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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-NINTH SESSION

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CHAPTER IV

RESERVATIONS TO TREATIES

Addendum

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B. Consideration of the topic at the present session

1. At the present session the Committee had before it the eleventh and twelfth reports of the Special Rapporteur (A/CN.4/574 and A/CN.4/584) on the formulation and withdrawal of acceptances and objections and on the procedure for acceptances of reservations respectively. The eleventh report had been introduced at the fifty-eighth session, but the Commission had decided to consider it at the fifty-ninth session, owing to a lack of time.

2. The Commission considered the eleventh report of the Special Rapporteur at its 2914th, 2915th, 2916th, 2917th, 2918th, 2919th and 2920th meetings, held on 7, 8, 9, 10, 11, 15 and 16 May 2007, and the twelfth report at its … meetings, held on … July 2007.

3. At its 2917th, 2919th and 2020th meetings, held on 10, 15 and 16 May 2007, the Committee decided to refer draft guidelines 2.6.3, 2.6.4, 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, 2.7.1-2.7.9 to the Drafting Committee, and to review the wording of draft guideline 2.1.6 in the light of the discussion.

1. Introduction by the Special Rapporteur of his eleventh report

4. The Special Rapporteur briefly reviewed the history of the topic “Reservations to treaties”, recalling the flexible regime established by the Vienna Conventions, the uncertainties that that regime entailed and the Commission’s fundamental decision not to call into question the work of the Vienna Conventions but to draw up a guide consisting of guidelines which, while not bending in themselves, might guide the practice of States and international organizations with regard to reservations and interpretative declarations.

5. The first group of draft guidelines included in the eleventh report (2.6.3 to 2.6.6) concerned the freedom to make objections to reservations. The Special Rapporteur recalled that it was merely a freedom, given that the Commission had not made it conditional on the incompatibility of a reservation with the object and purpose of the treaty, and that the Vienna Conference had followed the Commission in that regard despite the doubts of some delegations. That approach was in keeping with the spirit of consensus pervading all of treaty law, in the sense that a State could not unilaterally impose on other contracting parties the modification of a treaty binding them by means of a reservation. Limiting the freedom to make objections exclusively to

reservations that were incompatible with the object and purpose of the treaty would render the procedure for acceptance of and objections to reservations under article 20 of the Vienna Convention null and void.

6. Yet the freedom to make objections was not arbitrary but subject to conditions relating to both form and procedure, which were covered by draft guidelines 2.6.3 to 2.6.7. Grounds for objections could range from the (alleged) incompatibility of the reservation with the object and purpose of the treaty to political grounds. While the State was not obliged to mention incompatibility with the object and purpose of the treaty as the ground for its objection, States did, surprisingly enough, sometimes invoke that very ground.

7. Draft guideline 2.6.3[1] conveyed precisely that idea, namely the freedom of any State or international organization to make objections.

8. Turning to the relationship of the objection to entry into force of the treaty between the author of the reservation and the author of the objection, the Special Rapporteur recalled that although the Commission's special rapporteurs had in the past considered that the objection automatically precluded the entry into force of the treaty between those two parties, Sir Humphrey Waldock had subsequently supported the advisory opinion of the International Court of Justice of 1951, which held that the State that was the author of the reservation was free to draw its own conclusions concerning the effects of its objection on its relations with the reserving State. In the event that the objecting State remained silent on the matter, the presumption made by the Commission in 1966 was that the treaty would not enter into force between the two parties. That presumption, albeit logical, had nevertheless been reversed during the Vienna Conference of 1968-1969. As a result, the treaty was considered as being in force between the two parties concerned, with the exception of the provision covered by the reservation. Article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Convention reflected that presumption. While the Special Rapporteur was tempted to "revise" that wording,

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[1] **2.6.3 Freedom to make objections**

A State or an international organization may formulate an objection to a reservation for any reason whatsoever, in accordance with the provisions of the present Guide to Practice.

which was neither very logical nor satisfactory, he had ultimately decided not to change it, as it reflected current practice. It was therefore reproduced in draft guideline 2.6.4.[2]

9. Draft guideline 2.6.5[3] sought to answer a question that had been left pending by draft guideline 2.6.1,[4] on the definition of objections, namely who had the freedom to make objections. Article 20, paragraph 4 (b), of the Vienna Convention of 1986 provided guidance by referring to an objection by a contracting State or a contracting international organization. Any State or any international organization that was entitled to become a party to the treaty and that had been notified of the reservations could also formulate objections that would produce effects only when the State or organization became a party to the treaty.

