirement does not appear in alternative A (acceptance of reservations by a two-thirds majority, *ibid.*, p. 91).

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

[117] Draft art. 37: they "must be brought to the knowledge of the other interested States" (see footnote 64 above).

[118] *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 115.

[119] See paras. (5) and (6) of this commentary.

[120] *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 60. Not without reason, Waldock believed that it was unnecessary to notify the other States which took part in the negotiations of a reservation formulated "when signing a treaty at a meeting or conference of the negotiating States" if it appeared at the end of the treaty itself or in the final act of the conference.

nor drafting changes.[121] While States had not expressed any objections in this regard in their comments on the draft articles adopted on first reading, Waldock, with no explanations, proposed in his fourth report on the law of treaties, in 1965, to revert to the phrase “other States concerned”.[122] The Commission replaced this wording by “contracting States”[123] on the ground that the notion of “States concerned”[124] was “very vague”, finally adopting at its eighteenth session in 1966, the requirement of communication “to the other States entitled to become parties to the treaty”,[125] a phrase which was “regarded as more appropriate to describe the recipients of the type of communications in question”.[126]

(9) At the United Nations Conference on the Law of Treaties, Mr. McKinnon pointed out, on behalf of the delegation of Canada, that that wording “might create difficulties for a depositary, as there was no criterion for deciding which were those States. It would therefore be preferable to substitute the phrase ‘negotiating States and contracting States’ as was proposed in his delegation’s amendment (A/CONF.39/C.1/L.158)”.[127] Although this common-sense proposal was submitted to the Drafting Committee,[128] the latter preferred an amendment submitted by Spain,[129] which appears in the final text of article 23, paragraph 1, of the 1969 Vienna Convention and which was reproduced in the 1986 text unchanged except for the addition of international organizations.[130]

(10) Not only is the phrase adopted obscure, but the *travaux préparatoires* for the 1969 Vienna Convention do little to clarify it. The same is true of subparagraphs (*b*) and (*e*) of article 77, paragraph 1, of the Convention, which, while not referring expressly to reservations, provide that the depositary is responsible for transmitting “to the parties and to the States entitled to become parties to the treaty” copies of the texts of the treaty and informing them of “notifications and communications relating to the treaty”;[131] however, the *travaux préparatoires* for these provisions shed no light on this phrase,[132] on which the Commission’s members have never focused their attention.

(11) This was not the case during the preparation of the 1986 Vienna Convention. Whereas the Special Rapporteur on the topic of the law of treaties between States and international organizations or between two or more international organizations had, in his fourth and fifth reports,[133] merely adapted without comment the text of article 23, paragraph 1, of the 1969 Vienna Convention, several members of the Commission expressed particular concern during the discussion of the draft at the Commission’s twenty-ninth session in 1977 regarding the problems posed by the determination of “international organizations entitled to become parties to the treaty”.[134] However, following a contentious debate, it was decided merely to transpose the 1969 formulation.[135]

(12) It is certainly regrettable that the limitations proposed by Canada in 1968[136] and by Mr. Ushakov in 1977[137] regarding the recipients of communications relating to reservations were not adopted (in the second case, probably out of a debatable concern with not deviating from the 1969 wording and not making any distinction between the rights of States and those of international organizations); such limitations would have obviated practical difficulties for depositaries without significantly calling into question the “useful” publicity of reservations among truly interested States and international organizations.[138]

[121] Draft art. 18, para. 3; see *ibid.*, document A/5209, p. 176. In its commentary, the Commission considered that this phrase was equivalent to “other interested States” (p. 180).

[122] *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 56.

[123] *Ibid.*, document A/6009, p. 162.

[124] Explanation given by Sir Humphrey Waldock at the 813th meeting of the Commission, *Yearbook … 1965*, vol. I, p. 267.

[125] Draft art. 18, para. 1 (see footnote 71 above).

[126] Explanation given by Briggs, Chair of the Drafting Committee, *Yearbook ... 1966*, vol. I (Part II), 887th meeting, p. 293.

[127] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March—24 May 1968* (United Nations publication, Sales No. E.68.V.7), *23rd meeting of the Committee of the Whole*, p. 124, para. 38. Frowein points out that the United States of America had expressed the same concern in 1966 in the General Assembly’s discussion of the draft articles on the law of treaties relating to depositaries prepared by the Commission at its fourteenth and sixteenth sessions (see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 346 *et seq*., especially p. 352) (see J. A. Frowein, “Some considerations regarding the function of the depositary: comments on art. 72, para. 1 (*d*) of the ILC’s 1966 draft articles on the law of treaties”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967), p. 533); see also S. Rosenne, “More on the depositary of international treaties”, *AJIL*, vol. 64 (1970), pp. 847–848.

[128] See *Official Records of the United Nations Conference on the Law of Treaties* (footnote 72 above), para. 194.

[129] *Ibid.*, document A/CONF.39/C.1/L.149, para. 192 (*i*); for the text adopted by the Committee of the Whole, see para. 196.

[130] See para. (2) of this commentary.

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

[132] On the origin of these provisions, see, in particular, the report by Brierly on reservations to multilateral treaties, *Yearbook ... 1951*, vol. II, document A/CN.4/41, and the conclusions of the Commission, *ibid.*, document A/1858, p. 130, para. 34 (*l*); art. 17, para. 4 (*c*); and art. 27, para. 6 (*c*), of the draft articles proposed by Waldock in his first report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 66 and 82–83, and art. 29, para. 5, of the draft adopted by the Commission on first reading, *ibid.*, document A/5209, p. 185; and draft art. 72 adopted definitively by the Commission at its eighteenth session, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 269.

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

[134] For example, Mr. Ushakov observed: “In the case of treaties of a universal character concluded between States and international organizations, such communications would thus have to be made to all existing States. For the same category of treaties and also treaties concluded between international organizations only, it would, however, be more difficult to determine what international organizations were ‘entitled to become parties’. If 10 international organizations were parties to a treaty, to what other international organizations would the communications have to be sent?” *Yearbook … 1977*, vol. 1, 1434th meeting, p. 101, para. 42.

[135] See in particular the statements by Mr. Verosta, Mr. Calle y Calle, Mr. Schwebel and Mr. Reuter, *ibid.*, p. 102, and the conclusion of the debates, *ibid.*, 1451st meeting, p. 196, and *Yearbook … 1977*, vol. II (Part Two), p. 115.

[136] See footnote 127 above.

[137] See footnote 134 above.

[138] It is interesting to note that, while the specialized agencies of the United Nations are not, and are not entitled to become, “parties” to

(*Continued on next page.*)

(13) There is obviously no problem when the treaty itself determines clearly which States or international organizations are entitled to become parties, at least in the case of "closed" treaties; treaties concluded under the auspices of a regional international organization such as the Council of Europe,[139] OAS[140] or OAU[141] often fall into this category. Things are much more complicated when it comes to treaties that do not indicate clearly which States are entitled to become parties to them or "open" treaties containing the words "any State",[142] or when it is established that participants in the negotiations agreed that later accessions would be possible.[143] This is obviously the case particularly when depositary functions are assumed by a State which not only has no diplomatic relations with some States[144] but also does not recognize as States certain entities which proclaim themselves to be States.

(14) The *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* devotes an entire chapter to describing the difficulties encountered by the Secretary-General in determining the "States and international organizations which may become parties",[145] difficulties which legal theorists have amply underscored.[146] States which replied on this point to the Commission's questionnaire on reservations to treaties do not mention any particular difficulties in this area, but this can probably be explained by the fact that the problem is not specific to reservations and more generally concerns depositary functions. That is also why the Commission saw no merit in proposing the adoption of one or more draft guidelines on this point.

(15) By contrast, it is certainly necessary to reproduce in the Guide to Practice the rule set forth in article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions (taking the latter in its broadest formulation), no matter how problematic and arguable the provision may be.

