Chapter VIII

RESERVATIONS TO TREATIES

A. Introduction

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

93. At its forty-sixth session (1994), the Commission appointed Mr. Alain Pellet, Special Rapporteur for the topic.[669]

94. At its forty-seventh session (1995), the Commission received and discussed the first report of the Special Rapporteur.[670]

95. 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 1969 Vienna Convention, the Vienna Convention on succession of States in respect of treaties (hereinafter "1978 Vienna Convention") and the 1986 Vienna Convention.[671] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 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.

96. Also at its forty-seventh session, the Commission, in accordance with its earlier practice,[672] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions.[673] 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 also inviting States to answer the questionnaire.[674]

97. At its forty-eighth session (1996), the Commission had before it the Special Rapporteur's second report on the topic.[675] The Special Rapporteur had annexed to his report a draft resolution of the International Law 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.[676]

98. At its forty-ninth session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[677]

99. 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 International Law Commission of having their views on the preliminary conclusions.

100. From its fiftieth session (1998) to its fifty-seventh session (2005) the Commission considered eight more reports[678] by the Special Rapporteur and provisionally adopted 71 draft guidelines and the commentaries thereto.

B. Consideration of the topic at the present session

101. At the current session, the Commission had before it the second part of the tenth report of the Special Rapporteur (A/CN.4/558 and Add.1–2) on validity of reservations and the concept of the object and purpose of the

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

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

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

[672] See *Yearbook ... 1993*, vol. II (Part Two), p. 83, para. 286.

[673] 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.

[674] As of 31 July 2003, 33 States and 25 international organizations had answered the questionnaire.

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

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

[677] See footnote 6 above.

[678] Third report: *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6; fourth report: *Yearbook ... 1999*, vol. II (Part One), documents A/CN.4/499 and A/CN.4/478/Rev.1; fifth report: *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4; sixth report: *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3; seventh report: *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3; eighth report: *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1; ninth report: *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/544; and tenth report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2. See a detailed historical presentation of the third to fifth reports in *Yearbook ... 2004*, vol. II (Part Two), pp. 97–98, paras. 257–269.

treaty.[679] In this regard the Special Rapporteur, after the debate that took place during the fifty-seventh session (2005), had also prepared a note (A/CN.4/572) relating to draft guideline 3.1.5 (Definition of the object and purpose of the treaty) and presenting a new version of this guideline including two alternative texts.[680] The Special Rapporteur also submitted his eleventh report (A/CN.4/574) and the Commission decided to consider it at its fifty-ninth session (2007).

102. The Commission considered the second part of the tenth report of the Special Rapporteur at its 2888th to 2891st meetings, held on 5, 6, 7 and 11 July 2006.

103. At its 2891st meeting, the Commission decided to refer draft guidelines 3.1.5 to 3.1.13, 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee.

104. At its 2883rd meeting, on 6 June 2006, the Commission considered and provisionally adopted draft guidelines 3.1 (Permissible reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2 (Definition of specified reservations), 3.1.3 (Permissibility of reservations not prohibited by the treaty) and 3.1.4 (Permissibility of specified reservations) to the Drafting Committee. Moreover, the Commission provisionally adopted draft guidelines 1.6 (Scope of definitions) and 2.1.8 [2.1.7 *bis*] (Procedure in case of manifestly invalid reservations) as redrafted.

105. Those draft guidelines had already been sent to the Drafting Committee at the Commission's fifty-seventh session (2005).

106. At its 2911th and 2912th meetings, held on 9 and 10 August 2006, the Commission adopted the commentaries relating to the aforementioned draft guidelines.

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

1. Introduction by the Special Rapporteur of the second part of his tenth report

108. The Special Rapporteur recalled that, for lack of time, one portion of his tenth report could not be considered in depth during the previous Commission session and the final part concerning the validity of reservations had not been considered at all. In the light of the criticisms of the definition of the object and purpose of the treaty that had been voiced during the debate at the fifty-seventh session, the Special Rapporteur had formulated a new definition of the object and purpose of the treaty (A/CN.4/572).[681] For the new definition he offered two alternatives, not very different in their general meaning, although he preferred the first alternative. In the second addendum to his tenth report, the Special Rapporteur had tried to give a pragmatic answer to two important and difficult questions: who was competent to assess the validity of reservations and what were the consequences of an invalid reservation.

109. With regard to draft guideline 3.2,[682] the Special Rapporteur said that it followed from articles 20, 21 and 23 of the 1969 and 1986 Vienna Conventions that any contracting State or international organization could assess the validity of the reservations formulated with respect to a treaty. In that regard the term "State" meant the entire State apparatus, including, as applicable, the domestic courts. Such an assessment could also be made by the courts of the reserving State, although the Special Rapporteur was aware of only a single case in which a domestic court had declared a reservation formulated by the State invalid.[683] In order to take that possibility into account, the wording of the first bullet point of draft guideline 3.2 should be changed by deleting the word "other" before "contracting States" and before "contracting organizations". The dispute settlement bodies and the treaty implementation monitoring bodies could also rule on the validity of reservations, but it should be noted that the category of treaty monitoring bodies was relatively a new one and had not become well developed until after the adoption of the 1969 Vienna Convention.

110. The considerations that had led the Commission to adopt in 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties[684] were still relevant. The third bullet point of draft guideline 3.2 reflected practice and corresponded to paragraph 5 of the preliminary conclusions.

111. Draft guideline 3.2.1[685] spelled out that idea, at the same time indicating that, in so doing, monitoring bodies could go no further than their general mandate authorized.

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[679] Reproduced in *Yearbook ... 2005*, vol. II (Part One).

[680] Reproduced in *Yearbook … 2006*, vol. II (Part One).

[681] Alternative 1:

"3.1.5 *Definition of the object and purpose of the treaty*

"For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential rules, rights and obligations indispensable to the general architecture of the treaty, which constitute the *raison d'être* thereof and whose modification or exclusion could seriously disturb the balance of the treaty."

Alternative 2:

"3.1.5 *Incompatibility of a reservation with the object and purpose of the treaty*

"A reservation shall be incompatible with the object and purpose of the treaty if it has a serious impact on the essential rules, rights or obligations indispensable to the general architecture of the treaty, thereby depriving it of its *raison d'être*."

[682] "3.2 *Competence to assess the validity of reservations*

"The following are competent to rule on the validity of reservations to a treaty formulated by a State or an international organization:

"(*a*) the other contracting States [including, as applicable, their domestic courts] or other contracting organizations;

"(*b*) dispute settlement bodies that may be competent to interpret or apply the treaty; and

"(*c*) treaty implementation monitoring bodies that may be established by the treaty."

[683] See the decision of the Swiss Federal Supreme Court of 17 December 1992 in the case of *F.* v. *R. and the Council of State of Thurgau Canton, Journal des tribunaux* (1995), pp. 523.

[684] See footnote 6 above.

[685] "3.2.1 *Competence of the monitoring bodies established by the treaty*

"Where a treaty establishes a body to monitor application of the treaty, that body shall be competent, for the purpose of discharging the functions entrusted to it, to assess the validity of reservations formulated by a State or an international organization.

"The findings made by such a body in the exercise of this competence shall have the same legal force as that deriving from the performance of its general monitoring role."

If they had decision-making power, they could also decide as to the validity of reservations, and their decisions in that regard would be binding on States parties; otherwise, they could only make recommendations. That was also in keeping with paragraph 8 of the preliminary conclusions.

112. Draft guideline 3.2.2[686] echoed paragraph 7 of the preliminary conclusions in the form of a recommendation and was very much in keeping with the pedagogic spirit of the Guide to Practice, as was draft guideline 3.2.3,[687] which reminded States and international organizations that they should give effect to the decisions of the treaty monitoring bodies (if they had decision-making power) or take account of their recommendations in good faith.

113. Draft guideline 3.2.4,[688] corresponding to paragraph 6 of the preliminary conclusions adopted in 1997, recalled that, when there were several mechanisms for assessing the validity of reservations, they were not mutually exclusive but supportive.

114. The last section of the tenth report deals with the consequences of the invalidity of a reservation, a matter that constituted one of the most serious gaps on the topic in the 1969 and 1986 Vienna Conventions, which were silent on that point, whether deliberately or otherwise.

115. Despite the positions taken by certain authors, who draw a distinction between subparagraphs (*a*) and (*b*) of article 19 of the Vienna Conventions, on the one hand, and subparagraph (*c*) on the other, the Special Rapporteur was of the view that all the three subparagraphs had the same function (a view supported by the *travaux préparatoires*, practice and case law). The unity of article 19, which was confirmed by article 21, paragraph 1, of the Vienna Conventions, was expressed in draft guideline 3.3.[689]

116. The Special Rapporteur then sought to respond to some of the questions to which a response could be given at that stage. Draft guideline 3.3.1[690] explained that the formulation of an invalid reservation posed problems of validity, not of the responsibility of its author. Hence, draft guideline 3.3.2[691] expressed the idea that a reservation that did not fulfil the conditions for validity set forth in article 19 of the Vienna Conventions was null and void.

117. Draft guideline 3.3.3[692] expressed the idea that the other contracting parties, acting unilaterally, could not remedy the nullity of a reservation that did not meet the criteria of article 19. Otherwise, the unity of the treaty regime would be broken up, which would be incompatible with the principle of good faith.

118. The Special Rapporteur was of the view that what the contracting parties could not do unilaterally they might do collectively, provided they did it expressly, which would amount to an amendment of the treaty. If all parties formally accepted a reservation that was *a priori* invalid, they could be considered to be amending the treaty by unanimous agreement, as article 39 of the Vienna Conventions allowed. That idea was expressed in draft guideline 3.3.4.[693]

2. Summary of the debate

119. With regard to draft guideline 3.1.5, in the new version proposed by the Special Rapporteur, it was pointed out that the notion of "the balance of the treaty" was not necessarily applicable to all treaties, particularly those relating to human rights. The object and purpose of a treaty consisted in the objective underlying the essential rules, rights and obligations, rather than within those rules, rights and obligations themselves.

120. According to another point of view, the reference to "essential rules, rights and obligations" in the new version was a better way to describe the *raison d'être* of a treaty.

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[686] "3.2.2 *Clauses specifying the competence of monitoring bodies to assess the validity of reservations*

"States or international organizations should insert, in treaties establishing bodies to monitor their application, clauses specifying the nature and, where appropriate, the limits of the competence of such bodies to assess the validity of reservations. Protocols to existing treaties could be adopted to the same ends."

[687] "3.2.3 *Cooperation of States and international organizations with monitoring bodies*

"States and international organizations that have formulated reservations to a treaty establishing a body to monitor its application are required to cooperate with that body and take fully into account that body's assessment of the validity of the reservations that they have formulated. When the body in question is vested with decision-making power, the author of the reservation is bound to give effect to the decision of that body [provided that it is acting within the limits of its competence]."

[688] "3.2.4 *Plurality of bodies competent to assess the validity of reservations*

"When the treaty establishes a body to monitor its application, the competence of that body neither excludes nor affects in any other way the competence of other contracting States or other contracting international organizations to assess the validity of reservations to a treaty formulated by a State or an international organization, nor that of such dispute settlement bodies as may be competent to interpret or apply the treaty."

[689] "3.3 *Consequences of the non-validity of a reservation*

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

[690] "3.3.1 *Non-validity of reservations and responsibility*

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

[691] "3.3.2 *Nullity of invalid reservations*

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

[692] "3.3.3 *Effect of unilateral acceptance of an invalid reservation*

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

[693] "3.3.4 *Effect of collective acceptance of an invalid reservation*

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

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

121. The view was also expressed that the revised version of the draft guideline introduced terms that were difficult to understand and interpret and were extremely subjective. The earlier version accompanied by commentary would be a more appropriate way to clarify the notion of object and purpose. It was also pointed out that the phrase "has a serious impact" appeared to make the scope of the draft guideline very restrictive. It was noted that a reservation, without necessarily compromising the *raison d'être* of the treaty, might nonetheless compromise an essential part of it and thus be incompatible with its object and purpose.

122. The view was also expressed that when a treaty prohibited all reservations, it did not necessarily mean that all the provisions of the treaty constituted its *raison d'être*, and, conversely, when a treaty allowed specific reservations it did not necessarily mean that the particular provisions that might be the subject of reservations were not essential. The political context in which the treaty had been concluded should also be taken into account.

123. With regard to draft guideline 3.1.6, it was pointed out that the reference to "the articles that determine [the] basic structure" of the treaty gave the impression that the object and purpose of a treaty was to be found in certain provisions of the treaty, which was not necessarily the case. The reference to subsequent practice could be deleted, since the intention of the parties at the time the treaty was concluded was the essential consideration. The view was also expressed that the reference to the "subsequent practice of the parties" should be deleted both for the sake of consistency with previous decisions of the Commission and for the sake of the stability of treaty relations. However, another view held that the reference to subsequent practice should be retained and was an essential element of interpretation according to article 31 of the 1969 and 1986 Vienna Conventions.

124. With regard to draft guideline 3.1.7, it was observed that even vague, general reservations were not necessarily incompatible with the object and purpose of the treaty, since they might affect matters of lesser importance.

125. Several members voiced support for draft guideline 3.1.8.

126. With regard to draft guideline 3.1.9, the view was expressed that it might be possible to formulate a reservation to some aspect of a treaty provision setting forth a rule of *jus cogens* that did not actually contradict the *jus cogens* rule itself.

127. With regard to draft guideline 3.1.10, it was observed that a reservation might be made to a provision relating to non-derogable rights, provided the reservation was not incompatible with the object and purpose of the treaty as a whole.

128. Several members expressed support for draft guidelines 3.1.11, 3.1.12 and 3.1.13.

129. The view was expressed that another category of reservations deserved mention, namely, reservations to provisions relating to the implementation of the treaty through domestic legislation.

130. With regard to draft guideline 3.2, it was stressed that the competence of treaty monitoring bodies was not automatic unless provided for by the treaty. It was also suggested that the text should refer to "monitoring bodies that may be established within the framework of the treaty" rather than "by the treaty" in order to include bodies established subsequently, such as the Committee on Economic, Social and Cultural Rights. The question was raised whether monitoring bodies with quasi-judicial functions could rule on the legality of reservations formulated by States even if such a power was not expressly foreseen in the treaty.

