

## Chapter VI

### RESERVATIONS TO TREATIES

#### A. Introduction

67. The Commission, at its forty-fifth session (1993), decided to include the topic “The law and practice relating to reservations to treaties”<sup>197</sup> in its programme of work and at its forty-sixth session (1994), appointed Mr. Alain Pellet Special Rapporteur for the topic.<sup>198</sup>

68. At the forty-seventh session (1995), following the Commission’s consideration of his first report,<sup>199</sup> the Special Rapporteur summarized the conclusions drawn, including a change of the title of the topic to “Reservations to treaties”; the form of the results of the study to be undertaken, 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 1978 Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter “1986 Vienna Convention”).<sup>200</sup> 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. With regard to the Guide to Practice, 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. At the same session, the Commission, in accordance with its earlier practice,<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup>

<sup>197</sup> The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission.

<sup>198</sup> See *Yearbook ... 1994*, vol. II (Part Two), para. 381.

<sup>199</sup> *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470.

<sup>200</sup> *Ibid.*, vol. II (Part Two), para. 487.

<sup>201</sup> See *Yearbook ... 1983*, vol. II (Part Two), para. 286.

<sup>202</sup> See *Yearbook ... 1995*, vol. II (Part Two), para. 489. The questionnaires addressed 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.

<sup>203</sup> As of 31 July 2008, 33 States and 26 international organizations had answered the questionnaire.

69. At its forty-eighth (1996) and its forty-ninth (1997) sessions, the Commission had before it the Special Rapporteur’s second report,<sup>204</sup> to which was annexed a draft resolution 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.<sup>205</sup> At the latter session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.<sup>206</sup> In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission’s preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

70. From its fiftieth session (1998) to its fifty-ninth session (2007), the Commission considered 10 more reports<sup>207</sup> by the Special Rapporteur and provisionally adopted 85 draft guidelines and the commentaries thereto.

#### B. Consideration of the topic at the present session

71. At the present session, the Commission had before it the thirteenth report of the Special Rapporteur (A/CN.4/600) on reactions to interpretative declarations. The Commission also had before it a note by the Special Rapporteur on draft guideline 2.1.9, “Statement of reasons for reservations”,<sup>208</sup> which had been submitted at the end of the fifty-ninth session.

72. The Commission began by considering the note of the Special Rapporteur at its 2967th meeting on

<sup>204</sup> *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478.

<sup>205</sup> *Ibid.*, vol. II (Part Two), para. 136 and footnote 238.

<sup>206</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 57–58, para. 157.

<sup>207</sup> 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; tenth report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2; eleventh report: *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574; and twelfth report: *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584. See a detailed historical presentation of the third to ninth reports in *Yearbook ... 2004*, vol. II (Part Two), paras. 257–269.

<sup>208</sup> *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/586.

27 May 2008. It decided at that same meeting to refer the new draft guideline 2.1.9 to the Drafting Committee.

73. The Commission considered the thirteenth report of the Special Rapporteur at its 2974th to 2978th meetings, from 7 to 15 July 2008.

74. At its 2978th meeting, on 15 July 2008, the Commission decided to refer draft guidelines 2.9.1 (including the second paragraph of draft guideline 2.9.3) to 2.9.10 to the Drafting Committee, while emphasizing that draft guideline 2.9.10 was without prejudice to the subsequent retention or otherwise of the draft guidelines on conditional interpretative declarations. The Commission also hoped that the Special Rapporteur would prepare draft guidelines on the form, statement of reasons for and communication of interpretative declarations.

75. At its 2970th meeting on 3 June 2008, the Commission considered and provisionally adopted draft guidelines 2.1.6 (Procedure for communication of reservations) (as amended<sup>209</sup>), 2.1.9 (Statement of reasons [for reservations]), 2.6.6 (Joint formulation [of objections to reservations]), 2.6.7 (Written form), 2.6.8 (Expression of intention to preclude the entry into force of the treaty), 2.6.9 (Procedure for the formulation of objections), 2.6.10 (Statement of reasons), 2.6.13 (Time period for formulating an objection), 2.6.14 (Conditional objections), 2.6.15 (Late objections), 2.7.1 (Withdrawal of objections to reservations), 2.7.2 (Form of withdrawal), 2.7.3 (Formulation and communication of the withdrawal of objections to reservations), 2.7.4 (Effect on reservation of withdrawal of an objection), 2.7.5 (Effective date of withdrawal of an objection), 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation), 2.7.7 (Partial withdrawal of an objection), 2.7.8 (Effect of a partial withdrawal of an objection) and 2.7.9 (Widening of the scope of an objection to a reservation).

76. At its 2974th meeting, on 7 July 2008, the Commission considered and provisionally adopted draft guidelines 2.6.5 (Author [of an objection]), 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation), 2.6.12 (Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty) and 2.8 (Forms of acceptance of reservations).

77. At its 2988th meeting on 31 July 2008, the Commission took note of draft guidelines 2.8.1 to 2.8.12 as provisionally adopted by the Drafting Committee.

78. At its 2991st to 2993rd meetings, on 5 and 6 August 2008, the Commission adopted the commentaries to the above-mentioned draft guidelines.

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

#### 1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS THIRTEENTH REPORT

80. Introducing his thirteenth report, which deals with reactions to interpretative declarations and conditional

interpretative declarations, the Special Rapporteur indicated what progress had been made on the topic of reservations to treaties. The slowness of his working methods, for which he had sometimes been criticized, was in fact due to the very nature of the instrument that the Commission was elaborating (a Guide to Practice, not a draft treaty), and to a deliberate choice to encourage careful thought and extensive debate. Although the Commission itself still had a large number of guidelines to discuss and adopt, it was reasonable to suppose that the second part of the Guide to Practice might be concluded at its sixty-first session.

81. The thirteenth report, which was in fact a continuation of the twelfth report,<sup>210</sup> sought to extend the consideration of the questions of formulation and procedure. Any line of reasoning concerning reactions to interpretative declarations must take account of two observations. The first was that the 1969 and 1986 Vienna Conventions were totally silent on the question of interpretative declarations, which had been mentioned only rarely during the *travaux préparatoires*. The second was that reservations, on the one hand, and interpretative declarations and conditional interpretative declarations as defined in guidelines 1.2 and 1.2.1, on the other, served different purposes. Consequently, the rules applicable to reservations could not simply be transposed to cover interpretative declarations; they could, however, be looked to for inspiration, given the lack of reference to interpretative declarations in legal texts and the dearth of practice relating to them.

82. The Special Rapporteur distinguished four sorts of reactions to interpretative declarations: approval, disapproval, silence and reclassification, the latter being when the State concerned expressed the view that an interpretative declaration was in fact a reservation.

83. Explicit approval of an interpretative declaration did not raise any particular problems; an analogy could be drawn with the “subsequent agreement between the parties regarding the interpretation of the treaty” which, under article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, must be taken into account. Even so, approval of an interpretative declaration could not be assimilated to acceptance of a reservation inasmuch as acceptance of a reservation could render the treaty relationship binding or alter the effects of the treaty as between the author of the reservation and the author of the acceptance. The wording of draft guideline 2.9.1<sup>211</sup> was intended to preserve that distinction.

84. The Special Rapporteur also pointed out that, like objections to reservations, which were more frequent than cases of express acceptance, negative reactions to interpretative declarations were more frequent than expressions of approval. To reactions intended simply to

<sup>210</sup> See footnote 207 above.

<sup>211</sup> Draft guideline 2.9.1 reads as follows:

“2.9.1 *Approval of an interpretative declaration*

“Approval’ of an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation proposed in that declaration.”

<sup>209</sup> *Ibid.*, vol. II (Part Two), para. 45.

indicate rejection of the interpretation proposed should be added cases in which the State or organization concerned expressed opposition by putting forward an alternative interpretation. Draft guideline 2.9.2<sup>212</sup> reflected those two possibilities.

85. In any event, reactions to interpretative declarations had different effects from those produced by reactions to reservations, if only because the former had no consequences with regard to the entry into force of the treaty or the establishment of treaty relations. The Special Rapporteur therefore preferred to use the terms “approval” and “opposition” to denote reactions to interpretative declarations, as distinct from the terms “acceptance” and “objection” employed in the case of reactions to reservations. The question of the effects of interpretative declarations and reactions to them would be taken up in the third part of the Guide to Practice.

86. Provision had also to be made for a further reaction: “reclassification”, defined in draft guideline 2.9.3,<sup>213</sup> whereby the State or international organization indicated that a declaration presented by its author as interpretative was in fact a reservation. That relatively common practice was based on the usual criteria for distinguishing between reservations and interpretative declarations. The Special Rapporteur thus considered that the draft guideline could usefully refer to draft guidelines 1.3 to 1.3.3, leaving it to the Commission to determine how emphatic the reference should be.

87. Draft guideline 2.9.4<sup>214</sup> covered the time at which it was possible to react to an interpretative declaration, and who could react. As regards the question of time, the Special Rapporteur justified the proposal that a reaction could be formulated at any time, not merely out of a concern for symmetry with what draft guideline 2.4.3 specified in the case of interpretative declarations themselves, but also because there were no formal rules governing such declarations, of which the States or organizations concerned sometimes learned long after they had been made. As

<sup>212</sup> Draft guideline 2.9.2 reads as follows:

“2.9.2 *Opposition to an interpretative declaration*

“‘Opposition’ to an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation proposed in the interpretative declaration or proposes an interpretation other than that contained in the declaration with a view to excluding or limiting its effect.”

<sup>213</sup> Draft guideline 2.9.3 reads as follows:

“2.9.3 *Reclassification of an interpretative declaration*

“‘Reclassification’ means a unilateral statement made by a State or an international organization in response to a declaration in respect of a treaty formulated by another State or another international organization as an interpretative declaration, whereby the former State or organization purports to regard the declaration as a reservation and to treat it as such.

“[In formulating a reclassification, States and international organizations shall [take into account] [apply] draft guidelines 1.3 to 1.3.3.]”

<sup>214</sup> Draft guideline 2.9.4 reads as follows:

“2.9.4 *Freedom to formulate an approval, protest or reclassification*

“An approval, opposition or reclassification in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.”

for who could react, the possibility should be left open to all contracting States and organizations and all States and organizations entitled to become parties. There was no need, in his view, to apply to reactions to interpretative declarations the restriction imposed by draft guideline 2.6.5 on the author of an objection to a reservation. Whereas an objection had effects on the treaty relation, reactions to interpretative declarations were no more than indications, and there was no reason why they should be taken into consideration only once their authors had become parties to the treaty.

88. Recalling the advisory opinion given by the ICJ on the *International Status of South-West Africa*,<sup>215</sup> the Special Rapporteur emphasized that reactions to interpretative declarations were intended to produce legal effects. It was therefore important for them to be explained and to be formulated in writing so that other States or international organizations that were or might become parties to the treaty could be made aware of them. That was not, however, a legal obligation. It would be hard to justify making it so, for that would make reactions to interpretative declarations subject to stricter formal and procedural requirements than interpretative declarations themselves.

89. Any draft guidelines which the Commission decided to devote to the form of and procedure governing reactions to interpretative declarations should therefore take the form of recommendations, which was consistent with the drafting of a Guide to Practice. Draft guidelines 2.9.5,<sup>216</sup> 2.9.6<sup>217</sup> and 2.9.7<sup>218</sup> were put forward in that light in the thirteenth report. In the Special Rapporteur’s view, in light of those guidelines the Commission should also consider whether it was necessary to remedy the absence of equivalent provisions governing interpretative declarations themselves. Among the possible ways of doing so, he suggested dealing with the matter in the commentaries, setting it aside until the second reading, or that he himself should present some draft guidelines on that question.

90. In the Special Rapporteur’s view, another very important distinction was to be drawn between reactions to reservations and reactions to interpretative declarations.

<sup>215</sup> “Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument” (*International Status of South-West Africa, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950*, p. 128, at pp. 135–136).

<sup>216</sup> Draft guideline 2.9.5 reads as follows:

“2.9.5 *Written form of approval, opposition and reclassification*

“An approval, opposition or reclassification in respect of an interpretative declaration shall be formulated in writing.”

<sup>217</sup> Draft guideline 2.9.6 reads as follows:

“2.9.6 *Statement of reasons for approval, opposition and reclassification*

“Whenever possible, an approval, opposition or reclassification in respect of an interpretative declaration should indicate the reasons why it is being made.”

<sup>218</sup> Draft guideline 2.9.7 reads as follows:

“2.9.7 *Formulation and communication of an approval, opposition or reclassification*

“An approval, opposition or reclassification in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.”

Under the Vienna regime, silence on the part of the States concerned was presumed to indicate acceptance of a reservation. Nothing of the sort could be inferred from silence in response to an interpretative declaration unless it was to be argued that States had an obligation—unknown in practice—to respond to such declarations. Draft guideline 2.9.8<sup>219</sup> reflected the absence of any such presumption.

91. Approval of an interpretative declaration could nevertheless result from silence on the part of States or international organizations if they could legitimately be expected expressly to voice their opposition to the interpretation put forward. The rather general wording of draft guideline 2.9.9<sup>220</sup> was intended to cover that eventuality without embarking on the unreasonable task of including in the Guide to Practice the entire set of rules concerning acquiescence under international law.

92. Last, draft guideline 2.9.10<sup>221</sup> dealt with reactions to conditional interpretative declarations. While the purpose of such declarations was to interpret the treaty, they purported to produce effects on treaty relations. Reactions to conditional interpretative declarations were thus more akin to acceptances of or objections to a reservation than to reactions to a simple interpretative declaration. Accordingly, draft guideline 2.9.10 referred back to sections 2.6, 2.7 and 2.8 of the Guide to Practice without qualifying the reactions concerned. The Special Rapporteur stressed that the draft guideline was being presented as a provisional solution, like all those concerning conditional interpretative declarations, and that the Commission would take a final decision on the subject once it was sure that conditional interpretative declarations had the same effects as reservations.

## 2. SUMMARY OF THE DEBATE

### (a) *General comments*

93. Several Commission members spoke in favour of considering interpretative declarations and reactions to them since, among other reasons, a simple transposition of the regime applicable to reservations such as the Commission had settled upon in adopting draft guidelines 1.2 and 1.2.1 was not possible. Besides, interpretative declarations were especially important in practice, for instance

<sup>219</sup> Draft guideline 2.9.8 reads as follows:

“2.9.8 *Non-presumption of approval or opposition*

“Neither approval of nor opposition to an interpretative declaration shall be presumed.”

<sup>220</sup> Draft guideline 2.9.9 reads as follows:

“2.9.9 *Silence in response to an interpretative declaration*

“Consent to an interpretative declaration shall not be inferred from the mere silence of a State or an international organization in response to an interpretative declaration formulated by another State or another international organization in respect of a treaty.

“In certain specific circumstances, however, a State or an international organization may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be.”

<sup>221</sup> Draft guideline 2.9.10 reads as follows:

“2.9.10 *Reactions to conditional interpretative declarations*

“Guidelines 2.6 to 2.8.12 shall apply, mutatis mutandis, to reactions of States and international organizations to conditional interpretative declarations.”

in the case of treaties which prohibited reservations. Others argued that while, on the whole, the remarks and proposals made in the thirteenth report were persuasive, it was not clear that it was really necessary to tackle the question of reactions to interpretative declarations in a Guide to Practice devoted to reservations.

94. Several members applauded the division of possible reactions to interpretative declarations into several categories, and the choice of terms used to distinguish them from reactions to reservations. It was noted that the examples given in the thirteenth report nevertheless showed that interpretative declarations were not always easy to understand or to assign to any particular category.

### (b) *Specific comments on the draft guidelines*

95. Several members supported draft guideline 2.9.1 and the choice of the term “approval”. Regret was expressed that the effect of approval was not specified. A reference to article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions was also advocated.

96. Draft guideline 2.9.2 received support from several members, although doubts were expressed about the final reference to the “effect” of the interpretation being challenged, which narrowed the distinction between opposition to an interpretative declaration and objection to a reservation. Some members argued that the form in which the reasons for opposing an interpretation were stated was a matter that should be left to the State or organization concerned, not covered in a draft guideline. Others were of the view that draft guideline 2.9.2 should also cover cases in which the other parties were unwilling to accept an interpretative declaration on the grounds that it gave rise to additional obligations or expanded the scope of existing obligations.

97. On the subject of draft guideline 2.9.3, several members drew attention to the topical and specific nature of the reclassification of interpretative declarations, as for example in the case of treaties on the protection of the person. Although, in practice, reclassification was often associated with an objection, there was a need for specific procedural rules to govern reclassification. Care must be taken to avoid giving the impression that a State other than the author State had the right to determine the nature of a declaration. The reclassifying State should certainly apply the reservations regime to the reclassified declaration, but that unilateral interpretation could not prevail over the position of the State that had made the declaration. It was also emphasized that practitioners and depositaries needed guidance on the form, timing and legal effects of reactions to what might be called “disguised reservations”.

98. Another view expressed was that reclassification was a particular kind of opposition, and did not need to be assigned to a special category since its consequences were no different from those of other kinds of opposition; including reclassification as one case within draft guideline 2.9.2 would suffice.

99. There was widespread support for the retention of the second paragraph in draft guideline 2.9.3, and several

members also expressed a preference for the wording “apply” rather than “take into account”. However, it was also argued that the paragraph was unnecessary, and that the expression “take into account” should be the one used if the paragraph was retained.

100. Several members considered that there was good reason for draft guideline 2.9.4 to allow for States and international organizations entitled to become parties to the treaty to react, as the declarations concerned would have no effect on the entry into force of the treaty.

101. It was suggested that draft guidelines 2.9.5, 2.9.6 and 2.9.7 were unnecessary. Others felt, some editorial details notwithstanding, that those draft guidelines provided useful clarifications. Several members called for the drafting of equivalent provisions to govern interpretative declarations themselves. It was pointed out that the reference in draft guideline 2.9.7 to draft guideline 2.1.6 should be deleted, since it related to a time limit that did not apply to interpretative declarations.

102. The absence of presumption set forth in draft guideline 2.9.8 won the approval of several members. Others considered the guideline unnecessary inasmuch as it added nothing to the provisions of draft guideline 2.9.9.

103. Draft guideline 2.9.9 provoked a wide-ranging discussion. Some members felt it important to emphasize that, in the case of an interpretative declaration, silence did not betoken consent since there was no obligation to react expressly to such a declaration. It was pointed out that the notion of acquiescence was apposite in treaty law, even if the circumstances in which the “conduct” referred to in article 45 of the Vienna Conventions might constitute consent could not be determined beforehand. Several members expressed the view that draft guideline 2.9.9 offered a nuanced solution and should be retained, since it gave helpful indications as to how silence should be interpreted.

104. Other members, however, called for the draft guideline to be deleted altogether, since it was very general and appeared to contradict the absence of presumption of approval or opposition set forth in draft guideline 2.9.8, the text of and commentary to which could provide all necessary clarification. At the very least, if the second paragraph of draft guideline 2.9.9 was to be retained, instances should be given of the certain specific circumstances in which a State or international organization could be considered to have acquiesced in an interpretative declaration.

105. Some members felt that, in the absence of any indication as to the “specific circumstances” in which silence on the part of the State amounted to acquiescence, the two paragraphs of the guideline might contradict each other. There was thus a need to spell out the relationship between silence and conduct. The Special Rapporteur was right to flag the role which silence could play in determining the existence of conduct amounting to acquiescence, but silence alone could not constitute acquiescence. Acquiescence depended in particular on the legitimate expectations of the States and organizations concerned and the setting in which silence occurred.

106. Another view expressed was that the draft guideline should make it clear that consent could not be inferred from the conduct of the State in question unless the State had persistently failed to react although fully aware of the implications of the interpretative declaration, as in cases when the meaning of the declaration was quite plain.

107. Lastly, it was suggested that the second paragraph of draft guideline 2.9.9 might be worded as a “without prejudice” clause. Doing so would allow the possible consequences of silence, as an element in acquiescence, to be mentioned without placing undue emphasis on acquiescence.

108. Support was expressed for the distinction drawn by the Special Rapporteur between conditional and simple interpretative declarations. Some members still voiced doubts about the relevance of the category of conditional interpretative declarations, which purported to modify the legal effects of treaty provisions and should thus be assimilated to reservations. There would thus be just two categories, interpretative declarations and reservations, conditional interpretative declarations being a special form of reservation. It was also emphasized that the classification of an act was determined by its legal effects, not by how it was described. In this connection, it was noted that conditional interpretative declarations purporting to enlarge the scope of application of the treaty should also be regarded as reservations needing to be accepted before they could produce effects.

109. Other members did not consider it prudent for the time being to draw an analogy between the regime of conditional interpretative declarations and the regime of reservations: reservations were intended to modify the legal effects of a treaty, whereas conditional declarations made participation in the treaty subject to a particular interpretation. In any event, pending a decision by the Commission on the desirability of dealing specifically with the case of conditional interpretative declarations, the terminological precautions taken by the Special Rapporteur in draft guideline 2.9.10 were welcome.

### 3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

110. The Special Rapporteur observed that his report had not aroused much opposition. Most of the comments related to the second paragraph of draft guideline 2.9.9. First, however, he wished to react to the comments made on draft guideline 2.9.10. He continued to believe that declarations as defined in draft guideline 1.2.1 which purported to impose a particular interpretation on the treaty were not reservations, since they did not seek to exclude or modify the legal effect of certain treaty provisions. The Commission had decided in 2001 not to review draft guideline 1.2.1 on the definition of conditional interpretative declarations, which were a “hybrid” category resembling both reservations and interpretative declarations. Since then, it and the Special Rapporteur had realized that the regime of conditional interpretative declarations was very similar, if not identical, to that of reservations. However, the Commission was not yet ready to go back on its 2001 decision and delete the guidelines on conditional interpretative declarations, replacing them by a single guideline assimilating such declarations to reservations.

It was still too early to make an unqualified pronouncement that the two regimes were absolutely identical; meanwhile the Commission had decided, if only provisionally, to adopt guidelines on conditional interpretative declarations.

111. It was in that spirit that he had suggested referring draft guideline 2.9.10 to the Drafting Committee; as with similar cases in the past, the draft guideline could be provisionally adopted, thereby confirming the Commission's cautious attitude on the matter. He had nevertheless taken note of the comment admonishing him for failing to distinguish clearly in the report between conditional and "simple" interpretative declarations, and would try to put the matter right in the relevant commentaries.

