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Sixth report on reservations to treaties

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Addendum

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A. Modalities for formulating reservations and interpretative declarations (*continued*)

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(b) Communication of reservations and interpretative declarations

134. Article 23 of the 1969 and 1986 Vienna Conventions requires that reservations be communicated to recipients whom the provision defines, albeit somewhat enigmatically; it is silent, however, as to the person responsible for such communication. In most cases this will be the depositary, as shown by the general provisions of article 79 of the 1986 Convention,[186] which also give some information on the modalities for such communication and its effects. Nevertheless, it follows from both article 78[187] and the legal regime of reservations, as established by the Conventions, that the depositary's role is strictly limited and that he appears largely as a mere "conveyor belt" between the author of the reservation (or conditional interpretative declaration) and the States and international organizations to which it must be communicated. These considerations do not apply as strongly in the case of "simple" interpretative declarations; they are, however, equally compelling, and for the same reasons, in the case of conditional interpretative declarations.

(i) Authority responsible and modalities for communicating reservations

135. On prior occasions when the topic of reservations to treaties was considered, the Commission or its special rapporteurs planned to stipulate expressly that it was the duty of the depositary to communicate the text of formulated reservations to interested States. Thus, in 1951, for example, the Commission believed that "the depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention".[188] Likewise, in his fourth report in 1965, Waldock proposed that a reservation "shall be notified to the depositary or, where there is no depositary, to the other interested States".[189]

136. In the end, this formula was not adopted by the Commission, which, noting that the drafts previously adopted "contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter", came to the conclusion that "it would allow a considerable simplification to be effected in the texts of the various articles if a general article were to be introduced covering notifications and communications".[190]

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[186] Article 78 of the 1969 Convention.
[187] Article 77 of the 1969 Convention.
[188] See para. 103 and note 121 above.
[189] See para. 44 and note 62 above.
[190] *Yearbook ... 1966*, vol. II, para. (1) of the commentary on draft article 73, p. 270.

137. That is the object of draft article 73 of 1966, now article 78 of the 1969 Vienna Convention, which was reproduced, without change except for the addition of international organizations, in article 79 of the 1986 Convention:

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

138. Article 79 is indissociable from this latter provision, under which:

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

139. It may be noted in passing that the expression "the parties and the States and international organizations entitled to become parties to the treaty", which is used in this paragraph, is not the exact equivalent of the formula used in article 23, paragraph 1, which refers to "contracting States and contracting organizations". The difference has no practical consequences, since the contracting States and contracting international organizations are entitled to become parties in accordance with the definition of that term given in article 2, paragraph 1 (f), of the 1986 Vienna Convention;[191] it poses a problem, however, with regard to the wording of the draft guideline(s) to be included in the Guide to Practice.

140. Without doubt, the provisions of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention should be reproduced in the Guide to Practice and adapted to the special case of reservations; otherwise, the Guide would not fulfil its pragmatic purpose of making available to users a full set of guidelines enabling them to determine what conduct to adopt whenever they are faced with a question relating to reservations. But in preparing this draft (or these drafts), should the wording of these two provisions be reproduced, or that of article 23, paragraph 1?

141. The question is a minor one; the Commission need not resolve it. The Special Rapporteur has a slight preference for the second solution; since it is primarily a

[191] See para. 99 above.

matter of clarifying and completing the provisions of the Vienna Conventions relating to reservations, it would seem logical to adopt the terminology used in those provisions so as to avoid any ambiguity and conflict — even purely superficial — between the various guidelines of the Guide to Practice.

142. Moreover, there can be no doubt that communications relating to reservations — especially those concerning the actual text of reservations formulated by a State or an international organization — are communications "relating to the treaty", within the meaning of article 78, paragraph 1 (e), referred to above. Furthermore, in its 1966 draft, the Commission expressly entrusted the depositary with the task of "examining whether a signature, an instrument *or a reservation* is in conformity with the provisions of the treaty and of the present articles"[192] (italics added). This expression was replaced in Vienna with a broader one — "the signature or any instrument, notification or communication relating to the treaty"[193] — which cannot, however, be construed as excluding reservations from the scope of the provision.

