United Nations A/C.6/68/SR.20

General Assembly
Sixty-eighth session

Official Records

Distr.: General
22 November 2013

Original: English

Sixth Committee

Summary record of the 20th meeting
Held at Headquarters, New York, on Wednesday, 30 October 2013, at 3 p.m.

Chair: Mr. Silva (Vice-Chair) . . . . . (Brazil)

Contents

13-53915 (E)

In the absence of Mr. Kohona (Sri Lanka), Mr. Silva (Brazil), Vice-Chair, took the Chair.

The meeting was called to order at 3.05 p.m.

Agenda item 81: Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions (*continued*) (A/66/10, A/66/l0/Add.1 and A/68/l0)

1. **The Chair** invited Mr. Pellet, former member of the Commission and Special Rapporteur on the topic of reservations to treaties, to address the Committee.

2. **Mr. Pellet** (Special Rapporteur on reservations to treaties) said that he wished to draw the Committee's attention to several matters concerning the nature and intended use of the Guide to Practice on Reservations to Treaties (A/66/10/Add.1) which in the past had given rise to certain misunderstandings. First, it should be emphasized that the Guide was not just a set of 179 guidelines, but rather a set of guidelines with commentaries, which formed an inseparable whole. While he hoped that the General Assembly would adopt a resolution taking note of the Guide and urging Member States to make the greatest possible use of it, he also hoped that the Assembly would not opt to annex the guidelines alone to the resolution, or that, if it did so, it would clarify that the guidelines could not be dissociated from the commentary.

3. Second, the Guide was not a cookbook of "legal recipes", nor was it a quick reference handbook for lawyers or an aide-memoire for students. It should be seen as a toolbox that could be used by diplomats, judges, lawyers and even lawmakers to resolve problems, sometimes very difficult and technically sensitive ones, that might arise in connection with the formulation of reservations or interpretative declarations or reactions to them. The Guide did not purport to provide ready-made solutions to every problem that might arise — indeed, it would have been impossible to envisage every problem — but rather to identify the most significant and problematic issues that had arisen in the past and suggest possible ways of addressing them.

4. Third, the Guide was just that: a guide to practice which put forward some general recommendations. In that regard, the English word "guidelines" better conveyed the Commission's aim in producing the Guide than did the French "*directives*" or the Spanish "*directrices*". The Commission had never intended to produce draft articles that might eventually be adopted as a convention, nor had it necessarily sought merely to codify rules of customary law, although some of the guidelines did set forth well-established customary rules, particularly those that reproduced provisions of the 1969, 1978 and 1986 Vienna Conventions on the law of treaties. That was another good reason for reading the guidelines and the commentary together: the commentary revealed whether a guideline reflected a "hard" customary rule of international law or was simply a recommendation reflecting the solutions that the Commission had deemed most appropriate.

5. Fourth, the Guide represented the consensus of the Commission as a whole, a consensus that had not been reached without difficulty. He had embarked upon his work as Special Rapporteur without any preconceived ideas, his sole aim being to work with the other members of the Commission to address, to the extent possible, the many gaps in the Vienna Conventions and to clear up the numerous ambiguities in their provisions concerning reservations to treaties. But the process had begun in the midst of a "tempest", not just academic but also political and ideological, prompted by general observation No. 24 of the United Nations Human Rights Committee (CCPR/C/21/Rev.1/Add.6) on reservations to the International Covenant on Civil and Political Rights, which had led to heated debates often characterized by militancy and irrational arguments, rather than a measured effort to find effective and reasonable solutions. He had realized at an early stage that it would be necessary to find a middle ground between two camps: those focused on sovereignty and those focused on human rights. The same sort of debate had often been repeated in the Sixth Committee. He would therefore appeal to the Committee to approach the current discussion without preconceived ideas, taking the Guide for what it was: an effort to find balanced and useful answers to the difficult questions surrounding the implementation of the Vienna regime on reservations to treaties.

6. Lastly, the Guide, like all of the Commission's work, was the result of a collective effort, although the Special Rapporteurs obviously influenced the work and it was they who strove, or should strive, to ensure its coherence. He had endeavoured to do that, and while he had some doubts about the Commission's composition and working methods, he firmly believed that the final outcome of its members' combined

labours was an improvement on his reports and the guidelines that he had proposed at various times. He was grateful to his colleagues on the Commission and to the Secretariat for their support during the long years of gestation of the Guide.

7. During those years he had been attentive to the Sixth Committee's comments and had tried to find reasonable compromises. But that had not always been easy, as Committee members had shown a tendency to cling adamantly to their positions and had seldom exhibited a willingness to engage in an open and constructive dialogue aimed at reaching compromise. He truly hoped that the current year's debate would be different.