112. Turning to the various opinions expressed during the discussion, he believed that reclassification belonged in a separate category and was a different operation from opposition: it was a first step towards, but not identical to, opposition. He also favoured the expression "conditional approval" to describe some kinds of approval.

113. He observed that several members were concerned about the possible effects of approval as defined in draft guideline 2.9.1. He wished to reiterate that the effects of reservations themselves and of all declarations relating to reservations would be discussed comprehensively in the fourth part of the Guide to Practice.

114. With regard to draft guideline 2.9.3, he noted that most members who had spoken about it were in favour of keeping the second paragraph; the whole text would, consequently, be referred to the Drafting Committee.

115. Most members were also in favour of referring draft guidelines 2.9.4 to 2.9.7 to the Drafting Committee.

116. The Special Rapporteur was pleased to note that the reference in draft guideline 2.9.4 to "any State or any international organization that is entitled to become a party to the treaty" had not aroused reactions comparable to those provoked by the corresponding phrase in guideline 2.6.5, it being clear that the two cases were completely different.

117. As all the members who had spoken on the matter had asked him to prepare draft guidelines on the form of, reasons for and communication of interpretative declarations themselves, he was willing, if the Commission endorsed the idea, to do so at the current session or at the next session.

118. He pointed out that the question of silence was the thorniest problem. It was his impression that the relationship between guidelines 2.9.8 and 2.9.9 was still not very clearly understood; the second paragraph of draft guideline 2.9.9 had also been criticized.

119. To his mind, both guideline 2.9.8 and guideline 2.9.9 were necessary. The first established the principle that, in contrast to what applies with regard to reservations, acceptance of an interpretative declaration could not be presumed, while the second qualified it by saying that silence in itself did not necessarily indicate

acquiescence. In certain circumstances, silence could be regarded as acquiescence. Hence the principle was not rigid: exceptions were possible.

120. Most of the criticism directed at the second paragraph of draft guideline 2.9.9 concerned the failure to identify the "specific circumstances" it mentioned. It would, however, be hard to be more explicit in a draft guideline without incorporating a long treatise on acquiescence. He drew attention to a study on the subject produced by the Secretariat in 2006.<sup>222</sup>

121. An attempt could be made to define those "specific circumstances", but the entire theory of acquiescence could not be expounded in a draft guideline on reservations. He would be prepared to include some concrete examples in the commentary, but he was not optimistic about finding any. If he could not, he would use hypothetical examples. He still believed, however, that international case law offered several instances in which a treaty had been interpreted or modified by acquiescence in the form of silence (the Eritrea–Ethiopia Boundary Commission,<sup>223</sup> the *Temple of Preah Vihear* case of the ICJ,<sup>224</sup> the *Taba* award<sup>225</sup> and the *La Bretagne* award).<sup>226</sup>

122. He thus agreed that silence was one aspect of conduct underlying consent. The second paragraph of draft guideline 2.9.9 could be reworked in the Drafting Committee to capture that idea more faithfully. Thought could also be given to a saving clause. He hoped that all the draft guidelines could be referred to the Drafting Committee, with due regard given to his conclusions.

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

#### 1. TEXT OF THE DRAFT GUIDELINES

123. The text of the draft guidelines<sup>227</sup> provisionally adopted so far by the Commission is reproduced below.<sup>228</sup>

<sup>222</sup> "Acquiescence and its effects on the legal rights and obligations of States", of 20 June 2006, submitted to the Working Group on the long-term programme of work of the Commission.

<sup>223</sup> See *Decision regarding the delimitation of the border between Eritrea and Ethiopia*, Permanent Court of Arbitration, *Decision of 13 April 2002*, UNRIAA, vol. XXV (Sales No. E/F.05V.5), p. 83, at p. 111.

<sup>224</sup> *Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 6, at p. 40.

<sup>225</sup> *Case concerning the location of boundary markers in Taba between Egypt and Israel, Decision of 29 September 1988*, UNRIAA vol. XX (Sales No. E/F.93.V.3), pp. 1, at pp. 56–57.

<sup>226</sup> *Case concerning filleting within the Gulf of St. Lawrence between Canada and France, Decision of 17 July 1986*, UNRIAA, vol. XIX (Sales No. E/F.90.V.7), p. 225.

<sup>227</sup> At its 2991st meeting, on 5 August 2008, the Commission decided that, while the expression "draft guidelines" would continue to be used in the title, the text of the report would simply refer to "guidelines". This decision is purely editorial and is without prejudice to the legal status of the draft guidelines adopted by the Commission.

<sup>228</sup> 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

## RESERVATIONS TO TREATIES

## GUIDE TO PRACTICE

## Explanatory note

Some 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]<sup>229</sup> 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.

(Footnote 228 continued.)

*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; 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, in *Yearbook ... 2006*, vol. II (Part Two); and the commentary to guidelines 3.1.5, 3.1.6, 3.1.7, 3.1.8, 3.1.9, 3.1.10, 3.1.11, 3.1.12 and 3.1.13 in *Yearbook ... 2007*, vol. II (Part Two). The commentary to guidelines 2.1.6 [2.1.6, 2.1.8], 2.1.9, 2.6.5, 2.6.6, 2.6.7, 2.6.8, 2.6.9, 2.6.10, 2.6.11, 2.6.12, 2.6.13, 2.6.14, 2.6.15, 2.7, 2.7.1, 2.7.2, 2.7.3, 2.7.4, 2.7.5, 2.7.6, 2.7.7, 2.7.8, 2.7.9 and 2.8 are reproduced in section 2 below.

<sup>229</sup> The number between square brackets indicates the number of this guideline in the report of the Special Rapporteur or, as the case may be, the original number of a guideline in the report of the Special Rapporteur which has been merged with the final guideline.

## 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.

## 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*

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

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

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

### 1.6 *Scope of definitions*<sup>230</sup>

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.

<sup>230</sup> This guideline was reconsidered and modified during the fifty-eighth session of the Commission (2006). For the new commentary see *Yearbook ... 2006*, vol. II (Part Two), pp. 156–157.



## 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 international 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 international 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 international organizations for which it is intended as soon as possible.

2. A communication relating to a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

3. 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.

#### 2.1.8 [2.1.7 bis] Procedure in case of manifestly invalid reservations<sup>231</sup>

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.

#### 2.1.9 Statement of reasons

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

### 2.2 Confirmation of reservations

#### 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.

<sup>231</sup> *Idem.*

### 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.

## 2.3 *Late reservations*

### 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 by 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.

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*<sup>232</sup>

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.

<sup>232</sup> This guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new guidelines at the fifty-fourth session of the Commission (2002).

### 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].

### 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 *Formulation of objections*

### 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.

### 2.6.3, 2.6.4<sup>233</sup>

### 2.6.5 *Author*

An objection to a reservation may be formulated by:

(a) any contracting State and any contracting international organization; and

(b) any State and any international organization that is entitled to become a party to the treaty in which case such a declaration does not produce any legal effect until the State or the international organization has expressed its consent to be bound by the treaty.

### 2.6.6 *Joint formulation*

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

### 2.6.7 *Written form*

An objection must be formulated in writing.

### 2.6.8 *Expression of intention to preclude the entry into force of the treaty*

When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

### 2.6.9 *Procedure for the formulation of objections*

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

### 2.6.10 *Statement of reasons*

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

### 2.6.11 *Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation*

An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

### 2.6.12 *Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty*

An objection formulated prior to the expression of consent to be bound by the treaty does not need to be formally confirmed

by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization had signed the treaty when it had formulated the objection; it must be confirmed if the State or the international organization had not signed the treaty.

### 2.6.13 *Time period for formulating an objection*

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

### 2.6.14 *Conditional objections*

An objection to a specific potential or future reservation does not produce the legal effects of an objection.

### 2.6.15 *Late objections*

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.13 does not produce the legal effects of an objection made within that time period.

## 2.7 *Withdrawal and modification of objections to reservations*

### 2.7.1 *Withdrawal of objections to reservations*

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

### 2.7.2 *Form of withdrawal of objections to reservations*

The withdrawal of an objection to a reservation must be formulated in writing.

### 2.7.3 *Formulation and communication of the withdrawal of objections to reservations*

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

### 2.7.4 *Effect on reservation of withdrawal of an objection*

A State or an international organization that withdraws an objection formulated to a reservation is considered to have accepted that reservation.

### 2.7.5 *Effective date of withdrawal of an objection*

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

### 2.7.6 *Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation*

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notification of it.

### 2.7.7 *Partial withdrawal of an objection*

Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal of an objection is subject to the same formal and procedural rules as a complete withdrawal and becomes operative on the same conditions.

### 2.7.8 *Effect of a partial withdrawal of an objection*

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent of the new formulation of the objection.

<sup>233</sup> The Drafting Group decided to defer consideration of these two guidelines.

### 2.7.9 Widening of the scope of an objection to a reservation

A State or international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.13 provided that the widening does not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection.

### 2.8 Forms of acceptance of reservations

The acceptance of a reservation may arise from a unilateral statement in this respect or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13.

### 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 the reservation in question is formulated to one of such provisions; or
- (c) prohibiting certain categories of reservations and the 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.

#### 3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the *raison d'être* of the treaty.

#### 3.1.6 Determination of the object and purpose of the treaty

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its

conclusion and, where appropriate, the subsequent practice agreed upon by the parties.

#### 3.1.7 Vague or general reservations

A reservation shall be worded in such a way as to allow its scope to be determined, in order to assess in particular its compatibility with the object and purpose of the treaty.

#### 3.1.8 Reservations to a provision reflecting a customary norm

1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.

2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.

#### 3.1.9 Reservations contrary to a rule of jus cogens

A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

#### 3.1.10 Reservations to provisions relating to non-derogable rights

A State or an international organization may not formulate a reservation to a treaty provision relating to non-derogable rights unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

#### 3.1.11 Reservations relating to internal law

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific norms of the internal law of that State or rules of that organization may be formulated only insofar as it is compatible with the object and purpose of the treaty.

#### 3.1.12 Reservations to general human rights treaties

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.

#### 3.1.13 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

- (a) the reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or
- (b) the reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

### 2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTIETH SESSION

124. The text of the draft guidelines with commentaries thereto adopted by the Commission at its sixtieth session is reproduced below.

### 2.1.6 [2.1.6, 2.1.8] *Procedure for communication of reservations*<sup>234</sup>

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting international 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 international 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 international organizations for which it is intended as soon as possible.

2. A communication relating to a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

3. 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.

#### *Commentary*

(1) As in the two that follow, guideline 2.1.6 seeks to clarify aspects of the procedure to be followed in communicating the text of a treaty reservation to the addressees of the communication that are specified in guideline 2.1.5. It covers two different but closely linked aspects:

- the author of the communication; and
- the practical modalities of the communication.

(2) Article 23 of the 1969 and 1986 Vienna Conventions is silent as to the person responsible for such communication. In most cases, this will be the depositary, as shown by the provisions of article 79 of the 1986 Vienna Convention,<sup>235</sup> which generally apply to all notifications and communications concerning treaties. The provisions of that article also give some information on the modalities for the communication.

(3) On prior occasions when the topic of reservations to treaties was considered, the Commission or its special rapporteurs planned to stipulate expressly that it was the duty

<sup>234</sup> This guideline and the commentary thereto were adopted by the Commission in 2002 (see *Yearbook ... 2002*, vol. II (Part Two), pp. 38–42). At its fifty-ninth session, however, the Commission decided, in accordance with a suggestion to that effect by the Special Rapporteur (see *Yearbook ... 2007*, vol. II (Part Two), p. 18, para. 62), to revise the third paragraph of the guideline following its consideration of guideline 2.6.13 and to adapt the commentary accordingly. In addition, in the light of an amendment submitted by a member of the Commission in plenary meeting, the Commission decided, after a vote, to modify the *chapeau* of guideline 2.1.6. The commentary was also modified in consequence.

<sup>235</sup> Article 78 of the 1969 Vienna Convention.

of the depositary to communicate the text of formulated reservations to interested States. Thus, at its third session, in 1951, for example, the Commission believed that “[t]he depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention”.<sup>236</sup> Likewise, in his fourth report on the law of treaties in 1965, Sir Humphrey Waldock proposed that a reservation “must be notified to the depositary or, where there is no depositary, to the other interested States”.<sup>237</sup>

(4) In the end, this formula was not adopted by the Commission, which, noting that the drafts previously adopted “contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter”, came to the conclusion that “it would allow a considerable simplification to be effected in the texts of the various articles if a general article were to be introduced covering notifications and communications”.<sup>238</sup>

(5) That is the object of draft article 73 of 1966,<sup>239</sup> now article 78 of the 1969 Vienna Convention, which was reproduced, without change except for the addition of the mention of international organizations, in article 79 of the 1986 Vienna Convention:

#### Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State or any international organization under the present Convention shall:

(a) If there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;

(b) Be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) If transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1 (e).

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

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

...

(e) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty.

(7) It may be noted in passing that the expression “the parties and the States and international organizations entitled

<sup>236</sup> *Yearbook ... 1951*, vol. II, document A/1858, para. 34, p. 130.

<sup>237</sup> *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 53, para. 13.

<sup>238</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 270, para. 1 of the commentary to draft article 73.

<sup>239</sup> *Ibid.*

to become parties to the treaty”, which is used in this paragraph, is not the exact equivalent of the formula used in article 23, paragraph 1 of the Convention, which refers to “contracting States and contracting organizations”. The difference has no practical consequences, since the contracting States and contracting international organizations are quite obviously entitled to become parties to the treaty and indeed become so simply by virtue of the treaty’s entry into force, in accordance with the definition of the terms given in article 2, paragraph 1 (f), of the Convention; it poses a problem, however, with regard to the wording of the guideline to be included in the Guide to Practice.

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

(9) Moreover, there can be no doubt that communications relating to reservations—especially those concerning the actual text of reservations formulated by a State or an international organization—are communications “relating to the treaty” within the meaning of article 78, paragraph 1 (e), referred to above.<sup>240</sup> Furthermore, in its 1966 draft, the Commission expressly entrusted the depositary with the task of “examining whether a signature, an instrument or a reservation\* is in conformity with the provisions of the treaty and of the present articles”.<sup>241</sup> This expression was replaced in Vienna with a broader one—“the signature or any instrument, notification or communication relating to the treaty”<sup>242</sup>—which cannot, however, be construed as excluding reservations from the scope of the provision.

(10) In addition, as indicated in paragraph (2) of the commentary to article 73 of the draft articles adopted by the Commission in 1966 (now article 79 of the 1986 Vienna Convention), the rule laid down in subparagraph (a) of this provision “relates essentially to notifications and communications relating to the ‘life’ of the treaty—acts establishing consent, reservations,\* objections, notices regarding invalidity, termination, etc.”<sup>243</sup>

<sup>240</sup> See above, paragraph (6) of the commentary to this draft guideline.

<sup>241</sup> Draft article 72, para. 1 (d), *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 269. On the substance of this provision, see the commentary to draft guideline 2.1.7, *Yearbook ... 2002*, vol. II (Part Two), pp. 42–45.

<sup>242</sup> 1969 Vienna Convention, art. 77, para. 1 (d). The new formula is derived from an amendment proposed by the Byelorussian Soviet Socialist Republic, which was adopted by the Committee of the Whole by 32 votes to 24, with 27 abstentions, see *Official Records of the United Nations Conference on the Law of Treaties* (footnote 123 above), p. 203, para. 660 (i), see also pp. 130–131, para. 164 (iii).

<sup>243</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 270.

(11) In essence, there is no doubt that both article 78, paragraph 1 (e), and article 79 (a) of 1986 Vienna Convention reflect current practice.<sup>244</sup> They warrant no special comment, except for the observation that, even in cases where there is a depositary, the State which is the author of the reservation may directly inform the other States or international organizations concerned of the text of the reservation. Thus, the United Kingdom, for example, informed the Secretary-General of the United Nations, as depositary of the Agreement establishing the Caribbean Development Bank, that it had consulted all the signatories to that Agreement with regard to an aspect of the declaration (constituting a reservation) which it had attached to its instrument of ratification (and which was subsequently accepted by the Board of Governors of the Bank and then withdrawn by the United Kingdom).<sup>245</sup> Likewise, France submitted to the Board of Governors of the Asia-Pacific Institute for Broadcasting Development a reservation which it had formulated to the Agreement establishing that organization, for which the Secretary-General is also depositary.<sup>246</sup>

(12) There seem to be no objections to this practice, provided that the depositary is not thereby released from his or her own obligations.<sup>247</sup> It is, however, a source of confusion and uncertainty in the sense that the depositary could rely on States formulating reservations to perform the function expressly conferred on him or her by article 78, paragraph 1 (e), and the final phrase of article 79 (a) of the 1986 Vienna Convention.<sup>248</sup> For this reason, the Commission considered that such a practice should not be encouraged and refrained from proposing a guideline enshrining it.

(13) In its 1966 commentary, the Commission dwelt on the importance of the task entrusted to the depositary in draft article 72, paragraph 1 (e) (now article 77, paragraph 1 (e), of the 1969 Vienna Convention),<sup>249</sup> and stressed “the obvious desirability of the prompt performance of this function by a depositary”.<sup>250</sup> This is an important issue, which is linked to subparagraphs (b) and (c) of article 78 of the 1969 Vienna Convention.<sup>251</sup> the reservation produces effects only as from the date on which the communication relating thereto is received by

<sup>244</sup> *Ibid.* with regard to draft article 73 (a) (which became article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention).

<sup>245</sup> See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (United Nations publication, Sales No. E.07.V.3), document ST/LEG/SER.E/25, vol. I, p. 570, note 9 (chap. X.6).

<sup>246</sup> *Ibid.*, vol. II, p. 439, note 4 (chap. XXV.3).

<sup>247</sup> See guideline 2.1.7.

<sup>248</sup> Article 77, para. 1 (e), and article 78 (a), respectively, of the 1969 Vienna Convention. In the aforesaid case of the reservation of France to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, it seems that the Secretary-General confined himself to taking note of the absence of objections from the organization’s Governing Council (see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (footnote 245 above), vol. II). The Secretary-General’s passivity in this instance is subject to criticism.

<sup>249</sup> Article 78, para. 1 (e), of the 1986 Vienna Convention.

<sup>250</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 270, para. (5) of the commentary.

<sup>251</sup> Article 79 (a) and (b), of the 1986 Vienna Convention. See the text of these provisions in paragraph (5) of the commentary to this draft guideline above.

the States and organizations for which it is intended, and not as from the date of its formulation. In truth, it matters little whether the communication is made directly by the author of the reservation; he or she will have no one but himself or herself to blame if it is transmitted late to its recipients. On the other hand, if there is a depositary, it is essential for the latter to display promptness; otherwise, the depositary could stall both the effect of the reservation and the opportunity for the other States and international organizations concerned to react to it.<sup>252</sup>

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

1. The time period between receipt of a formality by the Treaty Section and its communication to the parties to a treaty is approximately 24 hours unless a translation is required or a legal issue is involved. If a translation is required, in all cases, it is requested by the Treaty Section on an urgent basis. If the legal issue is complex or involves communications with parties outside the control of the United Nations, then there may be some delay; however, this is highly unusual. It should be noted that, in all but a few cases, formalities are communicated to the relevant parties within 24 hours.

2. Depositary notifications are communicated to permanent missions and relevant organizations by both regular mail and electronic mail, within 24 hours of processing (see LA 41 TR/221). Additionally, effective January 2001, depositary notifications can be viewed on the United Nations Treaty Collection on the Internet at: <http://untreaty.un.org> (depositary notifications on the Internet are for information purposes only and are not considered to be formal notifications by the depositary). Depositary notifications with bulky attachments, for example those relating to chapter 11 (b) 16,<sup>253</sup> are sent by facsimile.<sup>254</sup>

(15) For its part, the International Maritime Organization has indicated that the time period between the communication of a reservation to a treaty for which the

<sup>252</sup> See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 270–271, paras. (3)–(6) of the commentary to draft art. 73; see also T. O. Elias, *The Modern Law of Treaties*, Dobbs Ferry/Leiden, Oceana/Sijthoff, 1974, pp. 216–217.

<sup>253</sup> These are communications relating to the Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions (see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (footnote 245 above), vol. I, p. 683).

<sup>254</sup> The Treaty Section has also advised: “3. Please note that the depositary practice has been changed in cases where the treaty action is a modification to an existing reservation and where a reservation has been formulated by a party subsequent to establishing its consent to be bound. A party to the relevant treaty now has 12 months within which to inform the depositary that it objects to the modification or that it does not wish to consider the reservation made subsequent to ratification, acceptance, approval, etc. The time period for this 12 months is calculated by the depositary on the basis of the date of issue of the depositary notification (see LA 41 TR/221 (23-1)).” See also P. T. B. Kohona, “Some notable developments in the practice of the UN Secretary-General as depositary of multilateral treaties: reservations and declarations”, *AJIL*, vol. 99 (2005), pp. 433–450, and “Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations as depositary of multilateral treaties”, *Georgia Journal of International and Comparative Law*, vol. 33 (2004–2005), pp. 415–450.

organization is depositary and its transmittal to the States concerned is generally from one to two weeks. Communications, which are translated into the three official languages of the organization (English, Spanish and French), are always transmitted by regular mail.

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

The usual period is two to three weeks (notifications are grouped and sent out approximately every two weeks). In some cases, delays occur owing to voluminous declarations/reservations or appendices (descriptions or extracts of domestic law and practices) that must be checked and translated into the other official language (the Council of Europe requires that all notifications be made in one of the official languages or be at least accompanied by a translation into one of these languages. The translation into the other official language is provided by the Treaty Office). Urgent notifications that have immediate effect (e.g., derogations under article 15 of the European Convention on Human Rights) are carried out within a couple of days.

Unless they prefer notifications to be sent directly to the Ministry of Foreign Affairs (currently 11 out of 43 member States), the original notifications are sent out in writing to the permanent representations in Strasbourg, which in turn forward them to their capitals. Non-member States that have no diplomatic mission (consulate) in Strasbourg are notified via a diplomatic mission in Paris or Brussels or directly. The increase in member States and notifications over the last 10 years has prompted one simplification: since 1999, each notification is no longer signed individually by the Director-General of Legal Affairs (acting for the Secretary-General of the Council of Europe), but notifications are grouped and only each cover letter is signed individually. There have not been any complaints against this procedure.