(16) The Commission also wished to specify that, just as reservations must be formulated and confirmed in writing,[147] so too must they be communicated in writing to the other States or international organizations concerned, as this is the only means of enabling the recipients to react to them in full knowledge of the facts. This latter requirement is only implicit in the text of the 1969 and 1986 Vienna Conventions, but it is clear from the context, since article 23, paragraph 1, of these conventions is the provision which requires that reservations be formulated in writing and which uses a very concise formula to link that condition to the requirement that reservations be communicated. Besides, when there is no depositary, the formulation and communication of reservations necessarily go hand in hand.[148] Moreover, practice confines itself to communications in written form.[149]

(17) Paragraph 2 of draft guideline 2.1.5 concerns the particular case of reservations to constituent instruments of international organizations.

(18) Article 23 of the 1969 and 1986 Vienna Conventions concerning the procedure regarding reservations does not deal with this particular case. The general rule set forth in paragraph 1 of the article must, however, be clarified and expanded in this respect.

(19) According to article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions: "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization." Now, that organ can take a decision only if the organization is aware of the reservation, which must therefore be communicated to it.

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

> However, in any case where a reservation is formulated to an instrument which is the constituent instrument of an international organization and the reservation is not one specifically authorized by such instrument, it shall be communicated to the head of the secretariat of the organization concerned in order that the question of its admissibility may be brought before the competent organ of such organization.[150]

(21) Waldock indicated that this clarification was motivated by

> a point to which attention is drawn in paragraph 81 of the *Summary of Practice of the Secretary-General* (ST/LEG/7), where it is said: "If the agreement should be a constitution establishing an international organization, the practice followed by the Secretary-General and the discussions in the Sixth Committee show that the reservation would be submitted to the competent organ of the organization before the State concerned was counted among the parties. The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions."[151]

(*Footnote 138 continued.*)

the Convention on the Privileges and Immunities of the Specialized Agencies, they do receive communications relating to the reservations formulated by some States with regard to its provisions. See, in particular, the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (footnote 89 above), pp. 60–61, paras. 199–203.

[139] See, for instance, art. K, para. 1, of the European Social Charter (revised): "This Charter shall be open for signature by the members of the Council of Europe"; or art. 32, para. 1, of the Criminal Law Convention on Corruption.

[140] See, for example, art. XVIII of the Inter-American Convention against Corruption.

[141] See also, for instance, art. 12, para. 1, of the Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora.

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

[143] See art. 15 of the 1969 and 1986 Vienna Conventions.

[144] See art. 74 of the 1969 and 1986 Vienna Conventions.

[145] Footnote 89 above, chap. V, pp. 21–30, paras. 73–100.

[146] See, *inter alia*, Frowein, *loc. cit.* (footnote 127 above), pp. 533–539, and Rosenne, "More on the depositary of international treaties", *ibid.*, pp. 847–848.

[147] See draft guidelines 2.1.1 and 2.1.2.

[148] See draft guideline 2.1.6, para. 1 (*a*).

[149] See the "depositary notifications" of the Secretary-General of the United Nations.

[150] *Yearbook ... 1962*, vol. II, document A/CN.4/144.

[151] *Ibid.*, p. 66.

(22) This provision disappeared from the draft after its consideration by the Drafting Committee,[152] probably because the latter's members felt that the adoption of an express stipulation that the decision on the effect of a reservation to a constituent instrument must be taken by "the competent organ of the organization in question"[153] made that clarification superfluous. The question does not appear to have been raised again later.

(23) It is not surprising that Waldock asked the question in 1962: three years earlier, the problem had arisen critically in connection with a reservation by India to the Convention on the Intergovernmental Maritime Consultative Organization (IMCO), which later became the International Maritime Organization (IMO).[154] The Secretary-General of the United Nations, as depositary of the Convention, transmitted to IMCO the text of the Indian reservation, which had been made that same day on the opening of the first session of the IMCO Assembly. He suggested that the IMCO secretariat should refer the question to the IMCO Assembly for a decision. When this referral was contested, the Secretary-General, in a well-argued report, maintained that "this procedure conformed (1) to the terms of the IMCO Convention; (2) to the precedents in depositary practice where an organ or body was in a position to pass upon a reservation; and (3) to the views on this specific situation expressed by the General Assembly during its previous debates on reservations to multilateral conventions".[155]

(24) The Secretary-General stated, *inter alia*: "In previous cases where reservations had been made to multilateral conventions which were in force and which either were constitutions of organizations or which otherwise created deliberative organs, the Secretary-General has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question."[156] He cited as examples the communication to the World Health Assembly of the reservation formulated in 1948 by the United States of America to the Constitution of WHO[157] and the communication the following year of reservations made by the Union of South Africa and by Southern Rhodesia to the General Agreement on Tariffs and Trade to the GATT Contracting Parties.[158] In the 1997 *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the Secretary-General gives another example of his consistent practice in this regard: "[W]hen Germany and the United Kingdom accepted the Agreement Establishing the African Development Bank of 17 May 1979, as amended, they made reservations which had not been contemplated in the Agreement. The Secretary-General, as depositary, duly communicated the reservations to the Bank and accepted the deposit of the instruments only after the Bank had informed him that it had accepted the reservations."[159]

(25) In view of the principle set forth in article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions and of the practice normally followed by the Secretary-General of the United Nations, the Commission considered it useful to set forth in a draft guideline the obligation to communicate reservations to the constituent instrument of an international organization to the organization in question.

(26) It nevertheless asked three questions in relation to the precise scope of this rule, the principle of which does not appear to be in doubt:

(*a*) Should the draft guideline include the clarification (which was included in the 1962 Waldock draft[160]) that the reservation must be communicated to the head of the secretariat of the organization concerned?

(*b*) Should it state that the same rule applies when the treaty is not, strictly speaking, the constituent instrument of an international organization, but creates a "deliberative organ" that may take a position on whether or not the reservation is valid, as the Secretary-General did in his 1959 summary of practice?[161]

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

(27) On the first question, the Commission considered that such a clarification is not necessary: even if, generally speaking, the communication will be addressed to the head of the secretariat, this may not always be the case because of the particular structure of a given organization. In the case of the European Union, for example, the collegial nature of the European Commission might raise some problems. Moreover, such a clarification has hardly any concrete value: what matters is that the organization in question should be duly alerted to the problem.

(28) On the question whether the same rule should apply to "deliberative organs" created by a treaty which nonetheless are not international organizations in the strict sense of the term, it is very likely that, in 1959, the drafters of the report of the Secretary-General of the United Nations had GATT in mind—especially since one of the examples cited related to that organization.[162] The problem no longer arises in that connection, since GATT has been replaced by WTO. The fact remains, however, that certain treaties, especially in the field of disarmament or environmental protection, create deliberative bodies having a secretariat which have sometimes been denied the status of an international organization.[163] The Commis-

[152] *Ibid*., document A/5209, draft art. 18, pp. 175–176.

[153] *Ibid*., draft art. 20, para. 4, p. 176.

[154] See A/4235.

[155] *Ibid*., para. 18. On this incident see also O. Schachter, "The question of treaty reservations at the 1959 General Assembly", *AJIL*, vol. 54 (1960), pp. 372–379.

[156] A/4235, para. 21.

[157] *Ibid*., para. 22. See also O. Schachter, "The development of international law through the legal opinions of the United Nations Secretariat", *BYBIL*, 1948, pp. 124–126.

[158] A/4235, para. 22.

[159] See footnote 89 above, p. 59, para. 198. See also Horn, *op. cit*. (footnote 73 above), pp. 346–347.

[160] See para. (20) of this commentary.

[161] See *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, document ST/LEG/7. See also para. (24) of the commentary to this draft guideline, above.

[162] See para. (24) of this commentary.