8. On behalf of the Committee, **the Chair** thanked Mr. Pellet for his outstanding and scholarly contribution to the Commission's work on the topic of reservations to treaties.

9. **Mr. Rönquist** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Nordic countries attached special importance to the question of reservations that ran counter to the object and purpose of a treaty. It was of fundamental importance that all States that became parties to a treaty should commit themselves to its object and purpose, not only because they had an obligation to other States parties to do so, but also to ensure that globally agreed norms were not undermined by reservations, especially in the field of human rights. The Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child were among the human rights treaties to which States had made reservations that the Nordic countries considered incompatible with the object and purpose of those treaties. Such reservations should not be accepted in the area of human rights or in any other area.

10. A growing number of States had developed the practice of severing invalid reservations, which was consistent with article 19 of the Vienna Convention on the Law of Treaties. The practice of severing reservations had also been developed by United Nations treaty bodies, particularly in the field of human rights. In its general comment No. 24 the Human Rights Committee, for example, had highlighted two fundamental elements: first, that a human rights treaty body had the competence to address the permissibility of reservations and, second, that the usual consequence of an impermissible reservation would be its severance, which would mean that the State in question was considered to be bound by the treaty without the benefit of its reservation. In that connection, the Nordic countries welcomed the clear and unequivocal statement in guideline 4.5.1 that a reservation that did not meet the conditions of formal validity and permissibility set out in parts 2 and 3 of the Guide to Practice was null and void, and therefore devoid of any legal effect. That provision was grounded in State practice and consistent with the Vienna regime.

11. The Nordic countries also agreed, as stated in guideline 4.5.2, that the nullity of an invalid reservation did not depend on the objection or the acceptance by a contracting State, and that a State that considered a reservation to be invalid should formulate a reasoned objection as soon as possible. They did not, however, agree with the content of guideline 4.5.3, particularly the provision that a State that had made an invalid reservation could express at any time its intention not to be bound by the treaty without the benefit of the reservation and that such an intention might also be expressed if a treaty body concluded that a reservation was invalid. The guideline was neither a codification of existing State practice nor a desirable development of it. States' adherence to a treaty must be seen as evidence of their commitment to common values and should not be conditional on their benefiting from reservations that were incompatible with the treaty's object and purpose.

12. While States should have the right to express their intention not to be bound by a treaty without the benefit of a reservation that was compatible with the object and purpose of the treaty, they should not have that right if the reservation was invalid. Treaties must not be undermined by reservations. States' adherence to certain treaties might be an essential element in broader cooperation between States. Certainly that was the case for human rights treaties. Moreover, persons under the jurisdiction of a State must be able rely on that State's compliance with its treaty obligations. There should be no uncertainty as to whether a State party was bound by a treaty or not.

13. The Nordic countries welcomed the Commission's conclusions on a reservations dialogue. Enhanced participation in such a dialogue by the European Union, the Council of Europe and various treaty bodies in recent years had served to highlight the provisions

of article 19 of the Vienna Convention. As a result of such dialogue a number of States had clarified, narrowed down or withdrawn their reservations.

14. **Mr. Buchwald** (United States of America) said that the Guide provided helpful and detailed pointers for practice in relation to treaty reservations and could be a valuable reference for practitioners. The introduction was particularly helpful in detailing the Guide's intended purpose and relationship to law. In that connection his delegation had noted the Commission's long-standing consensus that the Guide was not intended to replace or amend the Vienna Conventions. It was not legally binding and did not authoritatively interpret the Vienna Convention. Indeed, some guidelines were simply recommendations for good practice, which was consistent with the Guide's overarching purpose.

15. Although the Guide did reflect some obligations that were otherwise established by treaty or custom as law, it did not always reflect consistent State practice or settled consensus on certain important questions. For example, State practice with regard to the consequences of an invalid reservation remained quite varied, and therefore guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty), one of the more controversial elements of the Guide, should not be understood to reflect existing law. Nor could it be regarded as a desirable result, since it could not be reconciled with a fundamental principle of treaty law, namely that a State should only be bound to the extent that it had expressly accepted a treaty obligation. If a State objected to another State's reservation as invalid, the objecting State could decide either to accept treaty relations with the reserving State notwithstanding its objection or not to accept treaty relations. The reserving State, however, could not be bound without its consent to a treaty without the benefit of its reservation.