Since our new web site (<http://conventions.coe.int>) became operational in January 2000, all information relating to formalities is immediately made available on the web site. The texts of reservations or declarations are put on the web site the day they are officially notified. Publication on the web site is, however, not considered to constitute an official notification.

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

Member States are notified of any new signatures and ratifications to inter-American treaties through the OAS Newspaper, which circulates every day. In a more formal way, we notify every three months through a *procès-verbal* sent to the permanent missions to OAS or after meetings where there are a significant number of new signatures and ratifications such as, for example, the General Assembly.

The formal notifications, which also include the bilateral agreements signed between the General Secretariat and other parties, are done in Spanish and English.

(18) It did not seem necessary to the Commission for these very helpful clarifications to be reproduced in full in the Guide to Practice. It nonetheless seemed useful to give in guideline 2.1.6 some information in the form of general recommendations intended both for the depositary (where there is one) and for the authors of reservations (where there is no depositary). This guideline combines the text of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention<sup>255</sup> and adapts it to the special problems posed by the communication of reservations.

(19) The *chapeau* of the guideline reproduces the relevant parts that are common to the *chapeaux* of articles 77 and 78 of the 1969 Vienna Convention and articles 78 and 79 of the 1986 Vienna Convention, with some simplification:

<sup>255</sup> Art. 77, para. 1 (e), and art. 78 of the 1969 Vienna Convention.



the wording decided upon at Vienna to introduce article 78 of the 1986 Vienna Convention (“the contracting States and contracting organizations or, as the case may be, by the contracting organizations”) appears to be unnecessarily cumbersome and contains little additional information. Moreover, as was mentioned above,<sup>256</sup> the text of guideline 2.1.6 reproduces, with one small difference, the formulation used in article 23, paragraph 1, of the 1986 Vienna Convention (“to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”), in preference to that used in article 78, paragraph 1 (e) (“the parties and the States and international organizations entitled to become parties to the treaty”). While the latter formulation is probably more elegant and has the same meaning, it departs from the terminology used in the section of the Vienna Conventions relating to reservations. Nevertheless, it did not seem useful to burden the text by using the article 23 expression twice in subparagraphs (a) and (b). Incidentally, this purely drafting improvement involves no change in the Vienna text: the expression “the States and international organizations for which it is intended” (subpara. (b)) refers to the “contracting States and contracting international organizations and other States and international organizations entitled to become parties” (subpara. (a)). This is also true of the addition of the adjective “international”, which the Commission inserted before the noun “organizations” in the *chapeau* of the first paragraph in order to avoid any ambiguity and to compensate for the lack, in the Guide to Practice, of a definition of the term “contracting organization” (whereas such a definition does appear in article 2, paragraph 1 (f), of the 1986 Vienna Convention). Some members of the Commission, however, regretted this departure from the wording of the Vienna text, which they considered unnecessary; obviously, this clarification applies to the guideline as a whole. Similarly, the subdivision of the draft’s first paragraph into two separate subparagraphs probably makes it more readily understandable, without changing the meaning.

(20) As to the time periods for the transmittal of the reservation to the States or international organizations for which it is intended, the Commission did not think it possible to establish a rigid period of time. The expression “as soon as possible” in subparagraph (b) seems enough to draw the attention of the addressees to the need to proceed rapidly. On the other hand, such an indication is not required in subparagraph (a): it is for the author of the reservation to assume his or her responsibilities in this regard.<sup>257</sup>

(21) In keeping with guidelines 2.1.1 and 2.1.2, which point out that the formulation and confirmation of reservations must be done in writing, the last paragraph of guideline 2.1.6 specifies that communication to the States and international organizations for which they are intended must be formal. While some members of the Commission may have expressed doubts about the need for this stipulation, it seemed useful in view of the frequent practice among depositaries of using modern means of communication—electronic mail or fax—which are less reliable

than traditional methods. For this reason, a majority of the members of the Commission considered that any communication concerning reservations should be confirmed in a diplomatic note (in cases where the author is a State) or in a depositary notification (where it is from an international organization<sup>258</sup>). While some members held an opposite view, the Commission took the view that, in this case, the time period should start as from the time the electronic mail or facsimile is sent. This would help prevent disputes as to the date of receipt of the confirmation and would not give rise to practical problems, since, according to the indications given to the Commission, the written confirmation is usually done at the same time the electronic mail or facsimile is sent or very shortly thereafter, at least by depositary international organizations. These clarifications are given in the third paragraph of guideline 2.1.6.

(22) It seemed neither useful nor possible to be specific about the language or languages in which such communications must be transmitted, since the practices of depositaries vary.<sup>259</sup> Similarly, the Commission took the view that it was wise to follow practice on the question of the organ to which, specifically, the communication should be addressed.<sup>260</sup>

(23) On the other hand, the second paragraph of guideline 2.1.6 reproduces the rule set out in subparagraphs (b) and (c) of article 79 of the 1986 Vienna Convention.<sup>261</sup> However, it seemed possible to simplify the wording without drawing a distinction between cases in which the reservation is communicated directly by the author and instances in which it is done by the depositary. In both cases, it is the receipt of the communication by the State or international organization for which it is intended that is decisive. It is, for example, from the date of receipt that the period within which an objection may be formulated is counted.<sup>262</sup> It should be noted that the date of effect of the notification may differ from one State or international organization to another depending on the date of receipt.

### 2.1.9 *Statement of reasons*

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

#### *Commentary*

(1) The Commission’s work on the law of treaties and the 1969 and 1986 Vienna Conventions in no way stipulates that a State or international organization which formulates a reservation must give its reasons for doing so

<sup>258</sup> A depositary notification has become the usual means by which depositary international organizations or heads of secretariat make communications relating to treaties. The usual diplomatic notes could nonetheless be used by an international organization in the case of a communication addressed to non-member States of the organization that do not have observer status.

<sup>259</sup> Where the depositary is a State, it generally seems to transmit communications of this type in its official language(s); an international organization may use all its official languages (International Maritime Organization) or one or two working languages (United Nations).

<sup>260</sup> Ministries of Foreign Affairs, diplomatic missions to the depositary State(s), permanent missions to the depositary organization.

<sup>261</sup> See paragraph (5) of the commentary to the present guideline above.

<sup>262</sup> Regarding objections, see guideline 2.6.13 below.

<sup>256</sup> See paragraphs (7) and (8) of the commentary to the present guideline above.

<sup>257</sup> See paragraph (13) of the commentary to the present guideline above.

and explain why it 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. Thus, giving reasons is not an additional condition for validity under the Vienna regime.

(2) However, some conventional instruments require States to give reasons for their reservations and to explain why they are formulating them. A particularly clear example is article 57 of the European Convention on Human Rights, which states:

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.

Under this regime, which is unquestionably *lex specialis* with respect to general international law, indication of the law on which the reservation is based is a genuine condition for the validity of any reservation to the European Convention on Human Rights. In the famous *Belilos* case, the European Court of Human Rights decided that article 57 (former article 64), paragraph 2, establishes “not a purely formal requirement but a condition of substance”.<sup>263</sup> In the Court’s view, the required reasons or explanations “provide a guarantee—in particular for the other Contracting Parties and the Convention institutions—that a reservation does not go beyond the provisions expressly excluded by the State concerned”.<sup>264</sup> The penalty for failure to meet this requirement to give reasons (or to explain) is the invalidity of the reservation.<sup>265</sup>

(3) Under general international law, such a drastic consequence certainly does not follow automatically from a failure to give reasons, but the justification for and usefulness of giving reasons for reservations, stressed by the European Court of Human Rights in 1988, are applicable to all treaties and all reservations. It is on this basis that the Commission deemed it useful to encourage giving reasons without making it a legal obligation to do so, an obligation which, in any case, would have been incompatible with the legal character of the Guide to Practice. The non-binding formulation of the guideline, reflected in the use of the conditional, makes it clear that this formality, while desirable, is in no way a legal obligation.

(4) Giving reasons (which is thus optional) is not an additional requirement that would make it more difficult to formulate reservations; it is a useful way for both the author of the reservation and the other States, international organizations or monitoring bodies concerned to fulfil their responsibilities effectively. It gives the author of the reservation an opportunity not only to explain and clarify the reasons why the reservation was formulated—including (but not exclusively) by indicating impediments

under domestic law that may make implementation of the provision on which the reservation is based difficult or impossible—but also to provide information that will be useful in assessing the validity of the reservation. In this regard, it should be borne in mind that the author of a reservation is also responsible for assessing its validity.

(5) The reasons and explanations given by the author of a reservation also facilitate the work of the bodies with competence to assess the reservation’s validity, including other concerned States or international organizations, dispute settlement bodies responsible for interpreting or implementing the treaty and treaty monitoring bodies. Giving reasons, then, is also one of the ways in which States and international organizations making a reservation can cooperate with the other contracting parties and the monitoring bodies so that the validity of the reservation can be assessed.<sup>266</sup>

(6) Giving and explaining the reasons which, in the author’s view, made it necessary to formulate the reservation also helps to establish a fruitful reservations dialogue among the author of the reservation, the contracting States and international organizations and the monitoring body, if any. This is beneficial not only for the States or international organizations that are called upon to comment on the reservation by accepting or objecting to it, but also for the author of the reservation, which, by giving reasons, can help allay any concerns that its partners may have regarding the validity of its reservation and steer the reservations dialogue towards greater mutual understanding.

(7) In practice, reasons are more likely to be given for objections than for reservations. There are, however, examples in State practice of cases in which States and international organizations have made a point of giving their reasons for formulating a particular reservation. Sometimes, they do so purely for convenience, in which case their explanations are of no particular use in assessing the value of the reservation except perhaps insofar as they establish that it is motivated by such considerations of convenience.<sup>267</sup> Often, however, the explanations that accompany reservations shed considerable light on the reasons for their formulation. For example, Barbados justified its reservation to article 14 of the International Covenant on Civil and Political Rights by practical problems of implementation: “The Government of Barbados states that it reserves the right not to apply in full, the guarantee of free legal assistance in accordance with paragraph 3 (d)

<sup>266</sup> The Commission stressed this obligation to cooperate with monitoring bodies in its 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, paragraph 9 of which begins: “The Commission calls upon States to cooperate with monitoring bodies” (see footnote 206 above). This obligation to cooperate was also stressed by the international human rights treaty bodies in 2007 at their Sixth Inter-Committee Meeting (see the report of the meeting of the Working Group on reservations (HRI/MC/2007/5, para. 16 (Recommendations), recommendation No. 9 (a)).

<sup>267</sup> This is true of France’s reservation to the European Agreement supplementing the Convention on Road Signs and Signals: “With regard to article 23, paragraph 3 *bis* (b), of the Agreement on Road Signs and Signals, France intends to retain the possibility of using lights placed on the side opposite to the direction of traffic, so as to be in a position to convey meanings different from those conveyed by the lights placed on the side appropriate to the direction of traffic” (see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (footnote 245 above), vol. I, p. 907 (chap. XI.B.24)).

<sup>263</sup> *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. 26, para. 59.

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.*, para. 60.

of article 14 of the Covenant, since, while accepting the principles contained in the same paragraph, the problems of implementation are such that full application cannot be guaranteed at present.<sup>268</sup> In another example (among the many precedents), the Congo formulated a reservation to article 11 of the Covenant, accompanying it with a long explanation:

The Government of the People's Republic of Congo declares that it does not consider itself bound by the provisions of article 11 ...

Article 11 of the International Covenant on Civil and Political Rights is quite incompatible with articles 386 *et seq.* of the Congolese Code of Civil, Commercial, Administrative and Financial Procedure, derived from Act 51/83 of 21 April 1983. Under those provisions, in matters of private law, decisions or orders emanating from conciliation proceedings may be enforced through imprisonment for debt when other means of enforcement have failed, when the amount due exceeds 20,000 CFA francs and when the debtor, between 18 and 60 years of age, makes himself insolvent in bad faith.<sup>269</sup>

(8) In the light of the obvious advantages of giving reasons for reservations and the role this practice plays in the reservations dialogue, the Commission chose not to stipulate in guideline 2.1.9 that reasons should accompany the reservation and be an integral part thereof—as is generally the case for reasons for objections<sup>270</sup>—but this is no doubt desirable, even though there is nothing to prevent a State or international organization from stating the reasons for its reservation *ex post facto*.

(9) Furthermore, although it seems wise to encourage the giving of reasons, this practice must not, in the Commission's view, become a convenient smokescreen used to justify the formulation of general or vague reservations. According to guideline 3.1.7 (Vague or general reservations), “[a] reservation shall be worded such a way as to allow its scope to be determined, in order to assess in particular its incompatibility with the object and purpose of the treaty”. Giving reasons cannot obviate the need for the reservation to be formulated in terms that make it possible to assess its validity. Even without reasons, a reservation must be self-sufficient as a basis for assessment of its validity; the reasons can only facilitate this assessment.<sup>271</sup>

<sup>268</sup> *Ibid.*, p. 181 (chap. IV.4). See also the reservation of Gambia (*ibid.*, p. 182).

<sup>269</sup> *Ibid.*, pp. 181–182 (chap. IV.4).

<sup>270</sup> See, below, guideline 2.6.10 and the commentary thereto. It is in any case extremely difficult to distinguish the reservation from the reasons for its formulation if they both appear in the same instrument.

<sup>271</sup> Nevertheless, there are cases in which the clarification resulting from the reasons given for the reservation might make it possible to consider a “dubious” reservation to be valid. For example, Belize accompanied its reservation to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances with the following explanation:

“Article 8 of the Convention requires the Parties to give consideration to the possibility of transferring to one another proceedings for criminal prosecution of certain offences where such transfer is considered to be in the interests of a proper administration of justice.

“The courts of Belize have no extra-territorial jurisdiction, with the result that they will have no jurisdiction to prosecute offences committed abroad unless such offences are committed partly within and partly without the jurisdiction, by a person who is within the jurisdiction. Moreover, under the Constitution of Belize, the control of public prosecutions is vested in the Director of Public Prosecutions, who is an independent functionary and not under Government control.

(10) Likewise, the fact that reasons may be given for a reservation at any time cannot be used by authors to modify or widen the scope of a reservation made previously. This is stipulated in guidelines 2.3.4 (Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations) and 2.3.5 (Widening of the scope of a reservation).

## 2.6 Formulation of objections

### 2.6.5 Author

**An objection to a reservation may be made by:**

**(a) any contracting State and any contracting international organization; and**

**(b) any State and any international organization that is entitled to become a party to the treaty in which case such a declaration does not produce any legal effect until the State or the international organization has expressed its consent to be bound by the treaty.**

#### Commentary

(1) Guideline 2.6.1 on the definition of objections to reservations does not resolve the question of which States or international organizations have the freedom to make or formulate objections to a reservation made by another State or another international organization. That is the purpose of guideline 2.6.5.

(2) The 1969 and 1986 Vienna Conventions provide some guidance on the question of the possible authors of an objection. Article 20, paragraph 4 (b), of the 1986 Vienna Convention refers to “an objection by a contracting State or by a contracting organization to a reservation”. It is clear from this that contracting States and contracting international organizations within the meaning of article 2, paragraph 1 (f), of the 1986 Vienna Convention are without any doubt possible authors of an objection to a reservation. This hypothesis is covered by subparagraph (a) of guideline 2.6.5.

(3) The Commission has been divided, however, over the question of whether States or international organizations that are entitled to become parties to a treaty may also formulate objections. According to one viewpoint, these States and international organizations do not have the same rights as contracting States and international organizations and therefore cannot formulate objections as such. It was argued that the fact that the Vienna Convention makes no reference to the subject should not be interpreted as granting this category of States and international organizations the right to formulate objections,

“Accordingly, Belize will be able to implement article 8 of the Convention only to a limited extent insofar as its Constitution and the law allows.”

(*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (footnote 245 above), vol. I, p. 477 (chap. VI.19)).

Without such an explanation, the reservation of Belize might have been considered “vague or general” and might thus have fallen within the scope of guideline 3.1.7. Accompanied by this explanation, it appears much more defensible.

and that it would follow from article 20, paragraph 5, of the Vienna Conventions that only contracting parties may formulate objections. It was further argued that, as a consequence, declarations formulated by States and international organizations, which are so far merely entitled to become a party to the treaty,<sup>272</sup> should not be qualified as objections. According to this same opinion, allowing for such a possibility might create a practical problem since, in the case of an open treaty, the parties to such a treaty might not have been made aware of certain objections.

(4) Nevertheless, according to the majority view, the provisions of article 20, paragraphs 4 (b) and 5, of the Vienna Conventions make no exclusion of any kind; on the contrary, they allow States and international organizations that are entitled to become parties to the treaty to formulate objections within the definition contained in guideline 2.6.1. Article 20, paragraph 4 (b), simply determines the possible effects of an objection raised by a contracting State or by a contracting organization; however, the fact that paragraph 4 does not specify the effects of objections formulated by States other than contracting States or by organizations other than contracting organizations in no way means that such other States or organizations may not formulate objections.<sup>273</sup> The limitation on the possible authors of an objection that article 20, paragraph 4 (b), of the Vienna Conventions might seem to imply is not found in article 21, paragraph 3, on the effects of the objection on the application of the treaty in cases where the author of the objection has not opposed the entry into force of the treaty between itself and the reserving State. Moreover, as article 23, paragraph 1, clearly states, reservations, express acceptances and objections must be communicated not only to the contracting States and contracting international organizations but also to “other States and international organizations entitled to become parties to the treaty”.<sup>274</sup> Such a notification has meaning only if these other States and international organizations can in fact react to the reservation by way of an express acceptance or an objection. Lastly, and most importantly, this position appeared to the Commission to be the only one that was compatible with the letter and spirit of guideline 2.6.1, which defines objections to reservations not in terms of the effects they produce but in terms of those that objecting States or international organizations intend for them to produce.<sup>275</sup>

(5) This point of view is confirmed by the 1951 advisory opinion of the ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. In the operative part of its opinion, the Court clearly established that States that are entitled to become parties to the Convention can formulate objections:

<sup>272</sup> This position seems to be defended by Belinda Clark (“The Vienna Convention reservations regime and the Convention on Discrimination Against Women”, *AJIL*, vol. 85, No. 2 (1991), p. 297).

<sup>273</sup> In this regard, see P.-H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1978, p. 150.

<sup>274</sup> See also article 77, paragraphs 1 (e) and (f), of the 1969 Vienna Convention (article 78 of the 1986 Vienna Convention), regarding the function of the depositary with regard to “States and international organizations entitled to become parties”.

<sup>275</sup> The definition of the term “reservation”, as set out in article 2, paragraph 1 (d), of the Vienna Conventions, and reproduced in guideline 1.1, is formulated in the same manner: it concerns declarations that are intended to produce certain effects (but that do not necessarily do so).

THE COURT IS OF OPINION, ...

(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.<sup>276</sup>

(6) In State practice, non-contracting States often formulate objections to reservations. For instance, Haiti objected to the reservations formulated by Bahrain to the Vienna Convention on Diplomatic Relations at a time when it had not even signed the Convention.<sup>277</sup> Similarly, the United States of America formulated two objections to the reservations made by the Syrian Arab Republic and Tunisia to the 1969 Vienna Convention even though it was not—and is not—a contracting State to this Convention.<sup>278</sup> Likewise, in the following examples, the objecting States were, at the time they formulated their objections, mere signatories to the treaty (which they later ratified):

—objection of Luxembourg to the reservations made by the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic to the Vienna Convention on Diplomatic Relations;<sup>279</sup> and

—objections of the United Kingdom of Great Britain and Northern Ireland to reservations made by Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Iran, Romania, Tunisia, the Ukrainian Soviet Socialist Republic the Union of Soviet Socialist Republics, to the Convention on the Territorial Sea and the Contiguous Zone<sup>280</sup> and to those made by Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Iran, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics to the Convention on the High Seas.<sup>281</sup>

(7) In the practice of the Secretary-General as depositary, such objections formulated by States or international

<sup>276</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 30, para. III (despite the wording of subparagraph (b), some members of the Commission are of the view that the Court was referring here only to signatory States). The same position was also taken by Waldock in his first report on the law of treaties. Draft article 19, which is devoted entirely to objections and their effects, provided that “any State which is or is entitled\* to become a party to a treaty shall have the right to object” (*Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62). However, it is noted that this language was left out of the 1969 Vienna Convention.

<sup>277</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (see footnote 245 above), vol. I, p. 96 (chap. III.3). Date of objection: 9 May 1972; date of accession: 2 February 1978.

<sup>278</sup> *Ibid.*, vol. II, p. 417 (chap. XXIII.1).

<sup>279</sup> *Ibid.*, vol. I, p. 96 (chap. III.3). Date of signature: 2 February 1962; date of objection: 18 January 1965; date of ratification: 17 August 1966.

<sup>280</sup> *Ibid.*, vol. II, p. 317 (chap. XXI.1). Date of signature: 9 September 1958; date of objection: 6 November 1959; date of ratification: 14 March 1960.

<sup>281</sup> *Ibid.*, vol. II, p. 323 (chap. XXI.2). Date of signature: 9 September 1958; date of objection: 6 November 1959; date of ratification: 14 March 1960.

organizations that are entitled to become parties to the treaty are conveyed by means of “communications”<sup>282</sup> and not “depository notifications”; however, what is “communicated” are unquestionably objections in the sense of guideline 2.6.1.

(8) According to the majority position, then, it seems entirely possible that States and international organizations that are entitled to become parties to the treaty may formulate objections in the sense of the definition contained in guideline 2.6.1 even though they have not expressed their consent to be bound by the treaty. This possibility is established in subparagraph (b) of guideline 2.6.5.

(9) In reality, it would seem not only possible but also wise for States or international organizations that intend to become parties but have not yet expressed their definitive consent to be bound to express their opposition to a reservation and to make their views known on the reservation in question. As the ICJ noted in its advisory opinion of 1951, such an objection “merely serves as a notice to the other State of the eventual attitude of the signatory State”.<sup>283</sup> Such notification may also prove useful both for the reserving State or organization and, in certain circumstances, for the treaty monitoring bodies.