[163] See, for example, R. R. Churchill and G. Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law", *AJIL*, vol. 94 (2000)

sion does not intend to take a position on the matter; it considers, however, that it would be useful to allude to this hypothesis in the Guide to Practice. It would seem justifiable to apply this same rule to reservations to constituent instruments *stricto sensu* and to reservations to treaties creating oversight bodies that assist in the application of the treaty whose status as international organizations might be subject to challenge.

(29) Nevertheless, most members of the Commission considered that, for the purpose of classifying this type of body, the expression "deliberative organs", which had its supporters, was not the most appropriate, and that, in order to avoid any type of confusion, it was preferable to refer to "organs that have the capacity to accept a reservation".

(30) The reply to the last question in paragraph (26) above is the trickiest. It is also the one that has the greatest practical significance, for a reply in the affirmative would impose a heavier burden on the depositary than a negative one. Moreover, the practice of the Secretary-General—which does not appear to be wholly consistent[164]—seems to tend rather in the opposite direction.[165] The Commission nevertheless believes that a reservation to a constituent instrument should be communicated not only to the organization concerned but also to all other contracting States and organizations and to those entitled to become members thereof.

(31) Two arguments are advanced in support of this position. The first is that it is by no means evident that an organization's acceptance of the reservation precludes member States (and international organizations) from objecting to it; the Commission proposes to decide on the matter after it undertakes an in-depth study of whether or not it is possible to object to a reservation that is expressly provided for in a treaty. Second, there is a good practical argument to support this affirmative reply: even if the reservation is communicated to the organization itself, it is in fact its own member States (or international organizations) that will decide. It is therefore important for them to be aware of the reservation. A two-step procedure is a waste of time.

pp. 623–659; some authors also argue that the International Criminal Court is not, strictly speaking, an international organization.

[164] For an earlier example in which it appears that the Secretary-General communicated the reservation of the United States of America to the Constitution of WHO both to interested States and to the organization concerned, see O. Schachter, "The development of international law through the legal opinions of the United Nations Secretariat" (footnote 157 above), p. 125. See also *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (footnote 89 above), p. 51, para. 170.

[165] In at least one case, however, the State author of a unilateral declaration (which was tantamount to a reservation)—in this case, the United Kingdom—directly consulted the signatories to an agreement establishing an international organization, namely the Agreement establishing the Caribbean Development Bank, about the declaration (see United Nations, *Multilateral Treaties Deposited with the Secretary-General, status as at 31 December 2000*, vol. I (United Nations publication, Sales No. E.01.V.5), p. 482, footnote 8). The author of the reservation may also take the initiative to consult the international organization concerned (see the French reservation to the Agreement Establishing the Asia-Pacific Institute for Broadcast Development, *ibid.*, vol. II (United Nations publication, Sales No. E.01.V.5), p. 298, footnote 3).

(32) It goes without saying that the obligation to communicate the text of reservations to a constituent instrument to the international organization concerned arises only if the organization exists—in other words, if the treaty is in force.[166] This appears so evident that some members of the Commission questioned whether it was necessary to clarify it in the draft directive. However, it appeared that this clarification was necessary, since, without it, it would be difficult to understand the end of paragraph 2 of draft guideline 2.1.5. (It is impossible to communicate a reservation to an international organization or an organ that does not yet exist.)

(33) The question may nevertheless arise whether such reservations should also be communicated before the effective creation of the organization to the "preparatory committees" (or whatever name they may be given) that are often established to prepare for the prompt and effective entry into force of the constituent instrument. Even if, in many cases, an affirmative reply again appears necessary, it would be difficult to generalize, since everything depends on the exact mandate that the conference which adopted the treaty gives to the preparatory committee. Moreover, the reference to "organs that have the capacity to accept a reservation" seems to cover this possibility.

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

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

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

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

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

3. The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

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

[166] In practice, when the constituent instrument is not in force, the Secretary-General of the United Nations proceeds as in respect of any other treaty.

Commentary

(1) Like the two that follow, draft guideline 2.1.6 seeks to clarify aspects of the procedure to be followed in communicating the text of a treaty reservation to the addressees of the communication that are specified in draft guideline 2.1.5. It covers three different but closely linked aspects: the author of the communication; the practical modalities of the communication; and the effects.

(2) Article 23 of the 1969 and 1986 Vienna Conventions is silent as to the person responsible for such communication. In most cases, this will be the depositary, as is shown by the provisions of article 79 of the 1986 Vienna Convention,[167] which generally apply to all notifications and communications concerning treaties. The provisions of that article also give some information on the modalities for the communication and its effects.

(3) On prior occasions when the topic of reservations to treaties was considered, the Commission or its special rapporteurs planned to stipulate expressly that it was the duty of the depositary to communicate the text of formulated reservations to interested States. Thus, for example, at its third session the Commission believed that "the depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention".[168] Likewise, in his fourth report on the law of treaties, in 1965, Waldock proposed that a reservation "shall be notified to the depositary or, where there is no depositary, to the other interested States".[169]

(4) In the end, this formula was not adopted by the Commission, which, noting that the drafts previously adopted "contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter", came to the conclusion that "it would allow a considerable simplification to be effected in the texts of the various articles if a general article were to be introduced covering notifications and communications."[170]

(5) That is the object of draft article 73 of 1966,[171] now article 78 of the 1969 Vienna Convention, which was reproduced, without change except for the addition of a reference to international organizations, in article 79 of the 1986 Vienna Convention:

> Notifications and communications
>
> Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State or any international organization under the present Convention shall:
>
> (*a*) if there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;
>
> (*b*) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;
>
> (*c*) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1 (*e*).

(6) Article 79 is indissociable from this latter provision, under which:

> 1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:
>
> ...
>
> (*e*) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty.

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

(8) Without doubt, the provisions of article 78, paragraph 1 (*e*), and article 79 of the 1986 Vienna Convention should be reproduced in the Guide to Practice and adapted to the special case of reservations; otherwise the Guide would not fulfil its pragmatic purpose of making available to users a full set of guidelines enabling them to determine what conduct to adopt whenever they are faced with a question relating to reservations. But the Commission wondered whether, in the preparation of this draft, the wording of these two provisions should be reproduced, or that of article 23, paragraph 1, of the Convention. It seemed logical to adopt the terminology used in the latter so as to avoid any ambiguity and conflict—even purely superficial—between the various guidelines of the Guide to Practice.

(9) Moreover, there can be no doubt that communications relating to reservations—especially those concerning the actual text of reservations formulated by a State or an international organization—are communications "relating to the treaty" within the meaning of article 78, paragraph 1 (*e*), of the Convention, referred to above.[172] Furthermore, in its 1966 draft, the Commission expressly entrusted the depositary with the task of "examining whether a signature, an instrument or a *reservation** is in conformity with the provisions of the treaty and of the present articles".[173] This expression was replaced in Vienna with a broader one—"the signature or any instrument,

[167] Art. 78 of the 1969 Vienna Convention.

[168] *Yearbook … 1951*, vol. II, document A/1858, p, 130, para. 34.

[169] *Yearbook … 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 53.

[170] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, commentary to draft art. 73, para. (1), p. 270.

[171] *Ibid*.

[172] See para. (6) of this commentary.

[173] Draft art. 72, para. 1 (*d*), *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 269. On the substance of this provision, see the commentary to draft guideline 2.1.7, below.

notification or communication relating to the treaty"[174]—which cannot, however, be construed as excluding reservations from the scope of the provision.