10. With regard to draft guideline 2.6.6, the Special Rapporteur said that in the absence of any relevant practice, the draft guidelines constituted an exercise in progressive development. It was the counterpart of draft guidelines 1.1.7 and 1.2.2 in the area of objections.

11. Introducing draft guidelines 2.6.7 to 2.6.15, on the form of and procedure for the formulation of objections, the Special Rapporteur recalled that, as far as form was concerned,

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[2] **2.6.4 Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation**

A State or international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the reserving State or international organization for any reason whatsoever, in accordance with the provisions of the present Guide to Practice.

[3] **2.6.5 Author of an objection**

An objection to a reservation may be formulated by:

(i) Any contracting State and any contracting international organization; and

(ii) Any State and any international organization that is entitled to become a party to the treaty.

[4] **2.6.6 Joint formulation of an objection**

The joint formulation of an objection by a number of States or international organizations does not affect the unilateral nature of that objection.

article 23, paragraph 1, of the Vienna Conventions provided that objections must be formulated in writing; those were the terms used in draft guideline 2.6.7.[5]

12. Moreover, when a State or international organization intended that its objection should prevent the treaty from entering into force between it and the author of the reservation, such an intention must be clearly expressed, in accordance with article 20, paragraph 4 (b), of the Vienna Conventions. Although practice in that area was not conclusive, draft guideline 2.6.8[6] followed the wording of the Vienna Conventions. In the interests of legal security, the intention should be expressed during the period in which the objection might produce its full effects. For that reason, the Special Rapporteur thought that a phrase along the following lines should be added at the end of draft guideline 2.6.8: "in accordance with draft guideline 2.6.13", since the latter concerned the time period for formulating an objection.

13. The Special Rapporteur then noted that the procedure for objections was no different from that for reservations. Thus it might be possible to consider reproducing all the draft guidelines that the Commission had already adopted on the procedure for formulating reservations, or else simply to refer to them, which was what draft guideline 2.6.9[7] did.

14. The question of the reasons for the objection, which was not covered in the Vienna Conventions, was taken up in draft guideline 2.6.10.[8] While the freedom to make objections was

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[5] **2.6.7 Written form**

An objection must be formulated in writing.

[6] **2.6.8 Expression of intention to oppose the entry into force of the treaty**

When a State or international organization making an objection to a reservation intends to oppose the entry into force of the treaty as between itself and the reserving State or international organization, it must clearly express its intention when it formulates the objection.

[7] **2.6.9 Procedure for the formulation of objections**

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

[8] **2.6.10 Statement of reasons**

Whenever possible, an objection should indicate the reasons why it is being made.

discretionary, it was nevertheless true that it would be useful to make the reasons for the objection known, both for the reserving State and for third parties called upon to assess the validity of the reservation, at least when the objection was based on incompatibility with the object and purpose of the treaty. The Special Rapporteur even wondered whether the Commission should not include a similar recommendation concerning the reasons for reservations in the Guide to Practice.

15. On the question of the confirmation of objections, the Special Rapporteur recalled that article 23, paragraph 3, of the Vienna Convention of 1986 provided that objections did not require confirmation if they were made previously to confirmation of a reservation. That principle was also contained in draft guideline 2.6.11.[9] In his view, the same principle might also apply to the case in which a State or an international organization had formulated an objection before becoming party to a treaty, and that was reflected in draft guideline 2.6.12.[10]

16. Draft guideline 2.6.13[11]concerned the time when the objection should be formulated and was based on article 20, paragraph 5, of the Vienna Convention of 1986. However, the Special Rapporteur noted that the third paragraph of draft guideline 2.1.6 (already adopted and entitled

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[9] **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 draft guideline 2.2.1 does not itself require confirmation.

[10] **2.6.12 Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty[10]**

If an objection is made prior to the expression of consent to be bound by the treaty, it does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound.

[11] **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 is 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.

"Procedure for communication of reservations") dealt with the question of the period during which an objection could be raised, which might give rise to confusion. He therefore proposed that, in order to avoid any duplication with draft guideline 2.6.13, either the question should be reviewed on second reading or else the draft guideline 2.6.14 should be "revised" forthwith.