143. In addition, as indicated in the Commission's commentary on draft article 73 (now article 79 of the 1986 Convention), the rule laid down in subparagraph (a) of this provision "relates essentially to notifications and communications relating to the 'life' of the treaty — acts establishing consent, *reservations*, objections, notices regarding invalidity, termination, etc." (italics added).[194]

144. In essence, there is no doubt that both article 78, paragraph 1 (e), and article 79 (a) reflect current practice.[195] They warrant no special comment, except for the observation that, even in cases where there is a depositary, the State which is the author of the reservation may directly inform the other States or international organizations concerned of the text of the reservation. Thus, the United Kingdom, for example, informed the Secretary-General of the United Nations, as depositary of the Agreement of 18 October 1969 establishing the Caribbean Development Bank, that it had consulted all the signatories to that agreement with regard to an aspect of the declaration (constituting a reservation) which it had attached to its instrument of ratification (and which was subsequently accepted by the Board of Governors of the Bank, and then withdrawn by the United Kingdom).[196] Likewise, France itself submitted to the Board of Governors of the Asia-Pacific Institute for Broadcasting Development a reservation which it had formulated to the agreement establishing that organization, for which the Secretary-General is also depositary.[197]

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[192] *Yearbook ... 1966*, vol. II, p. 269, para. 1 (d) (italics added). On the substance of this provision, see para. 164 below.

[193] Article 77, para. 1 (d). The new formula is derived from an amendment proposed by the Byelorussian Soviet Socialist Republic, which was adopted by the Committee of the Whole by 32 votes to 24, with 27 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference, First and Second Sessions* (United Nations publication, Sales No.: E.70.V.5), para. 657 (iv) (4), p. 202, and para. 660 (i), p. 203; see also para. 164, third bullet, below.

[194] *Yearbook ... 1966*, vol. II, p. 270, para. (2) of the commentary.

[195] See ibid. with regard to draft article 73 (a) (which became article 78 of the 1969 Convention and article 79 of the 1986 Convention).

[196] See note 180 above.

[197] See ibid.

145. There seem to be no objections to this practice, provided that the depositary is not thereby released from his own obligations.[198] It is, however, a source of confusion and uncertainty in the sense that the depositary could rely on States formulating reservations to perform the function expressly conferred on him by article 78, paragraph 1 (e), and the final phrase of article 79 (a).[199] The practice should probably not be encouraged; for this reason, the Special Rapporteur will refrain from proposing a draft guideline enshrining it and will, unless otherwise instructed by the Commission, confine himself to noting its existence in the commentary on draft guideline 2.1.6.[200]

146. In its 1966 commentary, the Commission dwelt on the importance of the task entrusted to the depositary in draft article 72, paragraph 1 (now article 78, paragraph 1 (e), of the Vienna Convention), and stressed "the obvious desirability of the prompt performance of this function by a depositary".[201] This is an important issue, which is linked to subparagraphs (b) and (c) of article 79:[202] the reservation produces effects only as from the date on which the communication relating thereto is received by the States and organizations for which it is intended, and not as from the date of its formulation. In truth, it matters little whether the communication is made directly by the author of the reservation; he will have no one but himself to blame if it is transmitted late to its recipients. On the other hand, if there is a depositary, it is essential for the latter to display promptness; otherwise, the depositary could stall both the effect of the reservation and the opportunity for the other States and international organizations concerned to react to it.[203]

147. Some of the main international organizations which are depositaries of treaties and which were consulted by the Secretariat at the Special Rapporteur's request were kind enough to send information on their practice in this regard.[204] This information shows that, at the current stage of modern means of communication, they perform their tasks with great speed.

148. In its reply, the Treaty Section of the United Nations Office of Legal Affairs[205] stated:

> "1. The time period between receipt of a formality by the Treaty Section and its communication to the parties to a treaty is approximately 24 hours unless a

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198 See section (ii) below.

199 In the aforesaid case of the French reservation to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, it seems that the Secretary-General confined himself to taking note of the absence of objections from the organization's Governing Council (cf. *Multilateral Treaties Deposited with the Secretary-General*, Status as at 31 December 2000, ST/LEG/SER.E/19 (United Nations publication, Sales No.: E.01.V.5), vol. II, p. 291, note 2. The Secretary-General's passivity in this instance is subject to criticism.