(10) In addition, as is indicated in paragraph (2) of the commentary to article 73 of the draft articles adopted by the Commission in 1966 (now article 79 of the 1986 Vienna Convention), the rule laid down in subparagraph (*a*) of this provision "relates essentially to notifications and communications relating to the 'life' of the treaty—acts establishing consent, *reservations*,* objections, notices regarding invalidity, termination, etc.".[175]

(11) In essence, there is no doubt that both article 78, paragraph 1 (*e*), and article 79, subparagraph (*a*), of the 1986 Vienna Convention reflect current practice.[176] They warrant no special comment, except for the observation that, even in cases where there is a depositary, the State which is the author of the reservation may directly inform the other States or international organizations concerned of the text of the reservation. Thus, the United Kingdom, for example, informed the Secretary-General of the United Nations, as depositary of the Agreement establishing the Caribbean Development Bank, that it had consulted all the signatories to that agreement with regard to an aspect of the declaration (constituting a reservation) which it had attached to its instrument of ratification (and which was subsequently accepted by the Board of Governors of the Bank and then withdrawn by the United Kingdom).[177] Likewise, France itself submitted to the Board of Governors of the Asia-Pacific Institute for Broadcasting Development a reservation which it had formulated to the Agreement establishing that organization, for which the Secretary-General is also depositary.[178]

(12) There seem to be no objections to this practice, provided that depositaries are not thereby released from their own obligations.[179] It is, however, a source of confusion and uncertainty in the sense that depositaries could rely on States formulating reservations to perform the function expressly conferred on the depositary by article 78, paragraph 1 (*e*), and the final phrase of article 79, subparagraph (*a*), of the 1986 Vienna Convention.[180] For this reason, the Commission considered that such a practice should not be encouraged and refrained from proposing a draft guideline enshrining it.

(13) In its 1966 commentary, the Commission dwelt on the importance of the task entrusted to the depositary in draft article 72, paragraph 1 (*e*) (now article 77, paragraph 1 (*e*), of the 1969 Vienna Convention),[181] and stressed "the obvious desirability of the prompt performance of this function by a depositary".[182] This is an important issue, which is linked to subparagraphs (*b*) and (*c*) of article 78 of the 1969 Vienna Convention:[183] the reservation produces effects only as from the date on which the communication relating to it is received by the States and organizations for which it is intended, and not as from the date of its formulation. In truth, it matters little whether the communication is made directly by the author of the reservation; the author will have no one else to blame if it is transmitted late to its recipients. On the other hand, if there is a depositary, it is essential for the latter to display promptness; otherwise, the depositary could stall both the effect of the reservation and the opportunity for the other States and international organizations concerned to react to it.[184]

(14) In practice, at the current stage of modern means of communication, depositaries, at any event in the case of international organizations, perform their tasks very quickly. Whereas in the 1980s the period between the receipt of reservations and communicating them varied from one to two and even three months, it is apparent from the information supplied to the Commission by the Treaty Section of the United Nations Office of Legal Affairs that:

> 1. The time period between receipt of a formality by the Treaty Section and its communication to the parties to a treaty is approximately 24 hours unless a translation is required or a legal issue is involved. If a translation is required, in all cases, it is requested by the Treaty Section on an urgent basis. If the legal issue is complex or involves communications with parties outside the control of the United Nations, then there may be some delay; however, this is highly unusual. It should be noted that, in all but a few cases, formalities are communicated to the relevant parties within 24 hours.
>
> 2. Depositary notifications are communicated to permanent missions and relevant organizations by both regular mail and electronic mail, within 24 hours of processing (see LA41TR/221 (23-1)). Additionally, effective January 2001, depositary notifications can be viewed on the United Nations Treaty Collection on the Internet at http://untreaty.un.org (depositary notifications on the Internet are for information purposes only and are not considered to be formal notifications by

[174] 1969 Vienna Convention, art. 77, para. 1 (*d*). The new formula is derived from an amendment proposed by the Byelorussian Soviet Socialist Republic, which was adopted by the Committee of the Whole by 32 votes to 24, with 27 abstentions. See *Official Records of the United Nations Conference on the Law of Treaties* (footnote 72 above), document A/CONF.39/11/Add.2, p. 202, para. 657 (iv) (4), and p. 203, para. 660 (i), see also p. 141, para. 164 (iii).

[175] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 270.

[176] See, in para. (2) of the commentary to draft art. 73 (*ibid.),* the discussion of that article's subpara. (*a*) (which became art. 78 of the 1969 Vienna Convention and art. 79 of the 1986 Vienna Convention).

[177] See footnote 165 above.

[178] *Ibid.*

[179] See draft guideline 2.1.7 below.

[180] Art. 77, para. 1 (*e*), and art. 78, subpara. (*a*), respectively, of the 1969 Vienna Convention. In the aforesaid case of the French reservation to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, it seems that the Secretary-General confined himself to taking note of the absence of objections from the organization's Governing Council (see United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, ST/LEG/SER.E/19, vol. II (footnote 165 above), note 2). The Secretary-General's passivity in this instance is subject to criticism.

[181] Art. 78, para. 1 (*e*), of the 1986 Vienna Convention.

[182] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, para. (5) of the commentary to art. 72, p. 270.

[183] Art. 79, subparas. (*a*) and (*b*), of the 1986 Vienna Convention. See the text of these provisions in para. (5) of the commentary to this draft guideline, above.

[184] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 270–271, paras. (3)–(6) of the commentary to draft art. 73; see also T. O. Elias, *The Modern Law of Treaties* (Dobbs Ferry/Leiden, Oceana/Sijthoff, 1974), pp. 216–217.

the depositary). Depositary notifications with bulky attachments, for example those relating to chapter 11 (b) 16,[185] are sent by facsimile.[186]

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

(16) The Secretariat of the Council of Europe has described the practice of the Council to the Commission as follows:

> The usual period is two to three weeks (notifications are grouped and sent out approximately every two weeks). In some cases, delays occur owing to voluminous declarations/reservations or appendices (descriptions or extracts of domestic law and practices) that must be checked and translated into the other official language. (The Council of Europe requires that all notifications be made in one of the official languages or be at least accompanied by a translation into one of these languages. The translation into the other official language is provided by the Treaty Office.) Urgent notifications that have immediate effect (e.g., derogations under article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)) are carried out within a couple of days.
>
> Unless they prefer notifications to be sent directly to the ministry of foreign affairs (currently 11 out of 43 member States), the original notifications are sent out in writing to the permanent representations in Strasbourg, which in turn forward them to their capitals. Non-member States that have no diplomatic mission (consulate) in Strasbourg are notified via a diplomatic mission in Paris or Brussels or directly. The increase in member States and notifications over the last 10 years has prompted one simplification: since 1999, each notification is no longer signed individually by the Director-General of Legal Affairs (acting for the Secretary-General of the Council of Europe), but notifications are grouped and only each cover letter is signed individually. There have not been any complaints against this procedure.
>
> Since our new website (http://conventions.coe.int) became operational in January 2000, all information relating to formalities is immediately made available on the website. The texts of reservations or declarations are put on the website the day they are officially notified. Publication on the website is, however, not considered to constitute an official notification.

(17) Finally, it is apparent from information from OAS that:

> Member States are notified of any new signatures and ratifications to inter-American treaties through the OAS Newspaper, which circulates every day. In a more formal way, we notify every three months through a procès-verbal sent to the permanent missions to OAS or after meetings where there are a significant number of new signatures and ratifications such as, for example, the General Assembly.
>
> The formal notifications, which also include the bilateral agreements signed between the General Secretariat and other parties, are done in Spanish and English.

(18) It did not seem necessary to the Commission for these very helpful clarifications to be reproduced in full in the Guide to Practice. It nonetheless seemed useful to give in draft guideline 2.1.6 some information in the form of general recommendations intended both for the depositary (where there is one) and for the authors of reservations (where there is no depositary). This combines the text of article 78, paragraph 1 (*e*), and article 79 of the 1986 Vienna Convention[187] and adapts it to the special problems posed by the communication of reservations.