(10) In any event, there is no doubt that an objection formulated by a State or organization that has not yet expressed its consent to be bound by the treaty does not immediately produce the legal effects intended by its author. This is evidenced also by the operative part of the advisory opinion of 1951, which states that such an objection “can have the legal effect indicated in the reply to Question I only upon ratification” by the State or the organization that formulated it.<sup>284</sup> The potential legal effect of an objection formulated by a State or an international organization prior to becoming a party to the treaty is realized only upon ratification, accession or approval of the treaty (if it is a treaty in solemn form) or signature (in the case of an executive agreement). This does not preclude qualifying such statements as objections; however, they are “conditional” or “conditioned” in the sense that their legal effects are subordinate to a specific act: the expression of definitive consent to be bound.

### 2.6.6 Joint formulation

#### The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

##### Commentary

(1) Even though, according to the definition contained in guideline 2.6.1, an objection is a unilateral statement,<sup>285</sup>

<sup>282</sup> *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, United Nations publication (Sales No. E.94.V.15), document ST/LEG/7/Rev.1, para. 214.

<sup>283</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 276 above), p. 30, response to question III.

<sup>284</sup> *Ibid.*

<sup>285</sup> See also the commentary to guideline 2.6.1 (Definition of objections to reservations), *Yearbook ... 2005*, vol. II (Part Two), pp. 77–82, and, in particular, para. (6) of the commentary.

it is perfectly possible for a number of States and/or a number of international organizations to formulate an objection collectively and jointly. Practice in this area is not highly developed; it is not, however, non-existent.

(2) In the context of regional organizations, and in particular the Council of Europe, member States strive, to the extent possible, to coordinate and harmonize their reactions and objections to reservations. Even though these States continue to formulate objections individually, they coordinate not only on the appropriateness but also on the wording of objections.<sup>286</sup> Technically, however, these objections remain unilateral declarations on the part of each author State.

(3) Yet it is also possible to cite cases in which States and international organizations have formulated objections in a truly joint fashion. For example, the European Community and its (at that time) nine member States objected, via a single instrument, to the “declarations” made by Bulgaria and the German Democratic Republic regarding article 52, paragraph 3, of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets of 14 November 1975, which offers customs unions and economic unions the possibility of becoming contracting parties.<sup>287</sup> The European Community has also formulated a number of objections “on behalf of the Member States of the European Economic Community and of the Community itself”.<sup>288</sup>

(4) It seemed to the Commission that there was no fault to be found with the joint formulation of an objection by several States or international organizations: it is difficult to imagine what might prevent them from doing jointly what they can doubtless do individually and under the same terms. Such flexibility is all the more desirable in that, given the growing number of common markets and customs and economic unions, precedents consisting of the objections or joint interpretative declarations cited above are likely to increase, as these institutions often exercise shared competence with their member States. Consequently, it would be quite unnatural to require that the latter should act separately from the institutions to which they belong. Thus, from a technical standpoint there is nothing to prevent the joint formulation of an objection. However, this in no way affects the unilateral nature of the objection.

<sup>286</sup> See, for example, the objections of certain States members of the Council of Europe to the 1997 International Convention for the Suppression of Terrorist Bombings (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (see footnote 245 above), vol. II, pp. 138–146 (chap. XVIII.9)) or to the 1999 International Convention for the Suppression of the Financing of Terrorism (*ibid.*, pp. 175–192, chap. XVIII.11).

<sup>287</sup> *Ibid.*, vol. I, p. 639 (chap. XI-A.16).

<sup>288</sup> See, for example, the objection to the declaration made by the Union of Soviet Socialist Republics in respect of the Wheat Trade Convention, 1986 (United Nations, *Treaty Series*, vol. 1455, p. 286, or *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1987* (United Nations publication, Sales No. E.88.V.3), document ST/LEG/SER.E/6 (chap. XIX.26)) and the identical objection to the declaration made by the Union of Soviet Socialist Republics in respect of the International Tropical Timber Agreement, 1983 (*ibid.*, chap. XIX.28). In the same vein, see the practice followed at the Council of Europe since 2002 with respect to reservations to counter-terrorism conventions (para. (2) of the commentary to the present guideline).

(5) The wording of guideline 2.6.6 is modelled on that of guidelines 1.1.7 (Reservations formulated jointly) and 1.2.2 (Interpretative declarations formulated jointly). Nevertheless, in the English text, after the adjective “unilateral”, the word “character” was preferred over the word “nature”. This change offers the advantage of aligning the English text with the French version but will make it necessary to harmonize the three draft guidelines during the second reading.

### 2.6.7 *Written form*

#### **An objection must be formulated in writing.**

##### *Commentary*

(1) Pursuant to article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, an objection to a reservation “must be formulated in writing and communicated to the contracting States [and contracting organizations] and other States [and international organizations] entitled to become parties to the treaty”.

(2) As is the case for reservations,<sup>289</sup> the requirement that an objection to a reservation must be formulated in writing was never called into question but was presented as self-evident in the debates in the Commission and at the Vienna Conferences. In his first report on the law of treaties, Sir Humphrey Waldock, the first Special Rapporteur to draft provisions on objections already provided in paragraph 2 (a) of draft article 19 that “[a]n objection to a reservation shall be formulated in writing”,<sup>290</sup> without making this formal requirement the subject of commentary.<sup>291</sup> While the procedural guidelines were comprehensively revised by the Special Rapporteur in light of the comments of two Governments suggesting that “some simplification of the procedural provisions”<sup>292</sup> was desirable, the requirement of a written formulation for an objection to a reservation was always explicitly stipulated:

—in article 19, paragraph 5, adopted by the Commission on first reading (1962): “An objection to a reservation shall be formulated in writing and shall be notified”;<sup>293</sup>

—in article 20, paragraph 5, proposed by the Special Rapporteur in his fourth report (1965): “An objection to a reservation must be in writing”;<sup>294</sup>

—in article 20, paragraph 1, adopted by the Commission on second reading (1965): “A reservation, an express acceptance of a reservation and an objection

<sup>289</sup> See guideline 2.1.1 (Written form) and commentary, *Yearbook ... 2002*, vol. II (Part Two), pp. 28–29.

<sup>290</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62.

<sup>291</sup> *Ibid.*, p. 68, para. (22) of the commentary on draft article 19, which refers the reader to the commentary to draft article 17 (*ibid.*, p. 66, para. (11)).

<sup>292</sup> These were the Governments of Denmark and Sweden. See the fourth report on the law of treaties of Sir Humphrey Waldock, Special Rapporteur (footnote 237 above), pp. 46–47 and 53, para. 13.

<sup>293</sup> *Yearbook ... 1962*, vol. II, document A/5209, p. 176.

<sup>294</sup> *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 55.

to a reservation must be formulated in writing and communicated to the other contracting States”.<sup>295</sup>

The written form was not called into question at the Vienna Conference in 1968 and 1969 either. On the contrary, all proposed amendments to the procedure in question retained the requirement that an objection to a reservation must be formulated in writing.<sup>296</sup>

(3) That objections must be in written form is well established. Notification, another procedural requirement applicable to objections (by virtue of article 23, paragraph 1, of the Vienna Conventions), requires a written document; an oral communication alone cannot be filed or registered with the depositary of the treaty or communicated to other interested States. Furthermore, considerations of legal security justify and call for the written form. One must not forget that an objection has significant legal effects on the opposability of a reservation, the applicability of the provisions of a treaty as between the reserving State and the objecting State (art. 21, para. 3, of the Vienna Conventions) and the entry into force of the treaty (art. 20, para. 4). In addition, an objection reverses the presumption of acceptance arising from article 20, paragraph 5, of the Vienna Conventions, and the written form is an important means of proving whether a State did indeed express an objection to a reservation during the period of time prescribed by this provision or whether, by default, it must be considered as having accepted the reservation.

(4) Guideline 2.6.7 therefore confines itself to reproducing the requirement of written form for the objections referred to in the first part of article 23, paragraph 1, of the Vienna Conventions, and parallels guideline 2.1.1 relating to the written form of reservations.

### 2.6.8 *Expression of intention to preclude the entry into force of the treaty*

**When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.**

##### *Commentary*

(1) As article 20, paragraph 4 (b), of the 1969 and 1986 Vienna Conventions shows, a State or an international organization objecting to a reservation may oppose the entry into force of a treaty as between itself and the author of the reservation. In order for this to be so, according to the same provision, that intent must still be “definitely

<sup>295</sup> *Ibid.*, document A/6009, p. 162. Draft article 20 of 1965 became draft article 18 in the text adopted by the Commission in 1966 (*Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208).

<sup>296</sup> See the amendment by Spain: “A reservation, an acceptance of a reservation, and an objection to a reservation must be formulated in writing and duly communicated by the reserving, accepting or objecting State to the other States which are parties, or are entitled to become parties, to the treaty.” (A/CONF.39/C.1/L.149, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (footnote 123 above), p. 138).

expressed by the objecting State or organization". Following the reversal of the presumption regarding the effects of the objection on the entry into force of the treaty as between the reserving State and the objecting State decided at the 1969 Vienna Conference,<sup>297</sup> a clear and unequivocal statement is necessary in order to preclude the entry into force of the treaty in relations between the two States.<sup>298</sup> This is how article 20, paragraph 4 (b), of the Vienna Conventions, on which the text of guideline 2.6.8 is largely based, should be understood.

(2) The objection of the Netherlands to the reservations to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide certainly meets the requirement of definite expression; it states that "the Government of the Kingdom of the Netherlands ... does not deem any State which has made or which will make such reservation a party to the Convention".<sup>299</sup> France also very clearly expressed such an intention regarding the reservation of the United States to the Agreement on the international carriage of perishable foodstuffs and on the special equipment to be used for such carriage (ATP), by declaring that it would not "be bound by the ATP Agreement in its relations with the United States of America".<sup>300</sup> Similarly, the United Kingdom stated in its objection to the reservation of the Syrian Arab Republic to the 1969 Vienna Convention that it did "not accept the entry into force of the Convention as between the United Kingdom and Syria".<sup>301</sup>

(3) On the other hand, the mere fact that the reason for the objection is that the reservation is considered incompatible with the object and purpose of the treaty is not sufficient to exclude the entry into force of the treaty between the author of the objection and the author of the reservation. Practice is indisputable in this regard, since States quite frequently base their objections on such incompatibility, all the while clarifying that the finding does not prevent the treaty from entering into force as between them and the author of the reservation.<sup>302</sup>

<sup>297</sup> See, in particular, the amendment tabled by the Union of Soviet Socialist Republics (A/CONF.39/L.3, *ibid.*, pp. 265–266) finally adopted by the Conference (*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* (A/CONF.39/11/Add.1, United Nations publication, Sales No. E.70.V.6), tenth plenary meeting, 29 April 1969, p. 35, para. 79).

<sup>298</sup> See R. Baratta, *Gli effetti delle riserve ai trattati*, Milan, Giuffrè, 1999, p. 352. The author states: "There is no doubt that in order for the expected consequence of the rule regarding a qualified objection to be produced, the author must state its intention to that effect." See, however, paragraph (6) of the commentary to the present guideline.

<sup>299</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (see footnote 245 above), vol. I, pp. 132–133 (chap. IV.1). See also the objection of China (*ibid.*, p. 131).

<sup>300</sup> *Ibid.*, p. 899 (chap. XI.B.22). See also the objection of Italy (*ibid.*, p. 900).

<sup>301</sup> *Ibid.*, vol. II, p. 416 (chap. XXIII.1). See also the objection of the United Kingdom to the reservation of Viet Nam (*ibid.*, p. 417).

<sup>302</sup> Among many examples, see the objections of several States members of the Council of Europe to the reservation of the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism on the basis of the incompatibility of the reservation with the object and purpose of the Convention (Austria, Belgium, Canada [observer], Denmark, Estonia, Finland, France, Germany, Latvia, Netherlands, Norway, Portugal, Sweden; *ibid.*, pp. 175–192 (chap. XVIII.11)). In every case, it is stated that the objection does not

(4) Neither the Vienna Conventions nor the *travaux préparatoires* thereto gives any useful indication regarding the time at which the objecting State or international organization must clearly express its intention to oppose the entry into force of the treaty as between itself and the reserving State. It is nevertheless possible to proceed by deduction. According to the presumption of article 20, paragraph 4 (b), of the Vienna Conventions, whereby an objection does not preclude the entry into force of a treaty in treaty relations between an objecting State or international organization and the reserving State or international organization unless the contrary is expressly stated, an objection that is not accompanied by such a declaration results in the treaty entering into force, subject to article 21, paragraph 3, of the Vienna Conventions concerning the effect of a reservation on relations between the two parties. If the objecting State or international organization expressed a different intention in a subsequent declaration, it would undermine its legal security.

(5) However, this is the case only if the treaty actually enters into force in relations between the two States or international organizations concerned. It may also happen that although the author of the objection has not ruled out this possibility at the time of formulating the objection, the treaty does not enter into force immediately, for other reasons.<sup>303</sup> In such a case, the Commission considered that there was no reason to prohibit the author of the objection from expressing the intention to preclude the entry into force of the treaty at a later date; such a solution is particularly necessary in situations where a long period of time may elapse between the formulation of the initial objection and the expression of consent to be bound by the treaty by the reserving State or international organization or by the author of the objection. Accordingly, while excluding the possibility that a declaration "maximizing" the scope of the objection can be made after the entry into force of

preclude the entry into force of the Convention between the objecting State and the Syrian Arab Republic. See also the objections of Belgium to the reservations of Egypt, Cambodia and Morocco to the Vienna Convention on Diplomatic Relations (*ibid.*, vol. I, p. 94 (chap. III.3)) or the objections of Germany to several reservations concerning the same Convention (*ibid.*, pp. 95–96). It is, however, interesting to note that even though Germany considers all the reservations in question to be "incompatible with the letter and spirit of the Convention", the Government of Germany stated for only some objections that they did not preclude the entry into force of the treaty as between Germany and the reserving States; it did not take a position on the other cases. Many examples can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights, in particular the objections that were raised to the reservation of the United States to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (*ibid.*, pp. 191–200 (chap. IV.4)). All these States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose its entry into force in their relations with the United States. Only Germany remained silent regarding the entry into force of the Covenant, despite its objection to the reservation (*ibid.*). The phenomenon is not, however, limited to human rights treaties. See, for example, the objections made by Austria, France, Germany and Italy to the reservation of Viet Nam to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (*ibid.*, pp. 482–483 (chap. VI.19)) or the objections made by the States members of the Council of Europe to the reservations to the International Convention for the Suppression of Terrorist Bombings (*ibid.*, vol. II, pp. 138–146 (chap. XVIII.9)) or to the International Convention for the Suppression of the Financing of Terrorism (*ibid.*, (chap. XVIII.11)).

<sup>303</sup> Insufficient number of ratifications or accessions, additional time provided under the provisions of the treaty itself.

the treaty between the author of the reservation and the author of the objection, the Commission made it clear that the intention to preclude the entry into force of the treaty must be expressed “before the treaty would otherwise enter into force” between them, without making expression of the will to oppose the entry into force of the treaty in all cases at the time the objection is formulated a prerequisite.

(6) Nevertheless, expression of the intention to preclude the entry into force of a treaty by the author of the objection or the absence thereof does not in any way prejudice the question of whether the treaty actually enters into force between the reserving State or international organization and the State or international organization that made an objection. This question concerns the combined legal effects of a reservation and the reactions it has prompted, and is to some extent separate from that of the intention of the States or international organizations concerned.

### 2.6.9 Procedure for the formulation of objections

**Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.**

#### Commentary

(1) The procedural rules concerning the formulation of objections are not notably different from those that apply to the formulation of reservations. This is, perhaps, the reason why the Commission apparently did not pay very much attention to these issues during the *travaux préparatoires* for the 1969 Vienna Convention.

(2) This lack of interest can easily be explained in the case of the Special Rapporteurs who advocated the traditional system of unanimity, namely Brierly, Lauterpacht and Fitzmaurice.<sup>304</sup> While it was only logical, in their view, that an acceptance, which is at the heart of the traditional system of unanimity, should be provided with a legal framework, particularly where its temporal aspect was concerned, an objection, which they saw simply as a refusal of acceptance that prevented unanimity from taking place and, consequently, the reserving State from becoming a party to the instrument, did not seem to warrant specific consideration.

(3) Waldock’s first report, which introduced the “flexible” system in which objections play a role that is, if not more important, then at least more ambiguous, contained an entire draft article on procedural issues relating to the formulation of objections.<sup>305</sup> Despite the very detailed nature

<sup>304</sup> Even though Lauterpacht’s proposals *de lege ferenda* envisaged objections, the Special Rapporteur did not consider it necessary to set out the procedure that should be followed when formulating them. See the alternative drafts of article 9 included in the [first] report on the law of treaties by H. Lauterpacht, Special Rapporteur, *Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 91–92.

<sup>305</sup> This draft article 19 contained the following provision:

“... ”

“2. (a) An objection to a reservation shall be formulated in writing by the competent authority of the objecting State or by a representative of the State duly authorized for that purpose.

“(b) The objection shall be communicated to the reserving State and to all other States which are or are entitled to become parties to the treaty, in accordance with the procedure, if any, prescribed in the treaty for such communications.

of this provision, the report limits itself to a very brief commentary, indicating that “[t]he provisions of this article are for the most part a reflex of provisions contained in [the articles on the power to formulate and withdraw reservations (art. 17) and on consent to reservations and its effects (art. 18)] and do not therefore need further explanation”.<sup>306</sup>

(4) After major reworking of the draft articles on acceptance and objection initially proposed by the Special Rapporteur,<sup>307</sup> only draft article 18, paragraph 5, presented by the Drafting Committee in 1962 deals with the formulation and the notification of an objection,<sup>308</sup> a provision which, in the view of the Commission, “do[es] not appear to require comment”.<sup>309</sup> That lack of interest continued into 1965, when the draft received its second reading. And even though objections found a place in the new draft article 20 devoted entirely to questions of procedure, the Special Rapporteur still did not consider it appropriate to comment further on those provisions.<sup>310</sup>

(5) The desirability of parallel procedural rules for the formulation, notification and communication of reservations, on the one hand, and of objections, on the other, was stressed throughout the debate in the Commission and was finally reflected in article 23, paragraph 1, of the 1969

“(c) If no procedure has been prescribed in the treaty but the treaty designates a depositary of the instruments relating to the treaty, then the lodging of the objection shall be communicated to the depositary whose duty it shall be:

“(i) To transmit the text of the objection to the reserving State and to all other States which are or are entitled to become parties to the treaty; and

“(ii) To draw the attention of the reserving State and the other States concerned to any provisions in the treaty relating to objections to reservations.

“3. (a) In the case of a plurilateral or multilateral treaty, an objection to a reservation shall not be effective unless it has been lodged before the expiry of twelve calendar months from the date when the reservation was formally communicated to the objecting State; provided that, in the case of a multilateral treaty, an objection by a State which at the time of such communication was not a party to the treaty shall nevertheless be effective if subsequently lodged when the State executes the act or acts necessary to enable it to become a party to the treaty.

“(b) In the case of a plurilateral treaty, an objection by a State which has not yet become a party to the treaty, either actual or presumptive, shall:

“(i) Cease to have effect, if the objecting State shall not itself have executed a definitive act of participation in the treaty within a period of twelve months from the date when the objection was lodged;

“(ii) Be of no effect, if the treaty is in force and four years have already elapsed since the adoption of its text.

...”

(First report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 62).

<sup>306</sup> *Ibid.*, p. 68, para. (22) of the commentary.

<sup>307</sup> The only explanation that can be found in the work of the Commission for merging the draft articles initially proposed by Waldock is found in his presentation of the report of the Drafting Committee at the 663rd meeting of the Commission. On that occasion, the Special Rapporteur stated that “the new article 18 covered both acceptance of and objection to reservations; the contents of the two former articles 18 and 19 had been considerably reduced in length without, however, leaving out anything of substance” (*ibid.*, vol. I, 663rd meeting, para. 36).

<sup>308</sup> *Ibid.*, 668th meeting, para. 30. See also draft article 19, paragraph 5, adopted on first reading, *ibid.*, vol. II, p. 176.

<sup>309</sup> *Ibid.*, p. 180, para. (18) of the commentary.

<sup>310</sup> Fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177, p. 54, para. 19.



Vienna Convention, which sets forth the procedure for formulating an express acceptance of or an objection to a reservation. In 1965, Mr. Castrén rightly observed:

Paragraph 5 [of draft article 20, which, considerably shortened and simplified, was the source for article 23, paragraph 1] laid down word for word precisely the same procedural rules for objections to a reservation as those applicable under paragraph 1 to the proposal and notification of reservations. Preferably, therefore, the two paragraphs should be amalgamated or else paragraph 5 should say simply that the provisions of paragraph 1 applied also to objections to a reservation.<sup>311</sup>

(6) Therefore, it may be wise simply to take note, within the framework of the Guide to Practice, of this procedural parallelism between the formulation of reservations and the formulation of objections. It is particularly important to note that the requirement of a marked formalism that is a consequence of these similarities between the procedure for the formulation of objections and the procedure for the formulation of reservations is justified by the highly significant effects that an objection may have on the reservation and its application as well as on the entry into force and the application of the treaty itself.<sup>312</sup>

(7) This is particularly true of the rules regarding the authorities competent to formulate reservations at the international level and the consequences (or the absence of consequences) of the violation of internal rules regarding the formulation of reservations, the rules regarding the notification and communication of reservations and the rules regarding the functions of the depositary in this area. These rules would seem to be transposable *mutatis mutandis* to the formulation of objections. Rather than reproducing guidelines 2.1.3 (Formulation of a reservation at the international level),<sup>313</sup> 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations),<sup>314</sup> 2.1.5 (Communication of reservations),<sup>315</sup> 2.1.6 (Procedure for communication of reservations)<sup>316</sup> and 2.1.7 (Functions of depositaries)<sup>317</sup> by simply replacing “reservation” with “objection” in the text of the guidelines, the Commission considered it prudent to make a general reference in the texts of these guidelines<sup>318</sup> which apply *mutatis mutandis* to objections.

## 2.6.10 Statement of reasons

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

### Commentary

(1) Neither of the Vienna Conventions contains a provision requiring States to give the reasons for their objection

<sup>311</sup> *Ibid.*, vol. I, 799th meeting, p. 168, para. 53.

<sup>312</sup> See article 20, paragraph 4 (b), and article 23, paragraph 3, of the Vienna Conventions.

<sup>313</sup> See *Yearbook ... 2002*, vol. II (Part Two), pp. 30–32.