200 See para. 153 above.

201 *Yearbook ... 1966*, vol. II, para. (5) of the commentary, p. 270.

202 See the text of these provisions in para. 137 above; see also the text of draft guideline 2.1.6 in para. 153 below.

203 See the commentary on draft article 72 in the 1966 report of the Commission, *Yearbook ... 1966*, vol. II, pp. 270-271, paras. (3) to (6) of the commentary; see also T. O. Elias, *The Modern Law of Treaties*, Oceana Publications/Sijthoff, Dobbs Ferry/Leiden, 1974, pp. 216-217.

204 The Special Rapporteur wishes to express his gratitude to the persons who kindly sent him this valuable information.

205 In the past, the time period between the receipt of reservations and their communication to the parties was longer than the one now mentioned by the Treaty Section. In the 1980s, this period varied between one and, in exceptional cases, two or even three months.

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

"2. Depositary notifications are communicated to permanent missions and relevant organizations by both regular mail and electronic mail, within 24 hours of processing (see LA 41 TR/221). Additionally, effective January 2001, depositary notifications can be viewed on the United Nations Treaty Collection on the Internet at: http://untreaty.un.org (depositary notifications on the Internet are for information purposes only and are not considered to be formal notifications by the depositary). Depositary notifications with bulky attachments, for example those relating to chapter 11 (b) 16,[206] are sent by facsimile."[207]

(1. La période s'écoulant entre la réception d'un instrument par la Section des traités et sa communication aux parties à un traité est approximativement de 24 heures à moins qu'une traduction soit nécessaire ou qu'un problème juridique se pose. Si une traduction est nécessaire, dans tous les cas, la Section des traités la demande en précisant qu'elle est urgente. Si le problème juridique en cause est complexe ou suppose des communications avec les parties qui échappent au contrôle des Nations Unies, il peut alors s'écouler un certain délai; toutefois, ceci est tout à fait inhabituel. Il faut noter que, dans la quasi-totalité des cas, les instruments sont communiquées aux parties intéressées dans les 24 heures.

2. Les notifications dépositaires sont communiquées aux missions permanentes et aux organisations internationales intéressées par courrier à la fois ordinaire et électronique, dans les 24 heures (voir LA 41 TR/221 dans la Collection des traités de l'ONU). En outre, depuis janvier 2001, les notifications dépositaires peuvent être consultées sur Internet à: http://untreaty.un.org (les notifications

[206] These are communications relating to the Agreement of 20 March 1958 concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions (see *Multilateral Treaties* ..., vol. 1, p. 593).

[207] Electronic mail of 25 May 2001. The Treaty Section has also advised:

"3. Please note that the depositary practice has been changed in cases where the treaty action is a modification to an existing reservation and where a reservation has been formulated by a party subsequent to establishing its consent to be bound. A party to the relevant treaty now has 12 months within which to inform the depositary that it objects to the modification or that it does not wish to consider the reservation made subsequent to ratification, acceptance, approval, etc. The time period for this 12 months is calculated by the depositary on the basis of the date of issue of the depositary notification (see LA 41 TR/221 (23-1))."

(Il est à noter que la pratique du dépositaire a été modifiée dans les cas où il s'agit de la modification d'une réserve existante et quand la réserve est formulée par une partie postérieurement à l'expression de son consentement à être liée. Une partie au traité en question dispose dorénavant de 12 mois pour informer le dépositaire qu'il objecte à la modification ou qu'il ne souhaite pas que celui-ci prenne en considération la réserve faite postérieurement à la ratification, l'acceptation, l'approbation, etc. La période de 12 mois est calculée par le dépositaire à partir de la date d'envoi de la notification dépositaire (voir LA 41 TR/221 (23-1)).

dépositaires sont reproduites sur Internet seulement pour information et ne sont pas considérées comme des notifications formelles faites par le dépositaire). Les notifications dépositaires assorties d'annexes volumineuses, par exemple celle relatives au chapitre 11 (b) 16,[206] sont envoyés par télécopie.)[207]

149. For its part, the International Maritime Organization (IMO) has indicated[208] that the time period between the communication of a reservation to a treaty for which the organization is depositary and its transmittal to the States concerned is generally from one to two weeks. Communications, which are translated into the three official languages of the organization (English, Spanish and French), are always transmitted by regular mail.

