UNITED NATIONS **A**

General Assembly

Distr.
LIMITED

A/CN.4/L.733/Add.3*
17 September 2008

ENGLISH
Original: FRENCH

INTERNATIONAL LAW COMMISSION
Sixtieth session
Geneva, 5 May-6 June 2008 and
7 July-8 August 2008

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTIETH SESSION

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CHAPTER VI

RESERVATIONS TO TREATIES

Addendum

CONTENTS

* Reissued for technical reasons.

2. Text of the draft guidelines and commentaries thereto adopted by the Commission at its sixtieth session

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

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations*

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

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

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

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

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

Commentary

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

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* This draft guideline and the commentary thereto were adopted by the Commission in 2005 (see *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10)), pp. 93-104. At its fifty-ninth session, however, the Commission decided, in accordance with a suggestion to that effect by the Special Rapporteur (see *ibid*., *Sixty-second Session, Supplement No. 10* (A/62/10), p. 23, para. 62), to revise the third paragraph of the draft guideline following its consideration of draft guideline 2.6.13 and to adapt the commentary accordingly. In addition, in the light of an amendment submitted by a member of the Commission in plenary meeting, the Commission decided, after a vote, to modify the chapeau of draft guideline 2.1.6. The commentary was also modified in consequence.

The author of the communication; and

The practical modalities of the communication.

(2) Article 23 of the 1969 and 1986 Vienna Conventions is silent as to the person responsible for such communication. In most cases, this will be the depositary, as shown by the provisions of article 79 of the 1986 Convention,[1] which generally apply to all notifications and communications concerning treaties. The provisions of that article also give some information on the modalities for the communication.

(3) On prior occasions when the topic of reservations to treaties was considered, the Commission or its special rapporteurs planned to stipulate expressly that it was the duty 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".[2] 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".[3]

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

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[1] Art. 78 of the 1969 Convention.

[2] Report of the International Law Commission covering the work of its third session, 16 May-27 July 1951, *Yearbook … 1951*, vol. II, document A/1858, para. 34, p. 130.

[3] *Yearbook … 1965*, vol. II, p. 53.

[4] *Yearbook … 1966*, vol. II, commentary to draft article 73, para. 1, p. 294.

(5) 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)."

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

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

(7) It may be noted in passing that the expression "the parties and the States and international organizations entitled 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 quite obviously entitled to become parties to the treaty and indeed become so simply by virtue of the treaty's entry into force, in accordance with the definition of the terms given in article 2, paragraph 1 (f), of the 1986 Vienna Convention; it poses a problem, however, with regard to the wording of the draft guideline to be included in the Guide to Practice.

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

(9) Moreover, there can be no doubt that communications relating to reservations - especially those concerning the actual text of reservations formulated by a State or an international organization - are communications "relating to the treaty" within the meaning of article 78, paragraph 1 (e), referred to above.[5] 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".[6] This expression was replaced in Vienna with a broader one - "the signature or any instrument,

[5] See paragraph (6) above.

[6] *Yearbook … 1966*, vol. II, p. 269, draft article 72, para. 1 (d) (italics added). On the substance of this provision, see the commentary to draft guideline 2.1.7.

notification or communication relating to the treaty"[7] - which cannot, however, be construed as excluding reservations from the scope of the provision.

(10) In addition, as indicated in the Commission's commentary to 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.".[8]

(11) In essence, there is no doubt that both article 78, paragraph 1 (e), and article 79 (a) reflect current practice.[9] 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).[10] Likewise, France itself submitted to the Board of

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[7] Art. 77, para. 1 (d). The new formula is derived from an amendment proposed by the Byelorussian Soviet Socialist Republic, which was adopted by the Committee of the Whole by 32 votes to 24, with 27 abstentions (*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*, A/CONF.39/11/Add.2), para. 654 (iv) (4), p. 202, and para. 660 (i), p. 203.

[8] *Yearbook … 1966*, vol. II, p. 270, para. (2) of the commentary (italics added).

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

[10] See *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 2006* (ST/LEG/SER.E/25), vol. I, p. 570, note 8 (chap. X.6).

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.[11]

(12) There seem to be no objections to this practice, provided that the depositary is not thereby released from his own obligations.[12] 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) of the 1986 Vienna Convention.[13] For this reason, the Commission considered that such a practice should not be encouraged and refrained from proposing a draft guideline enshrining it.

(13) In its 1966 commentary, the Commission dwelt on the importance of the task entrusted to the depositary in draft article 73, paragraph 1 (e) (now article 77, paragraph 1 (e), of the 1969 Vienna Convention),[14] and stressed "the obvious desirability of the prompt performance of this function by a depositary".[15] This is an important issue, which is linked to subparagraphs (b) and (c) of article 78:[16] 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

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[11] See *ibid*., vol. II, p. 439, note 4 (chap. XXV.3).

[12] See draft guideline 2.1.7.

[13] Art. 77, para. 1 (e), and art. 78 (a), respectively, of the 1969 Convention. 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 (see *Multilateral Treaties* ..., vol. II, p. 439, note 4 (chap. XXV.3)). The Secretary-General's passivity in this instance is subject to criticism.

[14] Art. 78, para. 1 (e), of the 1986 Convention.

[15] *Yearbook … 1966*, vol. II, para. (5) of the commentary, p. 270.

[16] Art. 79 (a) and (b) of the 1986 Convention. See the text of these provisions in paragraphs (5) and (6) above.

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.[17]

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

> "1. The time period between receipt of a formality by the Treaty Section and its communication to the parties to a treaty is approximately 24 hours unless a translation is required or a legal issue is involved. If a translation is required, in all cases, it is requested by the Treaty Section on an urgent basis. If the legal issue is complex or involves communications with parties outside the control of the United Nations, then there may be some delay; however, this is highly unusual. It should be noted that, in all but a few cases, formalities are communicated to the relevant parties within 24 hours.
>
> 2. Depositary notifications are communicated to permanent missions and relevant organizations by both regular mail and electronic mail, within 24 hours of processing (see LA 41 TR/221). Additionally, effective January 2001, depositary notifications can be viewed on the United Nations Treaty Collection on the Internet at: http://untreaty.un.org (depositary notifications on the Internet are for information purposes only and are not considered to be formal notifications by the depositary).

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[17] See the commentary to draft article 73 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* (Dobbs Ferry/Leiden, Oceana Publications/Sijthoff, 1974), pp. 216-217.

> Depositary notifications with bulky attachments, for example those relating to chapter 11 (b) 16,[18] are sent by facsimile."[19]

(15) For its part, the International Maritime Organization (IMO) has indicated 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.

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

> "The usual period is two to three weeks (notifications are grouped and sent out approximately every two weeks). In some cases, delays occur owing to voluminous declarations/reservations or appendices (descriptions or extracts of domestic law and practices) that must be checked and translated into the other official language (the Council of Europe requires that all notifications be made in one of the official languages or be at least accompanied by a translation into one of these languages. The translation into the

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[18] 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. I, p. 683).

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

other official language is provided by the Treaty Office). Urgent notifications that have immediate effect (e.g., derogations under article 15 of the European Convention on Human Rights) are carried out within a couple of days.

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

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

(17) Lastly, it is apparent from information from the Organization of American States (OAS) that:

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

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

(18) It did not seem necessary to the Commission for these very helpful clarifications to be reproduced in full in the Guide to Practice. It nonetheless seemed useful to give in draft guideline 2.1.6 some information in the form of general recommendations intended both for the depositary (where there is one) and for the authors of reservations (where there is no depositary). This combines the text of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention[20] and adapts it to the special problems posed by the communication of reservations.

(19) 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,[21] the text of draft guideline 2.1.6 reproduces, with one small difference, 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 Conventions relating to reservations. Nevertheless, it did not seem useful to burden the text by using the article 23 expression twice in subparagraphs (i) and (ii). Incidentally, this purely drafting improvement involves no change in the Vienna text: the expression "the States and organizations for which it is intended" (ii) refers to the "contracting States and contracting organizations and other States and international organizations entitled to become parties" (i). This is also true of the addition of the adjective "international", which the Commission inserted before the noun "organizations" in the chapeau of the first paragraph in order to avoid any ambiguity and to compensate for the lack, in the Guide to Practice, of a definition of the term "contracting organization" (whereas such a

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[20] Art. 77, para. 1 (e), and art. 79 of the 1969 Convention.

[21] Paras. (7) and (8).

definition does appear in article 2, paragraph 1 (f), of the 1986 Vienna Convention); some members of the Commission, however, regretted this departure from the wording of the Vienna Convention, which they considered unnecessary; obviously, this clarification applies to the draft guideline as a whole. Similarly, the subdivision of the draft's first paragraph into two separate subparagraphs probably makes it more readily understandable, without changing the meaning.

(20) As to the time periods for the transmittal of the reservation to the States or international organizations for which it is intended, the Commission did not think it possible to establish a rigid period of time. The expression "as soon as possible" in subparagraph (ii) seems enough to draw the attention of the addressees to the need to proceed rapidly. On the other hand, such an indication is not required in subparagraph (i): it is for the author of the reservation to assume his responsibilities in this regard.[22]

(21) In keeping with draft guidelines 2.1.1 and 2.1.2, which point out that the formulation and confirmation of reservations must be done in writing, the last paragraph of draft guideline 2.1.6 specifies that communication to the States and international organizations for which they are intended must be formal. While some members of the Commission may have expressed doubts about the need for this stipulation, it seemed useful in view of the frequent practice among depositaries of using modern means of communication - electronic mail or fax - which are less reliable than traditional methods. For this reason, a majority of the members of the Commission considered that any communication concerning reservations should be confirmed in a diplomatic note (in cases where the author is a State) or in a depositary notification (where it is from an international organization[23]). While some members held an opposite view, the Commission took the view that, in this case, the time period should start as from the time the electronic mail or facsimile is sent. This would help prevent disputes as to the date of receipt of the confirmation

[22] See paragraph (13) above.