17. The Special Rapporteur then recalled a practice that had developed whereby States declared in advance that they would oppose certain types of reservations before they had even been formulated. Such pre-emptive objections seemed to fulfil one of the most important functions of objections, namely to give notice to the author of the reservation. Draft guideline 2.6.14[12] reflected that fairly widespread practice.

18. In contrast to pre-emptive objections there were also late objections, formulated after the end of the time period specified in the Vienna Conventions. Such "objections" could not have the same effects as objections formulated on time or remove the implicit acceptance of the reservation. However, the Special Rapporteur thought that such "objections" were governed *mutatis mutandis* by the regime for interpretative declarations rather than by the regime for reservations and could still perform the function of giving notice. As practice reflecting that view did in fact exist, draft guideline 2.6.15[13] dealt with such late "objections".

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[12] **2.6.14 Pre-emptive objections**

A State or international organization may formulate an objection to a specific potential or future reservation, or to a specific category of such reservations, or exclude the application of the treaty as a whole in its relations with the author of such a potential or future reservation. Such a pre-emptive objection shall not produce the legal effects of an objection until the reservation has actually been formulated and notified.

[13] **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 all the legal effects of an objection that has been made within that time period.

19. With regard to draft guidelines 2.7.1 to 2.7.9, the Special Rapporteur said that the Guide to Practice should contain guidelines on the withdrawal and modification of objections, even though practice in that area was virtually non-existent. He also thought that the guidelines must be modelled on those relating to the withdrawal and modification of reservations. Thus draft guidelines 2.7.1[14] and 2.7.2[15] merely reproduced article 22, paragraph 3, and article 23, paragraph 4, respectively, of the Vienna Conventions. Draft guideline 2.7.3[16] also referred to the relevant guidelines on reservations, transposing them to the formulation and communication of the withdrawal of objections.

20. On the other hand, the effect of the withdrawal of an objection could not be compared with the effect of the withdrawal of a reservation. That question could give rise to highly complex issues, but it would be better to consider that the withdrawal of an objection was tantamount to an acceptance of reservations, and that was the principle that was established in draft guideline 2.7.4.[17] The date on which the withdrawal of an objection took effect was dealt

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[14] **2.7.1 Withdrawal of objections to reservations**

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

[15] **2.7.2 Form of withdrawal of objections to reservations**

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

[16] **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.

[17] **2.7.4 Effect of withdrawal of an objection**

A State that withdraws an objection formulated earlier against a reservation is considered to have accepted that reservation.

with in draft guidelines 2.7.5[18] and 2.7.6[19], of which the former reflected the wording of article 22, paragraph 3 (b), of the Vienna Convention of 1986.

21. The Special Rapporteur also noted that, even in the absence of practice, it might be possible to contemplate the partial withdrawal of an objection, a situation which was covered by draft guideline 2.7.7.[20] As for draft guideline 2.7.8,[21] it was modelled on draft guideline 2.5.11 (Effect of a partial withdrawal of a reservation). Draft guideline 2.7.9[22] dealt with a case in which a State or international organization that had made a simple objection wished to transform

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[18] **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.

[19] **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 takes effect on the date set by its author where that date is later than the date on which the reserving State received notification of it.

[20] **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 limits the legal effects of the objection on the treaty relations between the author of the objection and that the author of the reservation or on the treaty as a whole.

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

[21] **2.7.8 Effect of a partial withdrawal of an objection**

The partial withdrawal of an objection modifies the legal effect of the objection to the extent of the new formulation of the objection.

[22] **2.7.9 Prohibition against the widening of the scope of an objection to a reservation**

A State or international organization which has made an objection to a reservation cannot subsequently widen the scope of that objection.

it into an accepted one. Considerations of good faith and the inability of the reserving State to state its views led him to believe that widening of the scope of the objection should be prohibited.