<sup>314</sup> *Ibid.*, pp. 32–34.

<sup>315</sup> *Ibid.*, pp. 34–38.

<sup>316</sup> For text and commentary of guideline 2.1.6, see above in the present report.

<sup>317</sup> See *Yearbook ... 2002*, vol. II (Part Two), pp. 42–45.

<sup>318</sup> The Commission proceeded in the same manner in guidelines 1.5.2 (referred to guidelines 1.2 and 1.2.1), 2.4.3 (referred to guidelines 1.2.1, 2.4.6 and 2.4.7) and, even more obviously, in 2.5.6 (referred to guidelines 2.1.5, 2.1.6 and 2.1.7).

to a reservation. Furthermore, notwithstanding the link initially established between an objection, on the one hand, and the compatibility of the reservation with the object and purpose of the treaty, on the other hand, Waldock never at any point envisaged requiring a statement of the reasons for an objection. This is regrettable.

(2) Under the Vienna regime, the freedom to object to a reservation is very broad, and a State or international organization may object to a reservation for any reason whatsoever, irrespective of the validity of the reservation: “No State can be bound by contractual obligations it does not consider suitable.”<sup>319</sup> Furthermore, during discussions in the Sixth Committee of the General Assembly, several States indicated that quite often the reasons a State has for formulating an objection are purely political.<sup>320</sup> Since this is the case, stating reasons risks uselessly embarrassing an objecting State or international organization, without any gain to the objecting State or international organization or to the other States or international organizations concerned.

(3) Yet the issue is different where a State or international organization objects to a reservation because it considers it invalid (whatever the reason for this position). Leaving aside the question as to whether there may be a legal obligation for States<sup>321</sup> to object to reservations that are incompatible with the object and purpose of a treaty nevertheless, in a “flexible” treaty regime the objection clearly plays a vital role in the determination of the validity of a reservation. In the absence of a mechanism for reservation control, the onus is on States and international organizations to express, through objections, their view, necessarily subjective, on the validity of a given

<sup>319</sup> 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 (Heidelberg Journal of International Law)*, vol. 27 (1967), p. 466.

<sup>320</sup> See, for example, the statement of the United States representative in the Sixth Committee during the fifty-eighth session of the General Assembly: “Practice demonstrated that States and international organizations objected to reservations for a variety of reasons, often political rather than legal in nature, and with different intentions” (*Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 20th meeting (A/C.6/58/SR.20), para. 9). During the sixtieth session, the representative of the Netherlands stated that “[i]n the current system, the political aspect of an objection, namely, the view expressed by the objecting State on the desirability of a reservation, played a central role, and the legal effects of such an objection were becoming increasingly peripheral” (*ibid.*, *Sixtieth Session, Sixth Committee*, 14th meeting (A/C.6/60/SR.14), para. 31); on the political aspect of an objection, see also the statement by the representative of Portugal (*ibid.*, 16th meeting (A/C.6/60/SR.16), para. 44). See also the separate opinion of Judge A. A. Cançado Trindade in the case of *Caesar v. Trinidad and Tobago, Judgement of 11 March 2005*, Inter-American Court of Human Rights, Series C, No. 123, para. 24.

<sup>321</sup> The Netherlands observed that “States parties, as guardians of a particular treaty, appeared to have a moral, if not legal, obligation to object to a reservation that was contrary to the object and purpose of that treaty” (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 14th meeting (A/C.6/60/SR.14), para. 29). According to this line of reasoning, “[a] party is required to give effect to its undertakings in good faith and that would preclude it from accepting a reservation inconsistent with the objects and purposes of the treaty” (final working paper prepared by Ms. Françoise Hampson in 2004 on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), para. 24); Ms. Hampson observed, however, that there did not seem to be a general obligation to formulate an objection to reservations incompatible with the object and purpose of the treaty (*ibid.*, para. 30).

reservation.<sup>322</sup> Such a function can only be fulfilled, however, by objections motivated by considerations regarding the non-validity of the reservation in question. Even if only for this reason, it would seem reasonable to indicate to the extent possible the reasons for an objection. It is difficult to see why an objection formulated for purely political reasons should be taken into account in evaluating the conformity of a reservation with the requirements of article 19 of the Vienna Conventions.

(4) In addition, indicating the reasons for an objection not only allows a reserving State or international organization to understand the views of the other States and international organizations concerned regarding the validity of the reservation but, like the statement of reasons for the reservation itself,<sup>323</sup> also provides important evidence to the monitoring bodies called on to decide on the conformity of a reservation with the treaty. Thus, in the *Loizidou* case, the European Court of Human Rights found confirmation of its conclusions regarding the reservation of Turkey to its declaration of acceptance to the Court's jurisdiction in the declarations and objections made by other States parties to the European Convention on Human Rights.<sup>324</sup> Similarly, in the working paper she submitted to the Sub-Commission on the Promotion and Protection of Human Rights in 2004, Ms. Hampson stated that "[i]n order for a treaty body to discharge its role, it will need to examine, amongst other materials, the practice of the parties to the treaty in question with regard to reservations and objections".<sup>325</sup> The Human Rights Committee itself, in its General Comment No. 24, which, while demonstrating deep mistrust with regard to the practice of States concerning objections and with regard to the conclusions that one may draw from it in assessing the validity of a reservation, nevertheless states that "an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant".<sup>326</sup>

(5) State practice shows that States often indicate in their objections not only that they consider the reservation in question contrary to the object and purpose of the treaty but also, in more or less detail, how and why

<sup>322</sup> Some treaty regimes go so far as to rely on the number of objections in order to determine the admissibility of a reservation. See for example article 20, paragraph 2, of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, which states: "A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it."

<sup>323</sup> See guideline 2.1.9 and paragraphs (4) to (6) of the commentary above.

<sup>324</sup> *Loizidou v. Turkey, Preliminary Objections, Judgment of 23 March 1995, Application No. 15318/89*, European Court of Human Rights, *Series A: Judgments and Decisions* vol. 310, pp. 28–29, para. 81. See also the statement of the representative of Sweden on behalf of the Nordic countries in the Sixth Committee (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 14th meeting, A/C.6/60/SR.14, para. 22).

<sup>325</sup> Final working paper prepared by Ms. Françoise Hampson in 2004 on reservations to human rights treaties (see footnote 321), para. 28; see, more generally, paragraphs 21–35 of this study.

<sup>326</sup> Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, para. 17.

they reached that conclusion. At the sixtieth session of the General Assembly, the representative of Italy to the Sixth Committee expressed the view that the Commission should encourage States to make use of the formulas set forth in article 19 of the Vienna Convention, with a view to clarifying their objections.<sup>327</sup>

(6) In the light of these considerations and notwithstanding the absence of an obligation in the Vienna regime to give the reasons for objections, the Commission considered it useful to include in the Guide to Practice guideline 2.6.10, which encourages States and international organizations to expand and develop the practice of stating reasons. However, it must be clearly understood that such a provision is only a recommendation, a guideline for State practice, and that it does not codify an established rule of international law.

(7) Guideline 2.6.10 is worded along the lines of guideline 2.1.9 concerning the statement of reasons for reservations, and goes no further than this; it does not specify the point at which the reasons for an objection must be given. Since the same causes produce the same effects,<sup>328</sup> it would nonetheless seem desirable that, to the extent possible, the objecting State or international organization indicate the reasons for its opposition to the reservation in the instrument giving notification of the objection.

#### 2.6.11 *Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation*

**An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.**

##### *Commentary*

(1) While article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions requires formal confirmation of a reservation when the reserving State or international organization expresses its consent to be bound by the treaty,<sup>329</sup> objections do not need confirmation. Article 23, paragraph 3, of the Vienna Conventions provides: "An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation." Guideline 2.6.11 simply reproduces some of the terms of this provision with the necessary editorial amendments to limit its scope to objections only.

(2) The provision contained in article 23, paragraph 3, of the 1969 Vienna Convention was included only at a very late stage of the *travaux préparatoires* for the Convention. The early draft articles relating to the procedure applicable to the formulation of objections did not refer to cases where an objection might be made to a reservation that had yet to be formally confirmed. It was only in 1966 that

<sup>327</sup> *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 16th meeting (A/C.6/60/SR.16), para. 20.

<sup>328</sup> See paragraph (8) of the commentary to guideline 2.1.9 above.

<sup>329</sup> See also guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty) and the commentary to this guideline, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 180–183.

the non-requirement of confirmation of an objection was expressed in draft article 18, paragraph 3, adopted on second reading in 1966,<sup>330</sup> without explanation or illustration; however, it was presented at that time as *lex ferenda*.<sup>331</sup>

(3) This is a common sense rule: the formulation of the reservation concerns all States and international organizations that are contracting parties or entitled to become parties; acceptances and objections affect primarily the bilateral relations between the author of the reservation and each of the accepting or objecting States or organizations. The reservation is an “offer” addressed to all contracting parties, which may accept or reject it; it is the reserving State or organization that endangers the integrity of the treaty and risks reducing it to a series of bilateral relations. On the other hand, it is not important whether the acceptance or objection is made before or after the confirmation of the reservation: what is important is that the reserving State or organization is aware of its partners’ intentions,<sup>332</sup> which is the case if the communication procedure established in article 23, paragraph 1, has been followed.

(4) State practice regarding the confirmation of objections is sparse and inconsistent: sometimes States confirm their previous objections once the reserving State has itself confirmed its reservation, but at other times they refrain from doing so.<sup>333</sup> Although the latter approach seems to be more usual, the fact that these confirmations exist does not invalidate the positive quality of the rule laid down in article 23, paragraph 3: these are precautionary measures that are by no means dictated by a sense of legal obligation (*opinio juris*). However, some members of the Commission consider that such confirmation is required when a long period of time has elapsed between the formulation of the reservation and the formal confirmation of the reservation.

(5) In the opinion of a minority of members who refuse to view declarations made by States or international organizations that are not contracting parties as real objections,<sup>334</sup> such declarations should in all cases be confirmed. This position was not accepted by the Commission, which considers that it is not necessary to make such a distinction.<sup>335</sup>

<sup>330</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 208.

<sup>331</sup> “[T]he Commission did not consider that an objection to a reservation made previously to the latter’s confirmation would need to be reiterated after that event” (*ibid.*, para. (5) of the commentary).

<sup>332</sup> In its advisory opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 276 above), the ICJ described the objection made by a signatory as a “notice” addressed to the author of the reservation (p. 29).

<sup>333</sup> For example, Australia and Ecuador did not confirm their objections to the reservations formulated at the time of the signing of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide by the Byelorussian Soviet Socialist Republic, Czechoslovakia, Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics when those States ratified that Convention while confirming their reservations (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (see footnote 245 above), vol. I, pp. 131–132 (chap. IV.1)). Similarly, Ireland and Portugal did not confirm the objections they made to the reservation formulated by Turkey at the time of the signing of the 1989 Convention on the Rights of the Child when Turkey confirmed its reservation in its instrument of ratification (*ibid.*, pp. 341–342 (chap. IV.11)).

<sup>334</sup> See paragraph (3) of the commentary to guideline 2.6.5 above.

<sup>335</sup> See paragraphs (4) and (5) of the commentary to guideline 2.6.5 above.

## 2.6.12 Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty

**An objection formulated prior to the expression of consent to be bound by the treaty does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization had signed the treaty when it had formulated the objection; it must be confirmed if the State or the international organization had not signed the treaty.**

### Commentary

(1) Article 23, paragraph 3, of the 1969 and 1986 Vienna Conventions does not, however, answer the question of whether an objection by a State or an international organization that, when formulating it, has yet to express its consent to being bound by the treaty must subsequently be confirmed if it is to produce the effects envisaged. Although Waldock did not overlook the possibility that an objection might be formulated by signatory States or by States only entitled to become parties to the treaty,<sup>336</sup> the question of the subsequent confirmation of such a reservation was never raised.<sup>337</sup> A proposal in that regard made by Poland at the Vienna Conference<sup>338</sup> was not considered. Accordingly, the Convention has a gap that the Commission should endeavour to fill.

(2) State practice in this regard is all but non-existent. One of the rare examples is provided by the objections formulated by the United States to a number of reservations to the 1969 Vienna Convention itself.<sup>339</sup> In its objection to the reservation by the Syrian Arab Republic, the United States—which has yet to express its consent to be bound by the Convention—specified that it:

intends, at such time as it may become a party to the Vienna Convention on the Law of Treaties, to *reaffirm its objection* to the foregoing reservation and to reject treaty relations with the Syrian Arab Republic under all provisions in Part V of the Convention with regard to which the Syrian Arab Republic has rejected the obligatory conciliation procedures set forth in the Annex to the Convention.<sup>340</sup>

<sup>336</sup> See in particular paragraph 3 (b) of draft article 19 proposed by Waldock in his first report on the law of treaties (footnote 305 above) or paragraph 6 of the draft article 20 proposed in his fourth report (footnote 237 above, p. 55).

<sup>337</sup> Except, perhaps, in a comment made incidentally by Mr. Tunkin: “It was clearly the modern practice that a reservation was valid only if made or confirmed at the moment when final consent to be bound was given, and that was the presumption reflected in the 1962 draft. The same applied to objections to reservations. The point was partially covered in paragraph 6 of the Special Rapporteur’s new text for article 20” (*Yearbook ... 1965*, vol. I, 799th meeting, para. 38).

<sup>338</sup> The Government of Poland proposed that paragraph 2 of article 18 (which became article 23), should be worded as follows: “If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation as well as an eventual objection to it must be formally confirmed by the reserving and objecting States when expressing their consent to be bound by the treaty. In such a case the reservation and the objection shall be considered as having been made on the date of their confirmation” (mimeographed document A/CONF.39/6/Add.1, p. 18).

<sup>339</sup> The reservations in question are those formulated by the Syrian Arab Republic (point E) and Tunisia (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (see footnote 245 above), vol. II, p. 412 (chap. XXIII.1)).

<sup>340</sup> *Ibid.*, p. 417.

Curiously, the second objection by the United States, formulated against the reservation by Tunisia, does not contain the same statement.

(3) In its 1951 advisory opinion, the ICJ also seemed to take the view that objections made by non-States parties do not require confirmation. It considered that:

Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification.\*

... The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect.<sup>341</sup>

The Court thereby seemed to accept that an objection automatically takes effect as a result of ratification alone, without the need for confirmation.<sup>342</sup> Nonetheless, it has yet to take a formal stand on this question and the debate has been left open.

(4) It is possible, however, to deduce from the omission from the text of the Vienna Conventions of any requirement that an objection made by a State or an international organization prior to ratification or approval should be confirmed that neither the members of the Commission nor the delegates at the Vienna Conference<sup>343</sup> considered that such a confirmation was necessary. The fact that the amendment proposed by Poland,<sup>344</sup> which aimed to bring objections in line with reservations in that respect, was not adopted further confirms this argument. These considerations are strengthened even more if one bears in mind that, when the requirement of formal confirmation of reservations formulated when signing the treaty, an obligation now firmly enshrined in article 23, paragraph 2, of the Vienna Conventions, was adopted by the Commission, it was more in the nature of progressive development than codification *stricto sensu*.<sup>345</sup> Therefore, the disparity on this score between the procedural rules laid down for the formulation of reservations, on the one hand, and the formulation of objections, on the other, could not have been due to a simple oversight but could reasonably be considered deliberate.

(5) There are other grounds for the non-requirement of formal confirmation of an objection made by a State or an international organization prior to the expression of its consent to be bound by the treaty. A reservation formulated

before the reserving State or international organization becomes a contracting party to the treaty should produce no legal effect and will remain a “dead letter” until such a time as the State’s consent to be bound by the treaty is effectively given. Requiring formal confirmation of the reservation is justified in this case in particular by the fact that the reservation, once accepted, modifies that consent. The same is not true of objections. Although objections, too, produce the effects provided for in article 20, paragraph 4, and article 21, paragraph 3, of the Vienna Conventions only when the objecting State or international organization has become a contracting party, they are not without significance even before then. They express their author’s opinion of a reservation’s validity or admissibility and, as such, may be taken into consideration by the bodies having competence to assess the validity of reservations.<sup>346</sup> Moreover, and on this point the 1951 advisory opinion of the ICJ remains valid, objections give notice to reserving States with regard to the attitude of the objecting State *vis-à-vis* their reservation. As the Court observed:

The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation.<sup>347</sup>

Such an objection, formulated prior to the expression of consent to be bound by the treaty, therefore encourages the reserving State to reconsider, modify or withdraw its reservation in the same way as an objection raised by a contracting State. This notification would, however, become a mere possibility if the objecting State were required to confirm its objection at the time it expressed its consent to be bound by the treaty. The requirement for an additional formal confirmation would thus, in the view of the Commission, largely undermine the significance attaching to the freedom of States and international organizations that are not yet contracting parties to the treaty to raise objections.

(6) Moreover, non-confirmation of the objection in such a situation poses no problem of legal security. The objections formulated by a signatory State or by a State entitled to become a party to the treaty must, like any notification or communication relating to the treaty,<sup>348</sup> be made in writing and communicated and notified, in the same way as an objection emanating from a party. Furthermore, unlike a reservation, an objection modifies treaty relations only with respect to the bilateral relations between the reserving State—which has been duly notified—and the objecting State. The rights and obligations assumed by the objecting State *vis-à-vis* other States parties to the treaty are not affected in any way.

(7) As convincing as these considerations might seem, the Commission nevertheless felt it necessary to draw a distinction between two different cases: objections formulated by signatory States or international organizations and

<sup>341</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 276 above), pp. 28–29.

<sup>342</sup> See, in this sense, F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5 (1988), p. 137.

<sup>343</sup> *Ibid.*

<sup>344</sup> See footnote 338 above.

<sup>345</sup> See Waldock’s first report on the law of treaties (footnote 276 above), p. 66, paragraph (11) of the commentary to draft article 17. See also D. W. Greig, “Reservations: equity as a balancing factor?”, *Australian Yearbook of International Law*, vol. 16 (1995), p. 28, and Horn, *op. cit.* (footnote 342 above), p. 41. See also the commentary to guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 180–183, at p. 181.

<sup>346</sup> See paragraph (4) of the commentary to guideline 2.6.10 above.

<sup>347</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 276 above), p. 29.

<sup>348</sup> See article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention.

objections formulated by States or international organizations that had not yet signed the treaty at the time the objection was formulated. It seems that, by signing the treaty, the first category of States and international organizations enjoys legal status *vis-à-vis* the instrument in question,<sup>349</sup> while the others have the status of third parties. Even though such third parties can formulate an objection to a reservation,<sup>350</sup> the Commission is of the view that formal confirmation of such objections would be appropriate at the time the author State or international organization signs the treaty or expresses its consent to be bound by it. This would seem all the more necessary in that a significant amount of time can elapse between the time an objection is formulated by a State or international organization that had not signed the treaty when it made the objection and the time at which the objection produces its effects.

(8) The Vienna Conventions do not define the notion of a “State [that] has signed the treaty”, which the Commission has used in guideline 2.6.12. It nevertheless follows from article 18, subparagraph (a), of the Vienna Conventions that it is States or international organizations that have “signed the treaty or [have] exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until [they] shall have made [their] intention clear not to become a party to the treaty”.

### 2.6.13 *Time period for formulating an objection*

**Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.**

#### *Commentary*

(1) The question of the time at which, or until which, a State or an international organization may raise an objection is partially and indirectly addressed by article 20, paragraph 5, of the Vienna Conventions. In its 1986 form, this provision states:

For the purposes of paragraphs 2 and 4,<sup>351</sup> and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

(2) Guideline 2.6.13 isolates those elements of the provision having to do specifically with the time period within which an objection can be formulated.<sup>352</sup> Once again, a distinction is drawn between two possible situations.

<sup>349</sup> See in particular article 18, subparagraph (a), of the Vienna Conventions.

<sup>350</sup> See guideline 2.6.5 above.

<sup>351</sup> Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, with reference to treaties with limited participation and the constituent acts of international organizations.

<sup>352</sup> The Commission notes that from a strictly logical standpoint it would have been more appropriate to speak of the time period during which an objection can be “made”. It nevertheless chose to

(3) The first situation involves States and international organizations that are contracting States or international organizations at the time the reservation is notified. They have a period of 12 months within which to make an objection to a reservation, a period that runs from the time of receipt of the notification of the reservation by the States and international organizations for which it is intended, in accordance with guideline 2.1.6.

(4) The 12-month period established in article 20, paragraph 5, was the result of an initiative by Waldock and was not chosen arbitrarily. By proposing such a time period, he did, however, depart from—the fairly diverse—State practice at that time. The Special Rapporteur had found time periods of 90 days and of six months in treaty practice,<sup>353</sup> but preferred to follow the proposal of the Inter-American Council of Jurists.<sup>354</sup> In that regard, he noted the following:

But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed.<sup>355</sup>

(5) The 12-month period within which an objection must be formulated in order to reverse the presumption of acceptance, provided for in article 20, paragraph 5, of the Vienna Conventions, did not, however, seem to be a well-established customary rule at the time of the Vienna Conference; nevertheless, it is still “the most acceptable” period.<sup>356</sup> Horn noted the following in this regard:

A too long period could not be admitted, because this would result in a protracted period of uncertainty as to the legal relations between the reserving State and the confronted parties. Nor should the period be too short. That again would not leave enough time for the confronted States to undertake the necessary analysis of the possible effects a reservation may have for them.<sup>357</sup>

(6) In fact, this time period—which clearly emerged from the progressive development of international law when the Vienna Convention was adopted—has never fully taken hold as a customary rule that is applicable in the absence of text.<sup>358</sup> For a long time, the practice of the Secretary-General as depositary of multilateral

remain faithful to the letter of article 20, paragraph 5, of the Vienna Conventions.

<sup>353</sup> First report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 66–67, para. (14) of the commentary to article 18.

<sup>354</sup> *Ibid.*, p. 67, para. 16.

<sup>355</sup> *Ibid.*

<sup>356</sup> Imbert, *Les réserves aux traités multilatéraux*, *op. cit.* (footnote 273 above), p. 107. D. W. Greig considers that the 12-month period established in article 20, paragraph 5, of the Vienna Convention is at least “a guide to what is ... reasonable” (Grieg, *loc. cit.* (footnote 345 above), p.128).

<sup>357</sup> Horn, *op. cit.* (footnote 342 above), p.126.