16. His delegation supported a robust reservations dialogue and welcomed the useful practices outlined in the Commission's conclusions in that respect, which could help to encourage clarity about the meaning and intent behind reservations and objections thereto. The reservations dialogue was not a rigid process, but rather a set of basic recommended practices and principles that could improve reservations practice. The idea of establishing an observatory on treaty reservations was interesting, but his delegation would need to reflect further on the details of the proposal before expressing a view as to whether it would be appropriate to establish such a body within the Sixth Committee. With regard to the suggested reservations assistance mechanism, his delegation questioned whether an independent mechanism consisting of a limited number of experts who would meet to consider problems related to reservations would be appropriate in a process that fundamentally took place between States. Further, it was concerned that the proposals resulting from such a mechanism might be seen as compulsory for States requesting assistance.

17. **Mr. Silberschmidt** (Switzerland), affirming that the Guide would provide valuable practical assistance in dealing with questions relating to reservations to treaties, said that he would highlight only his delegation's main concerns on the matter. Further detail could be found in its written statement.

18. His delegation supported the Commission's recommendation that the General Assembly should call upon States to initiate and pursue a reservations dialogue. It was essential that the authors of reservations should indicate the reasons for their reservations, as stated in guideline 2.1.2). It was equally important for other States not to remain silent when a questionable reservation was formulated. An objection could cause the reserving State to realize that there might be doubts as to the reservation's permissibility and thus prompt a dialogue between it and the objecting State and other interested parties. In order to facilitate such a dialogue, the objecting State should indicate the reasons for and the legal consequences attached to its objection and might ask the author of the reservation to clarify its position.

19. As to the suggested observatory on reservations to treaties, a forum for States to exchange information, discuss questionable reservations and coordinate their reactions or objections might indeed be useful. Switzerland was an active member of the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI), which served as such a forum. His delegation endorsed the recommendation concerning regional observatories, which all regions should be encouraged to establish. Once the effectiveness of the regional observatories had been demonstrated, the establishment of an observatory at the global level within the United Nations might be envisaged.

20. With regard to the Commission's suggestion regarding mechanisms of assistance, there was certainly a need to settle differences of view concerning reservations and to answer the complex questions that arose in the context of reservations and objections. However, his delegation believed that those needs could be met through existing mechanisms of international law. Moreover, when drafting new treaties States were free to establish special bodies to settle differences as needed and in accordance with the subject matter of the treaty in question.

21. With regard to guideline 3.3.3 (Absence of effect of individual acceptance of a reservation on the permissibility of the reservation), his delegation was of the view that an impermissible reservation was invalid and therefore null and void. That rule was also set out in guidelines 3.3.1 (Irrelevance of distinction among the grounds for non-permissibility) and 4.5.1 (Nullity of an invalid reservation). Acceptance could not cure the impermissibility of a reservation. The formulation of impermissible reservations should not be encouraged, and his delegation therefore welcomed the deletion of former guideline 3.3.3 [3.3.4] (Effect of collective acceptance of an impermissible reservation), which had provided that an impermissible reservation would be deemed permissible if no contracting State objected to it after having been expressly informed thereof by the depositary. Nevertheless, the commentary to new guideline 3.3.3 as it appeared in the final version of the Guide still left open the possibility of collective acceptance of an impermissible reservation, and, while the commentary basically argued against such a possibility, the Commission had concluded that it was better not to take a position on the question.

22. The argument made in favour of the possibility of collective acceptance of an impermissible reservation was that parties had a right to amend a treaty by general agreement *inter se* in accordance with articles 39 and 40 of the Vienna Convention. However, "acceptance" of a reservation, in the sense of both the Convention and the Guide to Practice, meant that no State had formulated an objection within 12 months of having received notification of it. The absence of objections could not be equated with unanimous agreement to amend the treaty. Furthermore, it was not clear what provision the contracting States might agree to amend. If a reservation was formulated notwithstanding a prohibition in the treaty, an amendment of the prohibiting provision might be conceivable, but it was difficult to conceive of parties amending a treaty in order to accommodate a reservation that was incompatible with its object and purpose. In sum, his delegation was of the view that the absence of objections within 12 months should not be deemed acceptance of an impermissible reservation.

23. Concerning the related and controversial question of the status of the author of an invalid reservation, the subject of guideline 4.5.3, when a reservation was impermissible and therefore null and void, the question arose whether the author of that reservation would be bound by the treaty in its entirety without benefit of the reservation, in accordance with the principle of severability, or whether the author would simply not become a party to the treaty. The Vienna Convention was silent on the legal effects of an impermissible reservation. Unquestionably, it was the author's intention that would determine its status. But if the author failed to make its intention known and if its intention could not be clearly established from the context, then the presumption should be that the reservation was not a sine qua non for the author's consent to be bound by the treaty. The author of the impermissible reservation would thus become a party without the benefit of the reservation. Accordingly, his delegation supported paragraphs 1 and 2 of guideline 4.5.3.