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

and would not give rise to practical problems, since, according to the indications given to the Commission, the written confirmation is usually done at the same time the electronic mail or facsimile is sent or very shortly thereafter, at least by depositary international organizations. These clarifications are given in the third paragraph of draft guideline 2.1.6.

(22) It seemed neither useful nor possible to be specific about the language or languages in which such communications must be transmitted, since the practices of depositaries vary.[24] Similarly, the Commission took the view that it was wise to follow practice on the question of the organ to which, specifically, the communication should be addressed.[25]

(23) On the other hand, the second paragraph of draft guideline 2.1.6 reproduces the rule set out in subparagraphs (b) and (c) of article 79 of the 1986 Vienna Convention.[26] However, it seemed possible to simplify the wording without drawing a distinction between cases in which the reservation is communicated directly by the author and instances in which it is done by the depositary. In both cases, it is the receipt of the communication by the State or international organization for which it is intended that is decisive. It is, for example, from the date of receipt that the period within which an objection may be formulated is counted.[27] It should be noted that the date of effect of the notification may differ from one State or international organization to another depending on the date of receipt.

2.1.9 Statement of reasons

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

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[24] Where the depositary is a State, it generally seems to transmit communications of this type in its official language(s); an international organization may use all its official languages (IMO) or one or two working languages (United Nations).

[25] Ministries of Foreign Affairs, diplomatic missions to the depositary State(s), permanent missions to the depositary organization.

[26] See paragraph (5).

[27] Regarding objections, see draft guideline 2.6.13 below.

Commentary

(1) The Commission's work on the law of treaties and the 1969 and 1986 Vienna Conventions in no way stipulate that a State or international organization which formulates a reservation must give its reasons for doing so and explain why it purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects. Thus, giving reasons is not an additional condition for validity under the Vienna regime.

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

> "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> 2. Any reservation made under this article shall contain a brief statement of the law concerned."

Under this regime, which is unquestionably *lex specialis* with respect to general international law, indication of the law on which the reservation is based is a genuine condition for the validity of any reservation to the European Convention. In the famous *Belilos* case, the European Court of Human Rights decided that article 57 (former article 64), paragraph 2, establishes "not a purely formal requirement but a condition of substance".[28] In the Court's view, the required reasons or explanations "provide a guarantee - in particular for the other Contracting Parties and the Convention institutions - that a reservation does not go beyond

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[28] *Belilos v. Switzerland* (application No. 10328/83), Judgment of 29 April 1988, *Reports of judgments and decisions of the European Court of Human Rights*, Series A, No. 132, para. 59.

the provisions expressly excluded by the State concerned".[29] The penalty for failure to meet this requirement to give reasons (or to explain) is the invalidity of the reservation.[30]

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

(4) Giving reasons (which is thus optional) is not an additional requirement that would make it more difficult to formulate reservations; it is a useful way for both the author of the reservation and the other concerned States, international organizations or monitoring bodies to fulfil their responsibilities effectively. It gives the author of the reservation an opportunity not only to explain and clarify the reasons why the reservation was formulated - including (but not exclusively) by indicating impediments under domestic law that may make implementation of the provision on which the reservation is based difficult or impossible - but also to provide information that will be useful in assessing the validity of the reservation. In this regard, it should be borne in mind that the author of a reservation is also responsible for assessing its validity.

(5) The reasons and explanations given by the author of a reservation also facilitate the work of the bodies with competence to assess the reservation's validity, including other concerned States or international organizations, dispute settlement bodies responsible for interpreting or implementing the treaty and treaty monitoring bodies. Giving reasons, then, is also one of the ways in which States and international organizations making a

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[29] *Ibid*.

[30] *Ibid*., para. 60.

reservation can cooperate with the other contracting parties and the monitoring bodies so that the validity of the reservation can be assessed.[31]

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

(7) In practice, reasons are more likely to be given for objections than for reservations. There are, however, examples in State practice of cases in which States and international organizations have made a point of giving their reasons for formulating a particular reservation. Sometimes, they do so purely for reasons of convenience, in which case their explanations are of no particular use in assessing the value of the reservation except perhaps insofar as they establish that it is motivated by such considerations of convenience.[32] But often, the explanations that accompany reservations shed considerable light on the reasons for their formulation. For example, Barbados justified its reservation to article 14 of the International Covenant on Civil and Political Rights by practical problems of implementation:

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[31] The Commission stressed this obligation to cooperate with monitoring bodies in its 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, paragraph 9 of which states: "The Commission calls upon States to cooperate with monitoring bodies ..." (*Yearbook ... 1997*, vol. II, Part Two, p. 58). This obligation to cooperate was also stressed by the international human rights treaty bodies in 2007 at their sixth inter-committee meeting (see the report of the meeting of the working group on reservations (HRI/MC/2007/5, para. 16 (Recommendations), recommendation No. 9 (a)).

[32] This is true of France's reservation to the European Agreement supplementing the Convention on Road Signs and Signals: "With regard to article 23, paragraph 3 *bis* (b), of the Agreement on Road Signs and Signals, France intends to retain the possibility of using lights placed on the side opposite to the direction of traffic, so as to be in a position to convey meanings different from those conveyed by the lights placed on the side appropriate to the direction of traffic" (*Multilateral Treaties* ..., vol. I, p. 907 (chap. XI-B.24)).

> "The Government of Barbados states that it reserves the right not to apply in full, the guarantee of free legal assistance in accordance with paragraph 3 (d) of article 14 of the Covenant, since, while accepting the principles contained in the same paragraph, the problems of implementation are such that full application cannot be guaranteed at present."[33]

In another example (among the many precedents), the Congo formulated a reservation to article 11 of the Covenant, accompanying it with a long explanation:

> "The Government of the People's Republic of Congo declares that it does not consider itself bound by the provisions of article 11 [...]
>
> Article 11 of the International Covenant on Civil and Political Rights is quite incompatible with articles 386 *et seq*. of the Congolese Code of Civil, Commercial, Administrative and Financial Procedure, derived from Act 51/83 of 21 April 1983. Under those provisions, in matters of private law, decisions or orders emanating from conciliation proceedings may be enforced through imprisonment for debt when other means of enforcement have failed, when the amount due exceeds 20,000 CFA francs and when the debtor, between 18 and 60 years of age, makes himself insolvent in bad faith."[34]

(8) In the light of the obvious advantages of giving reasons for reservations and the role this practice plays in the reservations dialogue, the Commission chose not to stipulate in draft guideline 2.1.6 that reasons should accompany the reservation and be an integral part thereof - as is generally the case for reasons for objections[35] - but this is no doubt desirable, even though there is nothing to prevent a State or international organization from stating the reasons for its reservation *ex post facto*.

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[33] *Ibid*., p. 181 (chap. IV.4). See also the Gambia's reservation (*ibid*., p. 188).

[34] *Ibid*., pp. 181-182 (chap. IV.4).

[35] See draft guideline 2.6.10 and the commentary thereto below. It is in any case extremely difficult to distinguish the reservation from the reasons for its formulation if they both appear in the same instrument.

(9) Furthermore, although it seems wise to encourage the giving of reasons, this practice must not, in the Commission's view, become a convenient smokescreen used to justify the formulation of general or vague reservations. According to draft guideline 3.1.7 (Vague, general reservations), "[a] reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty". Giving reasons cannot obviate the need for the reservation to be formulated in terms that make it possible to assess its validity. Even without reasons, a reservation must be self-sufficient as a basis for assessment of its validity; the reasons can only facilitate this assessment.[36]

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

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

> "Article 8 of the Convention requires the parties to give consideration to the possibility of transferring to one another proceedings for criminal prosecution of certain offences where such transfer is considered to be in the interests of a proper administration of justice.
>
> The courts of Belize have no extra-territorial jurisdiction, with the result that they will have no jurisdiction to prosecute offences committed abroad unless such offences are committed partly within and partly without the jurisdiction, by a person who is within the jurisdiction. Moreover, under the Constitution of Belize, the control of public prosecutions is vested in the Director of Public Prosecutions, who is an independent functionary and not under Government control.
>
> Accordingly, Belize will be able to implement article 8 of the Convention only to a limited extent insofar as its Constitution and the law allows."
>
> (*Multilateral Treaties* ..., vol. I, p. 477 (chap. VI.19)).

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

2.6 Formulation of objections

2.6.5 Author

An objection to a reservation may be made by:

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

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

Commentary

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

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

(3) The Commission has been divided, however, over the question of whether States or international organizations that are entitled to become parties to a treaty may also formulate objections. According to one viewpoint, these States and international organizations do not have the same rights as contracting States and international organizations and therefore cannot formulate objections as such. It was argued that the fact that the Vienna Convention makes no reference to the subject should not be interpreted as granting this category of States and international organizations the right to formulate objections, and that it would follow from article 20, paragraph 5, of the Vienna Conventions that only contracting parties may formulate objections. It was further argued that, as a consequence, declarations formulated by States and international organizations, which do not produce the same legal effects as an objection made by

a contracting State or a contracting international organization,[37] should not be qualified as objections. According to this same opinion, allowing for such a possibility might create a practical problem since, in the case of open treaties, the parties to such a treaty might not have been aware of certain objections.