2. Summary of the debate

22. With regard to draft guidelines 2.6.3 and 2.6.4, it was observed that it was possible to deduce from the 1951 advisory opinion of the International Court of Justice (*I.C.J. Reports*, p. 27) that a distinction could be drawn between "minor" objections (not relating to the object and purpose of the treaty) and "major" objections based on that incompatibility. The effects would be different, and it could be maintained that although the Vienna Convention did not draw any distinction between those two types of objection, the regime of objections was not necessarily the same. The distinction between the two types of objection might also raise issues as to the very appropriateness of objections concerning the validity of reservations, but at the present juncture one might well ask whether the presumption of article 20, paragraph 4 (b), of the Vienna Convention applied to all objections or to "minor" objections only. The difference in regimes might also explain the practice of some States whereby an objection to a reservation that was allegedly incompatible with the object and the purpose of the treaty did not preclude entry into force of the treaty between the reserving State and the objecting State. It was also pointed out that article 20, paragraph 4 (b), was consistent with article 19 only when it referred to "minor" objections. The Commission should not adopt texts that seemed to imply that a uniform regime did in fact exist.

23. The view was also expressed that it was not necessary to draw a distinction between "major" and "minor" objections, since a reservation that was incompatible with the object and purpose of the treaty was considered void and therefore produced no legal effects. Draft guideline 2.6.4 could be clearer and state directly that if the reserving State did not withdraw its reservation and the objecting State did not withdraw its objection, the treaty did not enter into force.

24. It was noted that the distinction between "major" and "minor" objections would have consequences for the time period for formulating an objection. From that standpoint, the time period of 12 months specified in article 20, paragraph 5, of the Vienna Convention would not be

applicable to objections relating to the validity of reservations (major reservations), given that articles 20 and 21 of the Vienna Convention did not concern objections to the reservations mentioned in article 19.

25. Even if one considered that articles 20 and 21 applied to all types of reservations, the distinction between the two types of objections should not be systematically disregarded. It would be useful to have an additional guideline which would state that, in the absence of an express or implicit indication, an objection was presumed not to relate to the validity of the reservation.

26. Regarding the distinction between “making” and “formulating” [objections], the question arose as to whether it would not be simpler to use the term “formulate” throughout the Guide to Practice.

27. The view was also expressed that there was a discrepancy between the title and the content of draft guideline 2.6.3, given that the expression “to make” appeared in the title, whereas the term “to formulate” was used in the text of the guideline. It was also asked whether there were any limitations on the freedom to make objections, particularly with regard to treaties that expressly permitted certain “reservations” or derogations, such as the North American Free Trade Agreement (NAFTA). It was further asked whether the original presumption, namely that the treaty did not enter into force between the objecting State or international organization and the author of the reservation, was not preferable to the current presumption reflected in article 20, paragraph 4 (b).

28. Concerning draft guidelines 2.6.3 and 2.6.4, it was further observed that the term “freedom” was not entirely appropriate, since what was involved was actually a right. The expression “for any reason whatsoever” also needed to be clarified, at least by a reference to the Vienna Conventions or to general international law, since the Guide to Practice should not include objections contrary to the principle of good faith or *jus cogens*.

29. The view was also expressed that if reservations were allowed, and the reservation formulated by a State or an international organization was clear, other States did not have the freedom to formulate an objection. The Guide to Practice should also contain a clearer description of the possible forms of acceptance of reservations (express or implicit) that might

limit the freedom to make objections, with a view to making treaty relations more secure. It was also observed that the discretionary right to formulate an objection was independent of the question of whether a reservation was or was not compatible with the object and purpose of the treaty, and that might be included in draft guideline 2.6.3.

30. With regard to draft guideline 2.6.5, it was asked whether one could speak of an "objection" by a potential party. It would be better to speak of a conditional objection. It was also asked whether there was a difference between an objection formulated jointly by several States and parallel or overlapping objections formulated in identical terms.

31. It was further asked whether it was justified that States that had no intention of becoming party to the treaty should have the same right as the contracting parties to formulate objections. In that connection, the practice of States and international organizations, and not only the practice of the Secretary-General of the United Nations, should be taken into consideration.

32. It was also observed that the reference in draft guideline 2.6.5 to States or international organizations that were entitled to become party to the treaty was preferable to the criterion of "intention" to become a party, in that it was not easy to determine intention, which was closely linked to the internal procedures of States or international organizations. It was pointed out, however, that the problem stemmed from the inappropriate English translation of the original French text of the draft guideline. It was also noted that practice with regard to the formulation of objections by States or international organizations that were entitled to become party to the treaty was inconclusive.