(19) The *chapeau* of the draft guideline reproduces the relevant parts that are common to the *chapeaux* of articles 77 and 78 of the 1969 Vienna Convention and articles 78 and 79 of the 1986 Vienna Convention, with some simplification: the wording decided upon at Vienna to introduce article 78 ("the contracting States and contracting organizations or, as the case may be, by the contracting organizations") appears to be unnecessarily cumbersome and contains little additional information. Moreover, as was mentioned above,[188] the text of draft guideline 2.1.6 reproduces the formulation used in article 23, paragraph 1, of the 1986 Vienna Convention ("to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty"), in preference to that used in article 78, paragraph 1 (*e*) ("the parties and the States and international organizations entitled to become parties to the treaty"). While the latter formulation is probably more elegant and has the same meaning, it departs from the terminology used in the section of the Conventions relating to reservations. Nevertheless, it did not seem useful to burden the text by using the article 23 expression twice in subparagraphs (*a*) and (*b*) of paragraph 1. Incidentally, this purely stylistic improvement involves no change in the Vienna text: the expression "the States and organizations for which it is intended" (subpara. (*b*)) refers to the "con-

[185] These are communications relating to the Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts Which Can Be Fitted and/or Be Used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions (see United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. I (footnote 165 above), p. 593).

[186] The Treaty Section has also advised:

> 3. Please note that the depositary practice has been changed in cases where the treaty action is a modification to an existing reservation and where a reservation has been formulated by a party subsequent to establishing its consent to be bound. A party to the relevant treaty now has 12 months within which to inform the depositary that it objects to the modification or that it does not wish to consider the reservation made subsequent to ratification, acceptance, approval, etc. The time period for this 12 months is calculated by the depositary on the basis of the date of issue of the depositary notification (see LA41 TR/221 (23-1)).

[187] Arts. 77, para. 1 (*e*), and 78 of the 1969 Vienna Convention.

[188] See paras. (7) and (8) of the commentary to this draft guideline, above.

tracting States and contracting organizations and other States and international organizations entitled to become parties" (subpara. (*a*)). Similarly, the division of paragraph 1 of the draft guideline into two separate subparagraphs probably makes it more readily understandable, without changing the meaning.

(20) As to the time periods for the transmittal of the reservation to the States or international organizations for which it is intended, the Commission did not think it possible to establish a rigid period of time. The expression "as soon as possible" in subparagraph (*b*) seems enough to draw the attention of the addressees to the need to proceed rapidly. On the other hand, such an indication is not required in subparagraph (*a*): it is for authors of reservations to assume their responsibilities in this regard.[189]

(21) In keeping with draft guidelines 2.1.1 and 2.1.2, which point out that the formulation and confirmation of reservations must be done in writing, paragraph 4 of draft guideline 2.1.6 specifies that communication to the States and international organizations for which they are intended must be formal. While some members of the Commission may have expressed doubts about the need for this stipulation, it seemed useful in view of the frequent practice among depositaries of using modern means of communication—electronic mail or fax—which are less reliable than traditional methods. For this reason, a majority of the members of the Commission considered that any communication concerning reservations should be confirmed in a diplomatic note (in cases where the author is a State) or in a depositary notification (where it is from an international organization[190]). While some members disagreed, the Commission took the view that, in this case, the time period should start as from the time the electronic mail or facsimile is sent. This would help prevent disputes as to the date of receipt of the confirmation and would not give rise to practical problems, since, according to the indications given to the Commission, the written confirmation is usually done at the same time the electronic mail or facsimile is sent or very shortly thereafter, at least by depositary international organizations. These clarifications are given in paragraph 4 of draft guideline 2.1.6.

(22) It seemed neither useful nor possible to be specific about the language or languages in which such communications must be transmitted, since the practices of depositaries vary.[191] Similarly, the Commission took the view that it was wise to follow practice on the question of the organ to which, specifically, the communication should be addressed.[192]

[189] See para. (13) of this commentary.

[190] A depositary notification has become the usual means by which depositary international organizations or heads of secretariat make communications relating to treaties. The usual diplomatic notes could nonetheless be used by an international organization in the case of a communication addressed to non-member States of the organization that do not have observer status.

[191] Where the depositary is a State, it generally seems to transmit communications of this type in its official language(s); an international organization may use all its official languages (IMO) or one or two working languages (United Nations).

[192] Ministries of foreign affairs, diplomatic missions to the depositary State(s), permanent missions to the depositary organization.

(23) On the other hand, paragraph 2 of draft guideline 2.1.6 reproduces the rule set out in subparagraphs (*b*) and (*c*) of article 79 of the 1986 Vienna Convention.[193] However, it seemed possible to simplify the wording without drawing a distinction between cases in which the reservation is communicated directly by the author and instances in which it is done by the depositary. The expression "as the case may be" covers the hypothesis where a depositary exists. In this case the communication of the reservation to the depositary may produce effects directly, if only with respect to the depositary, who is required to transmit it as soon as possible. That period of time can be assessed only in terms of the date on which the depositary has received the communication; moreover, some members were of the view that many reservation clauses set the period of time as from that date.

(24) Paragraph 3 of draft guideline 2.1.6 deals with the specific case of the time period for the formulation of an objection to a reservation by a State or an international organization. It is based on the principle embodied in article 20, paragraph 5, of the 1986 Vienna Convention (itself based on the corresponding provision of the 1969 Vienna Convention), which reads:

> … unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

It should be noted that in such cases the date of effect of the notification may differ from one State or organization to another, depending on the date of reception.

2.1.7 *Functions of depositaries*

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

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

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

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

Commentary

(1) The section on reservations in the Vienna Conventions on the law of treaties makes no mention of the role of the depositary. This silence is explained by the decision, adopted belatedly during the preparation of the 1969 Convention, to subsume the provisions relating to the communication of reservations within the general provisions of

[193] See para. (5) of this commentary.

the Convention relating to depositaries.[194] Consequently, however, it is self-evident that the provisions of articles 77 and 78 of the 1986 Vienna Convention[195] are fully applicable to reservations insofar as they are relevant to them. Draft guideline 2.1.7 performs this transposition.

(2) Under article 78, paragraph 1 (*e*), of the 1986 Vienna Convention, the depositary is responsible for "informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty". This rule, combined with the one in article 79, subparagraph (*a*), is reproduced in draft guideline 2.1.6. This same draft also implies that the depositary receives and keeps custody of reservations;[196] it therefore seems unnecessary to mention this expressly.

(3) It goes without saying that the general provisions of article 77, paragraph 2, relating to the international character of the functions of depositaries and their obligation to act impartially apply to reservations as to any other field.[197] In this general form, these principles do not specifically concern the functions of depositaries in relation to reservations, and, accordingly, there seems to be no need to reproduce them as such in the Guide to Practice. But these provisions should be placed in the context of those in article 78, paragraph 2:

> In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:
>
> (*a*) the signatory States and organizations and the contracting States and contracting organizations; or
>
> (*b*) where appropriate, the competent organ of the international organization concerned.

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

(5) The problem is posed in different terms when the depositary is a State that is itself a party to the treaty, or when it is "an international organization or the chief administrative officer of the organization".[198] In the first case, "if the other parties found themselves in disagreement with the depositary on this question—a situation which, to our knowledge, has never materialized—they would not be in a position to insist that he follow a course of conduct different from the one he believed that he should adopt".[199] In contrast, in the second case, the political organs of the organization (composed of States not necessarily parties to the treaty) can give instructions to the depositary. It is in this context that problems arose, and their solution has consistently tended towards a strict limitation on the depositary's power of judgement, culminating finally in the rules laid down in the 1969 Vienna Convention and reproduced in the 1986 Convention.