24. The question of when, or by when, such an intention must be expressed remained open, however. The situation was most critical when no objection had been made to the reservation. The newly added paragraph 3 of guideline 4.5.3, which stipulated that the author of the invalid reservation might express at any time its intention not to be bound by the treaty without the benefit of the reservation, went too far in protecting the author's interests. It was also vague and could lead to legal uncertainty, since it appeared to give the author of an invalid reservation the right to withdraw from the treaty at any time, without limitation and without being bound by the treaty's rules on withdrawal. Moreover, if the author had the option of revealing its intention at any time, it would be less inclined to do so, as it should, at the time of formulating the reservation. Furthermore, as paragraphs (53) to (55) of the commentary to guideline 4.5.3 rightly pointed out, there would be uncertainty with regard to when such an expression of intention not to be bound would produce its effects.

25. The author of an invalid reservation knowingly took a risk by formulating an impermissible reservation. In so doing, it could state the reasons for the reservation and make its intentions known. It was the author's responsibility if those intentions could not be established. The burden of legal uncertainty should not be put on the other States parties and their collective interests as embodied in the treaty. The author of the invalid reservation could, of course, withdraw from the treaty in accordance with the modalities envisaged therein. When the European Court of Human Rights had ruled against Switzerland in the case of *Belilos v. Switzerland*, for example, some members of the Swiss parliament had suggested that Switzerland should denounce the Convention in accordance with the relevant clause. In the end, it had not done so because it had been decided that the merits of remaining a party outweighed the disadvantages.

26. **Ms. Ridings** (New Zealand), welcoming the Guide to Practice, said that the topic of reservations to treaties was one of the most difficult areas of treaty law and had great practical consequences. The guidelines and commentary adopted by the Commission would no doubt serve as a useful tool for future practice. Her delegation particularly appreciated the approach taken in the commentary to guideline 1.1.3 (Reservations relating to the territorial application of the treaty) in relation to declarations on territorial scope. It supported the view that a declaration that excluded the application of a treaty as a whole to a particular territory was not a reservation in the sense of the Vienna Convention. Such a declaration did not concern the legal effect of a treaty. Rather, it established a "different intention" as to the territorial application of the treaty in the sense of article 29 of the Vienna Convention. That interpretation was in line with long-established State practice and with United Nations treaty practice. It was particularly relevant for New Zealand's dependent territory of Tokelau, where in some circumstances it might not be appropriate to apply a treaty to which New Zealand was a party.

27. **Mr. Hanami** (Japan) said that the Guide to Practice, which reflected in-depth study over two decades, was welcome, particularly given the complexity of the subject matter and the fact that the Vienna Convention on the Law of Treaties had left a number of uncertainties with practical implications regarding reservations to treaties. The Guide sometimes went beyond a reflection of State practice, however, and therefore some clarification of its status was called for.

28. For reasons of practicality, simplification in some areas might be desirable, particularly with regard to interpretative declarations. Since, unlike reservations, such declarations had no legal effect, subjecting them to the test of permissibility was rare in State practice and would appear to constitute progressive development rather than codification. When a de facto reservation was formulated as an interpretative declaration, the prevailing State practice was to make a determination on permissibility and legal effect by considering the interpretative declaration as constituting a reservation. In that light, it would seem sufficient to state in the Guide that the provisions on reservations also applied to interpretative declarations that were deemed to constitute de facto reservations. Moreover, as the Vienna Convention contained no provisions on formal confirmation of conditional interpretative declarations formulated when signing a treaty or on late formulation of an interpretative declaration, nor had any uniform and widespread practice of States been established on those questions, his delegation doubted the need for guidelines on those matters.

29. His delegation objected to late formulation of reservations beyond the time period established by the Vienna Convention. Guideline 2.3 allowed for the possibility of unanimous acceptance of such reservations, but the absence of opposition by any other party might not be sufficient to safeguard against an attempt by a State to modify the scope of its obligations at any time after expressing its intention to be bound by the treaty.

30. Guideline 2.6.3 (Author of an objection) provided that any State and any international organization that was entitled to become a party to the treaty could formulate an objection to a reservation. However, in the light of articles 20 to 22 of the Vienna Convention, it was reasonable to conclude that the regime of objections to reservations applied primarily to States parties, as it was intended to regulate the legal effect of the provision or provisions to which the reservation giving rise to the objection was made with regard to treaty relations between the reserving State and other States parties. States parties to a treaty could be directly affected by a reservation formulated by another State Party, but non-party States were not so affected. As guideline 2.6.3, subparagraph (ii),

indicated, the view of a non-party State regarding a reservation did not produce any legal effect as long as that State was not a party to the treaty; hence, its view carried a different legal weight from an objection by a State party. It was therefore questionable to treat objections formulated by States parties and views expressed by non-party States as part of the same concept of objections to reservations. The same problems arose with regard to guidelines 2.6.12 (Time period for formulating objections) and 2.8.3 (Express acceptance of reservations).