(4) Nevertheless, according to the majority view, the provisions of article 20, paragraphs 4 (b) and 5, of the Vienna Conventions, make no exclusion of any kind; on the contrary, they allow States and international organizations that are entitled to become parties to the treaty to formulate objections within the definition contained in draft guideline 2.6.1. Article 20, paragraph 4 (b), simply determines the possible effects of an objection raised by a contracting State or by a contracting organization; however, the fact that paragraph 4 does not specify the effects of objections formulated by States other than contracting States or by organizations other than contracting organizations in no way means that such other States or organizations may not formulate objections.[38] The limitation on the possible authors of an objection that article 20, paragraph 4 (b), of the Vienna Conventions might seem to imply is not found in article 21, paragraph 3, on the effects of the objection on the application of the treaty in cases where the author of the objection has not opposed the entry into force of the treaty between itself and the reserving State. Moreover, as article 23, paragraph 1, clearly states, reservations, express acceptances and objections must be communicated not only to the contracting States but also to "other States entitled to become parties to the treaty".[39] Such a notification has meaning only if these other States can in fact react to the reservation by way of an express acceptance or an objection. Lastly, and most importantly, this position appeared to the Commission to be the only one that was compatible with the letter and spirit of draft guideline 2.6.1, which defines

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[37] This position seems to be defended by Belinda Clark, "The Vienna Convention reservations regime and the Convention on Discrimination Against Women", AJIL., vol. 85 (1991), No. 2, p. 297.

[38] In this regard, see Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 150.

[39] See also article 77, paragraphs 1 (e) and (f), of the Vienna Conventions, regarding the function of the depositary with regard to "States and international organizations entitled to become parties ...".

objections to reservations not in terms of the effects they produce but in terms of those that objecting States or international organizations *intend for them to produce*.[40]

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

> "THE COURT IS OF OPINION, ...
>
> (*a*) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question 1 only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;
>
> (*b*) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect."[41]

This was also the position taken by Sir Humphrey Waldock in his first report on the law of treaties. Draft article 19, which is devoted entirely to objections and their effects, provided that "any State which is *or is entitled to become a party* to a treaty shall have the right to object ...".[42]

(6) In State practice, non-contracting States often formulate objections to reservations. For instance, Haiti objected to the reservations formulated by Bahrain to the Vienna Convention on

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[40] The definition of the term "reservation", as set out in article 2, paragraph 1 (d), of the Vienna Conventions, and reproduced in draft guideline 1.1, is formulated in the same manner: it concerns declarations that are *intended* to produce certain effects (but that do not necessarily do so).

[41] *I.C.J. Reports 1951*, p. 30, para. III. Despite the wording of subparagraph (b), some members of the Commission are of the view that the Court was referring here only to signatory States.

[42] *Yearbook ... 1962*, vol. II, p. 70 (italics added).

Diplomatic Relations at a time when it had not even signed the Convention.[43] Similarly, the United States of America formulated two objections to the reservations made by the Syrian Arab Republic and Tunisia to the 1969 Vienna Convention on the Law of Treaties even though it was not - and is not - a contracting State to this Convention.[44] Likewise, in the following examples, the objecting States were, at the time they formulated their objections, mere signatories to the treaty (which they later ratified):

- Objection of Luxembourg to the reservations made by the Soviet Union, the Byelorussian SSR and the Ukrainian SSR to the Vienna Convention on Diplomatic Relations;[45] and

- Objections of the United Kingdom of Great Britain and Northern Ireland to reservations made by Bulgaria, the Byelorussian SSR, Czechoslovakia, the Ukrainian SSR, Romania, the USSR, Iran and Tunisia to the Convention on the Territorial Sea and the Contiguous Zone[46] and to those made by Bulgaria, Hungary, Poland, the Byelorussian SSR, the Ukrainian SSR, Romania, Czechoslovakia, the USSR and Iran to the Convention on the High Seas.[47]

(7) In the practice of the Secretary-General as depositary, such objections formulated by States or international organizations that are entitled to become parties to the treaty are conveyed by

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[43] *Multilateral Treaties* …, vol. I, p. 96 (chap. III.3) - date of objection: 9 May 1972, date of accession: 2 February 1978.

[44] *Ibid*., vol. II, p. 417 (chap. XXIII.1).

[45] *Ibid*., vol. I, p. 96 (chap. III.3) - date of signature: 2 February 1962; date of objection: 18 January 1965; date of ratification: 17 August 1966.

[46] *Ibid*., vol. II, p. 317 (chap. XXI.1) - date of signature: 9 September 1958; date of objection: 6 November 1959; date of ratification: 14 March 1960.

[47] *Ibid*., vol. II, p. 323 (chap. XXI.2) - date of signature: 9 September 1958; date of objection: 6 November 1959; date of ratification: 14 March 1960.

means of "communications"[48] and not "depositary notifications"; however, what is "communicated" are unquestionably objections in the sense of draft guideline 2.6.1.

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

(9) In reality, it would seem not only possible but also wise for States or international organizations that intend to become parties but have not yet expressed their definitive consent to be bound to express their opposition to a reservation and to make their views known on the reservation in question. As the Court noted in its advisory opinion of 1951, such an objection "merely serves as a notice to the other State of the eventual attitude of the signatory State".[49] Such notification may also prove useful both for the reserving State or organization and, in certain circumstances, for the treaty monitoring bodies.

(10) In any event, there is no doubt that an objection formulated by a State or organization that has not yet expressed its consent to be bound by the treaty does not immediately produce the legal effects intended by its author. This is evidenced also by the operative part of the advisory opinion of 1951, which states that such an objection "can have the legal effect indicated in the reply to Question I only upon ratification" by the State or the organization that formulated it.[50] The potential legal effect of an objection formulated by a State or an international organization prior to becoming a party to the treaty is realized only upon

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[48] *Summary of practice of the Secretary-General as depositary of multilateral treaties* (ST/LEG/8, New York, 1997), para. 214.

[49] *I.C.J. Reports 1951*, p. 30, para. III of the operative part.

[50] *Ibid*.

ratification, accession or approval of the treaty (if it is a treaty in solemn form) or signature (in the case of an executive agreement). This does not preclude qualifying such statements as objections; however, they are "conditional" or "conditioned" in the sense that their legal effects are subordinate to a specific act: the expression of definitive consent to be bound.

2.6.6 Joint formulation

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

Commentary

(1) Even though, according to the definition contained in draft guideline 2.6.1, an objection is a unilateral statement,[51] it is perfectly possible for a number of States and/or a number of international organizations to formulate an objection collectively and jointly. Practice in this area is not highly developed; it is not, however, non-existent.

(2) In the context of regional organizations, and in particular the Council of Europe, member States strive, to the extent possible, to coordinate and harmonize their reactions and objections to reservations. Even though these States continue to formulate objections individually, they coordinate not only on the appropriateness but also on the wording of objections.[52] Technically, however, these objections remain unilateral declarations on the part of each author State.

(3) Yet it is also possible to cite cases in which States and international organizations have formulated objections in a truly joint fashion. For example, the European Community and its (at that time) nine member States objected, via a single instrument, to the "declarations" made by

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[51] See also the commentary to draft guideline 2.6.1 (Definition of objections to reservations), *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 189, para. (6) of the commentary.

[52] See, for example, the objections of certain States members of the Council of Europe to the International Convention for the Suppression of Terrorist Bombings of 1997 (*Multilateral Treaties* ..., vol. II, pp. 138-146 (chap. XVIII.9)) or to the International Convention for the Suppression of the Financing of Terrorism of 1999 (*ibid*., pp. 175-192, chap. XVIII.11).

Bulgaria and the German Democratic Republic regarding article 52, paragraph 3, of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets of 4 November 1975, which offers customs unions and economic unions the possibility of becoming contracting parties.[53] The European Community has also formulated a number of objections "on behalf of the European Economic Community and of its member States".[54]

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

(5) The wording of draft guideline 2.6.1 is modelled on that of draft guidelines 1.1.7 (Reservations formulated jointly) and 1.2.2 (Interpretative declarations formulated jointly). Nevertheless, in the English text, after the adjective "unilateral", the word "character" was preferred over the word "nature". This change offers the advantage of aligning the English text with the French version but will make it necessary to harmonize the three draft guidelines during the second reading.

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[53] *Ibid*., vol. I, p. 639 (chap. XI-A.16).

[54] See, for example, the objection to the declaration made by the Soviet Union in respect of the Wheat Trade Convention of 1986 (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1987* (ST/LEG/SER.E/6), chap. XIX.26) and the identical objection to the declaration made by the Soviet Union in respect of the Tropical Timber Agreement of 1983 (*ibid*., chap. XIX.28). In the same vein, see the practice followed at the Council of Europe since 2002 with respect to reservations to counter-terrorism conventions (para. (2) above).

2.6.7 Written form

An objection must be formulated in writing.

Commentary

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

(2) As is the case for reservations,[55] the requirement that an objection to a reservation must be formulated in writing was never called into question but was presented as self-evident in the debates in the Commission and at the Vienna Conferences. In his first report, Sir Humphrey Waldock, the first special rapporteur to draft provisions on objections already provided in paragraph 2 (a) of draft article 19, which dealt entirely with objections to reservations, that "an objection to a reservation shall be formulated in writing ...",[56] without making this formal requirement the subject of commentary.[57] While the procedural guidelines were comprehensively revised by the Special Rapporteur in light of the comments of two Governments suggesting that "some simplification of the procedural provisions"[58] was desirable, the requirement of a written formulation for an objection to a reservation was always explicitly stipulated:

- In article 19, paragraph 5, adopted on first reading (1962): "An objection to a reservation shall be formulated in writing ..." and "shall be communicated";[59]

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[55] See draft guideline 2.1.1 (Written form) and commentary, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 103.

[56] First report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 62.

[57] *Ibid*., p. 78, para. (22) of the commentary on draft article 19, which refers the reader to the commentary to draft article 17 (*ibid*., p. 75, para. (11)).

[58] These were the Governments of Sweden and Denmark. See Sir Humphrey Waldock, fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, pp. 48-49 and 56, para. 13.

[59] *Yearbook ... 1962*, vol. II, p. 194.

– In article 20, paragraph 5, proposed by the Special Rapporteur in his fourth report (1965): "An objection to a reservation must be in writing";[60]

– In article 20, paragraph 1, adopted on second reading (1965): "A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the other States entitled to become parties to the treaty".[61]

The written form was not called into question at the Vienna Conference in 1968 and 1969 either. On the contrary, all proposed amendments to the procedure in question retained the requirement that an objection to a reservation must be formulated in writing.[62]

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

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[60] Fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 56.