131. The view was expressed that the draft guideline departed from positive treaty law and the practice of States in conferring competence on monitoring bodies to rule on (rather than simply to assess) the validity of reservations. Others held the contrary view.

132. Some members thought that draft guidelines 3.2.1 and 3.2.2 should state that the monitoring bodies were competent to the extent provided by the treaty. The point was also made that the monitoring bodies did not take account of the positions adopted by the contracting States, an issue that was at the heart of the problem of the competence of such bodies to assess the validity of reservations.

133. Among the dispute settlement bodies, judicial bodies deserved special mention, since their decisions produced effects quite different from those produced by the decisions of other organs.

134. The point was made that national authorities other than courts might have occasion, within their sphere of competence, to consider the validity of some reservations formulated by other States.

135. It was observed that the reference to protocols might entail the risk of encouraging their use in order to limit or criticize the competence of monitoring bodies.

136. It was also pointed out that draft guideline 3.2.4 did not answer certain questions that might arise, such as what would happen if the various competent bodies did not agree on their assessment of the reservation, or its validity.

137. It was noted that the Commission had decided not to mention implicit prohibition, so that the term should be deleted from draft guideline 3.3.

138. With regard to draft guideline 3.3.1, the view was expressed that the Commission should refrain from stating a position on whether the international responsibility of a State or international organization that had formulated an invalid reservation was or was not engaged. It was stated that such an assertion does not appear to be compatible with the law of State responsibility and might even have the effect of encouraging States to formulate invalid reservations in the belief that their responsibility would not be engaged.

139. With regard to draft guidelines 3.3.2, 3.3.3 and 3.3.4, it was observed that they raised questions that it would be premature to decide at the current stage. They should be given further consideration before being referred to the Drafting Committee.

140. It was observed that an invalid reservation could not be null and void, because such a reservation could produce effects in certain situations.

141. Several members expressed doubts about draft guidelines 3.3.3 and 3.3.4, noting contradictions and ambiguities, and were not in agreement with the role of arbitrator in the matter of reservations that the guidelines appeared to confer on the depositary.

142. It was even questioned whether the Commission should take up the matter of the consequences of the invalidity of reservations, which, perhaps wisely, had not been addressed in the 1969 and 1986 Vienna Conventions. Perhaps that gap should not be filled; the regime that allowed States to decide on the validity of reservations and to draw the consequences already existed, and there was no reason to change it.

143. It was observed, with reference to article 20 of the Vienna Conventions concerning acceptance of reservations and objections to reservations, that there was no indication in the Vienna Conventions that the article was meant to apply to invalid reservations as well. In practice, States relied on article 20 when objecting to reservations that they considered incompatible with the object and purpose of the treaty, yet still maintained contractual relations between themselves and the State that had made the reservation. The Guide to Practice should take account of that practice and give guidance to States if the practice was thought to be incompatible with the Vienna regime.

3. Special Rapporteur's concluding remarks

144. Summing up the discussion, the Special Rapporteur noted that the rich debate had afforded him insights into different points of view on the major issues and produced some interesting comments that contributed constructively to the work of the Commission.

145. With regard to draft guidelines 3.1.5 and 3.1.6, he had noted that the participants in the debate had thought that they formed a whole defining the concept of the object and purpose of a treaty. The three versions of draft guideline 3.1.5 proposed in 2005[694] and 2006 (A/CN.4/572, paras. 7–8) could serve as a basis for a possible definition, bearing in mind, of course, the element of subjectivity inherent in the concept.

146. Since contracting States might have differing opinions on what was essential in a treaty, he was convinced that an effort should be made to identify the point of equilibrium, which he had expressed in the idea of "the general architecture" or "the balance of the treaty". He had noted, however, that the idea had not commanded general support and that the phrase "rules, rights and obligations" had been preferred to the phrase "essential conditions" of the treaty.

147. He was alive to the argument that the "*raison d'être*" of a treaty might be difficult to identify, since a treaty could have more than one *raison d'être*, if it had more than one objective or if the parties had different expectations. On the other hand, he did not think that the word "seriously" should be deleted from the phrase "could seriously disturb". Since a reservation by definition affected the integrity of a treaty, it was logical to suppose that only a serious impact was capable of threatening the object and purpose of the treaty.

148. With regard to draft guideline 3.1.6, he was doubtful about the wisdom of including a reference to the subsequent practice of the parties, although a majority of the members had been in favour of it. It was true that a treaty evolved over time, but it should be recalled that the reservation was generally formulated at the beginning of a treaty's life when practice still had little relevance. Moreover, he was not sure that the object and purpose of a treaty could evolve over time.

149. The Special Rapporteur noted that draft guidelines 3.1.7 to 3.1.13 and the pragmatic approach they represented had generally met with support. He was not sure that he had grasped how the additional category of reservations that a member had proposed, namely reservations to provisions relating to the implementation of treaties through domestic legislation, differed from those set out in draft guideline 3.1.11; however, he was not opposed to having the Drafting Committee consider whether to add a draft guideline on that point. He was persuaded by the argument put forward by several members that the vague and general nature of a reservation could cause it to be invalid, but for reasons other than incompatibility with the object and purpose of the treaty.

150. On draft guideline 3.1.9, several members had echoed the doubts that he himself had expressed at the previous session. He agreed that the draft guideline was grounded in article 53 of the 1969 Vienna Convention, rather than in article 19 (*c*).

151. He was not insensitive to the concern of some members that reservations to provisions relating to non-derogable rights should constitute the exception and should be strictly limited; however, that concern could be dealt with by rewording draft guideline 3.1.10 and did not call into question the underlying principle.

152. The Special Rapporteur had noted with satisfaction that no member had disputed the principle that States or international organizations had competence to assess the validity of reservations. He had listened with interest to the comments of several members on the relation between that principle and article 20 of the Vienna Convention, but he felt it would be more appropriate to take up the point when the Commission considered the effects of acceptance of and objections to reservations.

153. As to the competence of dispute settlement bodies or treaty implementation monitoring bodies to assess the validity of reservations, he recalled that he had simply taken note of practice without "conferring" (or refusing to confer) powers on such bodies, which, in his view, did not have greater competence in that area than they had in general.

[694] Tenth report on reservations to treaties, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2.

154. He pointed out that all the draft guidelines on that point were in keeping with the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties adopted by the Commission in 1997. He would also like to repeat his proposal to delete the word "other" in both places from the phrase "The other contacting States … or other contracting organizations" in draft guideline 3.2, in order to accommodate the point that domestic courts might have occasion to assess the validity of reservations formulated by their own State.

155. The Drafting Committee might consider the possibility of supplementing draft guideline 3.2.4 with another specifying that monitoring bodies should take into account the assessment by contracting States of the validity of reservations.

156. With regard to draft guideline 3.3.1, he was convinced that an invalid reservation did not violate the treaty to which it referred and did not engage the responsibility of its author; if the reservation was invalid, it was null and void.

157. In conclusion, the Special Rapporteur said that it would be preferable to defer a decision on draft guidelines 3.3.2, 3.3.3 and 3.3.4 until the Commission could consider the effect of objections to and acceptance of reservations.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. Text of the draft guidelines

158. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.[695]

RESERVATIONS TO TREATIES

Guide to practice

Explanatory note

Some draft guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

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][696] *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.

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.

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[695] See the commentary 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. 99–107; the commentary 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 commentary 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; the commentary 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) and corrigendum, pp. 180–195; the commentary 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] in *Yearbook ... 2002*, vol. II (Part Two), pp. 28–48; the commentary to the explanatory note and to guidelines 2.5, 2.5.1, 2.5.2, 2.5.3, 2.5.4 [2.5.5], 2.5.5 [2.5.5 *bis*, 2.5.5 *ter*], 2.5.6, 2.5.7 [2.5.7, 2.5.8] and 2.5.8 [2.5.9], to model clauses A, B and C, and to guidelines 2.5.9 [2.5.10], 2.5.10 [2.5.11] and 2.5.11 [2.5.12] in *Yearbook ... 2003*, vol. II (Part Two), pp. 70–92; the commentary to guidelines 2.3.5, 2.4.9, 2.4.10, 2.5.12 and 2.5.13 in *Yearbook ... 2004*, vol. II (Part Two), pp. 106–110; and the commentary to guidelines 2.6, 2.6.1 and 2.6.2 in *Yearbook ... 2005*, vol. II (Part Two). The commentary to guidelines 3, 3.1, 3.1.1, 3.1.2, 3.1.3 and 3.1.4, as well as the commentary to guidelines 1.6 and 2.1.8 [2.1.7 *bis*] in its new version are in section 2 below.

[696] 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.

1.2 ***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 nor 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 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***[697]

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the validity 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 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 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.

[697] This draft guideline has been reconsidered and modified during the Commission's fifty-eighth session (2006). For the new commentary, see section C.2 below.

2.1.8 [2.1.7 *bis*] *Procedure in case of manifestly invalid reservations*[698]

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

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

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 expressing 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 the 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 expressing its consent to be bound by the treaty.

… [699]

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.

2.3.5 *Widening of the scope of a reservation*

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

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 when signing 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 expressing 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 formulate an interpretative declaration concerning that treaty subsequently 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.

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.

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[698] *Ibid.*

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

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***[700]

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.

2.4.9 ***Modification of an interpretative declaration***

Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

2.4.10 ***Limitation and widening of the scope of a conditional interpretative declaration***

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

2.5 ***Withdrawal and modification of reservations and interpretative declarations***

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.

2.5.2 ***Form of withdrawal***

The withdrawal of a reservation must be formulated in writing.

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 serve their purpose.

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

2.5.4 [2.5.5] ***Formulation of the withdrawal of a reservation at the international level***

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made 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 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 [2.5.5 ***bis*****, 2.5.5** ***ter*****]** ***Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations***

1. 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 the relevant rules of each international organization.

2. 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.

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 [2.1.6, 2.1.8] and 2.1.7.

2.5.7 [2.5.7, 2.5.8] ***Effect of withdrawal of a reservation***

1. The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

2. 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 entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

2.5.8 [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.

Model clauses

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 notification addressed to [the 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 [the 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 [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the 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 [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

[700] 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 of the Commission, in 2002.

2.5.9 [2.5.10] ***Cases in which a reserving State or international organization 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 or international organization 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 add to the rights of the withdrawing State or international organization, in relation to the other contracting States or international organizations.

2.5.10 [2.5.11] ***Partial withdrawal of a reservation***

1. The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

2. The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

2.5.11 [2.5.12] ***Effect of a partial withdrawal of a reservation***

1. The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

2. No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

2.5.12 ***Withdrawal of an interpretative declaration***

An interpretative declaration may be withdrawn at any time by the authorities competent for that purpose, following the same procedure applicable to its formulation.

2.5.13 ***Withdrawal of a conditional interpretative declaration***

The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of reservations.

2.6.1 ***Definition of objections to reservations***

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

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

"Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.

3. ***Validity of reservations and interpretative declarations***

3.1 ***Permissible reservations***

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

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

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

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

3.1.1 ***Reservations expressly prohibited by the treaty***

A reservation is expressly prohibited by the treaty if it contains a particular provision:

(*a*) prohibiting all reservations;

(*b*) prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions; or

(*c*) prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

3.1.2 ***Definition of specified reservations***

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

3.1.3 ***Permissibility of reservations not prohibited by the treaty***

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.4 ***Permissibility of specified reservations***

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

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

159. The text of the draft guidelines with commentaries thereto adopted by the Commission at its fifty-eighth session are reproduced below.

3. *Validity of reservations and interpretative declarations*

General commentary

(1) The purpose of the third part of the Guide to Practice, following the first part, devoted to definitions, and the second, which deals with the procedure of formulation of reservations and interpretative declarations, is to determine the conditions for the validity of reservations to treaties.

(2) After extensive debate, the Commission decided, despite hesitation on the part of some members, to retain the term "validity of reservations" to describe the intellectual operation consisting in determining whether a unilateral statement made[701] by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty[702] in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation.

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[701] Since the mere formulation of a reservation does not allow it to produce the effects intended by its author, the word "formulated" would have been more appropriate (see below the commentary to draft guideline 3.1, paras. (6) and (7)), but the Vienna Conventions use the word "made" and as a matter of principle the Commission does not wish to revisit the Vienna text.

[702] Or of the treaty as a whole with respect to certain specific aspects (see draft guideline 1.1.1).

(3) Adhering to the definition found in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions, reproduced in draft guideline 1.1 of the Guide to Practice, the Commission accepted that all unilateral statements meeting that definition constituted reservations. But, as the Commission stated very clearly in its commentary on draft guideline 1.6, "[d]efining is not the same as regulating. … [A] reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established".[703] It went on to say: "Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime, in the first place, for the assessment of its permissibility. It is only once a particular instrument has been defined as a reservation ... that a decision can be taken as to whether it is permissible or not, its legal scope can be evaluated and its effect can be determined".[704]

(4) This terminology poses a problem. At an early stage, the Commission opted for the words "permissibility" and "impermissibility" in preference to "validity" and "invalidity" or "non-validity" in order to respond to the concerns expressed by some members of the Commission and some States who considered that the term "validity" cast doubt on the nature of statements that fit the definition of reservations given in article 2, paragraph 1 (*d*), of the Vienna Conventions but do not fulfil the conditions set forth in article 19.[705] Actually, the word "validity" seemed to a majority of the members of the Commission to be quite neutral in that regard. It offered the advantage that it did not prejudge the doctrinal controversy,[706] central to the question of reservations, between the proponents of "permissibility", who hold that "[t]he issue of 'permissibility' is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether, as a matter of policy, other Parties find the reservations acceptable or not",[707] and the proponents of "opposability", who hold that "the validity of a reservation depends solely on the acceptance of the reservation by another contracting State" and who therefore view article 19, subparagraph (*c*), of the 1969 Vienna Convention "as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that".[708]

(5) Moreover, it was thought that the term "impermissible" ("*illicite*") was not appropriate in any case to characterize reservations that did not fulfil the conditions of form or substance set by the Vienna Conventions. According to a majority of the members of the Commission, "in international law, an internationally wrongful act entails its author's responsibility, 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".[709] Consequently, the Commission, which in 2002 had decided to reserve its position on this matter pending an examination of the effect of such reservations,[710] thought that it would be better to settle that question of terminology without further delay.