31. Regarding guideline 2.9.9 (Silence with respect to an interpretative declaration), in most cases silence merely denoted a lack of relevance to the affairs of the non-responding State, rather than approval or opposition. Furthermore, States that did not react to an interpretative declaration usually did not explain their reasons. Thus, it would be extremely difficult to determine whether a State had not reacted to an interpretative declaration because the declaration was not relevant to its interests or because it had intentionally remained silent. In principle, therefore, silence in response to an interpretative declaration should not be construed as approval or acquiescence in respect of the declaration, and the text of guideline 2.9.9 in its current form and the commentary thereto suitably reflected his delegation's concerns.

32. His delegation had several other comments, which were reflected in its written statement, available on the PaperSmart portal.

33. **Mr. Schusterschitz** (Austria) said that reservations were a frequently used legal tool for opening multilateral treaties to a maximum number of parties, but they posed many problems in practice. Although the guidelines prepared by the Special Rapporteur might become an important instrument to guide the practice of States, they could not remove all uncertainties, ambiguities and deficiencies from the reservations regime and might even create additional problems or at least require additional explanations. Streamlining would undoubtedly contribute to better understanding of the guidelines. He would address some issues relating to the Guide in his oral statement; others were raised in his written statement, available on the PaperSmart portal.

34. A general issue was the use of the term "reservation" throughout the text, often without further qualification to distinguish between valid and invalid reservations. But in some cases the term "reservation" could only relate to valid reservations, in, for instance, guideline 2.6.12 (Time period for formulating objections). Regarding guideline 2.1.3 (Representation for the purpose of formulating a reservation at the international level), his delegation did not believe that it was necessary to go into such detail. Moreover, the text referred to heads of delegations and missions as being entitled to formulate reservations, which might not really be the case. The same remarks applied to guidelines 2.5.4 (Representation for the purpose of withdrawing a reservation at the international level) and 2.8.9 (Organ competent to accept a reservation to a constituent instrument). In all those cases, a shorter text reflecting article 7 of the Vienna Convention on the Law of Treaties would be more appropriate.

35. Although paragraph 2 of guideline 2.1.6 (Procedure for communication of reservations) was taken from article 78 of the Vienna Convention, it did not adequately reflect international practice. For the communication of a reservation to be considered as having been made, receipt by the depositary should be sufficient. With regard to section 2.3, his delegation had consistently opposed the idea of permitting late reservations as they would violate the principle of *pacta sunt servanda* and were not envisaged under the Vienna Convention. Such reservations might have been admitted in some cases, but that scarce practice should not be used to create a general rule. If late reservations were permitted as a matter of course, treaties could no longer serve as a basis for stable and predictable relations among States. Accordingly, guideline 2.3 (Late formulation of reservations) should provide only that a State or international organization could not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, and guidelines 2.3.1 to 2.3.4 should be deleted.

36. In guideline 2.6.13 (Objections formulated late) it was unclear what was meant by the statement that a late objection did not produce all the legal effects of an objection formulated on time, as there was no indication which legal effects were or were not produced. With regard to guideline 2.8.11 (Acceptance of a reservation to a constituent instrument of an international organization), his delegation would have preferred a solution allowing the views of the competent organs of the international organization to be taken into account once the organization had been established.

37. The first sentence of guideline 3.1.5.1 (Determination of the object and purpose of a treaty) gave priority to a literal interpretation, while the second provided for subsidiary means of interpretation. It was not made clear, however, when recourse to such subsidiary means would be appropriate. In his delegation's view, the use of subsidiary means of interpretation should be restricted, as it was under article 32 of the Vienna Convention, to situations in which a literal interpretation would leave the meaning ambiguous or obscure or lead to a result that was manifestly absurd or unreasonable.

38. Guideline 3.2 (Assessment of the permissibility of reservations) referred to contracting States or organizations, dispute settlement bodies and treaty monitoring bodies in a sequence. His delegation took it that the sequence was meant to establish a hierarchy; otherwise, divergences between the assessments by the different bodies could endanger the stability of treaty relations. Guideline 3.2.3 (Consideration of the assessment of the permissibility of reservations) needed to be supplemented, as treaty monitoring bodies might be entitled to make binding assessments. In such cases, mere "consideration" of their assessments would not be enough. His delegation would suggest rewording the guideline to read "States and international organizations … shall accept or give consideration to that body's assessment …".