[61] *Yearbook … 1965*, vol. II, p. 175. Draft article 20 of 1965 became draft article 18, without modification, in the text adopted by the International Law Commission in 1966 (*Yearbook … 1966*, vol. II, p. 226).

[62] See the Spanish amendment: "A reservation, an acceptance of a reservation, and an objection to a reservation must be formulated in writing and duly communicated by the reserving, accepting or objecting State to the other States which are parties, or are entitled to become parties, to the treaty." (A/CONF.39/C.1/L.149, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 150).

of proving whether a State did indeed express an objection to a reservation during the period of time prescribed by this provision or whether, by default, it must be considered as having accepted the reservation.

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

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

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

Commentary

(1) As article 20, paragraph 4 (b), of the Vienna Conventions shows, a State or an international organization objecting to a reservation may oppose the entry into force of a treaty as between itself and the reserving State. In order for this to be so, according to the same provision, that intent must still be "definitely expressed by the objecting State or organization". Following the reversal of the presumption regarding the effects of the objection on the entry into force of the treaty as between the reserving State and the objecting State decided at the 1969 Vienna Conference,[63] a clear and unequivocal statement is necessary in order to preclude the entry into force of the treaty in relations between the two States.[64] This is how article 20, paragraph 4 (b), of the Vienna Conventions, on which the text of draft guideline 2.6.8 is largely based, should be understood.

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[63] See, in particular, the amendment tabled by the Union of Soviet Socialist Republics (A/CONF.39/L.3, *ibid*., pp. 285-286) finally adopted by the Conference (*United Nations Conference on the Law of Treaties, Official records, Second Session, Vienna, 9 April-22 May 1969, Summary records* (A/CONF.39/11/Add.1), tenth plenary meeting, 29 April 1969, p. 35, para. 79).

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

(2) The objection of the Netherlands to the reservations to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide certainly meets the requirement of definite expression; it states that "the Government of the Kingdom of the Netherlands ... does not deem any State which has made or will make such reservation a party to the Convention".[65] France also very clearly expressed such an intention regarding the reservation of the United States of America to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP), by declaring that it would not "be bound by the ATP Agreement in its relations with the United States of America".[66] Similarly, the United Kingdom stated in its objection to the reservation of the Syrian Arab Republic to the Vienna Convention on the Law of Treaties that it did "not accept the entry into force of the Convention as between the United Kingdom and Syria".[67]

(3) On the other hand, the mere fact that the reason for the objection is that the reservation is considered incompatible with the object and purpose of the treaty is not sufficient to exclude the entry into force of the treaty between the author of the objection and the author of the reservation. Practice is indisputable in this regard, since States quite frequently base their objections on such incompatibility, all the while clarifying that the finding does not prevent the treaty from entering into force as between them and the author of the reservation.[68]

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[65] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (ST/LEG/SER.E/25), vol. I, pp. 132-133 (chap. IV.1). See also the objection of China (*ibid*., p. 131).

[66] *Ibid*., vol. I, p. 899 (chap. XI.B.22). See also the objection of Italy (*ibid*.).

[67] *Ibid*., vol. II, p. 416 (chap. XXIII.1). See also the objection of the United Kingdom to the reservation of Viet Nam (*ibid*., p. 417).

[68] Among many examples, see the objections of several States members of the Council of Europe to the reservation of the Syrian Arab Republic to the International Convention for the Suppression of the Financing of Terrorism on the basis of the incompatibility of the reservation with the object and purpose of the Convention (Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Latvia, Netherlands, Norway, Portugal, Sweden); *Multilateral Treaties* ..., vol. II, pp. 175-192 (chap. XVIII.11)). In every case it is stated that the objection does not preclude the entry into force of the Convention between the objecting State and the Syrian Arab Republic. See also Belgium's objections to the Egyptian, Cambodian and Moroccan reservations to the Vienna Convention on Diplomatic Relations (*ibid*., vol. I, p. 94 (chap. III.3))

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

(5) However, this is the case only if the treaty actually enters into force in relations between the two States or international organizations concerned. It may also happen that although the author of the objection has not ruled out this possibility at the time of formulating the objection,

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or the objections of Germany to several reservations concerning the same Convention (*ibid*., pp. 95-96). It is, however, interesting to note that even though Germany considers all the reservations in question to be "incompatible with the letter and spirit of the Convention", the German Government stated for only some objections that they did not preclude the entry into force of the treaty as between Germany and the reserving States; it did not take a position on the other cases. Many examples can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights, in particular the objections that were raised to the United States reservation to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (*ibid*., pp. 191-200 (chap. IV.4)). All these States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose its entry into force in their relations with the United States. Only Germany remained silent regarding the entry into force of the Covenant, despite its objection to the reservation (*ibid*.). The phenomenon is not, however, limited to human rights treaties. See, for example, the objections made by Austria, France, Germany and Italy to Viet Nam's reservation to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (*ibid*., pp. 482-483 (chap. V.19)) or the objections made by the States members of the Council of Europe to the reservations to the International Convention for the Suppression of Terrorist Bombings of 1997 (*ibid*., vol. II, pp. 138-146 (chap. XVIII.9)) or to the International Convention for the Suppression of the Financing of Terrorism of 1999 (*ibid*., p. 124 (chap. XVIII.7)).

the treaty does not enter into force immediately, for other reasons.[69] In such a case the Commission considered that there was no reason to prohibit the author of the objection from expressing the intention to preclude the entry into force of the treaty at a later date; such a solution is particularly necessary in situations where a long period of time may elapse between the formulation of the initial objection and the expression of consent to be bound by the treaty by the reserving State or international organization or by the author of the objection. Accordingly, while excluding the possibility that a declaration "maximizing" the scope of the objection can be made after the entry into force of the treaty between the author of the reservation and the author of the objection, the Commission made it clear that the intention to preclude the entry into force of the treaty must be expressed "before the treaty would otherwise enter into force" between them, without making expression of the will to oppose the entry into force of the treaty in all cases at the time the objection is formulated a prerequisite.

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

2.6.9 Procedure for the formulation of objections

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

Commentary

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

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[69] Insufficient number of ratifications or accessions, additional time provided under the provisions of the treaty itself.

(2) This lack of interest can easily be explained in the case of the special rapporteurs who advocated the traditional system of unanimity, namely Brierly, Lauterpacht and Fitzmaurice.[70] While it was only logical, in their view, that an acceptance, which is at the heart of the traditional system of unanimity, should be provided with a legal framework, particularly where its temporal aspect was concerned, an objection, which they saw simply as a refusal of acceptance that prevented unanimity from taking place and, consequently, the reserving State from becoming a party to the instrument, did not seem to warrant specific consideration.

(3) Sir Humphrey Waldock's first report, which introduced the "flexible" system in which objections play a role that is, if not more important, then at least more ambiguous, contained an entire draft article on procedural issues relating to the formulation of objections.[71] Despite the

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[70] Even though Lauterpacht's proposals *de lege ferenda* envisaged objections, the Special Rapporteur did not consider it necessary to set out the procedure that should be followed when formulating them. See the alternative drafts of article 9, H. Lauterpacht, [First] Report on the law of treaties, A/CN.4/63, *Yearbook ... 1953*, vol. II, pp. 91-92.

[71] This draft article 19 contained the following provision:

> "2. (*a*) An objection to a reservation shall be formulated in writing by the competent authority of the objecting State or by a representative of the State duly authorized for that purpose.
>
> (*b*) The objection shall be communicated to the reserving State and to all other States which are or are entitled to become parties to the treaty, in accordance with the procedure, if any, prescribed in the treaty for such communications.
>
> (*c*) If no procedure has been prescribed in the treaty but the treaty designates a depositary of the instruments relating to the treaty, then the lodging of the objection shall be communicated to the depositary whose duty it shall be:
>
> (i) To transmit the text of the objection to the reserving State and to all other States which are or are entitled to become parties to the treaty; and
>
> (ii) To draw the attention of the reserving State and the other States concerned to any provisions in the treaty relating to objections to reservations.
>
> 3. (*a*) In the case of a plurilateral or multilateral treaty, an objection to a reservation shall not be effective unless it has been lodged before the expiry of twelve calendar months from the date when the reservation was formally communicated to the objecting State; provided that, in the case of a multilateral treaty, an objection by a State which at the time

very detailed nature of this provision, the report limits itself to a very brief commentary, indicating that "the provisions of this article are for the most part a reflex of provisions contained in [the articles on the power to formulate and withdraw reservations (article 17) and on consent to reservations and its effects (article 18)] and do not therefore need further explanation".[72]

(4) After major reworking of the draft articles on acceptance and objection initially proposed by the Special Rapporteur,[73] only draft article 18, paragraph 5, presented by the Drafting Committee in 1962 deals with the formulation and the notification of an objection,[74] a provision which, in the view of the Commission, "do[es] not appear to require comment".[75] That lack of interest continued into 1965, when the draft received its second reading. And even though

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of such communication was not a party to the treaty shall nevertheless be effective if subsequently lodged when the State executes the act or acts necessary to enable it to become a party to the treaty.

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

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

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

…"

(First report on the law of treaties (A/CN.4/144), *Yearbook … 1962*, vol. II, p. 62).

[72] *Ibid*., p. 68, para. (22) of the commentary.

[73] The only explanation that can be found in the work of the Commission for merging the draft articles initially proposed by Sir Humphrey is found in his presentation of the report of the Drafting Committee at the 663rd meeting of the Commission. On that occasion, the Special Rapporteur stated that "the new article 18 covered both acceptance of and objection to reservations; the contents of the two former articles 18 and 19 had been considerably reduced in length without, however, leaving out anything of substance" (*Yearbook ... 1962*, vol. I, 663rd meeting, para. 36).