33. It was also noted that at the time that the effects of objections were considered, it should be made clear that an objection formulated by a State or international organization entitled to become a party to the treaty would not produce legal effects until such time as the State or international organization in question had actually become party to the treaty.

34. As for guideline 2.6.6, the point was made that it did not seem useful as currently drafted, since it laid emphasis on the unilateral nature of joint objections.

35. The basic thrust of draft guideline 2.6.10 met with general approval; however, one point of view held that there would be no need to extend that recommendation to reservations: a reservation, provided that it was clear, did not have to include the reasons, which were often of an internal nature, why it had been made, unlike objections, whose reasons might facilitate determination of the reservation's compatibility with the object and purpose of the treaty. According to another, more widely held point of view, such an extension to reservations would be desirable, since what was involved was only a recommendation.

36. Regarding draft guideline 2.6.12, it was asked whether it might not be going too far to exempt States or international organizations that had formulated an objection prior to the expression of their consent to be bound by the treaty (or even prior to signature) to confirm the objection at the time of expressing their consent. The guideline should be reconsidered, bearing in mind the often lengthy period of time that elapsed between the formulation of such an objection and the author's expression of consent to be bound by the treaty.

37. The view was also expressed that the phrase "prior to the expression of consent to be bound by the treaty" was vague. If an objection was formulated prior to the signature of the treaty by a State, and if signature was subject to ratification, acceptance or approval, the objection would need to be confirmed when the instrument of ratification, acceptance or approval was deposited if the State had not confirmed it at the time of signature. The question was also raised as to whether such "objections" made prior to the expression of consent to be bound by the treaty could be considered to be real objections. It was also maintained that only contracting parties should be able to make objections.

38. With regard to draft guideline 2.6.13, it was pointed out that the 12-month period ran from the date on which a State or international organization received notification of the reservation; it was therefore necessary to draw a clear distinction between that date and the date on which the reservation was communicated to the depositary. The same distinction should also be drawn in draft guideline 2.1.6, which had already been adopted. According to another point of view, in the light of draft guideline 2.6.1, the third paragraph of draft guideline 2.1.6 could be deleted. The view was expressed that the meaning of the term "notification" should be clarified further.

39. Concerning draft guideline 2.6.14, the view was expressed that “pre-emptive objections” could not have legal effects. States or international organizations should react to real reservations and not to hypothetical ones, and they had ample time to do so following notification of the reservation.

40. Moreover, it was considered that such objections were real objections, which produced all their effects but did not become operational until all conditions - namely the formulation and notification of the reservation - were met. It might therefore be more appropriate to speak of “conditional objections”. It was also noted that draft guideline 2.6.14 could give rise to confusion between political declarations and declarations intended to produce legal effects. According to one point of view, it was more a question of “preventive communications”, which, in order to be termed objections, should be confirmed once the reservation had been formulated. The possibility of excluding part of the treaty was also mentioned.

41. It was also observed that the expression “all the legal effects” in draft guideline 2.6.15 was not sufficiently clear; according to that view, late objections did not produce legal effects. Rather, they could be likened to interpretative declarations, since they were an indication of the manner in which the objecting State interpreted the treaty. In any event, it had to be ascertained whether such objections were permissible and what kinds of effects they produced. That was why they were notified by the Secretary-General as “communications”. It might be appropriate to include in the Guide to Practice reactions or “objecting communications” which were not objections; that was done with declarations that did not constitute reservations, and would reflect current practice.

42. With respect to draft guideline 2.7.1, it was observed that the title ought in fact to read: “Time of withdrawal of objections to reservations”.

43. Several members expressed support for draft guidelines 2.7.2 and 2.7.3. It was asked whether the withdrawal and modification of objections also included pre-emptive and late objections.

44. With regard to draft guideline 2.7.4, the view was expressed that its title was too general, since the withdrawal of objections could have several effects. It would be better if the title was amended to read “Acceptance of a reservation by the withdrawal of an objection”. Draft

guideline 2.7.7 sought to address the extremely complex issue of the partial withdrawal of objections but should perhaps be amplified in the light of future deliberations on the effects of reservations and objections. The second sentence of draft guideline 2.7.7 could be moved to draft guideline 2.7.8. The same held true for the title of draft guideline 2.7.8. It was pointed out in connection with that guideline that there was no exact parallel between the partial withdrawal of an objection and that of a reservation, since the purpose of the objection was first and foremost to safeguard the integrity of the treaty.