(6) As early as 1927, as a result of the difficulties created by the reservations to which Austria intended to subject its deferred signature of the International Opium Convention, the Council of the League of Nations adopted a resolution endorsing the conclusions of a Committee of Experts[200] and giving instructions to the Secretary-General of the League on what conduct to adopt.[201]

(7) But it is in the context of the United Nations that the most serious problems have arisen, as can be seen from the main stages in the evolution of the role of the Secretary-General as depositary in respect of reservations:[202]

- Initially, the Secretary-General "seemed to determine alone ... his own rules of conduct in the matter"[203] and subjected the admissibility of reservations to the unanimous acceptance of the contracting parties or the international organization whose constituent instrument was involved.[204]

- Following the advisory opinion of ICJ of 28 May 1951 on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case,[205] the General Assembly adopted its first resolution calling on the Secretary-General in respect of future conventions:

> (i) To continue to act as depositary in connection with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and
>
> (ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to

[194] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 270, para. (1) of the commentary to draft art. 73.

[195] Arts. 76 and 77 of the 1969 Vienna Convention.

[196] See art. 78: "… the functions of a depositary … comprise …: (*c*) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it".

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

[198] Art. 77, para. 1, of the 1986 Vienna Convention.

[199] J. Dehaussy, "Le dépositaire de traités", *Revue générale de droit international public*, vol. 56 (1952), p. 515.

[200] See the report of the Committee, composed of Mr. Fromageot, Mr. Diena and Mr. McNair, in League of Nations, *Official Journal* (July 1927), pp. 880 *et seq*.

[201] Resolution of 17 June 1927, *ibid.*, minutes of the forty-fifth session of the Council, sixth meeting, p. 791, at pp. 800–801. See also resolution XXIX of the Eighth International Conference of American States (Lima, 1938), which established the rules to be followed by the Pan American Union with regard to reservations, Eighth International Conference of American States, *Final Act*, 1938, p. 48, reproduced in *Yearbook … 1965*, vol. II, document A/5687, p. 80.

[202] See also, for example, P.-H. Imbert, "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités—Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire", *Annuaire français de droit international*, vol. 26 (1980), pp. 528–529, or S. Rosenne, *Developments in the Law of Treaties 1945–1986* (Cambridge University Press, 1989), pp. 429–434.

[203] Dehaussy, *loc. cit.* (footnote 199 above), p. 514.

[204] See *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (footnote 89 above), pp. 50–51, paras. 168–171.

[205] *ICJ Reports 1951*, p. 15.

each State to draw legal consequences from such communications.[206]

– These guidelines were extended to all treaties for which the Secretary-General assumes depositary functions under resolution 1452 B (XIV) of 7 December 1959, adopted as a result of the problems related to the reservations formulated by India to the constituent instrument of the Intergovernmental Maritime Consultative Organization (IMCO).[207]

(8) This is the practice followed since then by the Secretary-General of the United Nations and, apparently, by all international organizations (or the heads of the secretariats of international organizations) with regard to reservations where the treaty in question does not contain a reservations clause.[208] And this is the practice that the Commission drew on in formulating the rules to be applied by the depositary in this area.

(9) It should also be noted that, once again, the formulation adopted tended towards an ever greater limitation on the depositary's powers:

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

> On a reservation having been formulated, the depositary shall have the duty:
>
> (*a*) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the State which formulated the reservations;
>
> (*b*) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19.[209]

– The draft articles adopted on second reading in 1966 further provided that the functions of the depositary comprised "examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question.[210]

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

> Paragraph 1 (*d*) recognizes that a depositary has a certain duty to examine whether signatures, instruments and reservations are in conformity with any applicable provisions of the treaty or of the present articles, and if necessary to bring the matter to the attention of the State in question. That is, however, the limit of the depositary's duty in this connexion. It is no part of the functions to adjudicate on the validity of an instrument or reservation. If an instrument or reservation appears to be irregular, the proper course of a depositary is to draw the attention of the reserving State to the matter and, if the latter does not concur with the depositary, to communicate the reservation to the other interested States and bring the question of the apparent irregularity to their attention ...[211]

– During the United Nations Conference on the Law of Treaties, an amendment proposed by the Byelorussian Soviet Socialist Republic[212] further attenuated the provision in question: even if the disappearance of any express reference to reservations certainly does not prevent the rule laid down in article 77,[213] paragraph 1 (*d*), of the 1969 Vienna Convention from applying to these instruments, the fact remains that the depositary's power is limited henceforth to examining the form of reservations, his function being that of "examining whether the signature or any instrument, notification or communication relating to the treaty is *in due and proper form** and, if need be, bringing the matter to the attention of the States in question".[214]

(10) In this way, the principle of the depositary as "letter-box" was enshrined. As T. O. Elias has written: "It is essential to emphasize that it is no part of the depositary's function to assume the role of interpreter or judge in any dispute regarding the nature or character of a party's reservation *vis-à-vis* the other parties to a treaty, or to pronounce a treaty as having come into force when that is challenged by one or more of the parties to the treaty in question."[215]

(11) Opinions are divided as to the advantages or disadvantages of this diminution of the depositary's competencies with regard to reservations. Of course, as ICJ emphasized in its 1951 advisory opinion in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case, "the task of the [depositary] would be simplified and would be confined to receiving reservations and objections and notifying them".[216] "The effect of this, it is suggested, is to transfer the undoubted subjectivities of the United Nations system from the shoulders of the depositary to those of the individual States concerned, in their quality of parties to that treaty, and in that quality alone. This may be regarded as a positive innovation, or perhaps clarification of the modern law of treaties, especially of reservations to multilateral treaties, and is likely to reduce or at least limit the 'dispute' element of unacceptable reservations."[217]

(12) Conversely, we may also see in the practice followed by the Secretary-General of the United Nations

[206] Resolution 598 (VI) of 12 January 1952, para. 3 (*b*).

[207] See paras. (23) and (24) of the commentary to draft guideline 2.1.5, above.

[208] See *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (footnote 89 above), pp. 52–56, paras. 177–188.

[209] *Yearbook ... 1962*, vol. II, document A/5209, p. 185.

[210] Draft art. 72, para. 1 (*d*), *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 269.

[211] *Ibid.*, pp. 269–270, para. (4) of the commentary.

[212] See *Official Records of the United Nations Conference on the Law of Treaties* (footnotes 72 and 174 above).

[213] Art. 78 of the 1986 Vienna Convention.

[214] The 1986 text.

[215] *Op. cit.* (footnote 184 above), p. 213.

[216] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 205 above), p. 27; and it may be considered that "It is that passage which has established the theoretical basis for the subsequent actions by the General Assembly and the International Law Commission. For it is in that sentence that the essentially administrative features of the function [of the depositary] are emphasized and any possible political (and that means decisive) role is depressed to the greatest extent", S. Rosenne, "The depositary of international treaties", *AJIL*, vol. 61, no. 4 (October 1967), p. 931.

[217] S. Rosenne, *Developments in the Law of Treaties 1945–1986* (see footnote 202 above), pp. 435–436.

and embodied, indeed "solidified", in the 1969 Vienna Convention, "an unnecessarily complex system"[218] insofar as the depositary is no longer able to impose the least amount of coherence and unity in the interpretation and implementation of reservations.[219]

(13) The fact remains that distrust of the depositary, as reflected in the provisions analysed above of the relevant articles of the 1969 and 1986 Vienna Conventions, is too deeply entrenched, both in minds and in practice, for there to be any consideration of revising the rules adopted in 1969 and perpetuated in 1986. In the Commission's view, there is little choice but to reproduce them verbatim[220] in the Guide to Practice, combining the relevant provisions of article 78, paragraphs 1 (*d*) and 2, of the 1986 Vienna Convention in a single guideline and applying them only to the functions of depositaries with regard to reservations.

(14) Paragraph 1 of the draft guideline is based on the text of the first part of article 78, paragraph 1 (*d*), of the 1986 Vienna Convention, with express and exclusive reference to the approach that the depositary is to take to reservations. Paragraph 2 of the guideline reproduces the text of paragraph 2 of the same article while limiting the situation envisaged to that sole function (and not to the functions of the depositary in general, as article 78 does).