<sup>358</sup> See D. Müller, “Convention de Vienne de 1969: Article 20: acceptation des réserves et objections aux réserves”, in O. Corten and P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités: commentaire article par article*, Brussels, Bruylant, 2006, vol. I, pp. 807–808, para. 16. See also G. Gaja, “Unruly treaty reservations”, in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, Milan, Giuffrè, 1987, p. 324; Greig, *loc. cit.* (footnote 342 above), pp. 127 *et seq.*; and A. Aust, *Modern Treaty Law and Practice*, *op. cit.* (footnote 115 above), p. 127.

treaties was difficult to reconcile with the provisions of article 20, paragraph 5, of the Vienna Conventions.<sup>359</sup> This is because in cases where the treaty was silent on the issue of reservations, the Secretary-General traditionally considered that, if no objection to a duly notified reservation had been received within 90 days, the reserving State became a contracting State.<sup>360</sup> However, having decided that this practice delayed the entry into force of treaties and their registration,<sup>361</sup> the Secretary-General abandoned this practice and now considers any State that has formulated a reservation to be a contracting State as of the date of effect of the instrument of ratification or accession.<sup>362</sup> In order to justify this position, the Secretary-General has pointed out that it is unrealistic to think that the conditions set out in article 20, paragraph 4 (b), could ever be met, since in order to preclude the entry into force of the treaty for the reserving State, all the contracting parties would have had to object to the reservation. The Secretary-General's comments are, therefore, less about the presumption established in paragraph 5 than about the unrealistic nature of the three subparagraphs of paragraph 4. In 2000, the Legal Counsel of the United Nations also stated that he was in favour of the 12-month period specified in paragraph 5, which now applies to the—necessarily unanimous—acceptance of late reservations.<sup>363</sup> Moreover, State practice shows that States formulate objections even if the 12-month period specified in article 20, paragraph 5, has elapsed. Whatever uncertainties there may be regarding the “positive quality” of the rule with regard to general international law, the rule is retained by the Vienna Conventions, and modifying it for the purposes of the Guide to Practice would undoubtedly give rise to more disadvantages than advantages: according to the practice adopted by the Commission during its work on reservations, there should be good reason for departing from the wording of the provisions of the Conventions on the law of treaties; surely no such reason exists in the present case.

(7) For the same reason, while the expression “unless the treaty otherwise provides” is self-evident, given the relevant provisions of the Vienna Conventions are of a residuary, voluntary nature and apply only if the treaty does not otherwise provide, the Commission felt that it would be useful to retain this wording in guideline 2.6.13.

<sup>359</sup> See P.-H. Imbert, “À l’occasion de l’entrée en vigueur de la Convention de Vienne sur le droit des Traités, réflexions sur la pratique suivie par le Secrétaire Général des Nations Unies dans l’exercice de ses fonctions de dépositaire”, *Annuaire français de droit international*, vol. 26 (1980), pp. 524–541; Gaja, *loc. cit.* (footnote above), pp. 323–324; R. Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del Régimen de Viena*, University of Murcia, 2004, pp. 245–250; and D. Müller, *loc. cit.* (footnote above) pp. 821–822, para. 48.

<sup>360</sup> *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (footnote 282 above), p. 55, para. 185.

<sup>361</sup> The 90-day period continued to be applied, however, to the acceptance of late reservations for which unanimous acceptance by the contracting States is generally required (*ibid.*, pp. 61–62, paras. 205–206).

<sup>362</sup> *Ibid.*, pp. 54–55, paras. 184–187.

<sup>363</sup> Note verbale from the Legal Counsel of the United Nations addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000. See paragraphs (8) and (9) of the commentary to guideline 2.3.2, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 190. The practice of the Council of Europe regarding the acceptance of late reservations, however, is to give contracting States a period of only nine months to formulate an objection (see J. Polakiewicz, *Treaty-making in the Council of Europe*, Strasbourg, Council of Europe, 1999, p. 102).

A review of the *travaux préparatoires* of article 20, paragraph 5, of the 1969 Vienna Convention in fact explains why this expression was included and thus justifies its retention. Indeed, this phrase (“unless the treaty otherwise provides”) was included in response to an amendment proposed by the United States of America.<sup>364</sup> The representative of the United States to the Conference explained that an amendment had been proposed because “[t]he Commission’s text seemed to prevent the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months”.<sup>365</sup> Thus, the amendment proposed by the United States was not directed specifically at the 12-month period established by the Commission, but sought only to make it clear that it was merely a voluntary residual rule that in no way precluded treaty negotiators from establishing a different period.<sup>366</sup>

(8) The second case covered by guideline 2.6.13 involves States and international organizations that do not acquire “contracting status” until after the 12-month time period following the date they received notification has elapsed. In this case, the States and international organizations may make an objection up until the date on which they express their consent to be bound by the treaty, which, obviously, does not prevent them from doing so before that date.

(9) This solution of drawing a distinction between contracting States and those that have not yet acquired this status *vis-à-vis* the treaty was contemplated in J. L. Briery’s proposals but was not taken up by either Lauterpacht or Fitzmaurice nor retained by the Commission in the articles adopted on first reading in 1962,<sup>367</sup> even though Waldock had included it in the draft article 18 presented in his 1962 report.<sup>368</sup> In the end, it was reintroduced during the second reading in order to address the criticism voiced by the Government of Australia, which was concerned about the practical problems that might arise when the principle of tacit acceptance was actually applied.<sup>369</sup>

(10) However, this solution in no way places States and international organizations that are not contracting parties at the time the reservation is notified in a position of inequality *vis-à-vis* the contracting parties. On the contrary, one should not lose sight of the fact that under article 23, paragraph 1, any reservation that has been

<sup>364</sup> A/CONF.39/C.1/L.127, *Official Records of the United Nations Conference on the Law of Treaties, first and second sessions...* (footnote 123 above), p. 136.

<sup>365</sup> *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, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), twenty-first meeting, 10 April 1968, p. 108, para. 13.

<sup>366</sup> José María Ruda argues, however, that the United States amendment emphasizes the “residual character of Article 20, paragraph 5” (J.M. Ruda, “Reservations to treaties”, *Collected Courses of The Hague Academy of International Law, 1975–III*, vol. 146 (1977), p. 190).

<sup>367</sup> Indeed, draft article 19, paragraph 3, presented in the Commission’s report to the General Assembly concerned only implied acceptance in the strict sense of the word, see *Yearbook ... 1962*, vol. II, document A/5209, p. 176.

<sup>368</sup> *Ibid.*, document A/CN.4/144 and Add.1, pp. 61–62.

<sup>369</sup> See the fourth report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (footnote 237 above), p. 45 and p. 53, para. 17.

formulated must be notified not only to the contracting parties but also to other States and international organizations entitled to become parties to the treaty.<sup>370</sup> States and international organizations “entitled to become parties to the treaty” thus have all the information they need with regard to reservations to a specific treaty and also have a period for reflection that is at least as long<sup>371</sup> as that given to contracting parties (12 months).

#### 2.6.14 Conditional objections

##### **An objection to a specific potential or future reservation does not produce the legal effects of an objection.**

###### *Commentary*

(1) Guideline 2.6.13 provides only a partial response with respect to the date from which an objection to a reservation may be formulated. It does state that the time period during which the objection may be formulated commences when the reservation is notified to the State or international organization that intends to make an objection, in accordance with guideline 2.1.6, which implies that the objection may be formulated as from that date. This does not necessarily mean, however, that it may not be made earlier. Similarly, the definition of objections adopted by the Commission in guideline 2.6.1 provides that a State or an international organization may make an objection “*in response to a reservation to a treaty formulated*” by another State or another international organization”, which would seem to suggest that an objection may be made by a State or an international organization only after a reservation has been formulated. *A priori*, this would seem quite logical, but in the Commission’s view this conclusion is hasty.

(2) State practice in fact demonstrates that States also raise objections for “pre-emptive” purposes. Chile, for example, formulated the following objection to the 1969 Vienna Convention: “The Republic of Chile formulates an objection to the reservations which have been made or may be made in the future relating to article 62, paragraph 2, of the Convention.”<sup>372</sup> In the same vein, Japan raised the following objection:

The Government of Japan objects to any reservation intended to exclude the application, wholly or in part, of the provisions of article 66 and the Annex concerning the obligatory procedures for settlement of disputes and does not consider Japan to be in treaty relations with any State which has formulated or will formulate such reservation, in respect of those provisions of Part V of the Convention regarding which the application of the obligatory procedures mentioned above are to be excluded as a result of the said reservation.<sup>373</sup>

<sup>370</sup> See also the first paragraph of guideline 2.1.5.

<sup>371</sup> Draft article 18, paragraph 3 (b), in Waldock’s first report formulated the same rule as an exception to observance of the 12-month period, stipulating that a State that was not a party to the treaty “shall not be deemed to have consented to the reservation if it shall subsequently [i.e. after the 12-month period has elapsed] lodge an objection to the reservation, when executing the act or acts necessary to qualify it to become a party to the treaty” (*Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 61).

<sup>372</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (see footnote 245 above), vol. II, p. 413 (chap. XXIII.1).

<sup>373</sup> *Ibid.*, pp. 413–414.

However, in the second part of this objection, the Government of Japan noted that the effects of this objection should apply *vis-à-vis* the Syrian Arab Republic and Tunisia. It went on to reiterate its declaration to make it clear that the same effects should be produced *vis-à-vis* the German Democratic Republic and the Union of Soviet Socialist Republics, which had formulated reservations similar to those of the Syrian Arab Republic and Tunisia.<sup>374</sup> Other States, for their part, have raised new objections in reaction to every reservation to the same provisions newly formulated by another State party.<sup>375</sup>

(3) The objection of Japan to the reservations formulated by the Government of Bahrain and the Government of Qatar to the 1961 Vienna Convention on Diplomatic Relations also states that not only are the two reservations specifically concerned not regarded as valid, but that this “position [of Japan] is applicable to any reservations to the same effect to be made in the future by other countries”.<sup>376</sup>

(4) The objection of Greece regarding the Convention on the Prevention and Punishment of the Crime of Genocide also belongs in the category of advance objections. It states: “We further declare that we have not accepted and do not accept any reservation which has already been made or which may hereafter be made by the countries signatory to this instrument or by countries which have acceded or may hereafter accede thereto.”<sup>377</sup> A general objection was also raised by the Netherlands concerning the reservations to article IX of the same convention. Although this objection lists the States that had already formulated such a reservation, it concludes: “The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention.”<sup>378</sup> That objection was, however, withdrawn in 1996 with respect to the reservations made by Malaysia and Singapore and, on the same occasion, withdrawn in relation to Bulgaria, Hungary and Mongolia which had, for their part, withdrawn their reservations.<sup>379</sup>

(5) State practice is therefore far from uniform in this regard. The Commission believes that there is nothing to prevent a State or international organization from formulating pre-emptive or precautionary objections, before a reservation has been formulated or, in the case of reservations already formulated, from declaring in advance its opposition to any similar or identical reservation.

(6) Such objections do not, of course, produce the effects contemplated in article 20, paragraph 4, and article 21, paragraph 3, of the Vienna Conventions until a corresponding reservation is formulated by another contracting State or contracting organization. This situation is rather similar to that of a reservation formulated by a

<sup>374</sup> *Ibid.*

<sup>375</sup> See, for example, the declarations and objections of Germany, the Netherlands, New Zealand, the United Kingdom and the United States to the comparable reservations of several States to the 1969 Vienna Convention (*ibid.*, pp. 413–417).

<sup>376</sup> *Ibid.*, vol. I, p. 96 (chap. III.3).

<sup>377</sup> *Ibid.*, p. 132 (chap. IV.1). Despite this general objection, Greece raised two further objections with regard to the reservation of the United States (*ibid.*).

<sup>378</sup> *Ibid.*

<sup>379</sup> *Ibid.*, p. 133.

State or international organization that is a signatory but not yet a party, against which another State or organization has raised an objection; objections of this kind do not produce their effects until the reserving State expresses its consent to be bound by the treaty.<sup>380</sup> Similarly, a pre-emptive objection produces no effect so long as no reservation relating to its provisions is formulated; it nevertheless constitutes notice that its author will not accept certain reservations. As the ICJ noted, such notice safeguards the rights of the objecting State and warns other States intending to formulate a corresponding reservation that such a reservation will be met with an objection.<sup>381</sup>

(7) The Commission has decided to call this category of objections “conditional objections”. They are in fact formulated on the condition that a corresponding reservation will actually be formulated by another State or international organization. Until this condition is met, the objection remains ineffective and does not produce the legal effects of a “conventional” objection.

(8) Nevertheless, the Commission refrained from specifying in guideline 2.6.14 the effects that such a conditional objection might produce once the condition was met, i.e. once a corresponding reservation was formulated. This question has nothing to do with the formulation of objections, but rather with the effects they produce.

### 2.6.15 Late objections

**An objection to a reservation formulated after the end of the time period specified in guideline 2.6.13 does not produce the legal effects of an objection made within that time period.**

#### Commentary

(1) Just as it is possible to formulate an objection in advance, there is nothing to prevent States or international organizations from formulating objections late, in other words after the end of the 12-month period (or any other time period specified by the treaty), or after the expression of consent to be bound in the case of States and international organizations that accede to the treaty after the end of the 12-month period.<sup>382</sup>

(2) This practice is far from uncommon. In a study published in 1988, F. Horn found that of 721 objections surveyed, 118 had been formulated late,<sup>383</sup> and this figure has since increased.<sup>384</sup> Many examples can be found<sup>385</sup> relating to human rights treaties,<sup>386</sup> but also to treaties cov-

ering subjects as diverse as the law of treaties,<sup>387</sup> or the fight against terrorism,<sup>388</sup> as well as with respect to the Convention on the Safety of United Nations and Associated Personnel<sup>389</sup> and the 1998 Rome Statute of the International Criminal Court.<sup>390</sup>

(3) This practice should certainly not be condemned. On the contrary, it allows States and international organizations to express—in the form of objections—their views as to the validity of a reservation, even when the reservation was formulated more than 12 months earlier, and this practice has its advantages, even if such late objections do not produce any immediate legal effect. As it happens, the position of the States and international organizations concerned regarding the validity of a reservation is an important element for the interpreting body, whether a monitoring body or international court, to take into consideration when determining the validity of the reservation. The practice of the Secretary-General as the depositary of multilateral treaties confirms this view. The Secretary-General receives late objections and communicates them to the other States and organizations concerned, in general not as objections but as “communications”.<sup>391</sup> Furthermore, an objection, even a late objection, is

<sup>387</sup> *Ibid.*, p. 265 (note 317).

<sup>388</sup> See the late objections to the declaration made by Pakistan (13 August 2002) upon accession to the 1997 International Convention for the Suppression of Terrorist Bombings: Republic of Moldova (6 October 2003), Russian Federation (22 September 2003) and Poland (3 February 2004) (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (see footnote 245 above), vol. II, pp. 151–152, note 7 (chap. XVIII.9)); or the late objections to the reservations formulated by the following States in regard to the 1999 International Convention for the Suppression of the Financing of Terrorism: reservation by Belgium (17 May 2004); Russian Federation (7 June 2005) and Argentina (22 August 2005); declaration by Jordan (28 August 2003); Belgium (23 September 2004), Russian Federation (1 March 2005), Japan (14 July 2005), Argentina (22 August 2005); Ireland (23 June 2006), Czech Republic (23 August 2006); reservation by the Syrian Arab Republic (24 April 2005); Ireland (23 June 2006), Czech Republic (23 August 2006); reservation by the Democratic People’s Republic of Korea (12 November 2001, at the time of signature; as the State has not ratified the Convention, the reservation has not been confirmed); Republic of Moldova (6 October 2003), Germany (17 June 2004), Argentina (22 August 2005) (*ibid.*, pp. 197–200, notes 6, 7, 11 and 12 (chap. XVIII.11)).

<sup>389</sup> See the late objections by Portugal (15 December 2005) concerning the declaration by Turkey (9 August 2004) (*ibid.*, p. 130, note 5 (chap. XVIII.8)).

<sup>390</sup> See the late objections by Ireland (28 July 2003), the United Kingdom (31 July 2003), Denmark (21 August 2003) and Norway (29 August 2003) to the interpretative declaration (considered by objecting States to constitute a prohibited reservation) by Uruguay (28 June 2002) (*ibid.*, pp. 164–165, note 8 (chap. XVIII.10)).

<sup>391</sup> “[T]aking into account the indicative value of this provision in the Vienna Convention [article 20, paragraph 5], the Secretary-General, when thus receiving an objection after the expiry of this time lapse, calls it a ‘communication’ when informing the parties concerned of the deposit of the objection” (*Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (footnote 282 above), para. 213). In *Multilateral Treaties Deposited with the Secretary-General*, however, several examples of late objections are given in the section “Objections”. This is the case, for example, for the objection raised by Japan (27 January 1987) to the reservations formulated by Bahrain (2 November 1971) and Qatar (6 June 1986) to the 1961 Vienna Convention on Diplomatic Relations. While the objection was very late concerning the reservation made by Bahrain, it was received in good time concerning the reservation made by Qatar; it was no doubt for that reason that the objection was communicated as such, and not simply as a “communication” (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (see footnote 245 above), vol. I, p. 96 (chap. III.3)).

<sup>380</sup> See guideline 2.6.12 above.

<sup>381</sup> See the citations from the Court’s advisory opinion of 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 276 above) in paragraph (5) of the commentary to guideline 2.6.12 above.

<sup>382</sup> See guideline 2.6.13 above.

<sup>383</sup> Horn, *op. cit.* (footnote 342 above), p. 206. See also Riquelme Cortado, *op. cit.* (footnote 359 above), pp. 264–265.

<sup>384</sup> Riquelme Cortado, *op. cit.* (footnote 359 above), p. 265.

<sup>385</sup> The examples cited hereafter are solely cases identified by the Secretary-General and, consequently, notified as “communications”. The study is complicated by the fact that, in the collection of multilateral treaties deposited with the Secretary-General, the date indicated is not that of notification but of deposit of the instrument containing the reservation.

<sup>386</sup> See the very comprehensive list drawn up by Riquelme Cortado, *op. cit.* (footnote 359 above), p. 265 (note 316).



important in that it may lead, or contribute, to a reservations dialogue.<sup>392</sup>

(4) However, it follows from article 20, paragraph 5, of the Vienna Conventions that if a State or international organization has not raised an objection by the end of the 12-month time period following the formulation of the reservation or by the date on which it expresses its consent to be bound by the treaty, it is considered to have accepted the reservation, with all the consequences that that entails. Without going into the details of the effects of this type of tacit acceptance, suffice it to say that the effect of such an acceptance is, in principle, that the treaty enters into force between the reserving State or international organization and the State or organization considered as having accepted the reservation. This result cannot be called into question by an objection formulated after the treaty has entered into force between the two States or international organizations without seriously affecting legal security.

(5) States seem to be aware that a late objection cannot produce the normal effects of an objection made in good time. The Government of the United Kingdom, in its objection (made within the required 12-month period) to the reservation of Rwanda to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, said that it wished “to place on record that they take the same view [in other words, that they were unable to accept the reservation] of the similar reservation [to that of Rwanda] made by the German Democratic Republic as notified by the circular letter ... of 25 April 1973”<sup>393</sup> It is clear that the objection of the United Kingdom to the reservation of the German Democratic Republic was late. The careful wording of the objection shows that the United Kingdom did not expect it to produce the legal effects of an objection formulated within the period specified by article 20, paragraph 5, of the 1969 Vienna Convention.

(6) The communication of 21 January 2002 by the Government of Peru in relation to a late objection by Austria<sup>394</sup>—only a few days late—concerning its reservation to the 1969 Vienna Convention is particularly interesting:

[The Government of Peru refers to the communication made by the Government of Austria relating to the reservation made by Peru upon ratification]. In this document, Member States are informed of a communication from the Government of Austria stating its objection to the reservation entered in respect of the Vienna Convention on the Law of Treaties by the Government of Peru on 14 September 2000 when depositing the corresponding instrument of ratification.

<sup>392</sup> Following the late objection by Sweden, Thailand withdrew its reservation in respect of the Convention on the rights of the child (*ibid.*, p. 345, note 15 (chap. IV.11)). Roberto Baratta considered that [l]’*obiezione è strumento utilizzato non solo e non tanto per manifestare la propria disapprovazione all’atto-riserva altrui e per rilevarne, talvolta, l’incompatibilità con ulteriori obblighi posti dall’ordinamento internazionale, quanto e piuttosto per indurre l’autore della riserva a reconsiderarla e possibilmente a ritirarla* (“objections are a tool used not only and not chiefly to express disapproval of the reservation of another and sometimes to point out its incompatibility with further obligations under international law but also and mainly to induce the author of the reservation to reconsider and possibly to withdraw it”) (Baratta, *op. cit.* (footnote 298 above), pp. 319–320).

<sup>393</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (see footnote 245 above), vol. I, p. 133 (chap. IV.1).

<sup>394</sup> This late objection was notified as a “communication” (*ibid.*, vol. II, pp. 419–420, note 19 (chap. XXIII.1)).

As the [Secretariat] is aware, article 20, paragraph 5, of the Vienna Convention states that ‘a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation (...).’ The ratification and reservation by Peru in respect of the Vienna Convention were communicated to Member States on 9 November 2000.

Since the communication from the Austrian Government was received by the Secretariat on 14 November 2001 and circulated to Member States on 28 November 2001, the Peruvian Mission is of the view that there is tacit acceptance on the part of the Austrian Government of the reservation entered by Peru, the 12-month period referred to in article 20, paragraph 5, of the Vienna Convention having elapsed without any objection being raised. The Peruvian Government considers the communication from the Austrian Government as being without legal effect, since it was not submitted in a timely manner.<sup>395</sup>

Although it would appear excessive to consider the communication of Austria as being completely devoid of legal effect, the communication of Peru shows very clearly that a late objection does not preclude the presumption of acceptance under article 20, paragraph 5, of the Vienna Conventions.

(7) It follows from the above that while a late objection may constitute an element in determining the validity of a reservation, it cannot produce the “normal” effects of an objection of the type provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions.<sup>396</sup>

(8) Some members of the Commission feel that these late declarations do not constitute “objections”, given that they are incapable of producing the effects of an objection. Terms such as “declaration”, “communication” or “objecting communication” have been proposed. The Commission considers, however, that such declarations correspond to the definition of objections contained in guideline 2.6.1 as it relates to guideline 2.6.13. As the commentary to guideline 2.6.5 notes,<sup>397</sup> an objection (like a reservation) is defined not by the effects it produces but by those that its author wishes it to produce.

