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

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CHAPTER VIII

RESERVATIONS TO TREATIES

Addendum

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B. Consideration of the topic at the present session

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

18. The Special Rapporteur recalled that, for lack of time, one portion of his tenth report had not been able to be considered in depth during the previous Commission session and the final part concerning the validity of reservations had not been considered at all. In the light of the criticisms of the definition of the object and purpose of the treaty that had been voiced during the debate at the fifty-seventh session, the Special Rapporteur had formulated a new definition of the object and purpose of the treaty (A/CN.4/572 and Corr.1).[1] For the new definition he offered two alternatives, not very different in their general meaning, although he preferred the first alternative. In the second addendum to his tenth report (A/CN.4/588/Add.2), the Special Rapporteur had tried to give a pragmatic answer to two important and difficult questions: who was competent to assess the validity of reservations and what were the consequences of an invalid reservation.

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[1] **Alternative 1:**

3.1.5 Definition of the object and purpose of the treaty

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

Alternative 2:

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

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

19. With regard to draft guideline 3.2,[2] the Special Rapporteur said that it followed from articles 20, 21 and 23 of the Vienna Conventions that any contracting State or international organization could assess the validity of the reservations formulated with respect to a treaty. In that regard the term "State" meant the entire State apparatus, including, as applicable, the domestic courts. Such an assessment could also be made by the courts of the reserving State, although the Special Rapporteur was not aware of a single case in which a domestic court had declared a reservation formulated by the State invalid.[3] In order to take that possibility into account, the wording of the first bullet point of draft guideline 3.2 should be changed by deleting the word "other" before "contracting States" and before "contracting organizations". The dispute settlement bodies and the treaty implementation monitoring bodies could also rule on the validity of reservations. But it should be noted that the category of treaty monitoring bodies was relatively a new one and had not become well developed until after the adoption of the 1969 Vienna Convention.

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

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[2] **3.2 Competence to assess the validity of reservations**

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

- The other contracting States [including, as applicable, their domestic courts] or other contracting organizations;
- Dispute settlement bodies that may be competent to interpret or apply the treaty; and
- Treaty implementation monitoring bodies that may be established by the treaty.

[3] See the decision of the Swiss Federal Tribunal of 17 December 1991 in the case of *Elisabeth B. v. Conseil d'État du Canton de Thurgovie* (*Journal des Tribunaux*, I. *Droit fédéral*, 1995, pp. 523-537).

21. Draft guideline 3.2.1[4] spelled out that idea, at the same time indicating that, in so doing, monitoring bodies could go no further than their general mandate authorized. If they had decision-making power, they could also decide as to the validity of reservations, and their decisions in that regard would be binding on States parties; otherwise, they could only make recommendations. That was also in keeping with paragraph 8 of the preliminary conclusions.

22. Draft guideline 3.2.2[5] echoed paragraph 7 of the preliminary conclusions in the form of a recommendation and was very much in keeping with the pedagogic spirit of the Guide to Practice, as was draft guideline 3.2.3,[6] which reminded States and international organizations that they should give effect to the decisions of the treaty monitoring bodies (if they had decision-making power) or to take account of their recommendations in good faith.

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[4] **3.2.1 Competence of the monitoring bodies established by the treaty**

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

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

[5] **3.2.2 Clauses specifying the competence of monitoring bodies to assess the validity of reservations**

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

[6] **3.2.3 Cooperation of States and international organizations with monitoring bodies**

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

23. Draft guideline 3.2.4,[7] corresponding to paragraph 6 of the preliminary conclusions adopted in 1997, recalled that, when there were several mechanisms for assessing the validity of reservations, they were not mutually exclusive but reinforcing.

24. The last section of the tenth report deals with the consequences of the non-validity of a reservation, a matter that constituted one of the most serious gaps on the topic in the Vienna Conventions, which were silent on that point, whether deliberately or otherwise.

25. Despite the positions taken by one school of legal writers, who draw a distinction between subparagraphs (a) and (b) of article 19, on the one hand, and subparagraph (c) on the other, the Special Rapporteur was of the view that all the three subparagraphs had the same function (a view supported by the *travaux préparatoires*, practice and case law). The unity of article 19, which was confirmed by article 21, paragraph 1, of the Vienna Conventions, was expressed in draft guideline 3.3.[8]

26. The Special Rapporteur then sought to respond to some of the questions to which a response could be given at that stage. Draft guideline 3.3.1[9] explained that the formulation of

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[7] **3.2.4 Plurality of bodies competent to assess the validity of reservations**

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

[8] **3.3 Consequences of the non-validity of a reservation**

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

[9] **3.3.1 Non-validity of reservations and responsibility**

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

an invalid reservation posed problems of validity, not of the responsibility of its author. Hence, draft guideline 3.3.2[10] expressed the idea that a reservation that did not fulfil the conditions for validity set forth in article 19 of the Vienna Conventions was null and void.

27. Draft guideline 3.3.3[11] expressed the idea that the other contracting parties, acting unilaterally, could not remedy the nullity of a reservation that did not meet the criteria of article 19. Otherwise, the unity of the treaty regime would be broken up, which would be incompatible with the principle of good faith.

28. The Special Rapporteur was of the view that what the contracting parties could not do unilaterally they might do collectively, provided they did it expressly, which would amount to an amendment of the treaty. If all parties formally accepted a reservation that was *a priori* invalid, they could be considered to be amending the treaty by unanimous agreement, as article 39 of the Vienna Conventions allowed. That idea was expressed in draft guideline 3.3.4.[12]

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[10] **3.3.2 Nullity of invalid reservations**

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

[11] **3.3.3 Effect of unilateral acceptance of an invalid reservation**

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

[12] **3.3.4 Effect of collective acceptance of an invalid reservation**

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

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

2. Summary of the debate

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

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

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

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

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

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

35. Several members voiced support for draft guideline 3.1.8.

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

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

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

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

40. With regard to draft guideline 3.2, it was stressed that the competence of treaty monitoring bodies was not automatic unless provided for by the treaty. It was also suggested that the text should refer to "monitoring bodies that may be established within the framework of the treaty" rather than "by the treaty" in order to include bodies established subsequently, such as the Committee on Economic, Social and Cultural Rights. The question was raised whether monitoring bodies included those with quasi-judicial functions.

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

42. Following the same line of thought, draft guidelines 3.2.1 and 3.2.2 should state that the monitoring bodies were competent to the extent provided by the treaty. The point was also

raised that the monitoring bodies did not take account of the positions adopted by the contracting States, an issue that was at the heart of the problem of the competence of such bodies to assess the validity of reservations.

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

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

45. It was observed that the reference to protocols might have the effect of encouraging their use to criticize or limit the competence of monitoring bodies.

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

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

48. With regard to draft guideline 3.3.1, the view was expressed that the Commission should refrain from stating a position on whether the international responsibility of a State or international organization that had formulated an invalid reservation was or was not engaged. Such an assertion might have the effect of encouraging States to formulate non-valid reservations in the belief that their responsibility would not be engaged.

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

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

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

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

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