(6) It appeared to the Commission:

— In the first place, that the term "permissible" ("*licite*") implied that the formulation of reservations contrary to the provisions of article 19 of the Vienna Conventions would engage the responsibility of the reserving State or international organization, which was certainly not the case;[711] and

— In the second place, that the term "permissible" used in the English text of the draft guidelines adopted to date and their commentaries implied that it was exclusively a question of permissibility and not of opposability, which had the disadvantage of unprofitably prejudging the doctrinal dispute discussed above.[712]

(7) However, the term "permissibility" was retained to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions, since, according to the English speakers, the term did not imply taking a position as to the consequences of non-fulfilment of those conditions. That term was rendered in French by the expression "*validité matérielle*".

(8) The third part of the Guide to Practice deals successively with the questions relating to:

— The permissibility of reservations;

— Competence to assess the validity of reservations; and

— The consequences of the invalidity of a reservation.

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[703] *Yearbook ... 1999*, vol. II, (Part Two), p. 126, para. (2) of the commentary; see also, below, the commentary to the draft guideline as amended at the fifty-eighth session of the Commission.

[704] *Ibid*., para. (3) of the commentary. See also the commentary to draft guideline 1.1.1 [1.1.4] in *Yearbook ... 1998*, vol. II (Part Two), p. 101, especially para. (3) of the commentary, and the third report of the Special Rapporteur on reservations to treaties, *ibid.*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 250, para. 154, and p. 252, para. 175.

[705] See the statement of the United Kingdom in the Sixth Committee on 2 November 1993, *Official Records of the General Assembly, Forty-eighth Session, Sixth Committee, summary record of the 24th meeting* (A/C.6/48/SR.24), para. 42.

[706] On this doctrinal dispute, see in particular J. K. Koh, "Reservations to multilateral treaties: how international legal doctrine reflects world vision", *Harvard International Law Journal*, vol. 23 (1982–1983), pp. 71–116, *passim*, in particular pp. 75–77; see also C. Redgwell, "Universality or integrity? Some reflections on reservations to general multilateral treaties", BYBIL, vol. 64 (1993), pp. 245–282, at pp. 263–269; and I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester University Press, 1984, p. 81, footnote 78.

[707] D. W. Bowett, "Reservations to non-restricted multilateral treaties", BYBIL, vol. 48 (1976–1977), p. 88.

[708] J. M. Ruda, "Reservations to treaties", *Recueil des cours: Collected courses of the Hague Academy of International Law, 1975–III*, vol. 146 (1977), p. 190.

[709] Commentary to draft guideline 2.1.8 [2.1.7 *bis*] (Procedure in case of manifestly [impermissible] reservations), *Yearbook … 2002*, vol. II (Part Two), p. 46, para. (7) of the commentary. According to a minority view, the formulation of an impermissible reservation would engage the responsibility of its author. The issue will be discussed in greater detail in the commentary to draft guideline 3.3.1.

[710] See the commentary to draft guideline 2.1.8 [2.1.7 *bis*], *Yearbook … 2002*, vol. II (Part Two), pp. 45–46; see also draft guideline 2.1.7 (Functions of depositaries) and the commentary thereto, *ibid.*, pp. 42–45.

[711] See above paragraph (5) of the commentary to this draft guideline.

[712] See above paragraph (4) of the commentary to this draft guideline.

A special section will be devoted to the same questions in relation to interpretative declarations.

3.1 *Permissible reservations*

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

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

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

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

Commentary

(1) Draft guideline 3.1 faithfully reproduces the wording of article 19 of the 1986 Vienna Convention, which is patterned after the corresponding provision of the 1969 Convention with just two additions, which were needed in order to cover treaties concluded by international organizations.

(2) By providing that, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, "[a] State or an international organization may ... formulate a reservation", albeit under certain conditions, this draft guideline sets out "the general principle that the formulation of reservations is permitted".[713] This is an essential element of the "flexible system" stemming from the advisory opinion of the ICJ of 1951 on *Reservations to the Convention on Genocide*,[714] and it is no exaggeration to say that, on this point, it reverses the traditional presumption resulting from the system of unanimity,[715] the stated aim being to facilitate the widest possible participation in treaties and, ultimately, their universality.

(3) In this regard, the text of article 19 finally adopted in 1969 resulted directly from Waldock's proposals and takes the opposite view from the drafts prepared by the Special Rapporteurs on the law of treaties who preceded him, all of whom started from the inverse assumption, expressing in negative or restrictive terms the principle that a reservation might only be formulated (or "made")[716] if certain conditions were met.[717] Waldock,[718] on the other hand, presents the principle as the "power to formulate, that is, to *propose*, a reservation", which a State has "in virtue of its sovereignty".[719]

(4) However, this power is not unlimited:

— In the first place, it is limited in time, since a reservation may only be formulated "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty";[720]

— In the second place, the formulation of reservations may be incompatible with the object of some treaties, either because they are limited to a small group of States—a situation that is taken into account in article 20, paragraph 2, of the 1969 Vienna Convention,[721] which reverts to the system of unanimity where such instruments are concerned—or, in the case of instruments of universal scope, because the parties intend to make the integrity of the treaty take precedence over its universality or, at any rate, to limit the power of States to formulate reservations; on this issue, as on all others, the Vienna Convention is only intended to be residuary in nature, and there is nothing to prevent the negotiators from inserting in the treaty "reservations clauses" that limit or modify the freedom set out as a principle in article 19.[722]

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[713] Commentary to article 18 of the draft articles on the law of treaties, adopted by the Commission on first reading in 1962, *Yearbook … 1962*, vol. II, p. 180, para. (15); see also the commentary to draft article 16 adopted on second reading, *Yearbook ... 1966*, vol. II, p. 207, para. (17). For the 1986 Vienna Convention, see the commentary to draft article 19 (Formulation of reservations in the case of treaties between several international organizations), adopted by the Commission in 1977, *Yearbook ... 1977*, vol. II (Part Two), p. 106, para. (1), and to draft article 19 *bis* (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States), *ibid.*, p. 108, para. (3).

[714] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15.

[715] This concept, which had undoubtedly become the customary norm in the period between the wars (see the joint dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo, appended to the advisory opinion in *Reservations to the Convention on Genocide* (footnote 714 above), pp. 34–35), significantly restricted the freedom to make reservations: this was possible only if all the other parties to the treaty accepted the reservation, otherwise the author remained outside the treaty. In its comments on article 18 of the draft articles on the law of treaties, adopted by the Commission on first reading in 1962 (see footnote 713 above), Japan proposed reverting to the opposite presumption (see the fourth report of Special Rapporteur Sir Humphrey Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 49).

[716] On this point, see below paragraphs (6) and (7) of the commentary to this draft guidline.

[717] See, for example, draft article 10 (1) of the draft convention on the law of treaties, proposed by J. L. Brierly (*Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 238); the various drafts of article 9 proposed by Special Rapporteur H. Lauterpacht in his preliminary report (*Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 91–92) and his second report (*Yearbook ... 1954*, vol. II, document A/CN.4/87, p. 131); or draft article 39, paragraph 1, proposed by Special Rapporteur G. G. Fitzmaurice (*Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115). See also the comments of Pierre-Henri Imbert in *Les réserves aux traités multilatéraux*, Paris, Pedone, 1978, pp. 88–89.

[718] "A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation … unless: …" (preliminary report on the law of treaties , *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, article 17, para. 1 (*a*), p. 60).

[719] *Ibid*., para. (9) of the commentary to article 17, p. 65.

[720] In this regard, see below paragraph (9) of the commentary to this guideline.

[721] "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

[722] With regard to the residuary nature of the Vienna regime, see in particular A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, pp. 124–126; J. K. Gamble, Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", AJIL, vol. 74 (1980), pp. 383–391; P.-H. Imbert, *Les réserves aux traités …*, *op. cit.* (footnote 717 above), pp. 162–230; A. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, pp. 169–173; J. Polakiewicz, *Treaty-making in the Council of Europe*, Strasbourg, Council of Europe, 1999, pp. 85–90 and 101–104; and R. Riquelme Cortado, *Las reservas a los tratados: Lagunas, formulación y ambigüedades del Régimen de Viena*, Universidad de Murcia, 2004, pp. 89–136.

(5) It is probably excessive to speak of a "right to reservations",[723] even though the 1969 Vienna Convention proceeds from the principle that there is a presumption in favour of their validity. Some members contested the existence of such a presumption. This, moreover, is the significance of the very title of article 19 of the 1969 and 1986 Vienna Conventions (Formulation of reservations),[724] which is confirmed by its *chapeau*: "A State may ... formulate a reservation unless …". Certainly, by using the verb "may", the introductory clause of article 19 recognizes that States have a right, but it is only the right to "formulate" reservations.[725]

(6) The words "formulate" and "formulation" were carefully chosen. They signify that, while it is up to the State intending to attach a reservation to its expression of consent to be bound to indicate how it means to modify its participation in the treaty,[726] this formulation is not sufficient of itself. The reservation is not "made": it does not produce any effect, merely by virtue of such a statement. For that reason, an amendment by China seeking to replace the words "formulate a reservation" with the words "make reservations"[727] was rejected by the Drafting Committee of the Vienna Conference on the Law of Treaties.[728] As Waldock noted, "there is an inherent ambiguity in saying ... that a State may '*make*' a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively 'made' unless and until it has been assented to by the other interested States".[729] Now, not only is a reservation only "established"[730] if certain procedural conditions—admittedly, not very restrictive ones[731]—are met, but it must also comply with the substantive conditions set forth in the three subparagraphs of article 19 of the Vienna Conventions, as the word "unless" clearly demonstrates.[732]

(7) According to some authors, the terminology used in this provision is not consistent in that regard, since "*[l]orsque le traité autorise certaines réserves (article 19, alinéa* b*), elles n'ont pas besoin d'être acceptées par les autres États ... . Elles sont donc 'faites' dès l'instant de leur 'formulation' par l'État réservataire*" ["when the treaty permits specified reservations (article 19, subparagraph (*b*)), they do not need to be accepted by the other States … . They are thus 'made' from the moment of their formulation by the reserving State"].[733] Now, if subparagraph (*b*) meant to say that such reservations "may be *made*", the *chapeau* of article 19 of the Vienna Conventions would be misleading, for it implies that they, too, are merely "formulated" by their author.[734] But this is an empty argument:[735] subparagraph (*b*) is not about reservations that are established (or made) simply by virtue of being formulated, but rather about reservations that are not permitted by the treaty. As in the situation in subparagraph (*a*), such reservations may not be formulated: in one case (subparagraph (*a*)), the prohibition is explicit; in the other (subparagraph (*b*)), it is implied.

(8) Moreover, the principle of freedom to formulate reservations cannot be separated from the exceptions to the principle. For this reason, the Commission, which in

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[723] Some members of the Commission, however, spoke in support of the existence of such a right.

[724] Concerning the modification of this title in the context of the Guide to Practice, see below, paragraph (10) of the Commentary to this draft guideline.

[725] See Imbert, *Les réserves aux traités …*, *op. cit.* (see footnote 717 above), p. 83; see also P. Reuter, *Introduction au droit des traités*, 3rd ed. revised and augmented by Ph. Cahier, Paris, Presses universitaires de France, 1995, p. 75; or Riquelme Cortado, *op. cit.* (footnote 722 above), p. 84. It may also be noted that a proposal by Briggs to replace the word "free" in Waldock's draft (see footnote 718 above) with the words "legally entitled" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 22) was not accepted, nor was an amendment along the same lines proposed by the Union of Soviet Socialist Republics at the Vienna Conference (A/CONF.39/C.1/L.115, *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* (document A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 133, para. 175). The current wording ("A State may … formulate a reservation unless ...") was adopted by the Commission's Drafting Committee (see *Yearbook … 1962*, vol. I, 663rd meeting, 18 June 1962, p. 221, para. 3), then by the Commission in plenary meeting in 1962 (*ibid*., vol. II, pp. 175–176, article 18, para. 1). No amendments were made in 1966, other than the replacement of the words "*Tout État*" in the French text with the words "*Un État*" (see *Annuaire de la Commission du droit international 1965*, vol. I, 813th meeting, 29 June 1965, p. 287, para. 1 (text adopted by the Drafting Committee), and *Yearbook ... 1966*, vol. II, p. 202 (article 16 adopted on second reading)).

[726] See D. W. Greig, "Reservations: equity as a balancing factor?", *Australian Year Book of International Law*, vol. 16 (1995), pp. 21 *et seq.*, at p. 22.

[727] A/CONF.39/C.1/L.161, *Official Records of the United Nations Conference on the Law of Treaties, First and second sessions…* (footnote 725 above), p. 134, para. 177.

[728] See *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (document A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), Committee of the Whole, 23rd meeting, 11 April 1968, p. 121, para. 2 (explanations by China), and 24th meeting, 16 April 1968, p. 126, para. 13 (statement by the Expert Consultant, Sir Humphrey Waldock).

[729] First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62, para. (1) of the commentary to draft articles 17, 18 and 19.

[730] See paragraph 1 of article 21 of the 1969 and 1986 Vienna Conventions: "A reservation established with regard to another party in accordance with articles 19, 20 and 23 …".

[731] See articles 20, paragraphs 3–5, article 21, paragraph 1, and article 23 of the Vienna Conventions, and draft guidelines 2.1 to 2.2.3. See also M. Coccia, "Reservations to multilateral treaties on human rights", *California Western International Law Journal*, vol. 15 (1985), at p. 28.