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

1. Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

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

Commentary

(1) During the discussion of draft guideline 2.1.7, some members of the Commission considered that purely and simply applying the rules it establishes in the case of a reservation that was manifestly "impermissible" gave rise to certain difficulties. In particular, they stressed that there was no reason to provide for a detailed examination of the formal validity of the reservation by the depositary, as is done in paragraph 1 of draft guideline 2.1.7, while precluding him from reacting in the case of a reservation that is manifestly impermissible.

(2) However, allowing him to intervene in the latter case constituted a progressive development of international law, which, it must be acknowledged, departs from the spirit in which the provisions of the 1969 and 1986 Vienna Conventions on the functions of depositaries were drawn up.[221] This is why, during its fifty-third session, the Commission considered it useful to consult member States in the Sixth Committee on the question whether the depositary could or should "refuse to communicate to States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of a treaty".[222]

(3) The nuanced responses given to this question by the delegations of States to the Sixth Committee have inspired the wording of draft guideline 2.1.8. Generally speaking, States have expressed a preference for the strict alignment of the Guide to Practice with the provisions of the 1969 Vienna Convention concerning the role of the depositary, in particular article 77 of the Convention. Some of the delegations that spoke stressed that depositaries must demonstrate impartiality and neutrality in the exercise of their functions and should therefore limit themselves to transmitting to the parties the reservations that were formulated. However, a number of representatives on the Sixth Committee were of the view that, when a reservation is manifestly impermissible, it is incumbent upon the depositary to refuse to communicate it or at least to first inform the author of the reservation of its position and, if the author maintains the reservation, to communicate it and draw the attention of the other parties to the problem.

(4) Most of the members of the Commission supported this intermediate solution. They considered that it was not possible to allow any type of censure by the depositary, but that it would be inappropriate to oblige the depositary to communicate the text of a manifestly impermissible reservation to the contracting or signatory States and international organizations without previously having drawn the attention of the reserving State or international organization to the defects that, in the depositary's opinion, affect it. Nevertheless, it should be understood that, if the author of the reservation maintains it, the normal procedure should resume and the reservation should be transmitted, indicating the nature of the legal problems in question. In point of fact, this amounts to bringing the procedure to be followed in the case of a manifestly "impermissible" reservation into line with the procedure followed in the case of reservations that give rise to problems of form: according to draft guideline 2.1.7, should there be a difference of opinion regarding such problems, the depositary "shall bring the question to the attention of: (*a*) the signatory States and organizations and the contracting States and contracting organizations; or (*b*) where

[218] Imbert, *loc. cit.* (see footnote 202 above), p. 534; the author applies the term only to the practice of the Secretary-General and seems to consider that the 1969 Vienna Convention simplifies the context of the problem.

[219] The depositary can, however, play a not insignificant role in the "reservations dialogue" in reconciling opposing points of view, where appropriate. See also H. H. Han, "The UN Secretary-General's treaty depositary function: legal implications", *Brooklyn Journal of International Law*, vol. 14, no. 3 (1988), pp. 570–571; the author here dwells on the importance of the role that the depositary can play, but the article pre-dates the United Nations Conference on the Law of Treaties.

[220] However, see draft guideline 2.1.8.

[221] See paras. (9) and (10) of the commentary to draft guideline 2.1.7, above.

[222] *Yearbook … 2001*, vol. II (Part Two), p. 18, para. 25.

appropriate, the competent organ of the international organization concerned".

(5) According to some members of the Commission, this procedure should be followed only if the "impermissibility" invoked by the depositary is based on article 19, subparagraphs (*a*) and (*b*), of the 1969 and 1986 Vienna Conventions (a reservation that is prohibited by the treaty or not provided for in a treaty that authorizes only certain specific reservations). Other members considered that the only real problem was that of the compatibility of the reservation with the object and purpose of the treaty (art. 19, subpara. (*c*)). The Commission considered that it was not justifiable to make a distinction between the different types of "impermissibility" listed in article 19.

(6) Similarly, despite the contrary opinion of some of its members, the Commission did not consider that it was useful to confine the exchange of opinions between the author of the reservation and the depositary within strict time limits, as draft guideline 2.1.7 implies. That draft guideline does not derogate from draft guideline 2.1.6, paragraph 1 (*b*), according to which the depositary must act "as soon as possible". And in any case it is for the reserving State or international organization to advise whether it is willing to discuss the matter with the depositary. Should this not be the case, the procedure must follow its course and the reservation must be communicated to the other contracting parties or signatories.

(7) Although to date the Commission has used the word "impermissible" to characterize reservations covered by the provisions of article 19 of the 1969 and 1986 Vienna Conventions, some members pointed out that this word was not appropriate in that case: in international law, an internationally wrongful act entails its author's responsibility,[223] and this is plainly not the case of the formulation of reservations which are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose. The Commission decided to leave the matter open until it had adopted a final position on the effect of these inconsistencies or incompatibilities; to this end, the word "impermissible" has been placed between square brackets, and the Commission proposes to take a decision on this point in due course.

2.4 *Procedure for interpretative declarations*

Commentary

In view of the lack of any provision on interpretative declarations in the 1969 and 1986 Vienna Conventions and the scarcity or relative uncertainty of practice with regard to such declarations, they cannot be considered in isolation. We can only proceed by analogy with (or in contrast to) reservations, taking great care, of course, to distinguish conditional interpretative declarations from those that are not conditional.[224]

[223] See art. 1 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session (*ibid*., para. 76) and annexed to General Assembly resolution 56/83 of 12 December 2001.

[224] On the distinction, see draft guidelines 1.2 and 1.2.1 and the commentaries thereto (footnote 56 above).

2.4.1 *Formulation of interpretative declarations*

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

Commentary

(1) Draft guideline 2.4.1 transposes and adapts to interpretative declarations, as defined by draft guideline 1.2,[225] the provisions of draft guideline 2.1.3 on the formulation of reservations.

(2) It goes without saying that these declarations can only produce effects, whatever their nature, if they emanate from an authority competent to engage the State or the international organization at the international level. And since the declaration purports to produce effects in relation to a treaty, it would seem appropriate to limit the option of formulating it to the authorities competent to engage the State or the organization through a treaty.

(3) With regard to the form of interpretative declarations, however, a very different problem arises than with regard to reservations; the former are declarations purporting to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions, without subjecting its consent to be bound to that interpretation. Except in the case of conditional interpretative declarations, which are dealt with in draft guideline 2.4.3, the author of the declaration is taking a position,[226] but is not attempting to make it binding on the other contracting parties. Hence it is not essential for such declarations to be in writing, as it is in the case of reservations (draft guideline 2.1.1) or conditional interpretative declarations (draft guideline 2.4.3). It is certainly preferable that they should be known to the other parties, but ignorance of them would not necessarily void them of all legal consequences. Moreover, the oral formulation of such declarations is not uncommon and has not kept judges or international arbitrators from recognizing that they have certain effects.[227]

(4) Consequently, there is no need for a draft guideline on the form that simple interpretative declarations may take, since the form is unimportant. The silence of the Guide to Practice on that point should make this sufficiently clear.

(5) Also, there seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally; it would therefore be paradoxical to insist that they be formally communicated to other interested States

[225] *Ibid*.

[226] One which can have "considerable probative value" when it contains "recognition by a party of its own obligations under an instrument" (*International Status of South-West Africa, Advisory Opinion, ICJ Reports 1950*, p. 128, at pp. 135–136); see the commentary to draft guideline 1.2.1 (footnote 56 above), footnote 342.