(9) The wording of guideline 2.6.15 is sufficiently flexible to accommodate established State practice where late reservations are concerned. While it does not prohibit States or international organizations from formulating objections after the time period required by guideline 2.6.13 has elapsed, it spells out explicitly that they do not produce the legal effects of an objection made within that time period.

## 2.7 *Withdrawal and modification of objections to reservations*

### *Commentary*

(1) The question of the withdrawal of objections to reservations, like that of the withdrawal of reservations, is addressed only very cursorily in the Vienna

<sup>395</sup> *Ibid.*

<sup>396</sup> This does not prejudice the question of whether, and how, the reservation presumed to be accepted produces the “normal” effect provided for under article 21, paragraph 1, of the Vienna Conventions.

<sup>397</sup> See in particular paragraph (4) of the commentary.

Conventions.<sup>398</sup> There are merely some indications as to how objections may be withdrawn and when such withdrawals become operative. The modification of objections is not addressed at all.

(2) Article 22, paragraphs 2 and 3, of the 1986 Vienna Convention provides as follows:

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) ...

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23, paragraph 4, stipulates how objections may be withdrawn: “The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.”

(3) The *travaux préparatoires* of the Vienna Conventions are equally inconclusive on the withdrawal of objections. The question is not dealt with at all in the work of the early special rapporteurs; this is hardly surprising, given their advocacy of the traditional theory of unanimity, which logically precluded the possibility of an objection being withdrawn. Just as logically, it was the first report by Waldock, who favoured the flexible system, that contained the first proposal for a provision concerning the withdrawal of objections to reservations. He proposed the following text for draft article 19, paragraph 5:

A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or in part, at any time. Withdrawal of the objection shall be effected by written notification to the depositary of the instruments relating to the treaty, and failing any such depositary, to every State which is or is entitled to become a party to the treaty.<sup>399</sup>

After major reworking of the provisions on the form and procedure relating to reservations and objections, this draft article—which simply reiterated *mutatis mutandis* the similar provision on the withdrawal of a reservation<sup>400</sup>—was abandoned; the reasons for this are not clear from the Commission’s work. No such provision is to be found in either the text adopted on first reading or in the Commission’s final draft.

(4) It was only during the Vienna Conference that the issue of the withdrawal of objections was reintroduced

<sup>398</sup> Especially concerning the effects of the withdrawal of objections to reservations, see R. Szafarz, “Reservations to multilateral treaties”, *Polish Yearbook of International Law*, vol. 3 (1970), p. 314.

<sup>399</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62.

<sup>400</sup> Draft article 17, paragraph 6, provided as follows: “A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty” (*ibid.*, p. 61). The similarity between the two texts was highlighted by Waldock, who considered in the commentary on draft article 19, paragraph 5, that the latter provision reflected paragraph 6 of draft article 17 and “[did] not therefore need further explanation” (*ibid.*, p. 68, paragraph (22) of the commentary).

into the text of articles 22 and 23, based on an amendment proposed by Hungary<sup>401</sup> which realigned the procedure for the withdrawal of objections with that of withdrawal of reservations. As Ms. Bokor-Szegó explained on behalf of the delegation of Hungary:

[I]f a provision on the withdrawal of reservations was included, it was essential that there should also be a reference to the possibility of withdrawing objections to reservations, particularly since that possibility already existed in practice.<sup>402</sup>

The representative of Italy at the Conference also argued in favour of aligning the procedure for the withdrawal of an objection to a reservation with that for the withdrawal of a reservation:

The relations between a reservation and an objection to a reservation was the same as that between a claim and a counter-claim. The extinction of a claim, or the withdrawal of a reservation, was counter-balanced by the extinction of a counter-claim or the withdrawal of an objection to a reservation, which was equally a diplomatic and legal procedural stage in treaty-making.<sup>403</sup>

(5) However, there is virtually no State practice in this area. F. Horn could only identify one example of a clear, definite withdrawal of an objection.<sup>404</sup> In 1982, the Government of Cuba notified the Secretary-General of the withdrawal of objections it had made when ratifying the Convention on the Prevention and Punishment of the Crime of Genocide with respect to the reservations to articles IX and XII formulated by several socialist States.<sup>405</sup>

(6) Although the provisions of the Vienna Convention do not go into detail on the issue of withdrawal of objections, it is clear from the *travaux préparatoires* that, in principle, the withdrawal of objections ought to follow the same rules as the withdrawal of reservations, just as the formulation of objections follows the same rules as the formulation of reservations.<sup>406</sup> To make the relevant provisions clear and specific, the Commission based itself on the draft guidelines already adopted on the withdrawal (and modification) of reservations,<sup>407</sup> making the necessary changes to take account of the specific nature of objections. However, this should not be seen in any way as an attempt to implement the theory of parallelism of forms;<sup>408</sup> it is not a matter of aligning the procedure for the withdrawal of objections with the procedure for their formulation, but of applying the same rules to the withdrawal of an objection as those applicable to the withdrawal of

<sup>401</sup> A/CONF.39/L.18, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions...* (see footnote 123 above), p. 267. The amendment proposed by Hungary was adopted, with a slight modification, by 98 votes to none (*Official Records of the United Nations Conference on the Law of Treaties, Second Session...* (see footnote 297 above), eleventh plenary meeting, 30 April 1969, p. 38, para. 41).

<sup>402</sup> *Ibid.*, p. 37, para. 14.

<sup>403</sup> *Ibid.*, pp. 37–38, para. 27.

<sup>404</sup> Horn, *op. cit.* (footnote 342 above), p. 227.

<sup>405</sup> See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (footnote 245 above), vol. I, p. 136, note 31 (chap. IV.1).

<sup>406</sup> See paragraphs (1) to (6) of the commentary to guideline 2.6.9 above.

<sup>407</sup> Guidelines 2.5.1 to 2.5.11. For the relevant texts and commentaries, see *Yearbook ... 2003*, vol. II (Part Two), pp. 70–92.

<sup>408</sup> See paragraph (6) of the commentary to guideline 2.5.4, *ibid.*, pp. 77–78.

a reservation. The two acts, of course, have different effects on treaty relations and differ in their nature and their addressees. Nevertheless, they are similar enough to be governed by comparable formal systems and procedures, as was suggested during the *travaux préparatoires* of the 1969 Vienna Convention.

(7) Like those relating to the withdrawal and modification of reservations, the guidelines contained in this section concern, respectively: the form and procedure for withdrawal; the effects of withdrawal; the time at which withdrawal of the objection produces those effects; partial withdrawal; and the possible widening of the scope of the objection.

### 2.7.1 *Withdrawal of objections to reservations*

**Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.**

#### *Commentary*

(1) The question of the possibility of withdrawing an objection and the time at which it is withdrawn is answered in the Vienna Conventions, in particular in article 22, paragraph 2.<sup>409</sup> Neither the possibility of withdrawing an objection at any time nor the time at which it may be withdrawn require further elaboration, and the provisions of article 22, paragraph 2, of the Vienna Conventions are in themselves sufficient. Moreover, there is virtually no State practice in this area. Guideline 2.7.1 thus simply reproduces the text of the Vienna Conventions.

(2) While in principle it would be prudent to align the provisions relating to the withdrawal of objections with those relating to the withdrawal of reservations,<sup>410</sup> it must be noted that there is a significant difference in the wording of paragraph 1 (relating to the withdrawal of reservations) and that of paragraph 2 (relating to the withdrawal of objections) of article 22: whereas paragraph 1 is careful to state, with regard to a reservation, that “the consent of a State which has accepted the reservation is not required for its withdrawal”,<sup>411</sup> paragraph 2 does not make the same specification as far as objections are concerned. This difference in wording is logical: in the latter case, the purely unilateral character of the withdrawal is self-evident. This is in fact why the part of the amendment proposed by Hungary<sup>412</sup> which would have brought the wording of paragraph 2 into line with that of paragraph 1 was set aside at the request of the delegation of the United Kingdom, “in view of the differing nature of reservations and objections to reservations; the consent of the reserving State was self-evidently not required for the withdrawal of the objection, and an express provision to that effect might suggest that

<sup>409</sup> See paragraph (2) of the introductory commentary to section 2.7 above.

<sup>410</sup> *Ibid.*, *passim*.

<sup>411</sup> On this point, see guideline 2.5.1 and the commentary thereto, *Yearbook ... 2003*, vol. II (Part Two), pp. 70–74.

<sup>412</sup> A/CONF.39/L.18, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions...* (see footnote 123 above), p. 267. This amendment resulted in the inclusion of paragraph 2 in article 22 (see paragraph (4) of the introductory commentary to section 2.7 above).

there was some doubt on the point”.<sup>413</sup> This is a convincing rationale for the different wording of the two provisions, which does not need to be revisited.

### 2.7.2 *Form of withdrawal of objections to reservations*

**The withdrawal of an objection to a reservation must be formulated in writing.**

#### *Commentary*

(1) The answer to the question of the form the withdrawal of an objection should take is likewise to be found in the Vienna Conventions, in article 23, paragraph 4.<sup>414</sup> The requirement that it should be in writing does not call for any lengthy explanations, and the rules of the Vienna Conventions are adequate in themselves: while the theory of parallelism of forms is not accepted in international law,<sup>415</sup> it is certainly reasonable to require a certain degree of formality for the withdrawal of objections, which, like reservations themselves, must be made in writing.<sup>416</sup> A verbal withdrawal would entail considerable uncertainty, which would not necessarily be limited to the bilateral relations between the reserving State or organization and the author of the initial objection.<sup>417</sup>

(2) Guideline 2.7.2 now reproduces the text of article 23, paragraph 4, of both the 1969 and 1986 Vienna Conventions, which have identical wording.

(3) The form of a withdrawal of an objection to a reservation is thus identical to the form of a withdrawal of a reservation.

### 2.7.3 *Formulation and communication of the withdrawal of objections to reservations*

**Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.**

#### *Commentary*

(1) None of the provisions contained in either the 1969 or the 1986 Vienna Conventions is useful or specific with regard to questions relating to the formulation and communication of a withdrawal. However, it is abundantly clear from the *travaux préparatoires* of the 1969 Convention<sup>418</sup> that, as in the case of the formulation of objections and the formulation of reservations,<sup>419</sup> the

<sup>413</sup> *Official Records of the United Nations Conference on the Law of Treaties, Second Session...* (see footnote 297 above), eleventh plenary meeting, 30 April 1969, p. 38, para. 31.

<sup>414</sup> See paragraph (2) of the introductory commentary to section 2.7 above.

<sup>415</sup> See paragraph (6) of the commentary to guideline 2.5.4, *Yearbook ... 2003*, vol. II (Part Two), pp. 77–78.

<sup>416</sup> See paragraph (3) of the commentary to guideline 2.5.2, *ibid.*, p. 74.

<sup>417</sup> Given that the withdrawal of an objection resembles an acceptance of a reservation, it might, in certain circumstances, lead to the entry into force of the treaty *vis-à-vis* the reserving State or organization.

<sup>418</sup> See paragraphs (3) to (6) of the introductory commentary to section 2.7 above.

<sup>419</sup> See guideline 2.6.9 and the commentary thereto, above.

procedure to be followed in withdrawing unilateral declarations must be identical to that followed when withdrawing a reservation.

(2) It therefore seemed prudent to the Commission simply to take note, within the framework of the Guide to Practice, of this procedural parallelism between the withdrawal of a reservation and the withdrawal of an objection, which holds for the authority competent to make the withdrawal at the international level and the consequences (or, rather, the absence of consequences) of the violation of the rules of internal law at the time of formulation and those of notification and communication of the withdrawal. It would appear that they can be transposed *mutatis mutandis* to the withdrawal of objections. Rather than reproduce, by merely replacing the word “reservation” with the word “objection” in the text, guidelines 2.5.4 (Formulation of the withdrawal of a reservation at the international level),<sup>420</sup> 2.5.5 (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations)<sup>421</sup> and 2.5.6 (Communication of withdrawal of a reservation),<sup>422</sup> with the last of these itself referring back to the guidelines concerning the communication of reservations and the role of the depositary; the Commission considered it preferable to refer to all of these guidelines,<sup>423</sup> which apply *mutatis mutandis* to objections.

#### 2.7.4 Effect on reservation of withdrawal of an objection

**A State or an international organization that withdraws an objection formulated to a reservation is considered to have accepted that reservation.**

##### Commentary

(1) As it did with the withdrawal of reservations,<sup>424</sup> the Commission considered the effects of the withdrawal of an objection in the part devoted to the procedure for withdrawal. However, the question proved to be infinitely more complex: whereas withdrawing a reservation simply restores the integrity of the treaty in its relations between the author of the reservation and the other parties, the effects of withdrawing an objection are likely to be manifold.

(2) Without doubt, a State or an international organization that withdraws its objection to a reservation must be considered to have accepted the reservation. This follows implicitly from the presumption of article 20, paragraph 5, of the Vienna Conventions, which considers the lack of an objection by a State or an international organization to be an acceptance. Bowett also

asserts that the “withdrawal of an objection to a reservation ... becomes equivalent to acceptance of the reservation”.<sup>425</sup>

(3) Yet it is not evident that with the withdrawal of an objection “the reservation has full effect”.<sup>426</sup> As it happens, the effects of the withdrawal of an objection or of the resulting “delayed” acceptance can be manifold and complex, depending on factors relating not only to the nature and validity of the reservation, but also—and above all—to the characteristics of the objection itself.<sup>427</sup>

—if the objection was not accompanied by the definitive declaration provided for in article 20, paragraph 4 (b), of the Convention, the reservation produces its “normal” effects as provided for in article 21, paragraph 1;

—if the objection was a “maximum-effect” objection, the treaty enters into effect between the two parties and the reservation produces its full effects in accordance with the provisions of article 21;

—if the objection was a cause precluding the treaty from entering into force between all parties pursuant to article 20, paragraph 2, or with regard to the reserving State in application of article 20, paragraph 4, the treaty enters into force (and the reservation produces its effects).

This last situation in particular shows that the effects of the withdrawal of an objection not only relate to whether the reservation is applicable or not, but may also have an impact on the actual entry into force of the treaty.<sup>428</sup> The Commission nevertheless considered it preferable to restrict guideline 2.7.4 to the effects of an objection “on the reservation” and adopted the title of this guideline for that reason.

(4) Not only would it seem difficult to adopt a provision covering all the effects of the withdrawal of an objection, owing to the complexity of the question, but doing so might also prejudice the question of the effects of a reservation and of the acceptance of a reservation. The Commission therefore considered that, owing to the complexity of the effects of the withdrawal of an objection, it would be better to regard the withdrawal of an objection to a reservation as being equivalent to an acceptance and to consider that a State that has withdrawn its objection must be considered to have accepted the reservation, without examining, at the present stage, the nature and substance of the effects of such an acceptance. Such a provision implicitly refers to acceptances and their effects. The question of when these effects occur is the subject of guideline 2.7.5.

<sup>420</sup> *Yearbook ... 2003*, vol. II (Part Two), pp. 76–79.

<sup>421</sup> *Ibid.*, pp. 79–80.

<sup>422</sup> *Ibid.*, pp. 80–81.

<sup>423</sup> The Commission proceeded in a similar manner with guidelines 1.5.2 (which refers back to guidelines 1.2 and 1.2.1), 2.4.3 (which refers back to guidelines 1.2.1, 2.4.6 and 2.4.7) and, even more obviously, 2.5.6 (which refers back to guidelines 2.1.5, 2.1.6 and 2.1.7) and 2.6.9 (which refers back to guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7).

<sup>424</sup> See guideline 2.5.7 (Effect of withdrawal of a reservation) and the commentary thereto, *Yearbook ... 2003*, vol. II (Part Two), pp. 81–83.

<sup>425</sup> See D. W. Bowett, “Reservations to non-restricted multilateral treaties”, *BYBIL*, vol. 48 (1976–1977), p. 88. See also Szafarz, *loc. cit.* (footnote 398 above), p. 314, and L. Migliorino, “La revoca di riserve e di obiezioni a riserve”, *Rivista di diritto internazionale*, vol. 75 (1992), p. 329.

<sup>426</sup> Bowett, *loc. cit.* (footnote above), p. 88.

<sup>427</sup> In this connection see Szafarz, *loc. cit.* (footnote 398 above), p. 314, and Migliorino, *loc. cit.* (footnote 425 above), p. 329.

<sup>428</sup> See paragraph (3) of the commentary to guideline 2.7.5 below.

### 2.7.5 *Effective date of withdrawal of an objection*

**Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.**

#### *Commentary*

(1) The Vienna Conventions contain a very clear provision concerning the time at which the withdrawal of an objection becomes operative. Article 22, paragraph 3 (b), of the 1986 Convention states: “3. Unless the treaty otherwise provides, or it is otherwise agreed: ... (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.”

(2) This provision differs from the corresponding rule on the effective date of withdrawal of a reservation in that, in the latter case, the withdrawal 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”. The reasons for this difference in wording can easily be understood. Whereas withdrawing a reservation hypothetically modifies the content of treaty obligations between the reserving State or international organization and all the other contracting States or organizations, withdrawing an objection to a reservation modifies in principle only the bilateral treaty relationship between the reserving State or organization and the objecting State or organization. Ms. Bokor-Szegó, the representative of Hungary at the 1969 Vienna Conference, explained the difference in the wording between subparagraph (a) and the subparagraph (b) proposed by her delegation as follows:<sup>429</sup> “withdrawal of an objection directly concerned only the objecting State and the reserving State.”<sup>430</sup>

(3) However, the effects of withdrawing an objection to a reservation may go beyond this strictly bilateral relationship between the reserving party and the objecting party. All depends on the content and scale of the objection: the result of its withdrawal may even be that a treaty enters into force between all the States and international organizations that ratified it. This occurs in particular when an objection has prevented a treaty from entering into force between the parties to a treaty with limited participation (art. 20, para. 2, of the Vienna Conventions) or, a less likely scenario, when the withdrawal of an objection allows the reserving State or international organization to be a party to the treaty in question and thus brings the number of parties up to that required for the treaty’s entry into force. Accordingly, it could be questioned whether it is legitimate that the effective date of withdrawal of an objection to a reservation should depend solely on when notice of that withdrawal is given to the reserving State, which is certainly the chief interested party but not necessarily the only one. In the above-mentioned situations, limiting the requirement to give notice in this way means

<sup>429</sup> See paragraph (4) of the introductory commentary to section 2.7 above.

<sup>430</sup> *Official Records of the United Nations Conference on the Law of Treaties, Second Session...* (see footnote 297 above), eleventh plenary meeting, 30 April 1969, pp. 36–37, para. 14.

that the other contracting States or organizations are not in a position to determine the exact date when the treaty enters into force.

(4) This disadvantage appears to be more theoretical than real, however, since the withdrawal of an objection must be communicated not only to the reserving State but also to all the States and organizations concerned or to the depositary of the treaty, who will transmit the communication.<sup>431</sup>

(5) The other disadvantages of the rule setting the effective date at notification of the withdrawal were presented in the context of the withdrawal of reservations in the commentary to guideline 2.5.8 (Effective date of withdrawal of a reservation).<sup>432</sup> They concern the immediacy of that effect, on the one hand, and, on the other, the uncertainty facing the author of the withdrawal as to the date notification is received by the State or international organization concerned. The same considerations apply to the withdrawal of an objection, but there they are less problematic. As far as the immediacy of the effect of the withdrawal is concerned, it should be borne in mind that the chief interested party is the author of the reservation, who would like the reservation to produce all its effects on another contracting party: the quicker the objection is withdrawn, the better it is from the author’s perspective. It is the author of the objection, meanwhile, who determines this notification and who must make the necessary preparations (including the preparation of domestic law) to ensure that the withdrawal produces all its effects (and, in particular, that the reservation is applicable in the relations between the two States).

(6) In view of these considerations and in keeping with the Commission’s practice, it does not seem necessary to modify the rule set forth in article 22, paragraph 3 (b), of the Vienna Convention. Taking into account the recent practice of the principal depositaries of multilateral treaties and, in particular, that of the Secretary-General of the United Nations,<sup>433</sup> who use modern, rapid means of communication to transmit notifications, States and international organizations other than the reserving State or organization should normally receive the notification at the same time as the directly interested party. Simply reproducing this provision of the Vienna Convention would thus seem justified.

(7) In accordance with the practice followed by the Commission, guideline 2.7.5 is thus identical to article 22,

<sup>431</sup> This follows from guideline 2.7.3 and of guidelines 2.5.6 (Communication of withdrawal of a reservation) and 2.1.6 (Procedure for communication of reservations), to which it refers. Consequently, the withdrawal of the objection must be communicated “to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”.

<sup>432</sup> See the commentary to guideline 2.5.8 (Effective date of withdrawal of a reservation), *Yearbook ... 2003*, vol. II (Part Two), pp. 83–86.

<sup>433</sup> See paragraphs (14) to (18) of the commentary to guideline 2.1.6 (Procedure for communication of reservations) above. See also Kohona, “Some notable developments in the practice of the United Nations Secretary-General...”, *loc. cit.* (footnote 254 above), pp. 433–450, and “Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations...”, *loc. cit.* (*ibid.*), pp. 415–450.

paragraph 3 (b), of the 1986 Vienna Convention, which is more comprehensive than the corresponding 1969 provision in that it takes into account international organizations, without altering the meaning in any way. It is for this very reason that, notwithstanding the view of some of its members, the Commission decided not to replace the phrase “becomes operative” in the English text of the guideline with the phrase “takes effect”, which would seem to mean the same thing.<sup>434</sup> This linguistic problem arises only in the English version of the text.

### 2.7.6 Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation

**The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notification of it.**

#### Commentary

(1) For the reasons given in the commentary to guideline 2.5.9 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation),<sup>435</sup> the Commission felt it necessary to adopt a guideline that was analogous in order to cover the situation in which the objecting State or international organization unilaterally sets the effective date of withdrawal of its objection, without, however, entirely reproducing the former draft guideline.