[732] "This article states the general principle that the *formulation* of reservations is permitted except in three cases" (*Yearbook ... 1966*, vol. II, p. 207, commentary to art. 16, para. (17)); the use of the word "*faire*" in the French text of the commentary is open to criticism, but it is probably a translation error, rather than a deliberate choice –*contra*: Imbert, *Les réserves aux traités …*, *op. cit.* (footnote 717 above), p. 90. Moreover, the English text of the commentary is correct.

[733] Imbert, *Les réserves aux traités …*, *op. cit.* (footnote 717 above), pp. 83–84.

[734] See also Ruda, *loc. cit.* (footnote 708 above), pp. 179–180, as well as the far more restrained criticism by Frank Horn in *Reservations and Interpretative Declarations to Multilateral Treaties*, vol. 5, The Hague, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, (1988), pp. 111–112.

[735] One may, however, question the use of the verbs "formulate" and "make" in article 23, para. 2 of the Vienna Conventions; it is not consistent to state, at the end of this provision, that, if a reservation formulated when signing a treaty is confirmed at the time of the expression of consent to be bound, "the reservation shall be considered as having been *made** on the date of its confirmation". In elaborating the Guide to Practice on reservations, the Commission has endeavoured to adopt consistent vocabulary in this regard (the criticisms directed at it by Riquelme Cortado, *op. cit.* (footnote 722 above), p. 85, appear to be based on a translation error in the Spanish text).

general has avoided modifying the wording of the provisions of the Vienna Conventions that it has carried over into the Guide to Practice, decided against elaborating a separate draft guideline dealing only with the principle of the presumption of the validity of reservations.

(9) For the same reason, the Commission chose not to leave out of draft guideline 3.1 a reference to all the different moments (or "cases" or "instances", to reproduce the terminology used at various times in draft guideline 1.1.2),[736] "in which a reservation may be formulated". As discussed above,[737] article 19 of the Vienna Conventions reproduces the temporal limitations included in the definition of reservations in article 2, paragraph 1 (*d*), of the Conventions,[738] and this repetition is no doubt superfluous, as was stressed by Denmark[739] during the consideration of the draft articles on the law of treaties adopted in 1962.[740] However, the Commission did not think it necessary to correct the anomaly when the final draft was adopted in 1966,[741] and the repetition is not a sufficiently serious drawback to merit rewriting the 1969 Vienna Convention, which allowed this drawback to remain.

(10) The repetition also provides a discreet reminder that the validity of reservations does not depend solely on the substantive conditions set forth in article 19 of the Vienna Conventions but is also dependent on conformity with conditions of form and timeliness. However, those formal conditions are dealt with in the second part of the Guide to Practice, so that the third part places more emphasis on the substantive validity, that is, the permissibility of reservations—hence the title of "Permissible reservations" chosen by the Commission for draft guideline 3.1, for which it was not possible to retain the title of article 19 of the Vienna Conventions (Formulation of reservations), already used for draft guideline 2.1.3 (Formulation of a reservation at the international level).[742] In any case, it would tend to put the accent, inappropriately, on the formal conditions for the validity of reservations.

3.1.1 *Reservations expressly prohibited by the treaty*

A reservation is expressly prohibited by the treaty if it contains a particular provision:

(*a*) prohibiting all reservations;

(*b*) prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions; or

(*c*) prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

Commentary

(1) According to Paul Reuter, the situations envisaged in subparagraphs (*a*) and (*b*) of article 19 of the 1969 and 1986 Vienna Conventions (reproduced in draft guideline 3.1) constitute very simple cases.[743] However, this does not seem to be so. It is true that these provisions refer to cases where the treaty to which a State or an international organization wishes to make a reservation contains a special clause prohibiting or permitting the formulation of reservations. But, aside from the fact that not all possibilities are explicitly covered,[744] delicate problems can arise regarding the exact scope of a clause prohibiting reservations and the effects of a reservation formulated despite that prohibition.

(2) Draft guideline 3.1.1 is intended to clarify the scope of subparagraph (*a*) of draft guideline 3.1, which does not indicate what is meant by "reservation prohibited by the treaty", while draft guidelines 3.1.2 and 3.1.4 undertake to clarify the meaning and the scope of the expression "specified reservations" contained in subparagraph (*b*).

(3) In draft article 17, paragraph 1 (*a*), which he submitted to the Commission in 1962, Waldock distinguished three situations:

— Reservations "prohibited by the terms of the treaty or excluded by the nature of the treaty or by the established usage of an international organization";[745]

— Reservations not provided for by a clause that restricts the reservations that can be made; or

— Reservations not provided for by a clause that authorizes certain reservations.

What these three cases had in common was that, unlike reservations incompatible with the object and purpose of the treaty,[746] "when a reservation is formulated which is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself".[747]

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[736] The commentary to this draft guideline is in *Yearbook ... 1998*, vol. II (Part Two), pp. 103–104.

[737] See above paragraph (4) of the commentary to the present draft guideline.

[738] See draft guidelines 1.1 (Definition of reservations) and 1.1.2 (Cases in which a reservation may be formulated) and the commentary thereto in *Yearbook ... 1998*, vol. II (Part Two), pp. 99–100 and 103–104.

[739] See the fourth report of Special Rapporteur Sir Humphrey Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 46.

[740] *Yearbook ... 1962*, vol. II, pp. 165–186.

[741] *Yearbook ... 1966*, vol. II, pp. 177–274.

[742] The text of this draft guideline and its commentary can be found in *Yearbook … 2002*, vol. II (Part Two), pp. 31–33.

[743] P. Reuter, "Solidarité et divisibilité des engagements conventionnels", in Y. Dinstein (ed.), *International Law at a Time of Perplexity—Essays in Honour of Shabtai Rosenne*, Dordrecht, Martinus Nijhoff, 1989, p. 625; also reproduced in P. Reuter, *Le développement de l'ordre juridique international—Écrits de droit international*, Paris, Economica, 1995, p. 363.

[744] See below footnote 749 and paragraph (9) of the commentary to draft guideline 3.1.3.

[745] First report of Special Rapporteur Sir Humphrey Waldock on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, art. 17, para 1 (*a*), p. 60.

[746] Situation envisaged in paragraph 2 of draft article 17 included in the first report of Special Rapporteur Sir Humphrey Waldock on the law of treaties (*ibid.*), but in a rather different form than in the current text.

[747] *Ibid.*, p. 65, para. (9) of the commentary to article 17.

(4) Even though it was taken up again, in a slightly different form, by the Commission,[748] this categorization was unnecessarily complicated and, at the rather general level at which the authors of the 1969 Vienna Convention intended to operate, there was no point in drawing a distinction between the first two situations identified by the Special Rapporteur.[749] In draft article 18, paragraph 2, which he proposed in 1965 in the light of the observations by Governments,[750] he limited himself to distinguishing reservations prohibited by the terms of the treaty (or "by the established rules of an international organization"[751]) from those implicitly prohibited as a result of the authorization of specified reservations by the treaty. This distinction is found in a more refined form[752] in article 19, subparagraphs (*a*) and (*b*), of the 1969 Vienna Convention, without any distinction being made as to whether the treaty prohibits, or fully or partially authorizes reservations.[753]

(5) According to Tomuschat, the prohibition in subparagraph (*a*), as it is drafted, should be understood as covering both express prohibitions and implicit prohibitions of reservations.[754] Some justification for this interpretation can be found in the *travaux préparatoires* for this provision:

— In the original wording, proposed by Waldock in 1962,[755] it was specified that the provision concerned reservations that were "prohibited by the terms of the treaty", a clarification that was abandoned in 1965 without explanation by the Special Rapporteur and with little light shed by the discussions in the Commission on this matter;[756]

— In the commentary on draft article 16 adopted by the Commission on second reading in 1966, the Commission in effect seems to place on the same footing "[r]eservations expressly or implicitly prohibited by the provisions of the treaty".[757]

(6) This interpretation, however, is open to discussion. The idea that certain treaties could "by their nature", exclude reservations was discarded by the Commission in 1962, when it rejected the proposal along those lines made by Waldock.[758] Thus, apart from the case of

[748] Draft article 18, para. 1 (*b*), (*c*) and (*d*), *Yearbook ... 1962*, vol. II, pp. 175–176; see also paragraph (15) of the commentary to this article, *ibid.*, p. 180.

[749] On the contrary, during the discussion of the draft, Briggs considered that "the distinction was between the case set out in sub-paragraph (*a*), where all reservations were prohibited, and the case set out in sub-paragraphs (*b*) and (*c*), where only some reservations were either expressly prohibited or impliedly excluded" (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222, para. 12); see also the dissenting opinion of Waldock, *ibid.*, p. 223, para. 32. As the example of article 12 of the 1958 Convention on the Limits of the Continental Shelf indicates (see paragraph (6) of the commentary to draft guideline 3.1.2 above), this comment is highly relevant.

[750] Fourth report of Special Rapporteur Sir Humphrey Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 50.

[751] *Ibid*. Although the principle had not been disputed at the time of the debate in the plenary Commission in 1965, it had been disputed by Lachs in 1962 (see *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142, para. 53) and had been retained in the text adopted during the first part of the seventeenth session (see *Yearbook ... 1965*, vol. II, pp. 161–162), this indication disappeared without explanation from draft article 16 as finally adopted by the Commission in 1966 following the "final cleanup" by the Drafting Committee (see *Yearbook ... 1966*, vol. I (Part Two), 887th meeting, 11 July 1966, p. 295, para. 91). The deletion of this phrase should be seen in the context of the general safeguards clause concerning constituent instruments of international organizations and treaties adopted within an international organization appearing in article 5 of the Convention and adopted the same day in its final form by the Commission (*ibid.*, p. 294, para. 79). In practice, it is very unusual to allow reservations to be formulated to the constituent instruments of an international organization (see M. H. Mendelson, "Reservations to the constitutions of international organizations", BYBIL, vol. 45 (1971), pp. 137–171). As for treaties concluded within the context of international organizations, the best example of (purported) exclusion of reservations is that of the ILO, whose consistent practice is not to accept the deposit of instruments of ratification of international labour conventions when accompanied by reservations (see the memorandum submitted by the Director of the International Labour Office to the Council of the League of Nations on the admissibility of reservations to general conventions, *Official Journal of the League of Nations*, July 1927, p. 882; the memorandum submitted by the ILO to the ICJ in 1951 in the case concerning *Reservations to the Convention on Genocide, I.C.J. Pleadings, Oral Arguments and Documents*, pp. 227–228; or the statement of Wilfred Jenks, Legal Adviser of the International Labour Office, during the oral pleadings on that case, *Official Records of the United Nations Conference on the Law of Treaties, First session*... (footnote 728 above), seventh meeting, 1 April 1968, p. 37, para. 11). For a discussion and critique of this position, see paragraphs (3)–(5) of the commentary to draft guideline 1.1.8 (Reservations made under exclusionary clauses) of the Guide to Practice, adopted by the Commission at its fifty-second session, *Yearbook … 2000*, vol. II (Part Two), pp. 109–110.

[752] On the editorial changes made by the Commission, see the debate on draft article 18 (*Yearbook ... 1965*, vol. I, especially the 797th and 798th meetings, 8 and 9 June 1965, pp. 147–163) and the text adopted by the Drafting Committee (*ibid.*, 813th meeting, 29 June 1965, pp. 263–264, para. 1) and the debate on it (*ibid.*, pp. 263–265). The final texts of article 16 (*a*) and (*b*) adopted on second reading by the Commission read as follows: "A State may ... formulate a reservation unless: (*a*) The reservation is prohibited by the treaty; (*b*) The treaty authorizes specified reservations which do not include the reservation in question" (*Yearbook ... 1966*, vol. II, p. 202). See also the commentary to draft guideline 3.1.2 below, in particular paragraph (2).

[753] The "alternative drafts" proposed *de lege ferenda* in 1953 in the first report submitted by Hersch Lauterpacht all refer to treaties that "[do] not … prohibit or restrict the faculty of making reservations" (*Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 124).

[754] See C. Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties—Comments on arts. 16 and 17 of the ILC's 1966 draft articles on the law of treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967), p. 463, at p. 469.

[755] See above paragraph (3) of the commentary to the present draft guideline.

[756] See, however, the statement by Yasseen in the Commission's discussion at its seventeenth session: "the words 'the terms of' (*expressément*) could be deleted and it could read simply: '[unless] the making of reservations is prohibited by the treaty ...'. For it was enough that the treaty was not silent on the subject; it did not matter whether it referred to reservations implicitly or expressly" (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 19), but he was referring to the 1962 text.

[757] Like, moreover, "those expressly or impliedly authorized" (*Yearbook ... 1966*, vol. II, p. 205, para. (10) of the commentary; see also p. 207, para. (17)). In the same vein, article 19, para. 1 (*a*) of the draft articles on the law of treaties concluded between States and international organizations or between two or more international organizations adopted by the Commission in 1981 places on equal footing cases where reservations are prohibited by treaties and those where it is "otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited" (*Yearbook ... 1981*, vol. II (Part Two), p. 137).

[758] See above paragraph (4) of the commentary to the present draft guideline. The Special Rapporteur indicated that, in drafting this clause, "what he had had in mind was the Charter of the United Nations, which, by its nature, was not open to reservations" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 143, para. 60). This exception is covered by the safeguard clause of article 5 of the 1969 Vienna Convention (see footnote 751 above). The words "nature of the treaty" drew little attention during the discussion (Castrén, however, found the expression imprecise, *ibid.*, 652nd meeting, 28 May 1962, p. 148, para. 28; see also the statement of Verdross, *ibid.*, p. 149, para. 35); it was deleted by the Drafting Committee (*ibid.*, 663rd meeting, 18 June 1962, p. 221, para. 3).

reservations to the constituent instruments of international organizations—which will be covered by one or more specific draft guidelines—it is hard to see what prohibitions could derive "implicitly" from a treaty, except in the cases covered by subparagraphs (*a*) and (*b*)[759] of article 19,[760] and it must be recognized that subparagraph (*a*) concerns only reservations expressly prohibited by the treaty. Moreover, this interpretation appears to be compatible with the relative flexibility that pervades all the provisions of the 1969 Vienna Convention that deal with reservations.