[74] *Yearbook … 1962*, vol. I, 668th meeting, para. 30. See also draft article 19, paragraph 5, adopted on first reading, *Yearbook ... 1962*, vol. II, p. 176.

[75] *Yearbook … 1962*, vol. II, p. 180, para. (18) of the commentary.

objections found a place in the new draft article 20 devoted entirely to questions of procedure, the Special Rapporteur still did not consider it appropriate to comment further on those provisions.[76]

(5) The desirability of parallel procedural rules for the formulation, notification and communication of reservations, on the one hand, and of objections, on the other, was stressed throughout the debate in the Commission and was finally reflected in article 23, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, which sets forth the procedure for formulating an express acceptance of or an objection to a reservation. In 1965, Mr. Castrén rightly observed:

> "Paragraph 5 [of draft article 20, which, considerably shortened and simplified, was the source for article 23, paragraph 1] laid down word for word precisely the same procedural rules for objections to a reservation as those applicable under paragraph 1 to the proposal and notification of reservations. Preferably, therefore, the two paragraphs should be amalgamated or else paragraph 5 should say simply that the provisions of paragraph 1 applied also to objections to a reservation."[77]

(6) Therefore, it may be wise simply to take note, within the framework of the Guide to Practice, of this procedural parallelism between the formulation of reservations and the formulation of objections. It is particularly important to note that the requirement of a marked formalism that is a consequence of these similarities between the procedure for the formulation of objections and the procedure for the formulation of reservations is justified by the highly significant effects that an objection may have on the reservation and its application as well as on the entry into force and the application of the treaty itself.[78]

(7) This is particularly true of the rules regarding the authorities competent to formulate reservations at the international level and the consequences (or the absence of consequences) of

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[76] Fourth report on the law of treaties (A/CN.4/177), *Yearbook … 1965*, vol. II, pp. 53-54, para. 19.

[77] *Yearbook … 1965*, vol. I, 799th meeting, para. 53.

[78] See article 20, paragraph 4 (b), and article 23, paragraph 3, of the Vienna Conventions.

the violation of internal rules regarding the formulation of reservations, the rules regarding the notification and communication of reservations and the rules regarding the functions of the depositary in this area. These rules would seem to be transposable *mutatis mutandis* to the formulation of objections. Rather than reproducing draft guidelines 2.1.3 (Formulation of a reservation at the international level),[79] 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations),[80] 2.1.5 (Communication of reservations),[81] 2.1.6 (Procedure for communication of reservations)[82] and 2.1.7 (Functions of depositaries)[83] by simply replacing "reservation" with "objection" in the text of the drafts, the Commission considered it prudent to make a general reference in the texts of these draft guidelines[84] which apply *mutatis mutandis* to objections.

2.6.10 Statement of reasons

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

Commentary

(1) Neither of the Vienna Conventions contains a provision requiring States to give the reasons for their objection to a reservation. Furthermore, notwithstanding the link initially established between an objection, on the one hand, and the compatibility of the reservation with the object and purpose of the treaty, on the other hand, Sir Humphrey Waldock never at any point envisaged requiring a statement of the reasons for an objection. This is regrettable.

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[79] *See Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 68-75.

[80] *Ibid*., pp. 75-79.

[81] *Ibid*., pp. 79-83.

[82] See pp. 2-13 above.

[83] *See Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 105-112.

[84] The Commission proceeded in the same manner in draft guidelines 1.5.2 (referred to draft guidelines 1.2 and 1.2.1), 2.4.3 (referred to draft guidelines 1.2.1, 2.4.6 and 2.4.7) and, even more obviously, in 2.5.6 (referred to draft guidelines 2.1.5, 2.1.6 and 2.1.7).

(2) Under the Vienna Convention regime, the freedom to object to a reservation is very broad, and a State or international organization may object to a reservation for any reason whatsoever, irrespective of the validity of the reservation: "No State can be bound by contractual obligations it does not consider suitable."[85] Furthermore, during discussions in the Sixth Committee of the General Assembly, several States indicated that quite often the reasons a State has for formulating an objection are purely political.[86] Since this is the case, stating reasons risks uselessly embarrassing an objecting State or international organization, without any gain to the objecting State or international organization or to the other States or international organizations concerned.

(3) Yet the question is different where a State or international organization objects to a reservation because it considers it invalid (whatever the reason for this position). Leaving aside the possibility that States may have a legal obligation[87] to object to reservations that are incompatible with the object and purpose of a treaty, nevertheless, in a "flexible" treaty regime

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[85] Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967), p. 466.

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

[87] The Netherlands observed that "States parties, as guardians of a particular treaty, appeared to have a moral, if not legal, obligation to object to a reservation that was contrary to the object and purpose of that treaty" (A/C.6/60/SR.16, para. 29). According to this line of reasoning, "a party is required to give effect to its undertakings in good faith and that would preclude it from accepting a reservation inconsistent with the object and purpose of the treaty" (Françoise Hampson, final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), para. 24); Ms. Hampson observed, however, that there did not seem to be a general obligation to formulate an objection to incompatible reservations (*ibid*., para. 30); this is also the Commission's position.

the objection clearly plays a vital role in the determination of the validity of a reservation. In the absence of a mechanism for reservation control, the onus is on States and international organizations to express, through objections, their view, necessarily subjective, on the validity of a given reservation.[88] Such a function can only be fulfilled, however, by objections motivated by considerations regarding the non-validity of the reservation in question. It is difficult to see why an objection formulated for purely political reasons should be taken into account in evaluating the conformity of a reservation with the requirements of article 19 of the Vienna Conventions. Even if only for this reason, it would seem reasonable, even necessary, to indicate to the extent possible the reasons for an objection.

(4) In addition, indicating the reasons for an objection not only allows a reserving State or international organization to understand the views of the other States and international organizations concerned regarding the validity of the reservation but, like the statement of reasons for the reservation itself,[89] also provides important evidence to the monitoring bodies called on to decide on the conformity of a reservation with the treaty. Thus, in the *Loizidou* case, the European Court of Human Rights found confirmation of its conclusions regarding the reservation of Turkey in the declarations and objections made by other States parties to the European Convention on Human Rights.[90] Similarly, in the working paper she submitted to the Sub-Commission on the Promotion and Protection of Human Rights in 2004, Ms. Hampson stated that "in order for a treaty body to discharge its role, it will need to examine, amongst other materials, the practice of the parties to the treaty in question with regard to reservations and

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

[89] See draft guideline 2.1.9 and paragraphs (4) to (6) of the commentary.

[90] *Loizidou v. Turkey*, *Preliminary Objections, Judgment of 23 March 1995*, Series A, vol. 310, pp. 28-29, para. 81. See also the statement of the representative of Sweden on behalf of the Nordic countries in the Sixth Committee (A/C.6/60/SR.14, para. 22).

objections".[91] The Human Rights Committee itself, in its general comment No. 24, which, while demonstrating deep mistrust with regard to the practice of States concerning objections and with regard to the conclusions that one may draw from it in assessing the validity of a reservation, nevertheless states that "an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant".[92]

(5) State practice shows that States often indicate in their objections not only that they consider the reservation in question contrary to the object and purpose of the treaty but also, in more or less detail, how and why they reached that conclusion. At the sixtieth session of the General Assembly, the representative of Italy to the Sixth Committee expressed the view that the Commission should encourage States to make use of the formulas set forth in article 19 of the Vienna Convention, with a view to clarifying their objections.[93]

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

(7) Draft guideline 2.6.10 is worded along the lines of draft guideline 2.1.9 concerning the statement of reasons for reservations, and goes no further than this; it does not specify the point at which the reasons for an objection must be given. Since the same causes produce the same effects,[94] it would nonetheless seem desirable that, to the extent possible, the objecting State or

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[91] Final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42, para. 28); see, more generally, paragraphs 21-35 of this study.

[92] CCPR/C/21/Rev.1/Add.6, para. 17.

[93] A/C.6/60/SR.16, para. 20.

[94] See paragraph (8) of the commentary to draft guideline 2.1.9.

international organization should indicate the reasons for its opposition to the reservation in the instrument giving notification of the objection.

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

An objection to a reservation made by a State or an international organization before a reservation has been confirmed in accordance with draft guideline 2.2.1 does not itself require confirmation.

Commentary

(1) Contrary to what is provided in article 23, paragraph 2, of the Vienna Convention for reservations,[95] an objection does not require formal confirmation by its author if it was made prior to the formal confirmation of the reservation, in accordance with article 23, paragraph 3, of the Vienna Conventions, which states:

> "An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation."

Draft guideline 2.6.11 simply reproduces some of the terms of this provision with the necessary editorial amendments to limit its scope to objections only.

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

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[95] See also draft guideline 2.2.1 (Reservations formulated when signing and formal confirmation) and, for the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 157.

draft article 18, paragraph 3, adopted on second reading in 1966,[96] without explanation or illustration; however, it was presented at that time as *lex ferenda*.[97]

(3) This is a common sense rule: the formulation of the reservation concerns all States and international organizations that are contracting parties or entitled to become parties; acceptances and objections affect primarily the bilateral relations between the author of the reservation and each of the accepting or objecting States or organizations. The reservation is an "offer" addressed to all contracting parties, which may accept or reject it; it is the reserving State or organization that endangers the integrity of the treaty and risks reducing it to a series of bilateral relations. On the other hand, it is not important whether the acceptance or objection is made before or after the confirmation of the reservation: what is important is that the reserving State or organization is aware of its partners' intentions;[98] which is the case if the communication procedure established in article 23, paragraph 1, has been followed.

(4) State practice regarding the confirmation of objections is sparse and inconsistent: sometimes States confirm their previous objections once the reserving State has itself confirmed its reservation, but at other times they refrain from doing so.[99] Although the latter approach seems to be more usual, the fact that these confirmations exist does not invalidate the positive

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[96] *Yearbook ... 1966*, vol. II, p. 208.