150. The practice of the Council of Europe has been described as follows:

> "The usual period is two to three weeks (notifications are grouped and sent out approximately every two weeks). In some cases, delays occur owing to voluminous declarations/reservations or appendices (descriptions or extracts of domestic law and practices) that must be checked and translated into the other official language (the Council of Europe requires that all notifications be made in one of the official languages or be at least accompanied by a translation into one of these languages. The translation into the other official language is provided by the Treaty Office.) Urgent notifications that have immediate effect (e.g., derogations under article 15 of the European Convention on Human Rights) are carried out within a couple of days.
>
> Unless they prefer notifications to be sent directly to the Ministry of Foreign Affairs (currently 11 out of 43 member States), the original notifications are sent out in writing to the permanent representations in Strasbourg, which in turn forward them to their capitals. Non-member States that have no diplomatic mission (consulate) in Strasbourg are notified via a diplomatic mission in Paris or Brussels or directly. The increase in member States and notifications over the last 10 years has prompted one simplification: since 1999, each notification is no longer signed individually by the Director-General of Legal Affairs (acting for the Secretary-General of the Council of Europe), but notifications are grouped and only each cover letter is signed individually. There have not been any complaints against this procedure.
>
> Since our new web site (http://conventions.coe.int) became operational in January 2000, all information relating to formalities is immediately made available on the web site. The texts of reservations or declarations are put on the web site the day they are officially notified. Publication on the web site is, however, not considered to constitute an official notification."[209]

(La période habituelle est de deux à trois semaines (les notifications sont groupées et expédiées toutes les deux semaines). Dans quelques cas des retards ont eu lieu, dus aux déclarations/réserves volumineuses ou aux annexes (description ou extraits de législations et de pratiques internes) qui doivent être vérifiées et traduites aux autres langues officielles (le Conseil de l'Europe exige que toute notification soit faite dans une des langues officielles ou au moins accompagnée par une traduction à l'une de ces langues. La traduction aux autres langues officielles est fournie par le Bureau des traités). Les notifications urgentes qui ont un effet

[208] Telephone conversation of 24 May 2001.
[209] Electronic mail of 25 May 2001.

immédiat (par exemple, les dérogations sous l'article 15 de la Convention européenne des droits de l'homme) sont traitées dans un ou deux jours.

A moins que [les États] ne préfèrent que les notifications soient transmises directement au Ministères des affaires étrangères (actuellement 11 de 43 États membres), les notifications originales sont envoyées par écrit aux missions permanentes à Strasbourg qui à leur tour les transmettent aux capitales. Les États non-membres qui n'ont pas de mission diplomatique à Strasbourg (ou consulat) sont notifiés par l'intermédiaire de la mission diplomatique à Paris ou à Bruxelles ou même directement. L'augmentation des États membres et des notifications au cours des 10 dernières années a causé une simplification: depuis 1999, chaque notification n'est plus signée individuellement par le Directeur général des Affaires juridiques (agissant au nom du Sécrétaire général du Conseil de l'Europe), mais les notifications sont groupées et seulement chaque lettre de couverture est signée individuellement. Il n'y a pas eu de plaintes contre cette procédure.

Depuis que notre nouveau site (http://conventions.coe.int) est devenu opérationnel en janvier 2000, toute information relative aux formalités est immédiatement disponible sur le site internet. Le texte des réserves ou déclarations est placé sur le site le jour même de leur notification officielle. Toutefois, la publication sur le site n'est pas censée constituer une notification officielle.)[209]

151. At the Organization of American States (OAS):

> "Member States are notified of any new signatures and ratifications to Inter-American Treaties through the OAS Newspaper which circulates every day. In a more formal way, we notify every three months through a procès-verbal sent to the permanent missions to OAS or after meetings where there are a significant number of new signatures and ratifications such as, for example, the General Assembly.
>
> "The formal notifications, which also include the bilateral agreements signed between the General Secretariat and other parties, are done in Spanish and English."[210]

(Les États membres sont informés de toute signature ou ratification nouvelle des traités inter-américains par le moyen du Journal de l'OEA qui est diffusé chaque jour.