(7) There is no problem—other than determining whether or not the declaration in question constitutes a reservation[761]—if the prohibition is clear and precise, in particular when it is a general prohibition, on the understanding, however, that there are relatively few such examples[762] even if some are famous, such as that in article 1 of the Covenant of the League of Nations: "The original Members of the League shall be those of the Signatories ... as shall accede without reservation to this Covenant."[763] Likewise, article 120 of the 1998 Rome Statute of the International Criminal Court states: "No reservations may be made to this Statute."[764] And similarly, article 26, paragraph 1, of the 1989 Basel Convention on the control of transboundary movements of hazardous wastes and their disposal states: "No reservation or exception may be made to this Convention."[765]

(8) Sometimes, however, the prohibition is more ambiguous. Thus, in accordance with paragraph 14 of the Final Act of the 1961 Geneva conference which adopted the European Convention on International Commercial Arbitration, "the delegations taking part in the negotiation of the European Convention on International Commercial Arbitration declare that their respective countries do not intend to make any reservations to the Convention":[766] not only is it not a categorical prohibition, but this declaration of intention is even made in an instrument separate from the treaty. In a case of this type, it could seem that reservations are not strictly speaking prohibited, but that if a State formulates a reservation, the other parties should, logically, object to it.

(9) More often, the prohibition is partial and relates to one or more specified reservations or one or more categories of reservations. The simplest (but rather rare)

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[759] The amendments of Spain (A/CONF.39/C.1/L.147, *Official Records of the United Nations Conference on the Law of Treaties, First and second sessions…*(footnote 725 above), p. 134, para. 177) and of Colombia and the United States (A/CONF.39/C.1/L.126 and Add.1, *ibid*.), aimed at reintroducing the idea of the "nature" of the treaty in subparagraph (*c*), were withdrawn by their authors or rejected by the Drafting Committee (see the reaction of the United States, *Official Records of the United Nations Conference on the Law of Treaties*, Second session, Vienna, 9 April–22 May 1969*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (document A/CONF.39/11/Add.1, United Nations publication, Sales No. E.70.V.6), p. 37). During the Commission's discussion of draft guideline 3.1.1, some members stated the view that certain treaties, such as the Charter of the United Nations, by their very nature excluded any reservations. The Commission nonetheless concluded that this idea was consistent with the principle enunciated in subparagraph (*c*) of article 19 of the Vienna Conventions and that, where the Charter was concerned, the requirement of the acceptance of the competent organ of the organization (see article 20, para. 3, of the Vienna Conventions) provided sufficient guarantees.

[760] This is also the final conclusion arrived at by C. Tomuschat, *loc. cit.* (footnote 754 above), p. 471.

[761] See draft guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretive declarations) and its commentary, adopted by the Commission at its fifty-first session, *Yearbook ... 1999*, vol. II (Part Two), pp. 107–109.

[762] Even in the area of human rights (see P.-H. Imbert, "Reservations and human rights conventions", *The Human Rights Review*, vol. VI, No. 1 (1981), pp. 28 *et seq.*, at p. 28, or W. A. Schabas, "Reservations to human rights treaties: time for innovation and reform", *Canadian Yearbook of International Law 1994*, pp. 39 *et seq.*, at p. 46). See, however, for example, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (article 9), the 1960 Convention against discrimination in education (article 9), Protocol No. 6 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty, of 1983 (article 4), or the 1987 European Convention for the prevention of torture and inhuman or degrading treatment or punishment (article 21), which all prohibit any reservations to their provisions. Reservation clauses in human rights treaties sometimes refer to the provisions of the 1969 Vienna Convention concerning reservations (cf. article 75 of the American Convention on Human Rights: "Pact of San José, Costa Rica")—which conventions containing no reservation clauses do implicitly—or reproduce its provisions (cf. article 28, paragraph 2, of the 1979 Convention on the Elimination of All Forms of Discrimination against Women or article 51, paragraph 2, of the 1989 Convention on the Rights of the Child).

[763] It could be maintained that this rule was set aside when the Council of the League recognized the neutrality of Switzerland (in this respect, see Mendelson, *loc. cit.* (footnote 751 above), pp. 140–141).

[764] However straightforward it may seem, this prohibition is not actually totally devoid of ambiguity: the highly regrettable article 124 of the Statute, which authorizes "a State on becoming a party [to] declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court" with respect to war crimes, constitutes an exception to the rule stated in article 120, for such declarations amount to reservations (see A. Pellet, "Entry into force and amendment of the Statute" in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, vol. I, Oxford University Press, 2002, pp. 145 *et seq.*, at p. 157); see also the European Convention on the service abroad of documents relating to administrative matters, whose article 21 prohibits reservations, while several other provisions authorize certain reservations. For other examples, see S. Spiliopoulou Åkermark, "Reservation clauses in treaties concluded within the Council of Europe", *International and Comparative Law Quarterly*, vol. 48 (July 1999), pp. 493–494; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 7th ed., Paris, Librairie générale de droit et de jurisprudence, 2002, p. 181; Imbert, *Les réserves aux traités …*, *op. cit.* (footnote 717 above), pp. 165–166; Horn, *op. cit.* (footnote 734 above), p. 113; Riquelme Cortado, *op. cit.* (footnote 722 above), pp. 105–108; and Schabas, *op. cit.* (footnote 762 above), p. 46.

[765] For a very detailed commentary, see A. Fodella, "The declarations of States parties to the Basel Convention", in P. Ziccardi *et al.* (eds.), *Comunicazioni e Studi*, vol. 22, Milan, Giuffrè, 2002, pp. 111–148; article 26, paragraph 2 of the Convention authorizes States parties to make "declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State". The distinction between the reservations of paragraph 1 and the declarations of paragraph 2 can prove laborious, but this is a problem of definition that does not in any way restrict the prohibition stated in paragraph 1: if a declaration made under paragraph 2 proves to be a reservation, it is prohibited. The combination of articles 309 and 310 of the 1982 United Nations Convention on the Law of the Sea poses the same problems and calls for the same responses (see, in particular, A. Pellet, "Les réserves aux conventions sur le droit de la mer", in *La mer et son droit—Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, Paris, Pedone, 2003, pp. 501 *et seq.*, at pp. 505–517; see also the commentary to draft guideline 3.1.2 below, footnote 787).

[766] Final Act of the Special Meeting of Plenipotentiaries for the purpose of negotiating and signing a European Convention on International Commercial Arbitration, United Nations, *Treaty Series*, vol. 484, p. 349. Example given by Imbert, *Les réserves aux traités …*, *op. cit.* (footnote 717 above), pp. 166–167.

situation is that of clauses listing the provisions of the treaty to which reservations are not permitted.[767] Examples are article 42 of the 1951 Convention relating to the Status of Refugees[768] and article XIV of the 1972 International Convention for Safe Containers (CSC).

(10) The situation is more complicated where the treaty does not prohibit reservations to specified provisions but excludes certain categories of reservations. An example of this type of clause is provided by article 78, paragraph 3, of the International Sugar Agreement of 1977: "Any Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which do not affect the economic functioning of this Agreement."

(11) The distinction between reservation clauses of this type and those excluding specific reservations was made in Sir Humphrey Waldock's draft in 1962.[769] For their part, the 1969 and 1986 Vienna Conventions do not make such distinctions, and, despite the uncertainty that prevailed in their *travaux préparatoires*, it should certainly be assumed that subparagraph (*a*) of article 19 covers all three situations that a more precise analysis can discern:

— Reservation clauses prohibiting all reservations;

— Reservation clauses prohibiting reservations to specified provisions;

— Lastly, reservation clauses prohibiting certain categories of reservations.

(12) This clarification seems all the more helpful in that the third of these situations poses problems (of interpretation)[770] of the same nature as those arising from the criterion of compatibility with the object and purpose of the treaty, which certain clauses actually reproduce expressly.[771] By indicating that these reservations, prohibited without reference to a specific provision of the treaty, still come under article 19, subparagraph (*a*), of the Vienna Conventions, the Commission seeks from the outset to emphasize the unity of the legal regime applicable to the reservations mentioned in the three subparagraphs of article 19.

[767] This situation is very similar to that in which the treaty specifies the provisions to which reservations are permitted; see paragraph (5) of the commentary to draft guideline 3.1.2, below, and the comments by Briggs with respect to article 17 of the draft articles on the law of treaties presented by the Drafting Committee at the Commission's fourteenth session, *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222.

[768] With regard to this provision, Imbert notes that the influence of the advisory opinion of the ICJ on *Reservations to the Convention on Genocide* (see footnote 714 above) adopted two months earlier is very clear, since such a clause effectively protects the provisions which cannot be the object of reservations (*Les réserves aux traités ...*, *op. cit.* (footnote 717 above), p. 167); see the other examples given, *ibid.*, or in paragraphs (5)–(8) of the commentary to draft guideline 3.1.2 below.

[769] First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 60, art. 17, para. 1 (*a*).

[770] "Whether a reservation is permissible under exceptions (*a*) or (*b*) will depend on interpretation of the treaty" (A. Aust, *op. cit.* (footnote 722 above), p. 110).

[771] See the examples given in footnote 762 above. This is a particular example of "categories of prohibited reservations"—in a particularly vague way, it is true.

3.1.2 *Definition of specified reservations*

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

Commentary

(1) A cursory reading of article 19, subparagraph (*b*), of the 1969 and 1986 Vienna Conventions might suggest that it represents one side of the coin and subparagraph (*a*) represents the other. The symmetry is far from total, however. To create such symmetry, it would have been necessary to stipulate that reservations other than those expressly provided for in the treaty were prohibited, but that is not the case. Subparagraph (*b*) contains two additional elements which prevent oversimplification. The implicit prohibition of certain reservations arising from this provision, which is considerably more complex than it seems, depends on the fulfilment of three conditions:

(*a*) The treaty's reservation clause must permit the formulation of reservations;

(*b*) the reservations permitted must be "specified"; and

(*c*) it must be specified that "only" those reservations "may be made".[772]

The purpose of draft guideline 3.1.2 is to clarify the meaning of the expression "specified reservations", which is not defined by the 1969 and 1986 Vienna Conventions. This definition could, however, have important consequences for the applicable legal regime, as, among other things, reservations which are not "specified" must pass the test of compatibility with the object and purpose of the treaty.[773]

(2) The origin of article 19, subparagraph (*b*), of the Vienna Conventions can be traced back to paragraph 3 of draft article 37 submitted to the Commission in 1956 by Fitzmaurice: "In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted."[774] Waldock took up that concept again in paragraph 1 (*a*) of draft article 17, which he proposed in 1962[775] and which the Commission used in paragraph 1 (*c*) of draft article 18. That draft article was adopted the same year[776] and, following a number of minor drafting changes, was incorporated into article 16, subparagraph (*b*), of the 1966 draft,[777] then into

[772] On this word, see paragraphs (6)–(7) of the commentary to draft guideline 3.1, above.

[773] See draft guideline 3.1.4 below.

[774] *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115; see also p. 127, para. 95.

[775] First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 60.

[776] Report of the Commission to the General Assembly, document A/5209, pp. 175–176. See paragraphs (3)–(4) of the commentary to draft guideline 3.1.1, above.

[777] See footnote 752 above.

article 19 of the 1969 Convention. That course of action did not go unchallenged, however, as during the Vienna Conference on the Law of Treaties a number of amendments were submitted with a view to deleting the provision[778] on the pretext that it was too "rigid"[779] or redundant because it duplicated subparagraph (*a*),[780] or that it had not been confirmed by practice;[781] all those amendments were, however, withdrawn or rejected.[782]

(3) The only change to subparagraph (*b*) was made by means of a Polish amendment inserting the word "only" after the word "authorizes", which was accepted by the Drafting Committee of the Vienna Conference on the Law of Treaties "[i]n the interest of greater clarity".[783] This bland description must not obscure the vast practical implications of this specification, which actually reverses the presumption made by the Commission and, in keeping with the Eastern countries' persistent desire to facilitate as much as possible the formulation of reservations, offers the possibility of doing so even when the negotiators have taken the precaution of expressly indicating the provisions in respect of which a reservation is permitted.[784] This amendment does not, however, exempt a reservation which is neither expressly permitted nor implicitly prohibited from the requirement to observe the criterion of compatibility with the object and purpose of the treaty.[785] Such a reservation may also be subject to objections on other grounds. This is why, in the wording of draft guideline 3.1.2, the Commission favoured the word "envisaged" over the word "authorized" to qualify the reservations in question, in contrast to the expression "reservation expressly authorized", as found in article 20, paragraph 1, of the Vienna Conventions.

(4) In practice, the types of clauses permitting reservations are comparable to those containing prohibitive provisions and pose the same kind of difficulties with regard to determining *a contrario* those reservations which may not be formulated:[786]

— Some of them authorize reservations to particular provisions, expressly and restrictively listed either affirmatively or negatively;

— Others authorize specified categories of reservations;

— Lastly, others (few in number) authorize reservations in general.

(5) Article 12, paragraph 1, of the 1958 Convention on the Continental Shelf appears to illustrate the first of those categories: "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive."[787] As Ian Sinclair noted, "[a]rticle 12 of the 1958 Convention did not provide for *specified reservations*, even though it may have specified articles to which reservations might

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[778] Amendments by Colombia and the United States (A/CONF.39/C.1/L.126 and Add.1) and the Federal Republic of Germany (A/CONF.39/C.1/L.128), which were specifically designed to delete subparagraph (*b*), and by Ceylon (A/CONF.39/C.1/L.139), France (A/CONF.39/C.1/L.169), Spain (A/CONF.39/C.1/L.147) and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115), which proposed major revisions of article 16 (or of articles 16 and 17) that would also have led to the disappearance of that provision (for the text of these amendments, see *Official Records of the United Nations Conference on the Law of Treaties*, First and second sessions… (footnote 725 above), pp. 133–134, paras. 174–177). During the Commission's discussion of the draft, certain members had also taken the view that that provision was unnecessary (see *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, Yasseen, p. 149, para. 18; Tunkin, *ibid.*, p. 150, para. 29; but, for a more nuanced position, see *ibid.*, p. 151, para. 33; or Ruda, p. 154, para. 70).