[227] See the commentary to draft guideline 1.2.1 (*ibid.*).

or international organizations. By refraining from such communication, the author of the declaration runs the risk that the declaration may not have the intended effect, but this is a different problem altogether. There is no reason to transpose the corresponding parts of the provisions of draft guidelines 2.1.5 to 2.1.8 on the communication of reservations, and it does not seem necessary to include a clarification of this point in the Guide to Practice.

[2.4.2 [2.4.1 *bis*] *Formulation of an interpretative declaration at the internal level*]

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

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

Commentary

(1) In the Commission's opinion, the formulation of interpretative declarations at the internal level calls for the same comments as in the case of reservations. In this regard, national rules and practices are extremely diverse. This becomes clear from the replies of States to the Commission's questionnaire on reservations to treaties. Of the 22 States that replied to questions 3.5 and 3.5.1,[228]

– In seven cases, only the executive branch is competent to formulate a declaration;[229]

– In one case, only the parliament has such competence;[230] and

– In 14 cases, competence is shared between the two,[231] and the modalities for collaboration between them are as diverse as they are with regard to reservations.

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

(2) It follows *a fortiori* that the determination of competence to formulate interpretative declarations and the procedure to be followed in that regard is purely a matter for internal law and that a State or an international organization would not be entitled to invoke a violation of internal law as invalidating the legal effect that its declarations might produce—especially since it appears that in general there is greater reliance on practice than on formal written rules.

(3) It is therefore appropriate to transpose to interpretative declarations, whether they are conditional or not, the provisions of draft guideline 2.4.2 on the formulation of reservations at the internal level, without it being necessary to make a distinction between conditional interpretative declarations and other interpretative declarations.

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

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

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

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

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

Commentary

(1) In the case of conditional interpretative declarations, there are, *prima facie*, few reasons for departing from the rules on form and procedure applicable to the formulation of reservations: even by definition, the State or international organization which formulates them subjects its consent to be bound to a specific interpretation.[232] The reasons which dictate that reservations should be formulated in writing and authenticated by a person who has the authority to engage the State or the international organization are therefore equally valid in this instance: since they are indissociably linked to the consent of their author to be bound, they must be known to their partners, by whom they may be challenged because they are intended to have effects on the treaty relationship. The procedure for formulating them should therefore be brought into line with that for reservations.

(2) Draft guidelines 2.1.1 and 2.1.2 should therefore be transposed purely and simply with regard to the formulation of conditional interpretative declarations:

– They must be formulated in writing; and

– The same is true if the interpretative declaration must be formally confirmed in the conditions provided for in draft guideline 2.4.5.

[228] Question 3.5: "At the internal level, what authority or authorities take(s) the decision to make such interpretative declarations?"; question 3.5.1: "Is the Parliament involved in the formulation of these declarations?" (see footnote 12 above). This list of States is not identical to the list of States that responded to similar questions on reservations.

[229] Chile, India, Israel, Italy, Japan, Malaysia and the Holy See.

[230] Estonia.

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

[232] See draft guideline 1.2.1 above.

This is set forth in paragraphs 1 and 2 of draft guideline 2.4.7.

(3) However, as all interpretative declarations must be formulated by a competent authority in order to engage the State,[233] it has not seemed useful to repeat this specifically in the case of conditional declarations. The same is true with regard to their formulation at the internal level.[234]

(4) Attention should nevertheless be drawn to the specificity of conditional interpretative declarations in respect of their communication to other interested States and international organizations. In this regard, the reasons which justify the transposition of the rules relating to the formulation of reservations to the formulation of such declarations are particularly compelling: at issue are, inevitably, formal declarations which, by definition, establish the conditions for their author's expression of consent to be bound by the treaty and to which other interested States and international organizations must have an opportunity to react. Paragraphs 3 and 4 of draft guideline 2.4.7 are consequently modelled on the text of draft guideline 2.1.5, although the Commission has not considered it necessary to reproduce in detail the provisions of draft guidelines 2.1.6 to 2.1.8, the elements of which are, however, transposable *mutatis mutandis* to conditional interpretative declarations.

(5) The Commission reserves the option of reconsidering whether all the draft guidelines on conditional interpretative declarations, including draft guideline 2.4.7, should, in the light of the legal system applicable to them, be retained in the Guide to Practice. If it turns out that this system is substantially similar to that for reservations, all these draft guidelines will be replaced by a single provision equating these declarations with reservations. Pending its final decision in this regard, the Commission has adopted draft guideline 2.4.7 provisionally and has placed it between square brackets.

[233] See draft guideline 2.4.1 above.

[234] See draft guideline 2.4.2 above.

Chapter V

DIPLOMATIC PROTECTION

A. Introduction

104. The Commission at its forty-eighth session, in 1996, identified the topic of diplomatic protection as one of three topics appropriate for codification and progressive development.[235] In the same year, the General Assembly, in paragraph 13 of its resolution 51/160 of 16 December 1996, invited the Commission to further examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above Assembly resolution, at its 2477th meeting established a working group on the topic.[236] At the same session the Working Group submitted a report which was endorsed by the Commission.[237] The Working Group attempted to (*a*) clarify the scope of the topic to the extent possible, and (*b*) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.[238]

105. Also at its forty-ninth session, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.[239]

106. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the decision of the Commission to include on its agenda the topic "Diplomatic protection".

107. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.[240] At the same session, the Commission established an open-ended working group to consider conclusions which might be drawn on the basis of the discussion as to the approach to the topic.[241]

108. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John Robert Dugard Special Rapporteur for the topic,[242] after Mr. Bennouna was elected a judge to the International Tribunal for the Former Yugoslavia.

109. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's first report.[243] The Commission deferred its consideration of chapter III to the next session, due to the lack of time. At the same session, the Commission established an open-ended informal consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.[244] The Commission subsequently decided, at its 2635th meeting, on 9 June 2000, to refer draft articles 1, 3, 5, 6, 7 and 8 to the Drafting Committee together with the report of the informal consultation.

110. At its fifty-third session, in 2001, the Commission had before it the remainder of the Special Rapporteur's first report, as well as his second report.[245] Owing to a lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11 and deferred consideration of the rest of the report, concerning draft articles 12 and 13, to the next session. At its 2688th meeting, held on 12 July 2001, the Commission decided to refer draft article 9 to the Drafting Committee. At its 2690th meeting, held on 17 July 2001, it decided to refer draft articles 10 and 11 to the Committee.[246]

111. At its 2688th meeting, the Commission established an open-ended informal consultation, chaired by the Special Rapporteur, on article 9.[247]

B. Consideration of the topic at the present session

112. At the session, the Commission had before it the remainder of the second report of the Special Rapporteur,[248] concerning draft articles 12 and 13, as well as his third report (A/CN.4/523 and Add.1). The Commission considered the remaining parts of the second report, as well as the first part of the third report, concerning the state of the study on diplomatic protection and articles 14 and 15, at its 2712th to 2719th and 2729th meetings, held

[235] *Yearbook … 1996*, vol. II (Part Two), document A/51/10, pp. 97–98, para. 248, and annex II, add.1, p. 137.

[236] *Yearbook … 1997*, vol. II (Part Two), p. 60, para. 169.

[237] *Ibid.*, p. 60, para. 171.

[238] *Ibid.*, pp. 62–63, paras. 189–190.

[239] *Ibid.*, p. 63, para. 190.

[240] *Yearbook … 1998*, vol. II (Part One), document A/CN.4/484.

[241] For the conclusions of the Working Group see *ibid.*, vol. II (Part Two), p. 49, para. 108.

[242] *Yearbook … 1999*, vol. II (Part Two), document A/54/10, p. 17, para. 19.

[243] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

[244] The report of the informal consultations appears in *Yearbook … 2000*, vol. II (Part Two), p. 85, para. 495.

[245] See footnote 3 above.

[246] See *Yearbook … 2001*, vol. I.

[247] *Ibid*.

[248] See footnote 3 above.