D'une manière plus formelle nous notifions [les formalités] [aux États membres] tous les trois mois par un procès-verbal envoyé aux missions permanentes de l'OEA ou après les réunions pendant lesquelles il y a nombre considérable de nouvelles signatures et ratifications, comme par exemple l'Assemblée générale.

Les notifications formelles, qui incluent aussi les accords bilatéraux signés entre le Secrétariat général et autres parties, sont faites en espagnol et en anglais.)[210]

152. While it is probably unnecessary for these very helpful clarifications to be reproduced in full in the Guide to Practice, it would nevertheless be useful to give some information in the form of general guidelines intended both for the depositary (where there is one) and for the authors of reservations (where there is no depositary). This draft guideline might provide that:

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[210] Electronic mail of 29 May 2001.

– The communication must be made in writing (and that, where it is transmitted by electronic mail, confirmation must be sent by regular mail, or even by facsimile);

– The communication should be transmitted with all due speed (even though it appears neither possible nor necessary to set a fixed time limit).

On the other hand, it is difficult to be specific about the language or languages in which such communications must be transmitted, since the practices of depositaries vary.[211] Similarly, it is no doubt better to follow the customary practice on the question of to whom, specifically, the communications should be addressed.[212]

153. The draft guideline could combine the text of the two above-mentioned provisions of the Vienna Convention of 1986 and read as follows:

2.1.6 Procedure for communication of reservations

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations,[213] a communication relating to a reservation to a treaty shall be transmitted:

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

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

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

154. The chapeau of the draft guideline reproduces the relevant parts that are common to the chapeaux of articles 78 and 79 of the 1969 and 1986 Vienna Conventions, with some simplification: the wording decided upon at Vienna to introduce article 78 ("the contracting States and contracting organizations or, as the case may be, by the contracting organizations ..." appears to be unnecessarily cumbersome and contains little additional information. Moreover, as was mentioned above,[214] the text of the draft reproduces the formulation used in article 23, paragraph 1, of the 1986 Convention ("to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty"), in preference to that used in article 78, paragraph 1 (e), ("the parties and the States and international organizations entitled to become parties to the treaty"). While the latter formulation is probably more elegant and has the same meaning, it departs from the terminology used in the section of the Vienna

[211] Where the depositary is a State, it seems that such communications are generally made in the official language or languages of that State. Where the depositary is an international organization, it may use either all its official languages (IMO) or one or two working languages (United Nations).

[212] Ministries of Foreign Affairs, diplomatic missions to the depositary State or States, permanent missions to the depositary organization.

[213] The official text adopted at Vienna uses the word in its feminine form ("*contractantes*"; see A/CONF.129/15, p. 54). Since the masculine form takes precedence over the feminine form, this is a grammatical error.

[214] Paras. 139-141.

Conventions relating to reservations. Nevertheless, it did not seem useful to burden the text by using this expression twice in subparagraphs (i) and (ii); in order to remove any ambiguity, however, the commentary should clearly specify that the expression "States and organizations for which it is intended" (subparagraph (ii)) refers to the "contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty" (subparagraph (i)). Lastly, the division of the draft into two subparagraphs probably makes it easier to understand without changing the meaning.

155. It is also essential to reproduce the rule contained in paragraphs (b) and (c) of article 79 of the 1986 Vienna Convention,[215] adapting it to the specific case of reservations. However, since the distinction made in these two paragraphs can be understood[216] only in relation to article 78, paragraph 1 (e), which it does not appear useful to reproduce separately in the Guide to Practice[217] and since, in any event, a reservation can in principle produce effects only if it is accepted by the other contracting parties[218] (so that it is the date on which it is *received* by the other parties that matters), draft guideline 2.1.8 could no doubt be drafted more simply and concisely, as follows:

2.1.8 Effective date of communications relating to reservations

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

(ii) Functions of depositaries

156. The belated decision to subsume the provisions relating to the communication of reservations within the general articles of the 1969 Vienna Convention relating to depositaries[219] explains the lack of any reference to the depositary in the section on reservations. On the other hand (and consequently), it is self-evident that the provisions of articles 77 and 78 of the 1986 Convention[220] are fully applicable to reservations insofar as they are relevant to them.