[97] "The Commission did not consider that an objection to a reservation made previously to the latter's confirmation would need to be reiterated after that event" (*ibid*., para. (5) of the commentary).

[98] In its advisory opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice described the objection made by a signatory as a "warning" addressed to the author of the reservation (*I.C.J. Reports 1951*, p. 29).

[99] For example, Australia and Ecuador did not confirm their objections to the reservations formulated at the time of the signing of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide by the Byelorussian SSR, Czechoslovakia, Ukraine and the Soviet Union when those States ratified that Convention while confirming their reservations (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2006* (ST/LEG/SER.E/25), vol. I, pp. 131-132 (chap. IV.1)). Similarly, Ireland and Portugal did not confirm the objections they made to the reservation formulated by Turkey at the time of the signing of the 1989 Convention on the Rights of the Child when Turkey confirmed its reservation in its instrument of ratification (*ibid*., pp. 341-342 (chap. IV.11)).

quality of the rule laid down in article 23, paragraph 3: these are precautionary measures that are by no means dictated by a sense of legal obligation (*opinio juris*).

(5) However, some members of the Commission consider that such confirmation is required when a long period of time has elapsed between the formulation of the reservation and the formal confirmation of the reservation. In the opinion of a minority of members who refuse to view declarations made by States or international organizations that are not contracting parties as real objections,[100] such declarations should in all cases be confirmed. This position was not accepted by the Commission, which considers that it is not necessary to make such a distinction for the reasons given in the commentary to draft guideline 2.6.5.[101]

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

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

Commentary

(1) Article 23, paragraph 3, of the Vienna Conventions does not, however, answer the question of whether an objection made by a State or an international organization that, when making it, has yet to express its consent to being bound by the treaty must subsequently be confirmed if it is to produce the effects envisaged. Although Sir Humphrey Waldock did not overlook the possibility that an objection might be formulated by signatory States or by States only entitled to become parties to the treaty,[102] the question of the subsequent confirmation of such a reservation

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[100] See paragraph (3) of the commentary to draft guideline 2.6.5 above.

[101] See paragraphs (4) and (5) of the commentary to draft guideline 2.6.5 above.

[102] See in particular paragraph 3 (b) of the draft article 19 proposed by Sir Humphrey Waldock in his first report on the law of treaties (*Yearbook … 1962*, vol. II, p. 62) or paragraph 6 of the draft article 20 proposed in his fourth report (*Yearbook … 1965*, vol. II, p. 55).

was never raised.[103] A proposal in that regard made by Poland at the Vienna Conference[104] was not considered. Accordingly the Convention has a gap that the Commission should endeavour to fill.

(2) State practice in this regard is all but non-existent. One of the rare examples is provided by the objections formulated by the United States of America to a number of reservations to the 1969 Vienna Convention itself.[105] In its objection to the Syrian reservation, the United States - which has yet to express its consent to be bound by the Convention - specified that it:

> "intends, at such time as it may become a party to the Vienna Convention on the Law of Treaties, *to reaffirm its objection* to the foregoing reservation and to reject treaty relations with the Syrian Arab Republic under all provisions in Part V of the Convention with regard to which the Syrian Arab Republic has rejected the obligatory conciliation procedures set forth in the Annex to the Convention".[106]

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

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

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

[105] The reservations in question are those formulated by the Syrian Arab Republic (point E) and Tunisia (*Multilateral Treaties …*, vol. II, p. 411 (chap. XXIII.1).

[106] *Ibid*., p. 417 (italics added).

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

> "Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, *or they would become effective on ratification*.
>
> [...] The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect."[107]

The Court thereby seemed to accept that an objection automatically takes effect as a result of ratification alone, without the need for confirmation.[108] Nonetheless, it has yet to take a formal stand on this question and the debate has been left open.

(4) It is possible, however, to deduce from the omission from the text of the Vienna Conventions of any requirement that an objection made by a State or an organization prior to ratification or approval should be confirmed that neither the members of the Commission nor the delegates at the Vienna Conference[109] considered that such a confirmation was necessary. The fact that the Polish amendment,[110] which aimed to bring objections in line with reservations in that respect, was not adopted further confirms this argument. These considerations are further strengthened if one bears in mind that, when the requirement of formal confirmation of reservations formulated when signing the treaty, an obligation now firmly enshrined in article 23, paragraph 2, of the Vienna Conventions, was adopted by the Commission, it was more in the

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[107] *I.C.J. Reports 1959*, pp. 28-29 (italics added).

[108] See in this sense F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague, T.M.C. Asser Institut, 1988), p. 137.

[109] *Ibid*.

[110] See footnote 104 above.

nature of progressive development than codification *stricto sensu*.[111] Therefore, the disparity on this score between the procedural rules laid down for the formulation of reservations, on the one hand, and the formulation of objections, on the other, could not have been due to a simple oversight but could reasonably be considered deliberate.

(5) There are other grounds for the non-requirement of formal confirmation of an objection made by a State or an international organization prior to the expression of its consent to be bound by the treaty. A reservation formulated before the reserving State or international organization becomes a contracting party to the treaty should produce no legal effect and will remain a "dead letter" until such a time as the State's consent to be bound by the treaty is effectively given. Requiring formal confirmation of the reservation is justified in this case in particular by the fact that the reservation, once accepted, modifies that consent. The same is not true of objections. Although objections, too, only produce the effects provided for in article 20, paragraph 4, and article 21, paragraph 3, of the Vienna Conventions only when the objecting State or international organization has become a contracting party, they are not without significance even before then. They express their author's opinion of a reservation's validity or admissibility and, as such, may be taken into consideration by the bodies having competence to assess the validity of reservations.[112] Moreover, and on this point the advisory opinion of the International Court of Justice remains valid, objections give notice to reserving States with regard to the attitude of the objecting State *vis-à-vis* their reservation. As the Court observed:

> "The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal

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[111] See Sir Humphrey Waldock's first report (A/CN.4/144, *Yearbook … 1962*, vol. II, p. 66), paragraph (11) of the commentary to draft article 17; D.W. Greig, "Reservations: Equity as a balancing factor?", *Australian Yearbook of International Law*, 1995, p. 28; F. Horn, *op. cit.* (footnote 108 above), p. 41. See also the commentary to draft guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 157, pp. 467-468, para. (8) of the commentary.

[112] See paragraph (4) of the commentary to draft guideline 2.6.10 above.

effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation."[113]

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

(6) Moreover, non-confirmation of the objection in such a situation poses no problem of legal security. The objections formulated by a signatory State or by a State entitled to become a party to the treaty must, like any notification or communication relating to the treaty,[114] be made in writing and communicated and notified, in the same way as an objection emanating from a party. Furthermore, unlike a reservation, an objection modifies traditional relations only with respect to the bilateral relations between the reserving State - which has been duly notified - and the objecting State. The rights and obligations assumed by the objecting State *vis-à-vis* other States parties to the treaty are not affected in any way.

(7) As convincing as these considerations might seem, the Commission nevertheless felt it necessary to draw a distinction between two different cases: objections formulated by signatory States or international organizations and objections formulated by States or international organizations that had not yet signed the treaty at the time the objection was formulated. It seems that by signing the treaty the first category of States and international organizations enjoys legal status *vis-à-vis* the instrument in question,[115] while the others have the status of third parties.

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[113] *I.C.J. Reports 1951*, p. 29.

[114] See article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention.

[115] See in particular article 18, subparagraph (a), of the Vienna Conventions.

Even though such third parties can formulate an objection to a reservation,[116] the Commission is of the view that formal confirmation of such objections would be appropriate at the time the author State or international organization signs the treaty or expresses its consent to be bound by it. This would seem all the more necessary in that a significant amount of time can elapse between the time an objection is formulated by a State or international organization that had not signed the treaty when it made the objection and the time at which the objection produces its effects.

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

2.6.13 Time period for formulating an objection

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

Commentary

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

> "For the purposes of paragraphs 2 and 4,[117] and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international

[116] See draft guideline 2.6.5 above.

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

organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

(2) Draft guideline 2.6.13 isolates those elements of the provision having to do specifically with the time period within which an objection can be formulated.[118] Once again, a distinction is drawn between two possible situations.

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

(4) The 12-month period established in article 20, paragraph 5, was the result of an initiative by Sir Humphrey Waldock and was not chosen arbitrarily. By proposing such a time period, he did, however, depart from - the fairly inhomogeneous - State practice at that time. The Special Rapporteur had found time periods of 90 days and of six months in treaty practice,[119] but preferred to follow the proposal of the Inter-American Council of Jurists.[120] In that regard, he noted the following:

"But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a

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[118] The Commission notes that from a strictly logical standpoint it would have been more appropriate to speak of the time period during which an objection can be "made". It nevertheless chose to remain faithful to the letter of article 20, paragraph 5, of the Vienna Conventions.

[119] First report on the law of treaties (A/CN.4/144), *Yearbook … 1962*, vol. II, pp. 66-67, para. 14.

[120] *Ibid*., p. 67, para. 16.

general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed."[121]

(5) The 12-month period within which an objection must be formulated in order to reverse the presumption of acceptance, provided for in article 20, paragraph 5, of the Vienna Conventions, did not, however, seem to be a well-established customary rule at the time of the Vienna Conference; nevertheless, it is still "the most acceptable" period.[122] F. Horn noted the following in this regard:

"A too long period could not be admitted, because this would result in a protracted period of uncertainty as to the legal relations between the reserving State and the confronted parties. Nor should the period be too short. That again would not leave enough time for the confronted States to undertake the necessary analysis of the possible effects a reservation may have for them."[123]

(6) In fact, this time period - which clearly emerged from the progressive development of international law when the Vienna Convention was adopted - has never fully taken hold as a customary rule that is applicable in the absence of text.[124] For a long time, the practice of the Secretary-General as depositary of multilateral treaties was difficult to reconcile with the

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[121] *Ibid*.