39. Guideline 4.1 (Establishment of a reservation with regard to another State or international organization) should be supplemented in order to ensure that it also covered cases of implied acceptance and cases where no acceptance was necessary — for instance, when a reservation was expressly authorized by the treaty. In his delegation's view, reservations to treaties with a limited number of negotiating States required explicit acceptance, and guideline 4.1.2 (Establishment of a reservation to a treaty which has to be applied in its entirety) should be amended accordingly. Guideline 4.2.1 (Status of the author of an established reservation) did not conform to international practice. Normally, the author of a reservation did not have to wait for the expiration of the 12-month period to become a contracting State or a contracting organization. The author of a reservation should be able to attain that status earlier if there was no opposition. Wording similar to that in paragraph 2 of guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty) should therefore be added to guideline 4.2.1.

40. In Guideline 4.3 (Effect of an objection to a valid reservation) the term "valid reservation" appeared in the Guide for the first time, without a definition; its meaning could be discerned only by opposing it to the term "invalid" used in guideline 4.5.1 (Nullity of an invalid reservation). A definition should be included in the guidelines, which used a number of closely related terms, such as "validity", "permissibility", "formal validity" and "established reservation", the relationship of which remained unclear. Another question with respect to guideline 4.3 was whether objections could be raised to any reservation, including those explicitly authorized by a treaty.

41. His delegation could accept most of the substance of guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty), although there could be difficulties in establishing the intention of a reserving state. It could not, however, accept paragraph 3. Allowing the author of a reservation to express its intention not to be bound by the treaty at any time would pose a considerable risk to the stability of treaty relations, since the other parties would never be sure whether or not the reserving State or organization had become a party. In addition, it was unclear whether the effect of the expression of such an intention would be *ex nunc* or *ex tunc*. In his delegation's view, the intention not to be bound by a treaty should be expressed in immediate connection with the reservation. If it was not, then the reserving State or organization should be bound by the treaty without the benefit of its reservation.

42. His delegation doubted the usefulness of the guidelines relating to reservations and interpretative declarations in the case of succession of States, which were based on the Vienna Convention on Succession of States in respect of Treaties. That convention was binding for only a few States and did not reflect customary international law. The guidelines concerning "newly independent States" and their treatment were no longer appropriate, as the process of decolonization, and the need to consider special circumstances arising from it in the context of State succession, lay in the past. Accordingly, it would be preferable to restrict the guidelines regarding succession to general statements, leaving sufficient room for the treatment of State succession on a case-by-case basis.

43. Austria reserved the right to make additional comments if the guidelines were further discussed within any international forum.

44. **Ms. Faden** (Portugal) said that her delegation strongly supported the Guide to Practice on Reservations to Treaties, which represented a major contribution to the complex and dynamic field of treaty law. The Guide addressed matters on which the Vienna Conventions had left silences and ambiguities and would have a positive impact on the codification and progressive development of international law. It would also serve to encourage the formulation of reservations in strict compliance with international law, advancement of the reservations dialogue and even broader participation in treaties. Overall, the solutions proposed in the Guide were well balanced and in keeping with the progressive evolution of contemporary international law.

45. A welcome new element introduced by the Commission was the annex on the reservations dialogue. Such a dialogue could play a key role in avoiding the formulation of reservations that were incompatible with international law and in ensuring compliance with article 19 of the Vienna Convention on the Law of Treaties. The reservations dialogue should be as inclusive as possible in order to encourage broad participation. It was also important to ensure that when a State or an international organization tacitly accepted a reservation, it did so deliberately, not as a result of an unintentional silence that was not an expression of will. In cases where there was no monitoring body, it might be interesting to explore the possibility for depositaries to play a more active role in strengthening the reservations dialogue.

46. Her delegation also viewed with interest the Commission's recommendation on the establishment of reservations assistance mechanisms and observatories. The establishment of observatories at the regional and subregional levels would be of great value not only for monitoring reservations to key treaties, including those on human rights, but also for promoting the reservations dialogue. In that regard, Portugal's experience with the observatories established within the Council of Europe and the European Union had been positive. An observatory within the United Nations, as proposed by the Commission, could be modelled on those two examples, with certain refinements.

47. As most of the reservations to be examined would relate to the many treaties deposited with the Secretary-General, the Secretariat should play a prominent role, for example, by posting in a separate page of on the United Nations Treaty Collection website an updated list of reservations, together with information on their content, the deadline for the formulation of objections and an indication of the objections already raised. That would in no way be detrimental to the role of the Sixth Committee as a forum for reflection and debate aimed at clarifying specific reservations; the item "Reservations to treaties" might even be placed on the agenda of the Sixth Committee each year.