157. This is clearly the case with regard to article 78, paragraph 1 (e), under which the depositary is responsible for "informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty". This rule, combined with the one in article 79 (a), is reproduced in draft guideline 2.1.6.[221] This same draft implies also that the depositary receives and keeps custody of reservations;[222] it therefore seems unnecessary to mention this expressly.

158. It goes without saying that the general provisions of article 77, paragraph 2, relating to the international character of the functions of depositaries and their

[215] Para. 137.
[216] It is also difficult to understand.
[217] See paras. 139 and 153 above.
[218] Cf. article 20, paragraphs 4 and 5, of the Vienna Conventions of 1969 and 1986.
[219] See para. 136 above.
[220] Articles 76 and 77 of the 1969 Vienna Convention.
[221] See para. 153 above.
[222] See article 78, paragraph 1 (c).

obligation to act impartially apply to reservations as to any other field.[223] In this general form, these guidelines do not specifically concern the functions of depositaries in relation to reservations and, accordingly, there seems to be no need to reproduce them as such in the Guide to Practice. But these provisions should be placed in the context of those in article 78, paragraph 2:

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

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

160. As has been noted, the problem is posed in different terms when the depositary is a State that is itself a party to the treaty, or when it is "an international organization or the chief administrative officer of the organization".[224] In the first case, "if the other parties found themselves in disagreement with the depositary on this question — a situation which, to our knowledge, has never materialized — they would not be in a position to insist that he follow a course of conduct different from the one he believed that he should adopt".[225] In contrast, in the second case, the political organs of the organization (composed of States not necessarily parties to the treaty) can give instructions to the depositary. It is in this context that problems arose, and their solution has consistently tended towards a strict limitation on the depositary's power of judgement, culminating finally in the rules laid down in the 1969 Vienna Convention and reproduced in the 1986 Convention.

161. As early as 1927, as a result of the difficulties created by the reservations to which Austria intended to subject its deferred signature of the International Opium Convention of 19 February 1925, the Council of the League of Nations adopted a resolution endorsing the conclusions of a Committee of Experts[226] and giving instructions to the Secretary-General of the League on what conduct to adopt.[227] But it is in the context of the United Nations that the most serious problems have arisen.

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

[224] Article 77, paragraph 1, of the 1986 Vienna Convention.

[225] Jacques Dehaussy, "Le dépositaire de traités", *RGDIP* 1952, p. 515.

[226] See the report of the Committee, composed of Mr. Fromageot, Mr. MacNair and Mr. Diéna in *JOSdN* 1927, P. 881.

[227] Resolution of 17 June 1927. See also resolution XXIX of the Eighth Conference of American States (Lima 1938) which established the rules to be followed by the Pan American Union with regard to reservations.

162. It is sufficient to recall the main stages in the evolution of the role of the Secretary-General as depositary in respect of reservations:[228]

– Initially, the Secretary-General "seemed to determine alone ... his own rules of conduct in the matter"[229] and subjected the admissibility of reservations to the unanimous acceptance of the contracting parties or the international organization whose constituent instrument was involved;[230]

– Following the advisory opinion of the International Court of Justice of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[231] the General Assembly adopted its first resolution calling on the Secretary-General, in respect of future conventions:

"(i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications";[232]

These guidelines were extended to all treaties for which the Secretary-General assumes depositary functions under resolution 1452 B (XIV) of 7 December 1959, adopted as a result of the problems related to the reservations formulated by India to the constituent instrument of the International Maritime Consultative Organization (IMCO).[233]

163. This is the practice followed since then by the Secretary-General of the United Nations and, apparently, by all international organizations (or the heads of the secretariats of international organizations) with regard to reservations where the treaty in question does not contain a reservations clause.[234] And this is the practice that the International Law Commission drew on in formulating the rules to be applied by the depositary in this area.

164. It should also be noted that here, too, the formulation adopted tended towards an ever greater limitation on the depositary's powers:

• In the draft adopted on first reading in 1962, paragraph 5 of draft article 29 on "the functions of a depositary" provided that:

"On a reservation having been formulated, the depositary shall have the duty:

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[228] See also, for example, Pierre-Henri Imbert, "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités — Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire", *AFDI* 1980, pp. 528-529, or Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986*, Cambridge University Press, 1987, pp. 429-434.