[122] P.-H. Imbert, *op. cit.*, p. 107. D.W. Greig considers that the 12-month period established in article 20, paragraph 5, of the Vienna Convention is at least "a guide to what is reasonable" ("Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law*, 1995, p. 128).

[123] Frank Horn, *op. cit.*, p. 126.

[124] See Daniel Müller, Commentary on article 20 (1969) in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article* (Brussels, Bruylant, 2006), p. 808, para. 16. See also Giorgio Gaja, "Unruly Treaty Reservations", in *Le Droit international à l'heure de sa codification: Études en l'honneur de Roberto Ago* (Milan, A. Giuffrè, 1987), p. 324; D.W. Greig, *op. cit.*, pp. 127 ff.; Anthony Aust, *Modern Treaty Law and Practice* (Cambridge, Cambridge University Press, 2000), p. 127.

provisions of article 20, paragraph 5, of the Vienna Conventions.[125] This is because in cases where the treaty was silent on the issue of reservations, the Secretary-General traditionally considered that, if no objection to a duly notified reservation had been received within 90 days, the reserving State became a contracting State.[126] However, having decided that this practice delayed the entry into force of treaties and their registration,[127] the Secretary-General abandoned this practice and now considers any State that has formulated a reservation to be a contracting State as of the date of effect of the instrument of ratification or accession.[128] In order to justify this position, the Secretary-General has pointed out that it is unrealistic to think that the conditions set out in article 20, paragraph 4 (b), can be met, since in order to preclude the entry into force of the treaty for the reserving State, all the contracting Parties would have had to object to the reservation. The Secretary-General's comments are, therefore, less about the presumption established in paragraph 5 than about the unrealistic nature of the three subparagraphs of paragraph 4. In 2000, the Legal Counsel of the United Nations also stated that he was in favour of the 12-month period specified in paragraph 5, which now applies to the - necessarily unanimous - acceptance of late reservations.[129] Moreover, State practice shows that

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[125] P.-H. Imbert, "*À l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités. Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire*", *Annuaire Français de Droit International* (AFDI), vol. XXVI (1980), pp. 524-541; G. Gaja, *op. cit.*, pp. 323-324; R. Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del régimen de Viena* (Universidad de Murcia, 2004), pp. 245-250; D. Müller, *op. cit*., pp. 821-822, para. 48.

[126] *Summary of practice of the Secretary-General as depositary of multilateral treaties* (ST/LEG/8), p. 55, para. 185.

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

[128] *Ibid.*, pp. 54-55, paras. 184-187.

[129] Memorandum from the Legal Counsel of the United Nations addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000. See paragraphs (8) and (9) of the commentary to draft guideline 2.3.2, *Yearbook … 2001*, vol. II, Part Two, p. 190. The practice of the Council of Europe regarding the acceptance of late reservations, however, is to give contracting States a period of only nine months to formulate an objection (Jörg Polakiewicz, *Treaty-Making in the Council of Europe* (Council of Europe Publications, 1999), p. 102).

States formulate objections even if the 12-month period specified in article 20, paragraph 5, has elapsed. Whatever uncertainties there may be regarding the "positive quality" of the rule with regard to general international law, the rule is retained by the Vienna Conventions, and modifying it for the purposes of the Guide to Practice would undoubtedly give rise to more disadvantages than advantages: according to the practice adopted by the Commission during its work on reservations, there should be good reason for departing from the wording of the provisions of the Conventions on the law of treaties; surely no such reason exists in the present case.

(7) For the same reason, while the expression "unless the treaty otherwise provides" is self-evident, given that all the provisions of the Vienna Conventions are of a residuary, voluntary nature and apply only if the treaty does not otherwise provide, the Commission felt it would be useful to retain draft guideline 2.6.13. A review of the *travaux préparatoires* of article 20, paragraph 5, of the 1969 Vienna Convention in fact explains why this expression was included and thus justifies its retention. Indeed, this phrase ("unless the treaty otherwise provides") was included in response to an amendment proposed by the United States of America.[130] The United States representative to the Conference explained that an amendment had been proposed because

> "[t]he Commission's text seemed to prevent the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months".[131]

Thus the United States amendment was not directed specifically at the 12-month period established by the Commission, but sought only to make it clear that it was merely a voluntary residual rule that in no way precluded treaty negotiators from establishing a different period.[132]

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[130] A/CONF.39/C.1/L.127, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 136.

[131] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Documents of the Conference, Summary records* (A/CONF.39/11), 21st meeting, 10 April 1968, p. 108, para. 13.

[132] José María Ruda argues, however, that the United States amendment emphasizes the "residual character of Article 20, paragraph 5" ("Reservations to Treaties", *Recueil des cours de l'Académie de droit international de la Haye* (RCADI), vol. 146, 1975-III, p. 185).

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

(9) This solution of drawing a distinction between contracting States and those that have not yet acquired this status *vis-à-vis* the treaty was contemplated in J.L. Brierly's proposals but was not taken up by either H. Lauterpacht or G.G. Fitzmaurice nor, curiously, retained by the International Law Commission in the articles adopted on first reading in 1962,[133] even though Sir Humphrey had included it in the draft article 18 presented in his 1962 report.[134] In the end, it was reintroduced during the second reading in order to address the criticism voiced by the Australian Government, which was concerned about the practical problems that might arise when the principle of tacit acceptance was actually applied.[135]

(10) However, this solution in no way places States and international organizations that are not contracting parties at the time the reservation is notified in a position of inequality *vis-à-vis* the contracting parties. On the contrary, one should not lose sight of the fact that under article 23, paragraph 1, any reservation that has been formulated must be notified not only to the contracting parties but also to other States and international organizations entitled to become parties to the treaty.[136] States and international organizations "entitled to become parties to the

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[133] Indeed, draft article 19, paragraph 3, presented in the Commission's report to the General Assembly concerned only implied acceptance in the strict sense of the word. See *Yearbook ... 1962*, vol. II, p. 176.

[134] A/CN.4/144, *Yearbook … 1962*, vol. II, pp. 61-62.

[135] Fourth report (A/CN.4/177), *Yearbook … 1965*, vol. II, p. 45 and p. 53, para. 17.

[136] See also draft guideline 2.1.5, first paragraph.

treaty" thus have all the information they need with regard to reservations to a specific treaty and also have a period for reflection that is at least as long[137] as that given to contracting parties (12 months).

2.6.14 Conditional objections

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

Commentary

(1) Draft guideline 2.6.13 provides only a partial response with respect to the date from which an objection to a reservation may be formulated. It does state that the time period during which the objection may be formulated commences when the reservation is notified to the State or international organization that intends to make an objection, in accordance with draft guideline 2.1.6, which implies that the objection may be formulated as from that date. This does not necessarily mean, however, that it may not be made earlier. Similarly, the definition of objections adopted by the Commission in draft guideline 2.1.6 provides that a State or an international organization may make an objection "*in response to a reservation to a treaty formulated* by another State or another international organization",[138] which would seem to suggest that an objection may be made by a State or an international organization only after a reservation has been *formulated*. *A priori*, this would seem quite logical, but in the Commission's view this conclusion is hasty.

(2) State practice in fact demonstrates that States also raise objections for "pre-emptive" purposes. Chile, for example, formulated the following objection to the 1969 Vienna Convention on the Law of Treaties:

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[137] Draft article 18, paragraph 3 (b), in Sir Humphrey Waldock's first report formulated the same rule as an exception to observance of the 12-month period, stipulating that a State that was not a party to the treaty "shall not be deemed to have consented to the reservation if it shall subsequently [i.e. after the 12-month period has elapsed] lodge an objection to the reservation, when executing the act or acts necessary to qualify it to become a party to the treaty" (*Yearbook … 1962*, vol. II, p. 61).

[138] Italics added.

> "The Republic of Chile formulates an objection to the reservations which have been made or may be made in the future relating to article 62, paragraph 2, of the Convention."[139]

In the same vein, Japan raised the following objection:

> "The Government of Japan objects to any reservation intended to exclude the application, wholly or in part, of the provisions of article 66 and the Annex concerning the obligatory procedures for settlement of disputes and does not consider Japan to be in treaty relations with any State which has formulated or will formulate such reservation, in respect of those provisions of Part V of the Convention regarding which the application of the obligatory procedures mentioned above are to be excluded as a result of the said reservation."[140]

However, in the second part of this objection the Japanese Government noted that the effects of this objection should apply *vis-à-vis* the Syrian Arab Republic and Tunisia. It went on to reiterate its declaration to make it clear that the same effects should be produced *vis-à-vis* the German Democratic Republic and the Union of Soviet Socialist Republics, which had formulated reservations similar to those of the Syrian Arab Republic and Tunisia.[141] Other States, for their part, have raised new objections in reaction to every reservation to the same provisions newly formulated by another State party.[142]

(3) The Japanese objection to the reservations formulated by the Government of Bahrain and the Government of Qatar to the 1961 Vienna Convention on Consular Relations also states that

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[139] *Multilateral Treaties* ..., vol. II, p. 421 (chap. XXIII.1).

[140] *Ibid*., pp. 413-414.

[141] *Ibid*.

[142] See, for example, the declarations and objections of Germany, the Netherlands, New Zealand, the United Kingdom and the United States to the comparable reservations of several States to the 1969 Vienna Convention (*ibid*., pp. 413-417).

not only are the two reservations specifically concerned not regarded as valid, but that this [Japan's] "position is applicable to any reservations to the same effect to be made in the future by other countries".[143]

(4) The objection of Greece regarding the Convention on the Prevention and Punishment of the Crime of Genocide also belongs in the category of advance objections. It states:

> "We further declare that we have not accepted and do not accept any reservation which has already been made or which may hereafter be made by the countries signatory to this instrument or by countries which have acceded or may hereafter accede thereto."[144]

A general objection was also raised by the Netherlands concerning the reservations to article IX of the same convention. Although this objection lists the States that had already made such a reservation, it concludes: "The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which *will* make such reservation a party to the Convention." That objection was, however, withdrawn in 1996 with respect to the reservations made by Malaysia and Singapore and, on the same occasion, withdrawn in relation to Hungary, Bulgaria and Mongolia which had, for their part, withdrawn their reservations.[145]

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

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

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[143] *Multilateral Treaties* ..., vol. I, p. 96 (chap. III.3).