48. The Commission's suggestion regarding the reservations assistance mechanism was a good one, but careful study would be needed in order to ensure that the mechanism did not overlap with existing mechanisms for dispute settlement, including those provided for under article 66 of the Vienna Conventions. The mandate of the reservations assistance mechanism would need to indicate clearly its specific features, its raison d'être and position with respect to existing dispute settlement mechanisms; reflect the fact that it was not a body established by treaty; and establish working methods that would enable it to provide rapid and flexible assistance.

49. Her delegation encouraged its widest possible dissemination and use of the Guide to Practice and further study, as needed, of the recommendations regarding the reservations dialogue and assistance mechanisms.

50. **Mr. Popkov** (Belarus) said that the Commission had done commendable work in what was one of the most complex and unregulated areas of treaty law. It was to be hoped that the guidelines would enjoy wide acceptance and use by practitioners of international law. His delegation supported the non-binding format chosen by the Commission for the Guide and welcomed the Commission's conclusions on the reservations dialogue and its recommendations on mechanisms of assistance in relation to reservations.

51. Some of the guidelines could benefit from further refinement. In guideline 1.7.2 (Alternatives to interpretative declarations), the phrase "the conclusion of a supplementary agreement", for example, created the potential for confusion with similar concepts used in guideline 1.7.1 (Alternatives to reservations). A

clear distinction should be drawn between the alteration of a multilateral treaty in the relations among a few of the States parties and the interpretation of a treaty by agreement among the States parties as provided for under article 31 of the Vienna Convention. In the first case, such an agreement would amount to a modification of the treaty, whereas in the second case it would not necessarily imply even a tacit amendment.

52. Given the optional nature of the guidelines and the importance of stating the reasons for a reservation in order to facilitate a reservations dialogue, his delegation would suggest deleting "to the extent possible" from guideline 2.1.2 (Statement of reasons for reservations). The same suggestion applied to guidelines 2.6.9 (Statement of reasons for objections) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization). For the sake of greater legal certainty, his delegation would also suggest that in guidelines 2.4.1 (Form of interpretative declarations) and 2.9.5 (Form of approval, opposition and recharacterization) the word "preferably" should be removed from the phrase "should preferably be formulated in writing". The wording of guideline 2.6.13 (Objections formulated late) was unclear and should be revised along the lines of guidelines 2.3 (Late formulation of reservations), 2.3.1 (Acceptance of the late formulation of a reservation) and 2.3.2 (Time period for formulating an objection to a reservation that is formulated late). With regard to guideline 3.1.5.2 (Vague or general reservations), his delegation considered that reservations not formulated in accordance with the guideline should be considered null and void.

53. **Ms. Tomlinson** (United Kingdom) said that she was pleased to see that the final version of the Guide included an introduction explaining its purpose and the legal status of the guidelines, including their relationship to the 1969, 1978 and 1986 Vienna Conventions. The introduction made it clear that the Guide was not intended to replace, amend or in any way depart from the Vienna Conventions, but rather to provide assistance and possible solutions to practitioners of international law who were faced with difficult issues relating to reservations. In that regard, the research and analysis of past practice set out in the commentaries was invaluable. While not a binding instrument, the Guide included a range of provisions which varied in terms of their obligatory nature. Some reflected binding rules of the Vienna Conventions, some were intended to be suggestions *de lege ferenda* and others were simply recommendations of good practice.

54. Guideline 1.1.3 (Reservations relating to the territorial application of a treaty) was consistent with the Vienna Convention on the Law of Treaties, and the United Kingdom's position on it remained unchanged. Like other States with overseas territories, it considered that a declaration regarding the extent of the territorial application of a treaty did not constitute a reservation to that treaty. The Vienna Convention made it clear that a declaration or statement was capable of constituting a reservation if it purported to exclude or modify the legal effect of certain provisions of the treaty in their application to the State concerned. A declaration or statement that had the effect of entirely excluding a treaty's application to a given territory would not constitute a reservation, since it did not concern the legal effect of certain provisions of the treaty, but rather was directed towards excluding the residual rule on territorial application incorporated in article 29 of the Vienna Convention. It was clear that, unless a different intention was established, a treaty would be binding in respect of the non-metropolitan as well as the metropolitan territory of a party. The United Kingdom's long-standing practice in relation to treaties that were silent on territorial application was to specify in the instrument of ratification or accession the territories to which the treaty would apply. Territories might be included at a later stage by means of a separate notification to the depositary. That practice was consistent with paragraph (5) of the commentary to guideline 1.1.3, which set out the correct position in law. Her delegation was grateful to the Commission for heeding the comments of concerned States and amending the guideline and commentary accordingly.