[229] Jacques Dehaussy, "Le dépositaire de traités", *RGDIP* 1952, p. 514.

[230] See the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1 (United Nations publication, Sales No.: E.94.V.15) (hereinafter referred to as *Summary of Practice* ... (ST/LEG/7/Rev.1)), pp. 50-51, paras. 168-172.

[231] *I.C.J. Reports 1951*, p. 15.

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

[233] See para. 120 above.

[234] See *Summary of Practice* ... (ST/LEG/7/Rev.1), pp. 52-53, paras. 177-188.

(a) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the State which formulated the reservations;

(b) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19";[235]

- The draft adopted on second reading in 1966 further provided that the functions of the depositary comprised:

"Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question";[236]

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

"Paragraph 1 (d) recognizes that a depositary has a certain duty to examine whether signatures, instruments and reservations are in conformity with any applicable provisions of the treaty or of the present articles, and if necessary to bring the matter to the attention of the State in question. That is, however, the limit of the depositary's duty in this connexion. It is no part of the functions to adjudicate on the validity of an instrument or reservation. If an instrument or reservation appears to be irregular, the proper course of a depositary is to draw the attention of the reserving State to the matter and, if the latter does not concur with the depositary, to communicate the reservation to the other interested States and bring the question of the apparent irregularity to their attention. ...";[237]

- During the Vienna Conference an amendment proposed by the Byelorussian Soviet Socialist Republic[238] further attenuated the provision in question: even if the disappearance of any express reference to reservations certainly does not prevent the rule laid down in article 77,[239] paragraph 1 (d), from applying to these instruments,[240] the fact remains that the depositary's power is limited henceforth to examining the *form* of reservations, his function being that of:

"Examining whether the signature or any instrument, notification or communication relating to the treaty is *in due and proper form* and, if need be, bringing the matter to the attention of the States in *question*" (italics added).[241]

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[235] *Yearbook ... 1962*, vol. II, p. 205.
[236] Draft article 72, para. 1 (d), *Yearbook ... 1966*, vol. II, p. 293.
[237] Ibid., pp. 369-370, para. (4) of the commentary.
[238] See note 193 above.
[239] Article 78 in the 1986 Convention.
[240] See ibid. and para. 142.
[241] The 1986 text (italics added).

165. In this way the principle of the depositary as "letter box" has been enshrined. As T. O. Elias has written:

> "It is essential to emphasize that it is no part of the depositary's function to assume the role of interpreter or judge in any dispute regarding the nature or character of a party's reservation vis-à-vis the other parties to a treaty, or to pronounce a treaty as having come into force when that is challenged by one or more of the parties to the treaty in question".[242]
>
> (Il est essentiel d'insister sur le fait qu'il ne relève pas des fonctions du dépositaire de jour le rôle d'interprète ou de juge dans un différend relatif à la nature ou aux caractères d'une réserve d'une des parties à l'égard des autres parties à un traité ou de décider qu'un traité est entré en vigueur lorsque cela est contesté par une ou plusieurs parties au traité en cause).

166. Opinions are divided as to the advantages or disadvantages of this diminution of the depositary's competencies with regard to reservations. Of course, as the International Court of Justice emphasized in its 1951 opinion, "the task of the [depositary] would be simplified and would be confined to receiving reservations and objections and notifying them".[243] "The effect of this, it is suggested, is to transfer the undoubted subjectivities of the United Nations system from the shoulders of the depositary to those of the individual States concerned, in their quality of parties to that treaty, and in that quality alone. This may be regarded as a positive innovation, or perhaps clarification of the modern law of treaties, especially of reservations to multilateral treaties, and is likely to reduce or at least limit the 'dispute' element of unacceptable reservations".[244] (On peut penser que la conséquence de ceci est de transférer l'indéniable subjectivité du système des Nations Unies des épaules du dépositaire sur celles des Etats individuellement, en leur qualité de parties au traité, et en cette qualité exclusivement. On peut y voir une innovation bien venue, ou, peut-être, une clarification apportée au droit moderne des traités, particulièrement à celui applicable aux réserves aux traités multilatéraux, et cela devrait réduire, en tout cas limiter l'élément conflictuel lié aux réserves inacceptables.)