[779] According to the representatives of Poland and the United States at the twenty-first and twenty-second meetings of the Plenary Committee (10 and 11 April 1968, respectively), *Official Records of the United Nations Conference on the Law of Treaties, First session…* (footnote 728 above), p. 108, para. 8, and p. 118, para. 42); see also the statement made by the representative of the Federal Republic of Germany (*ibid.*, p. 109, para. 23).

[780] See the statement of the representative of Colombia, *ibid.*, p. 113, para. 68.

[781] See the statement of the representative of Sweden, *ibid.*, p. 117, para. 29.

[782] See *Official Records of the United Nations Conference on the Law of Treaties, First and second sessions…* (footnote 725 above), pp. 136–138, paras. 181–188. See also the explanations of the Expert Consultant, Sir Humphrey Waldock, *Official Records of the United Nations Conference on the Law of Treaties, First session…* (footnote 728 above), twenty-fourth meeting, 16 April 1968, p. 126, para. 6, and the results of the votes on those amendments, *ibid.*, twenty-fifth meeting, 16 April 1968, p. 135, paras. 23–25.

[783] A/CONF.39/C.1/L.136, *Official Records of the United Nations Conference on the Law of Treaties,* First and second sessions… (footnote 725 above), p. 134, para. 177 and p. 137, para. 183; see also *Official Records of the United Nations Conference on the Law of Treaties,* First session… (footnote 728 above), Committee of the Whole, 70th meeting, 14 May 1968, p. 415, para. 16. Already in 1965, during the Commission's discussion of draft article 18, subparagraph (*b*), as reviewed by the Drafting Committee, Castrén proposed inserting "only" after "authorizes" in subparagraph (*b*) (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 14, and 813th meeting, 29 June 1965, p. 264, para. 13; see also the similar proposal made by Yasseen, *ibid.*, para. 11), which, in the end, was not accepted following a further review by the Drafting Committee (see *ibid.*, 816th meeting, p. 283, para. 41).

[784] In this repsect, see Horn, *op. cit.* (footnote 734 above), p. 114; L. Lijnzaad, *Reservations to UN-Human Rights Treaties*: *Ratify and Ruin?*, T.M.C. Asser Instituut, Dordrecht, Martinus Nijhoff, 1995, p. 39; J. Ruda, *loc. cit.* (footnote 708 above), p. 181; or R. Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, vol. 3 (1970), pp. 299–300. Such restrictive formulas are not unusual: see, for example, article 17 of the 1961 Convention on the reduction of statelessness ("1. At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15; 2. No other reservations to this Convention shall be admissible") and the other examples given by Riquelme Cortado, *op. cit.* (footnote 722 above), pp. 128–129. On the significance of the reversal of the presumption, see also the statement of Patrick Lipton Robinson during the Commission's discussion of the law and practice relating to reservations to treaties at its forty-seventh session, *Yearbook ... 1995*, vol. I, 2402nd meeting, p. 158, para. 17.

[785] See below draft guideline 3.1.3 and the related commentary, in particular paragraphs (2)–(3).

[786] See above draft guideline 3.1.1 and the related commentary.

[787] Article 309 of the United Nations Convention on the Law of the Sea provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention" (on this provision, see Pellet, "Les réserves aux convention…", *loc. cit.* (footnote 765 above), pp. 505–511). A treaty may set a maximum number of reservations or provisions that can be subject to reservations (see, for example, article 25 of the 1967 European Convention on the adoption of children). These provisions may be compared with those authorizing parties to accept certain obligations or to choose between the provisions of a treaty, which are not reservation clauses *stricto sensu* (see draft guidelines 1.4.6. [1.4.6, 1.4.7] and 1.4.7. [1.4.8], and the related commentary, adopted by the Commission at its fifty-second session, *Yearbook … 2000*, vol. II (Part Two), pp. 112–116).

be made"[788] and neither the scope nor the effects of that authorization are self-evident, as demonstrated by the judgment of the ICJ in the *North Sea Continental Shelf* case[789] and, above all, by the arbitral award given in 1977 in the *English Channel* case.[790]

(6) In that case, the Arbitral Tribunal emphasized that:

> Article 12 [of the 1958 Geneva Convention on the Continental Shelf], by its clear terms, authorised any contracting State, in particular the French Republic, to make its consent to be bound by the Convention subject to reservations to articles other than Articles 1 to 3 inclusive.[791]

However,

> Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 and 3 … . Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorised the making of specific reservations could the parties to the Convention be understood as having accepted a particular reservation in advance. But that is not the case with Article 12, which authorises the making of reservations to articles other than Article 1 to 3 in quite general terms.[792]

(7) The situation is different when the reservation clause defines the categories of permissible reservations. Article 39 of the 1928 General Act of Arbitration (Pacific Settlement of International Disputes) provides an example of this:

> 1. In addition to the power given in the preceding article[793], a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph These reservations must be indicated at the time of accession.
>
> 2. These reservations may be such as to exclude from the procedure described in the present Act:
>
> (*a*) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said party may have a dispute;
>
> (*b*) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;
>
> (*c*) Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories.

As the ICJ pointed out in its judgment of 1978 in the *Aegean Sea Continental Shelf* case:

> When a multilateral treaty thus provides in advance for the making only of particular, designated categories of reservations, there is clearly a high probability, if not an actual presumption, that reservations made in terms used in the treaty are intended to relate to the corresponding categories in the treaty,

even when States do not "meticulously [follow] the pattern" set out in the reservation clause.[794]

(8) Another particularly famous and widely discussed example[795] of a clause authorizing reservations (which falls under the second category mentioned above)[796] is found in article 57 of the European Convention on Human Rights (article 64 prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby):

> (1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> (2) Any reservation made under this article shall contain a brief statement of the law concerned.

In this instance, the power to formulate reservations is limited by conditions relating to both form and content; in addition to the usual limitations *ratione temporis*,[797] a reservation to the European Convention on Human Rights must:

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[788] Sinclair, *op. cit.* (footnote 706 above), p. 73. On the distinction between specified and non-specified reservations, see also below paragraphs (11)–(13) of the commentary to the present draft guideline.

[789] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–41.

[790] *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, decision of 30 June 1977*, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 32–35, paras. 39–44.

[791] *Ibid*., p. 32, para. 39.

[792] *Ibid*., pp. 32–33.

[793] Article 38 provides that parties may accede to only parts of the General Act.

[794] *Aegean Sea Continental Shelf, Judgment of 19 December 1978, I.C.J. Reports 1978*, p. 3, at p. 23, para. 55.

[795] See A. Bonifazi, "La disciplina delle riserve alla Convenzione europea dei diritti dell'uomo", in *Les clauses facultatives de la Convention européenne des droits de l'homme (Minutes of the round table organized in Bari on 17 and 18 December 1973 by the Faculty of Law of the University of Bari)*, Bari, Levante, 1974, pp. 301–319; G. Cohen-Jonathan, *La Convention européenne des droits de l'homme*, Paris, Economica, 1989, pp. 85–94; J. A. Frowein, "Reservations to the European Convention on Human Rights", in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension—Studies in Honour of Gérard J. Wiarda*, Cologne, Carl Heymanns Verlag, 1988, pp. 193–200; P.-H. Imbert, "Reservations to the European Convention on Human Rights before the Strasbourg Commission: the *Temeltasch* case", *International and Comparative Law Quarterly*, vol. 33 (1984), pp. 558–595; Rolf Kühner, "Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention: Die Problematik des Art. 64 MRK am Beispiel der schweizerischen 'auslegenden Erklärung' zu Art. 6 Abs. 3 *lit*.e MRK", *Zeitschrift für ausländisches öffentlisches Recht und Völkerrecht*, vol. 42 (1982), pp. 58–92 (summary in English); S. Marcus-Helmons, "L'article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l'homme", *Revue de droit international et de droit comparé*, forty-fifth year, No. 1 (1968), pp. 7–26; M. J. M. Pires, *As reservas à Convenção europeia dos direitos do homem*, Coimbra, Almedina, 1997; R. Sapienza, "Sull'ammissibilità di riserve all'accettazione della competenza della Commissione europea dei diritti dell'uomo", *Rivista di diritto internazionale*, vol. 70, Nos. 3–4 (1987), pp. 641–654; and W. A. Schabas, "Article 64" in L.-E. Pettiti, E. Decaux and P.-H. Imbert (eds.), *La Convention européenne des droits de l'homme: commentaire article par article*, Paris, Economica, 1995, pp. 923–942.

[796] See above paragraph (4) of the commentary to the present draft guideline. For other examples, see Aust, *op. cit.* (footnote 722 above), pp. 109–110; Spiliopoulou Åkermark, *loc. cit.* (footnote 764 above), pp. 495–496; W. W. Bishop, Jr., "Reservations to treaties", *Recueil des cours: Collected courses of the Hague Academy of International Law*, vol. 103, 1961–II, pp. 323–324; or Daillier and Pellet, *op. cit.* (footnote 764 above), p. 181; see also the table of Council of Europe conventions showing clauses falling into each of the first two categories of permissible reservation clauses mentioned above in paragraph (4) of the commentary to the present draft guideline, in Riquelme Cortado, *op. cit.* (footnote 722 above), p. 125, and the other examples of partial authorizations given by this author, pp. 126–129.

[797] See the commentary to draft guideline 3.1, footnote 715 above.

— refer to a particular provision of the Convention;

— be justified by the state of legislation [in the reserving State] at the time that the reservation is formulated;

— not be "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope";[798] and

— be accompanied by a brief statement explaining "the scope of the Convention provision whose application a State intends to prevent by means of a reservation".[799]

Assessing whether each of these conditions has been met raises problems. It must surely be considered, however, that the reservations authorized by the European Convention on Human Rights are "specified" within the meaning of article 19 (*b*) of the 1969 and 1986 Vienna Conventions and that only such reservations are valid.

(9) It has been noted that the wording of article 57 of the European Convention on Human Rights is not fundamentally different[800] from that used, for example, in article 26, paragraph 1, of the 1957 European Convention on Extradition: "Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention", even though the latter could be interpreted as a general authorization. While, however, the type of reservations that can be formulated to the European Convention on Human Rights is "specified", here the authorization is restricted only by the exclusion of "across the board" reservations.[801]

(10) In fact, a general authorization of reservations[802] itself does not necessarily resolve all the problems. It leaves unanswered the question of whether the other parties may still object to reservations[803] and whether these authorized reservations[804] are subject to the test of compatibility with the object and purpose of the treaty.[805] The latter question is addressed by draft guideline 3.1.4,[806] which draws a distinction between specified reservations whose reservation clause defines the content and those which leave the content relatively open.

(11) This distinction is not self-evident. It caused particular controversy following the 1977 arbitration award in the *English Channel* case[807] and divided the Commission, whose members advocated different positions. Some reserving States thought that a reservation was "specified" if the treaty set precise limits within which it could be formulated; those criteria then superseded (but only in that instance) the criterion of the object and purpose.[808] Others pointed out that this occurred very exceptionally, perhaps only in the rare case of "negotiated reservations",[809] and, furthermore, that the Commission had not retained Mr. Rosenne's proposal that the expression "specified reservations", which he considered "unduly narrow", should be replaced by "reservations to specific provisions";[810] accordingly, it would be unrealistic to require the content of specified reservations to be established with precision by the treaty, otherwise subparagraph (*b*) would be rendered meaningless.[811] According to a third view, a compromise was possible between the undoubtedly excessive position that would require the content of the reservations envisaged to be precisely stated in the reservation clause and the position that equated a specified reservation with a "reservation expressly authorized by the treaty",[812] even though article 19, paragraph (*b*), and article 20, paragraph 1, of the Vienna Conventions use different expressions. Consequently, it was suggested that it should be recognized that reservations that were specified within the meaning of article 19, subparagraph (*b*) (and of draft guideline 3.1 (*b*)), must, on the one hand, relate to specific provisions and, on the other, fulfil certain conditions specified in the treaty, but without going so far as to require their content to be predetermined.[813]

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[798] *Belilos* v. *Switzerland, Judgement of 29 April 1988, Application no. 10328/83*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132, p. 25, para. 55.

[799] *Temeltasch* v. *Switzerland, Application No. 9116/80,* Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 31, 1983, p. 150, para. 90.

[800] Imbert, *Les réserves aux traités …*, *op. cit.* (footnote 717 above), p. 186; see also Riquelme Cortado, *op. cit.* (footnote 722 above), p. 122.

[801] Regarding this concept, see draft guideline 1.1.1 [1.1.4] adopted by the Commission at its fifty-first session and the related commentary, *Yearbook ... 1999*, vol. II (Part Two), pp. 93–95.

[802] For another even clearer example, see article 18, paragraph 1, of the 1983 European Convention on the compensation of victims of violent crimes: "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more reservations."

[803] This is sometimes expressly stated (see, for example, article VII of the 1953 Convention on the Political Rights of Women and the related comments by Riquelme Cortado, *op. cit.* (footnote 722 above), p. 121).

[804] It cannot be reasonably argued that subparagraph (*b*) could include "implicitly authorized" reservations, other than on the grounds that any reservations that are not prohibited are, *a contrario*, authorized, subject to the provisions of subparagraph (*c*).

[805] See the questions raised by Spiliopoulou Åkermark, *loc. cit.* (footnote 764 above), pp. 496–497, or Riquelme Cortado, *op. cit.* (footnote 722 above), p. 124.

[806] See the commentary to this draft guideline below.

[807] See footnote 790 above.

[808] See Bowett, *loc. cit.* (footnote 707 above), pp. 71–72.