[144] *Ibid*., p. 132 (chap. IV.1). Despite this general objection, Greece raised two further objections with regard to the reservation of the United States (*ibid*.).

[145] *Ibid*.

situation is rather similar to that of a reservation formulated by a State or international organization that is a signatory but not yet a party, against which another State or organization has raised an objection; objections of this kind do not produce their effects until the reserving State expresses its consent to be bound by the treaty.[146] Similarly, a pre-emptive objection produces no effect so long as no reservation relating to its provisions is formulated; it nevertheless constitutes notice that its author will not accept certain reservations. As the International Court of Justice noted, such notice safeguards the rights of the objecting State and warns other States intending to formulate a corresponding reservation that such a reservation will be met with an objection.[147]

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

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

2.6.15 Late objections

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

Commentary

(1) Just as it is possible to formulate an objection in advance, there is nothing to prevent States or international organizations from formulating objections late, in other words after the end of

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[146] See draft guideline 2.6.12.

[147] See the citations from the Court's advisory opinion of 1951 in paragraph (5) of the commentary to draft guideline 2.6.12.

the 12-month period (or any other time period specified by the treaty), or after the expression of consent to be bound in the case of States and international organizations that accede to the treaty after the end of the 12-month period.[148]

(2) This practice is far from uncommon. In a study published in 1988, F. Horn found that of 721 objections surveyed, 118 had been formulated late,[149] and this figure has since increased.[150] Many examples can be found[151] relating to human rights treaties,[152] but also to treaties covering subjects as diverse as the law of treaties,[153] the fight against terrorism,[154]

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[148] See draft guideline 2.6.13.

[149] F. Horn, *op. cit.*, p. 206. See also R. Riquelme Cortado, *op. cit*., pp. 264-265.

[150] *Ibid*., p. 265.

[151] The examples cited hereafter are solely cases identified by the Secretary-General and, consequently, notified as "communications". The study is complicated by the fact that, in the collection of multilateral treaties deposited with the Secretary-General, the date indicated is not that of notification but of deposit of the instrument containing the reservation.

[152] See the very comprehensive list drawn up by R. Riquelme Cortado, *op. cit*., p. 265 (note 316).

[153] *Ibid*., p. 265 (note 317).

[154] See the late objections to the declaration made by Pakistan (13 August 2002) upon accession to the 1997 International Convention for the Suppression of Terrorist Bombings: Republic of Moldova (6 October 2003), Russian Federation (22 September 2003) and Poland (3 February 2004) (*Multilateral Treaties* …, vol. II, pp. 151-152, note 7 (chap. XVIII.9, note 5)); or the late objections to the reservations formulated by the following States in regard to the 1999 International Convention for the Suppression of the Financing of Terrorism: reservation by Belgium (17 May 2004): Russian Federation (7 June 2005) and Argentina (22 August 2005); declaration by Jordan (28 August 2003): Belgium (24 September 2004), Russian Federation (1 March 2005), Japan (14 July 2005), Argentina (22 August 2005), Ireland (23 June 2006), Czech Republic (23 August 2006); reservation by the Syrian Arab Republic (24 April 2005): Ireland (23 June 2006), Czech Republic (23 August 2006); reservation by the Democratic People's Republic of Korea (12 November 2001, at the time of signature; as the State has not ratified the Convention, the reservation has not been confirmed): Republic of Moldova (6 October 2003), Germany (17 June 2004), Argentina (22 August 2005) (*ibid*., pp. 197-200, notes 6, 7, 11 and 12 (chap. XVIII.11)).

the Convention on the Safety of United Nations and Associated Personnel[155] and the 1998 Rome Statute of the International Criminal Court.[156]

(3) This practice should certainly not be condemned. On the contrary, it allows States and international organizations to express - in the form of objections - their views as to the validity of a reservation, even when the reservation was formulated more than 12 months earlier, and this practice has its advantages, even if such late objections do not produce any immediate legal effects. As it happens, the position of the States and international organizations concerned regarding the validity of a reservation is an important element for the interpreting body, whether a monitoring body or international court, to take into consideration when determining the validity of the reservation. Furthermore, an objection, even a late objection, is important in that it may lead to a reservations dialogue.[157]

(4) However, it follows from article 20, paragraph 5, of the Vienna Conventions that if a State or international organization has not raised an objection by the end of the 12-month time period following the formulation of the reservation or by the date on which it expresses its consent to be bound by the treaty, it is considered to have accepted the reservation, with all the consequences that that entails. Without going into the details of the effects of this type of tacit acceptance, suffice it to say that the effect of such an acceptance is, in principle, that the treaty enters into

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[155] See the late objections by Portugal (15 December 2005) concerning the declaration by Turkey (9 August 2004) (*ibid*., p. 130, note 5 (chap. XVIII.8)).

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

[157] Following the late objection by Sweden, Thailand withdrew its reservation in respect of the Convention on the Rights of the Child (*ibid*., vol. I, p. 345, note 15 (chap. IV.11)). Roberto Baratta considered that "objections are a tool used not only and not chiefly to express disapproval of the reservation of another and sometimes to point out its incompatibility with further obligations under international law but also and mainly to induce the author of the reservation to reconsider and possibly to withdraw it" (*op. cit*., pp. 319-320).

force between the reserving State or international organization and the State or organization considered as having accepted the reservation. This result cannot be called into question by an objection formulated several years after the treaty has entered into force between the two States or international organizations without seriously affecting legal security. The practice of the Secretary-General as the depositary of multilateral treaties confirms this view. The Secretary-General receives late objections and communicates them to the other States and organizations concerned, not as objections but as "communications".[158]

(5) States seem to be aware that a late objection cannot produce the normal effects of an objection made in good time. The Government of the United Kingdom, in its objection (made within the required 12-month period) to the reservation of Rwanda to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, said that it wished "to place on record that they take the same view [in other words, that they were unable to accept the reservation] of the similar reservation [to that of Rwanda] made by the German Democratic Republic as notified by the circular letter [...] of 25 April 1973".[159] It is clear that the British objection to the reservation of the German Democratic Republic was late. The careful wording of the objection shows that the United Kingdom did not expect it to produce the legal effects of an objection formulated within the period specified by article 20, paragraph 5, of the 1969 Vienna Convention.

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[158] *Summary of practice* … (ST/LEG/8, New York, 1997, para. 213). In *Multilateral Treaties Deposited with the Secretary-General*, however, several examples of late objections are given in the section "Objections". This is the case, for example, for the objection raised by Japan (27 January 1987) to the reservations formulated by Bahrain (2 November 1971) and Qatar (6 June 1986) to the Vienna Convention on Diplomatic Relations. While the objection was very late concerning the reservation made by Bahrain, it was received in good time concerning the reservation made by Qatar; it was no doubt for that reason that the objection was communicated as such, and not simply as a "communication" (*Multilateral Treaties* …, vol. I, p. 96 (chap. III.3)).

[159] *Ibid.*, p. 133 (chap. IV.1).

(6) The communication of 21 January 2002 by the Peruvian Government in relation to a late objection by Austria[160] - only a few days late - concerning its reservation to the 1969 Vienna Convention on the Law of Treaties is particularly interesting:

> "[The Government of Peru refers to the communication made by the Government of Austria relating to the reservation made by Peru upon ratification]. In this document, Member States are informed of a communication from the Government of Austria stating its objection to the reservation entered in respect of the Vienna Convention on the Law of Treaties by the Government of Peru on 14 September 2000 when depositing the corresponding instrument of ratification.
>
> As the [Secretariat] is aware, article 20, paragraph 5, of the Vienna Convention states that 'a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation (...).' The ratification and reservation by Peru in respect of the Vienna Convention were communicated to Member States on 9 November 2000.
>
> Since the communication from the Austrian Government was received by the Secretariat on 14 November 2001 and circulated to Member States on 28 November 2001, the Peruvian Mission is of the view that there is tacit acceptance on the part of the Austrian Government of the reservation entered by Peru, the 12-month period referred to in article 20, paragraph 5, of the Vienna Convention having elapsed without any objection being raised. The Peruvian Government considers the communication from the Austrian Government as being without legal effect, since it was not submitted in a timely manner."[161]

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[160] This late objection was notified as a "communication" (*ibid.*, vol. II, pp. 419-420, note 19 (chap. XXIII.1)).

[161] *Ibid*.

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

(7) It follows from the above that while a late objection may constitute an important element in determining the validity of a reservation, it cannot produce the "normal" effects of an objection of the type provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions.[162]

(8) Some members of the Commission feel that these late declarations do not constitute "objections", given that they are incapable of producing the effects of an objection. Terms such as "declaration" or "communication" have been proposed. The Commission considers, however, that such declarations correspond to the definition of objections contained in draft guideline 2.6.1 as it relates to draft guideline 2.6.13. As the commentary to draft guideline 2.6.5 notes,[163] an objection (like a reservation) is defined not by the effects it produces but by those that its author wishes it to produce.

(9) The wording of draft guideline 2.6.15 is sufficiently flexible to accommodate established State practice where late reservations are concerned. While it does not prohibit States or international organizations from formulating objections after the time period required by draft guideline 2.6.13 has elapsed, it spells out in the clearest of terms that they do not produce the effects that their authors generally expect them to.

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[162] This does not prejudge the question of whether, and how, the reservation presumed to be accepted produces the "normal" effect provided for under article 21, paragraph 1, of the Vienna Conventions.

[163] See in particular paragraph (4) of the commentary.