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[242] *The Modern Law of Treaties*, Leiden, Oceana Publications/Sijthoff, Dobbs Ferry, N.Y., 1974, p. 213.

[243] *I.C.J. Reports 1951*, p. 27; and it may be considered that:
"It is that passage which has established the theoretical basis for the subsequent actions by the General Assembly and the International Law Commission. For it is in that sentence that the essentially administrative features of the function [of the depositary] are emphasized and any possible political (and that means decisive) role is depressed to the greatest extent."
(C'est ce passage qui fournit la base théorique des positions ultérieures de l'Assemblée générale et de la Comission du droit international. Car c'est dans cette phrase que l'accent est mis sur les aspects essentiellement administratifs de la fonction [de dépositaire] tandis que tout rôle politique éventuel est limité au maximum.)
Shabtai Rosenne, "The Depositary of International Treaties", *American Journal of International Law* 1967, p. 931.

[244] Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986*, Cambridge University Press, 1987, pp. 435-436.

167. Conversely, we may also see in the practice followed by the Secretary-General of the United Nations and embodied, indeed "solidified", in the 1969 Vienna Convention, "an unnecessarily complex system"[245] insofar as the depositary is no longer able to impose the least amount of coherence and unity in the interpretation and implementation of reservations.[246]

168. The fact remains that distrust of the depositary, as reflected in the provisions analysed above of the relevant articles of the Vienna Conventions, is too deeply entrenched, both in minds and in practice, for there to be any consideration of revising the rules adopted in 1969 and perpetuated in 1986. In the view of the Special Rapporteur, there is little choice but to reproduce them verbatim in the Guide to Practice, combining the relevant provisions of article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention[247] in a single guideline, and applying them only to the functions of depositaries with regard to reservations.

169. On this basis, draft guideline 2.1.7 would read as follows:

2.1.7 ***Functions of depositaries***

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

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

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

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

170. The first paragraph of this draft reproduces the text of the first phrase of article 78, paragraph 1 (d), referring expressly and exclusively to the attitude to be adopted by the depositary with regard to reservations. In contrast, it did not seem useful to transpose the second phrase of this provision since article 78, paragraph 2, which is reproduced word for word in the second paragraph of draft guideline 2.1.7, contains the same rule in greater detail.

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[245] Pierre-Henri Imbert, op. cit., p. 534; the author applies the term only to the practice of the Secretary-General and seems to consider that the Vienna Convention simplifies the context of the problem; this is doubtful.

[246] The depositary can, however, play a not insignificant role in the "reservations dialogue" in reconciling opposing points of view, where appropriate (see chap. III below). See also Henry Han, "The U.N. Secretary-General's treaty depositary function: legal implications", *BJIL* 1988, pp. 570-571; the author here dwells on the importance of the role that the depositary can play.

[247] In view of its highly general character, it does not seem appropriate to recall in the Guide to Practice the general principle set forth in article 77, paragraph 2 (see text, note 223 above).

(iii) Communication of interpretative declarations

171. In view of the very informal character of the formulation of "simple" interpretative declarations,[248] the problem of communicating them obviously does not arise.

172. The situation is different with regard to conditional interpretative declarations. The reasons which justify the transposition of the rules relating to the formulation of reservations to the formulation of such declarations[249] are equally compelling when it comes to their communication and publicity: at issue are, inevitably, formal declarations which, by definition, establish the conditions for their author's expression of consent to be bound by the treaty and to which other interested States and international organizations must have an opportunity to react.

173. It seems legitimate, therefore, to include in the Guide to Practice a consolidated draft guideline which, in order to avoid reproducing the entire text of draft guidelines 2.1.5, 2.1.6, 2.1.7 and 2.1.8, could simply refer to them, without, however, formally citing them for the reasons outlined in paragraph 86 of this report. In that case, the text would read as follows:

2.4.9[250] ***Communication of conditional interpretative declarations***

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty under the same conditions as a reservation.

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

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[248] See paras. 88 and 90 above.

[249] See para. 84 above.

[250] It would probably be preferable to insert this draft guideline between draft guidelines 2.4.2 ("Formulation of conditional interpretative declarations") and 2.4.3 ("Moment of formulation of interpretative declarations") — indeed, to include it in draft guideline 2.4.2.