[809] On this concept, see paragraph (11) of the commentary to guideline 1.1.8 (Reservations made under exclusionary clauses) adopted by the Commission at its fifty-second sesson, *Yearbook … 2000*, vol. II (Part Two), p. 111. See also W. P. Gormley, "The modification of multilateral conventions by means of 'negotiated reservations' and other 'alternatives': a comparative study of the ILO and Council of Europe–part one", *Fordham Law Review*, vol. 39 (1970–1971), pp. 59 *et seq.*, at pp. 75–76. See also the annex to the European Convention on Civil Liability for Damage Caused by Motor Vehicles, which accords to Belgium the faculty over a period of three years to make a specific reservation; or article 32, paragraph 1 (*b*), of the 1989 European Convention on Transfrontier Television, which exclusively grants the United Kingdom the ability to formulate a specified reservation (examples provided by Spiliopoulou Åkermark, *loc. cit.* (footnote 764 above), p. 499). The main example given by Bowett to illustrate his theory relates precisely to a "negotiated reservation", *loc. cit.* (footnote 707 above), p. 71.

[810] *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 264, para. 7. Imbert points out, however, that, even though Mr. Rosenne's proposal was not accepted, Sir Humphrey Waldock himself had also drawn this parallel (*ibid*., p. 265, para. 27); see P.-H. Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire français de droit international*, vol. 24 (1978), pp. 29–58, at p. 52.

[811] Imbert, "La question des réserves…" (footnote 810 above), pp. 50–53.

[812] In this respect, see *ibid.*, p. 53.

[813] See the tenth report on reservations to treaties, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, para. 49.

(12) The case law was not very helpful in reconciling those opposing views. The arbitral award of 1977 in the *English Channel* case, invoked by the proponents of both arguments, says more about what a specified reservation is not than what it is.[814] Indeed, the result of all this is that the mere fact that a reservation clause authorizes reservations to particular provisions of the treaty is not enough to "specify" these reservations within the meaning of article 19, subparagraph (*b*) of the Vienna Conventions.[815] The Tribunal, however, confined itself to requiring reservations to be "specific",[816] without indicating what the test of that specificity was to be. In addition, during the Vienna Conference on the Law of Treaties, K. Yasseen, Chairperson of the Drafting Committee, assimilated specified reservations to those which were expressly authorized by the treaty[817] with no further clarification.

(13) Accordingly, most members of the Commission held that a reservation should be considered specified if a reservation clause indicated the treaty provisions in respect of which a reservation was possible or, to take into account draft guideline 1.1.1 [1.1.4] on "across the board" reservations,[818] indicated that reservations were possible to the treaty as a whole in certain specific aspects. The divergence between these different points of view should not be overstated, however; while the term "envisaged" reservations, which was preferred to "authorized" reservations, undoubtedly gives more weight to the broad-brush approach favoured by the Commission, at the same time, in draft guideline 3.1.4, the Commission introduced a distinction between specified reservations with defined content and those whose content is not defined, the latter being subject to the test of compatibility with the object and purpose of the treaty.

3.1.3 *Permissibility of reservations not prohibited by the treaty*

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

Commentary

(1) Draft guidelines 3.1.3 and 3.1.4 specify the scope of article 19, subparagraphs (*a*) and (*b*), of the Vienna Conventions (the 1986 text of which is repeated in draft guideline 3.1). They make explicit what the Conventions leave implicit: that failing a contrary provision in the treaty—and in particular if the treaty authorizes specified reservations as defined in draft guideline 3.1.2—any reservation must satisfy the basic requirement, set forth in article 19, subparagraph (*c*), of not being incompatible with the object and purpose of the treaty.

(2) This principle is one of the fundamental elements of the flexible system established by the Vienna regime, moderating the "radical relativism"[819] resulting from the pan-American system, which reduces multilateral treaties to a network of bilateral relations,[820] while avoiding the rigidity resulting from the system of unanimity.

(3) The notion of the object and purpose of the treaty,[821] which first appeared in connection with reservations in the 1951 advisory opinion of the ICJ,[822] has become increasingly accepted. It is now the fulcrum between the need to preserve the essence of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of States. There is, however, a major difference between the role of the criterion of compatibility with the object and purpose of the treaty according to the 1951 advisory opinion, on the one hand, and article 19, subparagraph (*c*), of the 1969 Vienna Convention, on the other.[823] In the advisory opinion, the criterion applied equally to the formulation of reservations and to objections: "The object and purpose of the [Convention on the Prevention and Punishment of the Crime of Genocide] thus limit both the freedom of making reservations and that of objecting to them."[824] In the 1969 Vienna Convention, it is restricted to reservations: article 20 does not restrict the ability of other contracting States to formulate objections.

(4) While there is no doubt that this requirement that a reservation must be compatible with the object and purpose of the treaty now represents a rule of customary law which is unchallenged,[825] its content remains vague[826]

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[814] See above, paragraph (6) of the commentary to the present draft guideline and footnote 790.

[815] See above, paragraphs (6)–(7) of the commentary to the present draft guideline.

[816] In reality, it is the authorization that must apply to specific or specified reservations—terms which the Tribunal considered to be synonymous, in the *English Channel* case (see footnote 790 above).

[817] See *Official Records of the United Nations Conference on the Law of Treaties, First session*... (footnote 728 above), seventieth meeting, 14 May 1968, p. 416, para. 23.

[818] See *Yearbook ... 1999*, vol. II (Part Two), pp. 93–95.

[819] P. Reuter, *Introduction au droit des traités*, *op. cit.* (footnote 725 above), p. 73, para. 130. This author applies the term to the system adopted by the ICJ in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 714 above); the criticism applies perfectly well, however, to the pan-American system.

[820] On the pan-American system, see the bibliography in Imbert, *Les réserves aux traités ...*, *op. cit.* (footnote 717 above), pp. 485–486. See also, in addition to the description by Imbert himself (*ibid*., pp. 33–38), M. M. Whiteman, *Digest of International Law*, vol. 14 (1970), pp. 141–144, or Ruda, *loc. cit.* (footnote 708 above), pp. 115–133.

[821] This notion will be defined in draft guideline 3.1.5.

[822] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 714 above), pp. 24 and 26.

[823] See Coccia, *loc. cit.* (footnote 731 above), p. 9; Lijnzaad, *op. cit.* (footnote 784 above), p. 40; M. Rama-Montaldo, "Human rights conventions and reservations to treaties", in *Héctor Gros Espiell* Amicorum Liber*: Human Person and International Law*, vol. II, Brussels, Bruylant, 1997, pp. 1265–1266; or Sinclair, *op. cit.* (footnote 706 above), p. 61.

[824] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 714 above), p. 24.

[825] See the many arguments to that effect given by Riquelme Cortado, *op. cit.* (footnote 722 above), pp. 138–143. See also the preliminary conclusions of the Commission in 1997, in which it reiterated its view that "articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and of the Vienna Convention on the Law of Treaties between States and Inernational Organizations or between International Organizations of 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations" (*Yearbook ... 1997*, vol. II (Part Two), p. 57, first conclusion).

[826] See draft guidelines 3.1.5 to 3.1.13 proposed by the Special Rapporteur in his tenth report on reservations to treaties, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2.

and there is some uncertainty as to the consequences of incompatibility.[827] Moreover, article 19 of the 1969 Vienna Convention does not dispel the ambiguity as to its scope of application.

(5) The principle set forth in article 19, subparagraph (*c*), whereby a reservation incompatible with the object and purpose of the treaty may not be formulated, is of a subsidiary nature since it applies only in cases not covered in article 20, paragraphs 2 and 3, of the Convention[828] and where the treaty itself does not resolve the reservations issue.

(6) If the treaty does regulate reservations, a number of cases must be distinguished which offer different answers to the question whether the reservations concerned are subject to the test of compatibility with the object and purpose of the treaty. In two of these cases, the answer is clearly negative:

— There is no doubt that a reservation expressly prohibited by the treaty cannot be held to be valid on the pretext that it is compatible with the object and purpose of the treaty;[829]

— The same applies to "specified" reservations that are expressly authorized by the treaty, with a defined content: they are automatically valid without having to be accepted by the other contracting States[830] and they are not subject to the test of compatibility with the object and purpose of the treaty.[831]

In the Commission's view, these obvious truths are not worth mentioning in separate provisions of the Guide to Practice; they follow directly and inevitably from article 19, subparagraph (*c*), of the Vienna Conventions, the text of which is repeated in draft guideline 3.1.

(7) The same is not true of two other cases which arise *a contrario* out of the provisions of article 19, subparagraphs (*a*) and (*b*):

— Those in which a reservation is authorized because it does not fall under the category of prohibited reservations (subparagraph (*a*));

— Those in which a reservation is authorized without being "specified" within the meaning of subparagraph (*b*) as spelt out in draft guideline 3.1.2.

(8) In both these cases, it cannot be presumed that treaty-based authorization to formulate reservations offers States or international organizations *carte blanche* to formulate any reservation they wish, even if it would leave the treaty bereft of substance.

(9) On the subject of implicitly authorized reservations, Sir Humphrey Waldock recognized, in his fourth report on the law of treaties, that "[a] conceivable exception [to the principle of automatic validity of reservations permitted by the treaty] might be where a treaty expressly forbids certain specified reservations and thereby implicitly permits others; for it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations". However, he excluded that eventuality not because this was untrue but because "this may, perhaps, go too far in refining the rules regarding the intentions of the parties, and there is something to be said for keeping the rules in article 18 [which became article 19 of the Convention] as simple as possible".[832] These considerations do not apply to the Guide to Practice, the aim of which is precisely to provide States with coherent answers to all questions they may have in the area of reservations.

(10) This is why draft guideline 3.1.3 stipulates that reservations which are implicitly authorized because they are not formally excluded by the treaty must be compatible with the object and purpose of the treaty. It would be paradoxical, to say the least, if reservations to treaties containing reservations clauses should be allowed more liberally than in the case of treaties which contain no such clauses.[833] Thus the criterion of compatibility with the object and purpose of the treaty applies.

3.1.4 *Permissibility of specified reservations*

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

Commentary

(1) Draft guideline 3.1.3 states that reservations not prohibited by the treaty are still subject to the criterion of compatibility with the object and purpose of the treaty. Draft guideline 3.1.4 does likewise in the case of specified reservations in the sense of draft guideline 3.1.1 where the treaty does not define the content of the reservation: the same problem arises, and the considerations put forward in support of draft guideline 3.1.3 apply *mutatis mutandis*.

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[827] See draft guidelines 3.3 to 3.3.4 proposed by the Special Rapporteur in his tenth report, *ibid.*

[828] In the case of treaties with limited participation and the constituent instruments of international organizations. These cases do not constitute instances of implicit prohibitions of formulating reservations; they reintroduce the system of unanimity for particular types of treaties.

[829] In its observations on the draft articles on the law of treaties adopted on first reading by the Commission, Canada had suggested that "consideration should be given to extending the criterion of 'compatibility with the object and purpose' equally to reservations made pursuant to express treaty provisions in order not to have different criteria for cases where the treaty is silent on the making of reservations and cases where it permits them" (fourth report of the Special Rapporteur on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 46). That proposal, which was not very clear, was not retained by the Commission; cf. the clearer proposals along the same lines by Briggs in *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222, paras. 13 and 14, and *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 264, para. 10; or by Ago (*contra*), *ibid.*, para. 16.

[830] See paragraph 1 of article 20 of the 1969 Vienna Convention.

[831] See above draft guideline 3.1.2 and the commentary thereto.

[832] *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 50, para. 4.

[833] In that vein, see the statement of Rosenne during the Commission's debate at its seventeenth session, *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 10.

(2) The Polish amendment to subparagraph (*b*) of article 19, adopted by the Vienna Conference on the Law of Treaties in 1968, restricted the possibility of implicit prohibition of reservations to treaties which provided that "*only* specified reservations which do not include the reservation in question" may be formulated.[834] But it does not follow that reservations thus authorized may be made at will: the arguments applicable to non-prohibited reservations[835] apply here, and if one accepts the broad definition of specified reservations favoured by the majority of Commission members,[836] a distinction must be drawn between reservations whose content is defined in the treaty itself and those which are permitted in principle but which there is no reason to suppose should be allowed to deprive the treaty of its object or purpose. The latter must be subject to the same general conditions as reservations to treaties which do not contain specific clauses.

(3) The modification made to article 19, subparagraph (*c*) of the 1969 Vienna Convention following the Polish amendment in fact goes in that direction. In the Commission's text, subparagraph (*c*) was drafted as follows: "(*c*) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty." [837] This was consistent with subparagraph (*b*), which prohibited the formulation of reservations other than those authorized by a reservations clause. Once an authorization was no longer interpreted *a contrario* as automatically excluding other reservations, the formula could not be retained;[838] it was therefore changed to the current wording by the Drafting Committee of the Vienna Conference.[839] The result is, *a contrario*, that if a reservation does not fall within the scope of subparagraph (*b*) (because its content is not specified), it is subject to the test of compatibility with the object and purpose of the treaty.

(4) That was, indeed, the reasoning followed by the arbitral tribunal which settled the *English Channel* dispute in deciding that the mere fact that article 12 of the Convention on the Continental Shelf authorized certain reservations without specifying their content[840] did not necessarily mean that such reservations were automatically valid.[841]

(5) In such cases, the validity of the reservation "cannot be assumed simply on the ground that it is, or purports to be, a reservation to an article to which reservations are permitted".[842] Its validity must be assessed in the light of its compatibility with the object and purpose of the treaty.[843]

(6) *A contrario*, it goes without saying that when the content of a specified reservation is indeed indicated in the reservations clause itself, a reservation consistent with that provision is not subject to the test of compatibility with the object and purpose of the 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 validity and effects of such statements under the rules applicable to them.

Commentary

(1) This draft guideline was provisionally adopted by the Commission at its fiftieth session, in 1998, in a form which referred only to reservations. The related draft commentary indicated that its title and placement in the Guide to Practice would be determined at a later stage and that the Commission would consider the possibility of referring under a single caveat to both reservations and interpretative declarations, which, in the view of some members, posed identical problems.[844] At its fifty-first session, the plenary Commission adopted this approach, deeming it necessary to clarify and specify the scope of the entire set of draft guidelines relating to the definition of all unilateral statements which are envisaged, in order to make their particular object clear.[845]

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[834] See above paragraph (3) of the commentary to draft guideline 3.1.2 and footnote 783.