45. With regard to draft guideline 2.7.9, several members wondered whether an absolute prohibition, even during the 12-month period, could be justified by the lack of practice. The principle of good faith, which had not been invoked for the widening of the scope of reservations, was not convincing. Since the Commission had accepted the widening of the scope of reservations under certain conditions, it would be logical to accept such a widening for objections, at least during the 12-month period, given that the Vienna Conventions were silent on the matter. An absolute prohibition seemed far too categorical to be justified, and it was not possible to draw an exact parallel between widening of the scope of a reservation and widening of the scope of an objection. Moreover, if a signatory State had formulated an objection to a reservation before formally becoming a party to the treaty, it must be able to formulate an additional objection by becoming a party to the treaty within the 12-month period.

46. Other members pointed out that if an objection had been made without preventing the entry into force of the treaty between the reserving State and the objecting State, any further widening of the scope of the objection would be virtually without effect. On the other hand, if several reservations had been made, there was nothing to prevent a State or an international organization from raising successive objections to every reservation, still within the 12-month period. There was nothing to indicate that all objections had to be made at the same time. Similarly, if a reservation was withdrawn, an objection to that reservation would automatically cease to have any effect. The view was also expressed that draft guideline 2.7.9 was acceptable in that States should not have the impression that such widening of the scope was permissible, as that would make it possible for the author of an objection to circumvent all or some of its treaty obligations *vis-à-vis* the author of the reservation. It was also observed that there would be no problem in limiting draft guideline 2.7.9 to a situation in which a State that had formulated an initial

objection which did not preclude the entry into force of the treaty between it and the reserving State subsequently widened the scope of its objection, precluding treaty relations. One widely held point of view was that a draft guideline should be added recommending that States should explain the reasons for the withdrawal of their objection, which would help the treaty bodies understand why the reservation was being considered in another light; that might facilitate the "reservations dialogue".

3. Special Rapporteur's concluding remarks

47. Summing up the discussion, the Special Rapporteur said that he was pleased to note that a consensus seemed to be emerging to refer the draft guidelines to the Drafting Committee. He was rather attracted by the distinction between major and minor objections, but remained sceptical as to its appropriateness, given that it was based on a somewhat rare and unconvincing practice. Nothing in article 20, paragraph 4 (b), of the Vienna Conventions, the *travaux préparatoires* or the Soviet proposal made during the Vienna Conference made it possible to draw such a distinction, which had been mentioned in passing in the 1951 advisory opinion of the International Court of Justice. The Vienna Conference had been particularly concerned with the idea of making the formulation of reservations as easy as possible, and consequently of limiting the effects of objections. The reversal of the presumption in article 20, paragraph 4 (b), posed problems of consistency. At best, the Vienna Conventions were silent on whether the rules they contained were applicable to all reservations or only to those that had passed the test of compatibility with the object and purpose of the treaty. In any case, that distinction - intellectually interesting as it might be - could have an impact only on the effects of reservations.

48. The Special Rapporteur endorsed the comments made concerning the discrepancy between the title and the text of draft guideline 2.6.3. The title should be aligned with the text, and "to make" should be replaced with "to formulate". He was sympathetic to the argument that the freedom to formulate objections was limited by rules of procedure and by the treaty itself, even if the treaty did permit certain reservations. He wondered, however, whether that last point ought to be mentioned in the text, given that the Guide to Practice contained only recommendations, which States were free to follow or not.

49. The Special Rapporteur was also somewhat convinced by the argument that the phrase "for any reason whatsoever" should be included in the context of the Vienna Conventions, general international law and the Guide to Practice itself. As for the freedom to formulate objections, he firmly believed that however discretionary that freedom might be, it was not arbitrary but circumscribed by law. He nevertheless found it difficult to imagine objections contrary to *jus cogens*, even if such objections were not totally inconceivable. The idea of stating that the freedom to formulate objections was independent of the validity of the reservation or of its compatibility with the object and purpose of the treaty seemed acceptable to him. Conversely, he was opposed to any reference in the Guide to Practice to the Vienna Conventions because the Guide to Practice should be self-contained.