55. In relation to the competence of treaty monitoring bodies as set out in guidelines 3.2.1 to 3.2.5, her delegation considered that the role of such bodies in assessing the validity of reservations should derive principally from the provisions of the treaty concerned, which were the product of free negotiation among States and other subjects of international law. The legal effect of any such assessments by a monitoring body should thus be determined by reference to its functions under the treaty. Her delegation could not accept that treaty monitoring bodies were competent to rule on the validity of reservations in the absence of an express

treaty provision to that effect. Any comments or recommendations from a treaty monitoring body should be taken into account by States in the same way as other recommendations and comments on their periodic reports. Her delegation did, however, accept that a treaty monitoring body might have to take a view on the status and effect of a reservation where necessary to enable that body to carry out its substantive functions. With regard to guideline 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations), if States expressly intended to empower a treaty monitoring body to assess the validity of reservations, they would so specify under the treaty; the absence of such a specific provision should not under any circumstances be interpreted as permitting a legally binding role in that respect.

56. The issue dealt with in guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty) was the most contentious and debated area of reservations practice. In accordance with the advisory opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, if a State made an invalid reservation, it had not validly expressed its consent to be bound by the treaty, and therefore treaty relations could not arise. Her delegation considered that to be the *lex lata*. Treaty relations were based on consent, so that the only result of an invalid reservation was that treaty relations would not arise between the reserving and objecting States.

57. When the guideline had first been proposed, the Commission had suggested that there should be a presumption that a State entering an invalid reservation would nevertheless become a party to a treaty without the benefit of its reservation. Although her delegation had responded positively to the sentiment behind the Commission's thinking, it had considered that the criteria for assessing an author's intention were vague and that the guideline as then drafted would lead to a lack of legal certainty. The current guideline 4.5.3 was much closer to the approach her delegation had advocated in its written comments (A/CN.4/639, paras. 170-182).

58. Paragraph 1 correctly stated that the reserving State's intention would determine whether that State wished to be bound without the benefit of its reservation or considered that it was not bound by the treaty. Paragraph 2 did not reflect the *lex lata*, nor did it purport to do so. There was a real question, as noted in the commentary, as to whether it would have been better for paragraph 2 to set out the reverse presumption. Her delegation appreciated that the Commission had had to make a choice and that its proposals for future practice in guideline 4.5.3 represented an effort to strike a reasonable balance. Paragraph 3 provided that a State could express "at any time" its intention not to be bound by a treaty if its reservations were considered invalid. To allow a reserving State to be able to say that it did not consider itself bound by a treaty when, for example, a reservation had been the subject of litigation for many years created a lack of legal certainty. With regard to paragraph 4, which was clearly a recommendation of the Commission, she had already stated her delegation's view on the limited role of treaty bodies: they could not give a definitive ruling on the validity of reservations unless they had been given specific powers to do so.

59. Her delegation fully supported the Commission's conclusions on the reservations dialogue. Regrettably, it appeared to be rare that a reserving State would provide any kind of meaningful response to inquiries concerning the rationale for its reservation, a situation which was not conducive to the smooth operation of treaty relations or to legal certainty. The Commission's conclusions set out a clear process that could be followed by States and international organizations entering reservations, as well as by those States and international organizations that wished either to understand more clearly the basis of a reservation or to object to a reservation. The key to the reservations dialogue was that it should be flexible and not prescriptive, as the Commission indicated. In addition, the conclusions contained elements — such as a recommendation that States and international organizations should explain the basis of their reservations — that would be helpful to contracting parties in assessing that reservation's validity. The United Kingdom would respond positively to requests from other States to explain the basis for any reservations it might make, and it urged other States to take a similarly cooperative stance.

60. With regard to the Commission's recommendation on mechanisms of assistance in relation to reservations to treaties, the idea of an observatory on reservations, modelled on the observatory of the Council of Europe Committee of

Legal Advisers on Public International Law (CAHDI), might be worth pursuing within the Sixth Committee. The CAHDI observatory had proved a useful forum for discussing reservations and potential objections and for coordinating State positions. Her delegation would be interested in hearing other States' views on the matter, in particular with regard to how the observatory might be developed. It was also prepared to hear the views of other States on whether they would consider the suggested reservations assistance mechanism useful, but would note that there would be budgetary considerations to be tackled.

61. The Guide to Practice was comprehensive and thoroughly researched, and her delegation was confident that, like the 1969 Vienna Convention, it would stand the test of time and prove to be the definitive guide to reservations for decades to come.

The meeting rose at 4.30 p.m.