[835] See above paragraph (9) of the commentary to draft guideline 3.1.3.

[836] See above paragraph (13) of the commentary to draft guideline 3.1.2.

[837] *Yearbook ... 1966*, vol. II, p. 202 (art. 16).

[838] Poland had not, however, put forward any amendment to subparagraph (*c*), drawing the consequences from the amendment it had successfully proposed for subparagraph (*b*). An amendment by Viet Nam, however, intended to delete the phrase "in cases where the treaty contains no provisions regarding reservations" (A/CONF.39/C.1/L.125, *Official Records of the United Nations Conference on the Law of Treaties, First and second sessions…* (footnote 725 above), p. 134, para. 177), was rejected by the plenary Commission (*ibid.*, p. 136, para. 182).

[839] Curiously, the reason given by the Chairperson of the Drafting Committee makes no connection between the modifications made to subparagraphs (*b*) and (*c*); Yasseen merely stated that "[s]ome members of the Committee had considered that a treaty might conceivably contain a provision on reservation which did not fall into any of the categories contemplated in paragraphs (*a*) and (*b*)" (*Official Records of the United Nations Conference on the Law of Treaties, First session…* (footnote 728 above), Committee of the Whole, seventieth meeting, 14 May 1968, p. 415, para. 17). Cf. a remark by Briggs in 1965 to the same effect during discussions in the Commission at its seventeenth session, *Yearbook ... 1965*, vol. I, 796th meeting, 4 June 1965, p. 146, para. 37.

[840] See above paragraph (5) of the commentary to draft guideline 3.1.2 and footnote 790.

[841] See the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (footnote 790 above), p. 32, para. 39. See also above paragraph (6) of the commentary to draft guideline 3.1.2.

[842] Bowett, *loc. cit.* (footnote 707 above), p. 72. In the same vein, see Ruda, *loc. cit.* (footnote 708 above), p. 182; or G. Teboul, "Remarques sur les réserves aux conventions de codification", *Revue générale de droit international public*, *vol. 86 (*1982), pp. 691–692. *Contra:* Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 …", *loc. cit.* (footnote 810 above), pp. 50–53; this opinion, very well argued, does not sufficiently take into account the consequences of the modification made to subparagraph (*c*) of article 19 of the 1969 Vienna Convention at the Vienna Conference on the Law of Treaties (see above, paragraph (3) of the commentary to the present draft guideline).

[843] C. Tomuschat gives a pertinent example: "If, for example, a convention on the protection of human rights prohibits in a 'colonial clause' the exception of dependent territories from the territorial scope of the treaty, it would be absurd to suppose that consequently reservations of any kind, including those relating to the most elementary guarantees of individual freedom, are authorised, even if by these restrictions the treaty would be deprived of its very substance" (*loc. cit.* (footnote 754 above), p. 474).

[844] *Yearbook ... 1998*, vol. II (Part Two), pp. 107–108.

[845] See *Yearbook ... 1999*, vol. II (Part Two), p. 126 (paragraph (1) of the commentary to draft guideline 1.6).

(2) As originally worded, draft guideline 1.6 read: "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." At the fifty-seventh session, however, some members argued that the word "permissibility" was not appropriate: in international law, an internationally wrongful act entailed its author's responsibility,[846] and that was plainly not the case of the formulation of reservations that did not fulfil the conditions relating to form or substance that the Vienna Conventions imposed on reservations. At its fifty-eighth session, the Commission decided to replace "permissibility" by "validity", a term the majority of members considered more neutral. The commentary to draft guideline 1.6 was amended accordingly.[847]

(3) Defining is not the same as regulating. As "[a] precise statement of the essential nature of a thing",[848] the sole function of a definition is to determine the general category in which a given statement should be classified. However, this classification does not in any way prejudge the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. *A contrario*, it is not a reservation if it does not meet the criteria set forth in these draft guidelines, but this does not necessarily mean that such statements are valid (or invalid) from the standpoint of other rules of international law. The same is true of interpretative declarations, which might conceivably not be valid either because they would alter the nature of the treaty or because they were not formulated at the required time,[849] etc.[850]

(4) Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime, in the first place, for the assessment of its validity. It is only once a particular instrument has been defined as a reservation (or an interpretative declaration, either simple or conditional) that it can be decided whether it is valid, that its legal scope can be evaluated and that its effect can be determined. However, this validity and these effects are not otherwise affected by the definition, which requires only that the relevant rules be applied.

(5) For example, the fact that draft guideline 1.1.2 indicates that a reservation "may be formulated" in all the cases referred to in draft guideline 1.1 and in article 11 of the 1969 and 1986 Vienna Conventions does not mean that such a reservation is necessarily valid; its validity depends upon whether it meets the conditions stipulated in the law on reservations to treaties and, in particular, those stipulated in article 19 of the 1969 and 1986 Vienna Conventions. Similarly, the Commission's confirmation of the well-established practice of "across the board" reservations in draft guideline 1.1.1 [1.1.4] is in no way meant to constitute a decision on the validity of such a reservation in a specific case, which would depend on its contents and context; the sole purpose of the draft is to show that a unilateral statement of such a nature is indeed a reservation and, as such, subject to the legal regime governing reservations.

(6) The "rules applicable" referred to in draft guideline 1.6 are, first of all, the relevant rules in the 1969, 1978 and 1986 Vienna Conventions and, in general, the customary rules applicable to reservations and to interpretative declarations, which this Guide to Practice is intended to codify and develop progressively in accordance with the Commission's mandate, and those relating to other unilateral statements which States and international organizations may formulate in respect of treaties, but which are not covered in the Guide to Practice.

(7) More generally, all the draft guidelines adopted thus far are interdependent and cannot be read and understood in isolation from one another.

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

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

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

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 established in the case of a reservation that was manifestly "invalid" 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 the first paragraph of draft guideline 2.1.7 did, while precluding him from reacting in the case of a reservation that was manifestly impermissible from a substantive viewpoint (in particular, when the conditions specified in article 19 of the Vienna Conventions were not met).

(2) However, allowing him to intervene in the latter case would constitute a progressive development of international law, which, it had to be acknowledged, departed from the spirit in which the provisions of the Vienna Conventions on the functions of depositaries had been drawn

[846] Cf. article 1 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 32, and General Assembly resolution 56/83 of 12 December 2001, annex.

[847] And likewise the text of and commentary to draft guideline 2.1.8. For the original wording of the commentary, see *Yearbook ... 1999*, vol. II (Part Two), p. 126.

[848] *The Oxford English Dictionary*, 2nd ed., Oxford, Clarendon Press, 1989.

[849] This problem may very likely arise in connection with conditional interpretative declarations (see draft guideline 1.2.1 [1.2.4]).

[850] The same may obviously be said about unilateral statements which are neither reservations nor interpretative declarations, referred to in section 1.4.

up.[851] That is why, during its fifty-third session, the Commission considered it useful to consult Member States in the Sixth Committee of the General Assembly about 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".[852]

(3) The nuanced responses given to this question by the delegations to the Sixth Committee inspired the wording of draft guideline 2.1.8. Generally speaking, States 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 thereof. Some of the delegations that spoke stressed that the depositary must demonstrate impartiality and neutrality in the exercise of his functions and should therefore limit himself to transmitting to the parties the reservations that were formulated. However, a number of representatives to the Sixth Committee expressed the view that, when a reservation was manifestly not valid, it was incumbent upon the depositary to refuse to communicate it or at least to first inform the author of the reservation of his position and, if the author maintained the reservation, to communicate it and draw the attention of the other parties to the problem.

(4) Most 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 him to communicate the text of a manifestly invalid 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 his opinion, affected it. Nevertheless, it was to be understood that, if the author of the reservation maintained it, the normal procedure would resume and the reservation should be transmitted, with an indication of 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 reservation that is not manifestly valid in terms of substance into line with the procedure to be followed in the case of reservations that present 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 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 "invalidity" invoked by the depositary is based on subparagraphs (*a*) and (*b*) of article 19 of the 1969 and 1986 Vienna Conventions (a reservation prohibited by the treaty, or not provided for in a treaty that authorizes only certain specific reservations). Other members consider that the only real problem is that of the compatibility of the reservation with the object and purpose of the treaty (subparagraph (*c*) of article 19). The majority considered that this procedure applied to all the subparagraphs and therefore the Commission did not consider it justified to distinguish among the different types of invalidity listed in article 19.

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

(7) Although the Commission initially used the word "impermissible" to characterize reservations covered by the provisions of article 19 of the Vienna Conventions,[853] some members pointed out that the word was not appropriate in that case: in international law, an internationally wrongful act entails its author's responsibility,[854] but this is plainly not the case with reservations which are contrary to the provisions of the treaty to which they relate or which are incompatible with its object and purpose or which do not respect the stipulations as to form or time limits laid down by the Vienna Conventions. At its fifty-eighth session, the Commission therefore decided to replace the words "permissible", "impermissible", "permissibility" and "impermissibility" by "valid", "invalid", "validity" and "invalidity", and to amend this commentary accordingly.[855]

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[851] See paragraphs (9)–(10) of the commentary to draft guideline 2.1.7.

[852] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 18, para. 25.

[853] For the original version of draft guideline 2.1.8 [2.1.7 *bis*] and the commentary thereto, see *Yearbook … 2002*, vol. II (Part Two), pp. 45–46.

[854] Cf. draft article 1 of the draft articles on responsibility of States for internationally wrongful acts (footnote 846 above).

[855] The text of and commentary to draft guideline 1.6 have been similarly amended.

Chapter IX

UNILATERAL ACTS OF STATES

A. Introduction

160. In the report of the Commission to the General Assembly on the work of its forty-eighth session (1996), the Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.[856]

161. The General Assembly, in paragraph 13 of resolution 51/160 of 16 December 1996, *inter alia*, invited the Commission to further examine the topic "Unilateral acts of States" and to indicate its scope and content.

162. At its forty-ninth session (1997), the Commission established an open-ended working group on the topic which reported to the Commission on the admissibility and feasibility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.[857]

163. Also at its forty-ninth session, the Commission appointed Mr. Víctor Rodríguez Cedeño, Special Rapporteur on the topic.[858]

164. The General Assembly, in paragraph 8 of its resolution 52/156 of 15 December 1997, endorsed the Commission's decision to include the topic in its work programme.

165. From its fiftieth session (1998) to its fifty-seventh session (2005), the Commission received and considered eight reports from the Special Rapporteur.[859]

166. The Commission also reconvened the Working Group on unilateral acts of States from its fiftieth session (1998) to its fifty-third session (2001) and from its fifty-fifth session (2003) to its fifty-seventh session (2005). The Working Group in its report at the fifty-sixth session (2004) established a grid which would permit it to use uniform analytical tools.[860] Individual members of the Working Group took up a number of studies, which were carried out in accordance with the established grid. These studies were transmitted to the Special Rapporteur for the preparation of his eighth report. The Commission requested the Working Group at the fifty-seventh session (2005) to consider the points on which there was general agreement and which might form the basis for preliminary conclusions or proposals on the topic.

B. Consideration of the topic at the present session

167. At the present session, the Commission had before it the Special Rapporteur's ninth report (A/CN.4/569 and Add.1) which it considered at its 2886th, 2887th and 2888th meetings on 3, 4 and 5 July 2006.

168. The ninth report of the Special Rapporteur comprised two parts. The first part related to the causes of invalidity,[861]

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[856] *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, pp. 97–98, para. 248, and Annex II, p. 133.

[857] *Yearbook ... 1997*, vol. II (Part Two), A/52/10, pp. 64–65, paras. 194 and 196–210.

[858] *Ibid*., pp. 66 and 71, paras. 212 and 234.

[859] First report: *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486; second report: *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1; third report: *Yearbook … 2000*, vol. II (Part One), document A/CN.4/505; fourth report: *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519; fifth report: *Yearbook … 2002*, vol. II (Part One), document A/CN.4/525 and Add.1–2; sixth report: *Yearbook … 2003*, vol. II (Part One), document A/CN.4/534; seventh report: *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/542; and eighth report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/557.

[860] The grid included the following elements: date; author/organ; competence of author/organ; form; content; context and circumstances; aim; addressees; reactions of addressees; reactions of third parties; basis; implementation; modification; termination/revocation; legal scope; decision of a judge or an arbitrator; comments; literature, *Yearbook ... 2004*, vol. II (Part Two), p. 96, para. 247 and footnote 516.

[861] "Principle 5.

"*Invalidity of an act formulated by a person not qualified to do so*

"A unilateral act formulated by a person not authorized or qualified to do so may be declared invalid, without prejudice to the possibility that the State from which the act was issued may confirm it in accordance with guiding principle 4."

"Principle 6.

"*Invalidity of a unilateral act that conflicts with a norm of fundamental importance to the domestic law of the State formulating it*

"A State that has formulated a unilateral act may not invoke as grounds for invalidity the fact that the act conflicts with its domestic law, unless it conflicts with a norm of fundamental importance to its domestic law and the contradiction is manifest."

"Principle 7.

"*Invalidity of unilateral acts*

"1. (*a*) A State that is the author of a unilateral act may not invoke error as grounds for declaring the act invalid, unless the act was formulated on the basis of an error of fact or a situation that was assumed by the State to exist at the time when the act was formulated and that fact or that situation formed an essential basis of its consent to be bound by the unilateral act.

"(*b*) The foregoing shall not apply if the author State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of the possibility of such an error.

"2. Fraud may be invoked as grounds for declaring a unilateral act invalid if the author State was induced to formulate the act by the fraudulent conduct of another State.

"3. Corruption of the representative of the State may be invoked as grounds for declaring a unilateral act invalid if the act was formulated owing to the corruption of the person formulating it.

"4. Coercion of the person who formulated a unilateral act may be invoked as grounds for declaring its invalidity if that person formulated it as a result of acts or threats directed against him or her.

"5. Any unilateral act formulated as a result of the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations is invalid.

"6. Any unilateral act which at the time of its formulation is contrary to (or conflicts with) a peremptory norm of general international law (*jus cogens*) is invalid."