50. The term "*faculté*" was perfectly appropriate in French, but in English a more satisfactory term than "freedom", which was used in the English translation of the report, could be found.

51. The Special Rapporteur thought that all those observations could apply also to draft guideline 2.6.4, including with regard to the use of the term "freedom" in its title. The Drafting Committee might wish to give the matter careful consideration.

52. Turning to draft guideline 2.6.5, he said he felt that several criticisms were the result of linguistic misunderstandings. The expression used in French - "*Tout état … ayant qualité pour devenir partie au traité*" - made no mention of intention. The text itself was based on article 23, paragraph 1, of the Vienna Conventions. If regional organizations or States did not, in the exercise of their functions as depositary, communicate reservations to States entitled to become party to the treaty, they were not acting in accordance with article 23, paragraph 1, of the Vienna Conventions. As to the distinction between the two types of authors of objections, it could be explained in greater detail in the commentary without necessarily changing the wording of the draft guideline.

53. With regard to draft guideline 2.6.6, the Special Rapporteur approved the observation that it was the possibility of the joint formulation of objections that should be stressed rather than their unilateral nature, which could simply be mentioned in the commentary. As for similar objections formulated by several States, he thought that they could not be considered as jointly formulated objections, but could be considered parallel separate ones.

54. The Special Rapporteur noted that draft guidelines 2.6.7, 2.6.8 and 2.6.9 had met with general approval and did not call for any specific commentary.

55. Draft guideline 2.6.10 had elicited favourable comments; he found interesting the proposal that, in the event of silence on the part of an objecting State, a presumption could be established either along the lines that the objection was based on the incompatibility of the reservation with the object and purpose of the treaty or vice versa. However, he did not see the usefulness of such a presumption, since he doubted that the effects of the two types of objections were different.

56. The Special Rapporteur also noted that the proposal for an additional guideline recommending that States should give the reasons for their reservations had met with considerable support notwithstanding some hesitation. He agreed with the comments made concerning draft guideline 2.6.12, namely that it would apply only to treaties that must be ratified or approved after signature and not to those which entered into force by signature alone, but he thought that that could be mentioned in the commentary. He was aware of the risk of too long a period elapsing between the time an objection was formulated and the time it took for the objection to produce the effects mentioned by some members, but he did not see how that risk could be avoided.

57. With respect to draft guideline 2.6.13, the Special Rapporteur noted that most members were in favour of deleting the third paragraph of guideline 2.1.6, which duplicated it.

58. Draft guidelines 2.6.14 and 2.6.15 had elicited the most criticism. The two draft guidelines concerned objections formulated outside the specified time period. Since he held a flexible view of the law, he had attributed to them effects that certain members had had difficulty in accepting. Pre-emptive objections produced their effects only when the reservation to which they referred was made. The question of pre-emptive objections with intermediate effect was complex and difficult, but it seemed to him that such objections could be compatible with the Vienna Conventions. The Special Rapporteur also thought that the terminology might be open to discussion; he was attracted by the English expression “objecting declarations” but wondered how it ought to be translated into French.

59. As far as draft guideline 2.6.15 was concerned, he thought that the question of validity was totally different from that of definition. A late objection, even if it was not valid, was always an objection. Yet from a positivist point of view it was correct to say that a late objection did not produce the same legal effects as those produced by an objection formulated on time, and that could be reflected by rewording the draft guideline.

60. The Special Rapporteur agreed with those members who thought that the time of withdrawal should be mentioned in draft guideline 2.7.1. He noted that draft guidelines 2.7.2, 2.7.3, 2.7.4, 2.7.5, 2.7.6, 2.7.7 and 2.7.8 had been supported by speakers, aside from a few comments of a drafting nature, which could be taken up in the Drafting Committee.

61. Furthermore, he was not unsympathetic to criticisms of the way in which draft guideline 2.7.9 was worded. He thought that widening of the scope of an objection to a reservation could be permitted if it took place within the 12-month period, and provided that it did not have the effect of modifying treaty relations.

62. The Special Rapporteur noted that the draft guidelines on the withdrawal and modification of objections covered pre-emptive objections, which were genuine potential objections, but not late objections that had no legal effect.

63. In conclusion, the Special Rapporteur expressed the hope that all the draft guidelines would be referred to the Drafting Committee, which might wish to consider redrafting some of them.