(2) In fact, in the case where the author of the objection decides to set as the effective date of withdrawal of its objection a date earlier than that on which the reserving State received notification of the withdrawal, a situation corresponding *mutatis mutandis* to subparagraph (b) of guideline 2.5.9,<sup>436</sup> the reserving State or international organization is placed in a particularly awkward position. The State or international organization that has withdrawn its objection is considered as having accepted the reservation, and may therefore, in accordance with the provisions of article 21, paragraph 1, invoke the effect of the reservation on a reciprocal basis; the reserving State or international organization would then have incurred international obligations without being aware of it, and this could seriously undermine legal security in treaty relations. It is for this reason that the Commission decided quite simply to rule out this possibility and to omit it from guideline 2.7.9. As a result, only a date later than the date of notification may be set by an objecting State or international organization when withdrawing an objection.

(3) In the English version of guideline 2.7.6, the phrase “becomes operative”, which some English-speaking members of the Commission found awkward, was nevertheless retained by the Commission because it is used in article 22, paragraph 3 (b), of the Vienna Conventions and also in guideline 2.7.5.<sup>437</sup> The phrase simply means “takes

effect”. This linguistic problem does not arise in any of the other language versions.

### 2.7.7 Partial withdrawal of an objection

**Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal of an objection is subject to the same formal and procedural rules as a complete withdrawal and becomes operative on the same conditions.**

#### Commentary

(1) As with the withdrawal of reservations, it is quite conceivable that a State (or international organization) might modify an objection to a reservation by partially withdrawing it. If a State or an international organization can withdraw its objection to a reservation at any time, it is hard to see why it could not simply reduce its scope. Two quite different situations illustrate this point:

—in the first place, a State might change an objection with “maximum”<sup>438</sup> or intermediate<sup>439</sup> effect into a “normal” or “simple” objection.<sup>440</sup> In such cases, the modified objection will produce the effects foreseen in article 21, paragraph 3. Moving from an objection with maximum effect to a simple objection or one with intermediate effect also brings about the entry into force of the treaty as between the author of the reservation and the author of the objection;<sup>441</sup>

—in the second place, it would appear that there is nothing to prevent a State from “limiting” the actual content of its objection (by accepting certain aspects of reservations that lend themselves to being separated out in such a way)<sup>442</sup> while maintaining its principle. In this case, the relations between the two States are governed by the new formulation of the objection.

<sup>438</sup> An objection with “maximum” effect is an objection in which its author expresses the intention of preventing the treaty from entering into force as between itself and the author of the reservation in accordance with the provisions of article 20, paragraph 4 (b), of the Vienna Conventions. See *Yearbook ... 2005*, vol. II (Part Two), p. 81, para. (22) of the commentary to guideline 2.6.1.

<sup>439</sup> By making an objection with “intermediate” effect, a State expresses the intention to enter into treaty relations with the author of the reservation but considers that the exclusion of treaty relations should go beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions. *Ibid.*, para. (23) of the commentary to guideline 2.6.1.

<sup>440</sup> “Normal” or “simple” objections are those with “minimum” effect, as provided for in article 21, paragraph 3, of the Vienna Conventions. *Ibid.*, para. (22) of the commentary to guideline 2.6.1.

<sup>441</sup> If, on the contrary, an objection with “super maximum” effect were abandoned and replaced by an objection with maximum effect, the treaty would no longer be in force between the States or international organizations concerned; even if an objection with “super maximum” effect is held to be valid, that would enlarge the scope of the objection, which is not possible (see guideline 2.7.9 and the commentary thereto below). An objection with “super maximum” effect states not only that the reservation to which the objection is made is not valid, but also that, consequently, the treaty applies *ipso facto* as a whole in the relations between the two States. See *Yearbook ... 2005*, vol. II (Part Two), p. 81, para. (24) of the commentary to guideline 2.6.1.

<sup>442</sup> In some cases, the question of whether, in the latter hypothesis, it is really possible to speak of a “limitation” of this kind is debatable—but neither more nor less than the question of whether modifying a reservation is tantamount to its partial withdrawal.

<sup>434</sup> See also paragraph (3) of the commentary to guideline 2.7.6 and paragraph (5) of the commentary to guideline 2.7.7 below.

<sup>435</sup> *Yearbook ... 2003*, vol. II (Part Two), pp. 86–87.

<sup>436</sup> *Ibid.*; see also paragraphs (4) and (5) of the commentary to the guideline.

<sup>437</sup> See paragraph (7) of the commentary to guideline 2.7.5 above and paragraph (5) of the commentary to guideline 2.7.7 below.

(2) The Commission has no knowledge of a case in State practice involving such a partial withdrawal of an objection. This does not, however, appear to be sufficient ground for ruling out such a hypothesis. In his first report, Waldock expressly provided for the possibility of a partial withdrawal of this kind. Paragraph 5 of draft article 19, which was devoted entirely to objections but subsequently disappeared in the light of changes made to the structure of the draft articles, states: “A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or *in part*\*, at any time.”<sup>443</sup> The commentaries to this provision<sup>444</sup> presented by the Special Rapporteur offer no explanation of the reasons why he proposed it. Nonetheless, it is noteworthy that this draft article 19, paragraph 5, was again identical to the corresponding proposal concerning the withdrawal of reservations,<sup>445</sup> as was made explicit in Waldock’s commentary.<sup>446</sup>

(3) The arguments which led the Commission to allow for the possibility of partial withdrawal of reservations<sup>447</sup> may be transposed *mutatis mutandis* to partial withdrawal of objections, even though in this case the result is not to ensure a more complete application of the provision of the treaty but, on the contrary, to give full effect (or greater effect) to a reservation. Consequently, just as partial withdrawal of a reservation follows the rules applicable to full withdrawal,<sup>448</sup> it would seem that the procedure for the partial withdrawal of an objection should be modelled on that of its total withdrawal. Guideline 2.7.7 has been formulated to reflect this.

(4) Given the problems inherent in determining the effects of total withdrawal of an objection in the abstract,<sup>449</sup> the Commission felt that it was neither possible nor necessary to define the term “partial withdrawal” any further. It was enough to say that partial withdrawal is necessarily something less than full withdrawal and that it limits the legal effects of the objection *vis-à-vis* the reservation without wiping them out entirely: as the above examples show, the reservation is not simply accepted; rather, the objecting State or international organization merely wishes to alter slightly the effects of an objection which, in the main, is maintained.

(5) In the English version of guideline 2.7.7, the phrase “becomes operative”, which is perhaps awkward, was retained by the Commission on account of its use in article 22, paragraph 3 (b), of the Vienna Conventions and also in guidelines 2.7.5 and 2.7.6.<sup>450</sup> The phrase simply means “takes effect”. This linguistic problem does not arise in any of the other language versions.

<sup>443</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 62.

<sup>444</sup> *Ibid.*, p. 68.

<sup>445</sup> See draft article 17, paragraph 6, *ibid.*, p. 61.

<sup>446</sup> *Ibid.*, p. 68.

<sup>447</sup> See the commentary to guideline 2.5.10 (Partial withdrawal of a reservation), *Yearbook ... 2003*, vol. II (Part Two), pp. 89–90, paras. (11) and (12).

<sup>448</sup> See the second paragraph of guideline 2.5.10: “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” (*ibid.*, p. 87).

<sup>449</sup> See the commentary to guideline 2.7.4 above.

<sup>450</sup> See paragraph (7) of the commentary to guideline 2.7.5 and paragraph (3) of the commentary to guideline 2.7.6 above.

## 2.7.8 *Effect of a partial withdrawal of an objection*

**The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent of the new formulation of the objection.**

### *Commentary*

(1) It is difficult to determine *in abstracto* what effects are produced by the withdrawal of an objection and even more difficult to say with certainty what concrete effect a partial withdrawal of an objection is likely to produce. In order to cover all possible effects, the Commission wanted to adopt a guideline that was sufficiently broad and flexible. It considered that the wording of guideline 2.5.11 concerning the effects of a partial withdrawal of a reservation<sup>451</sup> met this requirement. Consequently, guideline 2.7.8 is modelled on the analogous guideline dealing with the partial withdrawal of a reservation.

(2) While the text of guideline 2.7.8 does not explicitly say so, it is clear that the term “partial withdrawal” implies that by partially withdrawing its objection, the State or international organization that is the author of the objection intends to limit the legal effects of the objection, it being understood that this may prove fruitless if the legal effects of the reservation are already weakened as a result of problems relating to the validity of the reservation.

(3) The objection itself produces its effects independently of any reaction on the part of the author of the reservation. If States and international organizations can make objections as they see fit, they may similarly withdraw them or limit their legal effects at will.

## 2.7.9 *Widening of the scope of an objection to a reservation*

**A State or international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.13 provided that the widening does not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection.**

### *Commentary*

(1) Neither the *travaux préparatoires* of the 1969 and 1986 Vienna Conventions nor the text of the Conventions themselves contain any provisions or indications on the question of the widening of the scope of an objection previously made by a State or international organization, and there is no State practice in this area.

(2) In theory, it is conceivable that a State or international organization that has already raised an objection to a reservation may wish to widen the scope of its objection, for example by adding the declaration provided for in article 20, paragraph 4 (b) of the Vienna Conventions, thereby transforming it from a simple objection, which does not preclude the entry into force of the treaty as

<sup>451</sup> *Yearbook ... 2003*, vol. II (Part Two), p. 91.

between the objecting and reserving parties, into a qualified objection, which precludes any treaty-based relations between the objecting and reserving parties.

(3) In the view of some Commission members, this example alone demonstrates the problems of legal security that would result from such an approach. They argue that any hint of an intention to widen or enlarge the scope of an objection to a reservation could seriously undermine the status of the treaty in the bilateral relations between the reserving party and the author of the new objection. Since in principle the reserving party does not have the right to respond to an objection, to allow the widening of the scope of an objection would amount to exposing the reserving State to the will of the author of the objection, who could choose to change the treaty relations between the two parties at any time. The lack of State practice suggests that States and international organizations consider that widening the scope of an objection to a reservation is simply not possible.

(4) Other considerations, according to this point of view, support such a conclusion. In its work on reservations, the Commission has already examined the similar issues of the widening of the scope of a reservation<sup>452</sup> and the widening of the scope of a conditional interpretative declaration.<sup>453</sup> In both cases, the widening is understood as the late formulation of a new reservation or a new conditional interpretative declaration.<sup>454</sup> Because of the presumption of article 20, paragraph 5, of the Vienna Conventions, the late formulation of an objection cannot be said to have any legal effect.<sup>455</sup> Any declaration formulated after the end of the prescribed period is no longer considered to be an objection properly speaking but a renunciation of a prior acceptance, without regard for the commitment entered into with the reserving State,<sup>456</sup> and the practice of the Secretary-General as depositary of multilateral treaties bears out this conclusion.<sup>457</sup>

(5) Other Commission members, however, held that a reading of the provisions of the Vienna Conventions does not justify such a categorical solution. Under article 20, paragraph 5, States and international organizations are given a specific time period within which to make their objections, and there is nothing to prevent them from widening or reinforcing their objections during that period; for practical reasons, then, it is appropriate to give States such a period for reflection.

(6) A compromise was nevertheless reached between the two points of view. The Commission considered that the widening of the scope of an objection cannot call into question the very existence of treaty relations between the

author of the reservation and the author of the objection. Making a simple objection that does not imply an intention to preclude the entry into force of the treaty between the author of the objection and the author of the reservation may indeed have the immediate effect of establishing treaty relations between the two parties, even before the time period allowed for the formulation of objections has elapsed. To call this *fait accompli* into question by subsequently widening the scope of the objection and accompanying it with a clear expression of intent to preclude the entry into force of the treaty in accordance with article 20, paragraph 4 (b), of the Vienna Convention is inconceivable and seriously undermines legal security.

(7) The guideline reflects this compromise. It does not prohibit the widening of objections within the time period prescribed in guideline 2.6.13—which simply reproduces the provision contained in article 20, paragraph 5, of the Vienna Conventions—provided that such widening does not modify treaty relationships. Widening is thus possible if it is done before the expiry of the 12-month period (or any other period stipulated in the treaty) that follows notification of the reservation or before the date on which the State or international organization that made the objection expresses its consent to be bound by the treaty, if it is later and if it does not call into question the very existence of treaty relations acquired subsequently through the formulation of the initial objection.

## 2.8 Forms of acceptance of reservations

**The acceptance of a reservation may arise from a unilateral statement in this respect or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13.**

### Commentary

(1) In accordance with paragraph 5 of article 20<sup>458</sup> of the 1986 Vienna Convention:

For the purposes of paragraphs 2 and 4,<sup>[459]</sup> and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

(2) It emerges from this definition that acceptance of a reservation can be defined as the absence of any objection. Acceptance is presumed in principle from the absence of an objection, either at the end of the 12-month period

<sup>452</sup> See guideline 2.3.5 (Widening of the scope of a reservation) and the commentary thereto, *Yearbook ... 2004*, vol. II (Part Two), pp. 106–108.

<sup>453</sup> See guideline 2.4.10 (Limitation and widening of the scope of a conditional interpretative declaration) and the commentary thereto, *ibid.*, p. 109.

<sup>454</sup> See paragraph (1) of the commentary to guideline 2.3.5, *ibid.*, p. 106, and paragraph (1) of the commentary to guideline 2.4.10, *ibid.*, p. 109.

<sup>455</sup> See also guideline 2.6.15 above.

<sup>456</sup> See the commentary to guideline 2.6.15 above.

<sup>457</sup> See paragraph (4) of the commentary to guideline 2.6.15 above.

<sup>458</sup> This article is entitled “Acceptance of and objection to reservations”. Unlike the English text, the French version of the two Vienna Conventions keeps the word “acceptance” in the singular but leaves “objections” in the plural. This distortion, which appeared in 1962 (see *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 223, *Annuaire de la Commission du droit international 1962*, vol. I, p. 248 and *Anuario de la Comisión de Derecho Internacional 1962*, vol. I, p. 239 (text adopted by the Drafting Committee); *Yearbook ... 1962*, vol. II, p. 176, *Annuaire de la Commission du droit international 1962*, vol. II, p. 194 and *Anuario de la Comisión de Derecho Internacional 1962*, vol. II, p. 203), was never corrected or explained.

<sup>459</sup> Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, treaties with limited participation and constituent acts of international organizations.



following receipt of notification of the reservation or at the time of expression of consent to be bound. In both cases, which are conceptually distinct but yield identical results in practice, silence is tantamount to acceptance without the need for a formal unilateral declaration. This does not mean, however, that acceptance is necessarily tacit; moreover, paragraphs 1 and 3 of article 23 make explicit reference to “express acceptance of a reservation”, and such express formulation may be obligatory, as is implied by the phrase “unless the treaty otherwise provides” in article 20, paragraph 5, even if this phrase was inserted in that provision for other reasons,<sup>460</sup> and the omission from the same provision of any reference to paragraph 3 of article 20, concerning the acceptance of a reservation to the constituent instrument of an international organization, which does indeed require a particular form of acceptance.

(3) Guideline 2.8, which opens the section of the Guide to Practice dealing with the procedure and forms of acceptance of reservations, presents two distinct forms of acceptance:

—express acceptance, resulting from a unilateral declaration to that end; and

—tacit acceptance, resulting from silence or, more specifically, the absence of any objection to the reservation during a certain period of time. This time period corresponds to the time during which an objection may legitimately be made, i.e. the period specified in guideline 2.6.13.

(4) It has been argued nevertheless that this division between formal acceptances and tacit acceptances of reservations disregards the necessary distinction between two forms of acceptance without a unilateral declaration, which could be either tacit or implicit. Furthermore, according to some authors, reference should be made to “early” acceptance when the reservation is authorized by the treaty: “Reservations may be accepted, according to the Vienna Convention, in three ways: in advance, by the terms of the treaty itself or in accordance with Article 20(1).”<sup>461</sup> While these distinctions may have some meaning in academic terms, the Commission did not feel that it was necessary to reflect them in the Guide to Practice, given that they did not have any concrete consequences.

(5) With respect to so-called “early” acceptances, the Commission’s commentary on draft article 17 (current article 20) clearly indicates that: “Paragraph 1 of this article covers cases where a reservation is expressly or impliedly authorized by the treaty; in other words, where the consent of the other contracting States has been given in the treaty. No further acceptance of the reservation by them is therefore required.”<sup>462</sup> Under this provision, and unless the treaty otherwise provides, an acceptance is not, in this case, a requirement for a reservation to be established: it is established *ipso facto* by virtue of the treaty, and the

reaction of States—whether an express acceptance, tacit acceptance or even an objection—can no longer call this acquired acceptance into question. Although this does not prohibit States from expressly accepting a reservation of this kind, such an express acceptance is a redundant act, with no specific effect. Moreover, no examples of such an acceptance exist. This does not mean that article 20, paragraph 1, of the Vienna Conventions should not be reflected in the Guide to Practice. However, the provision has much more to do with the effects of a reservation than with formulation or the form of acceptance; accordingly, its rightful place is in the fourth part of the Guide.

(6) Similarly, the Commission did not feel it appropriate to reflect in the Guide to Practice the distinction made by some authors, based on the two cases provided for in article 20, paragraph 5, of the Vienna Conventions, between “tacit” and “implicit” acceptances, depending on whether the reservation has already been formulated at the time the other interested party expresses its consent to be bound. In the former case, the acceptance would be “implicit”; in the latter, it would be “tacit”.<sup>463</sup> In the former case, States or international organizations are deemed to have accepted the reservation if they have raised no objection thereto when they express their consent to be bound by the treaty. In the latter case, the State or international organization has a period of 12 months in which to raise an objection, after which it is deemed to have accepted the reservation.

(7) Although the result is the same in both cases—the State or international organization is deemed to have accepted the reservation if no objection has been raised at a specific time—their grounds are different. With respect to States or international organizations which become contracting parties to a treaty after the formulation of a reservation, the presumption of acceptance is justified not by their silence, but rather by the fact that this State or international organization, aware of the reservations formulated,<sup>464</sup> accedes to the treaty without objecting to the reservations. The acceptance is thus implied in the act of ratification of or accession to the treaty, that is, in a positive act which fails to raise objections to reservations already formulated,<sup>465</sup> hence the notion of “implicit” acceptances. In the case of States or international organizations that are already parties to a treaty when the reservation is formulated, however, the situation is different: it is their protracted silence—generally for a period of 12 months—or, in particular, the absence of any objection on their part which is considered as an acceptance of the reservation. This acceptance is therefore inferred

<sup>463</sup> Greig, *loc. cit.* (footnote 345 above), p. 120; Horn, *op. cit.* (footnote 342 above), pp. 125–126; Müller, *loc. cit.* (footnote 358 above), p. 816, para. 35.

<sup>464</sup> See article 23, paragraph 1, of the 1986 Vienna Convention, which stipulates that reservations “must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”. See also guideline 2.1.5 and paragraphs (1) to (16) of the commentary thereto, *Yearbook ... 2002*, vol. II (Part Two), pp. 34–38.

<sup>465</sup> See Müller, *loc. cit.* (footnote 358 above), p. 816, para. 36. See also article 10, paragraph 5, of the draft convention on the law of treaties proposed by Special Rapporteur J. L. Brierly in his first report on the subject (document A/CN.4/23 (mimeographed), para. 100); for the English version, see *Yearbook ... 1950*, vol. II, p. 241, para. 100.

<sup>460</sup> See paragraph (7) of the commentary to guideline 2.6.13 above.

<sup>461</sup> Greig, *loc. cit.* (footnote 345 above), p. 118. This article is perhaps the most thorough study of the rules that apply to the acceptance of reservations (see in particular pages 118–135 and 153).

<sup>462</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 207, para. (18).

only from the silence of the State or international organization concerned; it is tacit.

(8) In fact, this doctrinal distinction is of little interest in practice and should probably not be reflected in the Guide to Practice. It is sufficient, for practical purposes, to distinguish the States and international organizations which have a period of 12 months to raise an objection from those which, not yet being parties to the treaty at the time the reservation is formulated, have time for consideration until the date on which they express their consent to be bound by the treaty, which nevertheless does not prevent them from formulating an acceptance or an objection before that date.<sup>466</sup> The question is one of time period, however, and not one of definition.

(9) Another question relates to the definition itself of tacit acceptances. One may well ask whether in some cases an objection to a reservation is not tantamount to a tacit acceptance thereof. This paradoxical question stems from the wording of paragraph 4 (b) of article 20. The paragraph states: “an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization.” It thus seems to follow that in the event that the author of the objection raises no objection to the entry into force of the treaty between itself and the reserving State, an objection has the same effects as an acceptance of the reservation, at least concerning the entry into force of the treaty (and probably the “establishment” of the reservation itself). This question, which involves much more than purely hypothetical issues, nevertheless primarily concerns the problem of the respective effects of acceptances and objections to reservations.

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<sup>466</sup> See also paragraphs (8) and (9) of the commentary to guideline 2.6.5 and paragraphs (8) and (9) of guideline 2.6.13 above.

(10) Guideline 2.8 limits the potential authors of an acceptance to contracting States and organizations alone. The justification for this is to be found in article 20, paragraph 4, which takes into consideration only acceptances made by a contracting State or contracting international organization, and article 20, paragraph 5, which provides that the presumption of acceptance applies only to States that are parties to the treaty. Thus, a State or an international organization which, on the date that notice of the reservation is given, is not yet a contracting party to the treaty will be considered as having accepted the reservation only on the date when it expresses its consent to be bound—that is, on the date when it definitively becomes a contracting State or contracting organization.

(11) It is a different matter, however, for acceptances of reservations to the constituent instruments of international organizations referred to in paragraph 3 of the same article, on the one hand, and express acceptances, on the other. In the latter case, there is nothing to prevent a State or international organization that has not yet expressed its consent to be bound by the treaty from making an express declaration accepting a reservation formulated by another State, even though that express acceptance cannot produce the same legal effects as those described in article 20, paragraph 4, for acceptances made by contracting States or international organizations. The same holds true for any express acceptances by a State or international organization of a reservation to the constituent instrument of an international organization: there is nothing to prevent such express acceptances from being formulated, but they cannot produce the same effects as the acceptance of a reservation to a treaty that does not take this form.

(12) Furthermore, it can be seen both from the text of the Vienna Conventions and their *travaux préparatoires* and from practice that tacit acceptance is the rule and express acceptance the exception. Guideline 2.8, however, is purely descriptive and is not intended to establish cases in which it is possible or necessary to resort to either of the two possible forms of acceptances.