



General Assembly

Distr.: Limited
4 August 2011

Original: English and French

International Law Commission

Sixty-third session

Geneva, 26 April–3 June and 4 July–12 August 2011

Draft report of the International Law Commission on the work of its sixty-third session

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Chapter IV Reservations to treaties

Addendum

Introduction

(1) The Guide to Practice on Reservations to Treaties consists of guidelines that have been adopted by the International Law Commission and are reproduced below, accompanied by commentaries. Although they do not have the same weight as the guidelines themselves, the commentaries are an integral part of the Guide and an indispensable supplement to the guidelines, which they expand and explain. No summary, however long, could cover all the questions that may arise on this highly technical and complex subject or to provide all useful explanations for practitioners.¹

(2) As its name indicates, the purpose of the Guide to Practice is to provide assistance to practitioners of international law, who are often faced with sensitive problems concerning the permissibility and effects of reservations to treaties — a matter on which the rules contained in the 1969, 1986 and 1978 Vienna Convention have gaps and are often unclear — and, to a lesser extent, interpretative declarations in respect of treaty provisions, of which these Conventions make no mention whatsoever. Despite frequent assumptions to the contrary, its purpose is not — or, in any case, not only — to offer the reader a guide to past (and often uncertain) practice in this area, but rather to direct the user towards solutions that are consistent with existing rules (where they exist) or to the solutions that seem most likely to result in the progressive development of such rules.

(3) In that connection, it should be stressed that while the Guide to Practice, as an instrument — or “official source” — is by no means binding, the extent to which the

¹ The present Guide contains 199 [180] guidelines.

various norms set out in the guidelines and the various legal norms embodied therein are compulsory in nature varies widely:²

- Some of them simply reproduce provisions of the Vienna Conventions which set out norms that were either uncontroversial³ at the time of their inclusion in the Conventions⁴ or have since become so; as such, while not compulsory in nature,⁵ they are nevertheless required of all States or international organizations, whether or not they are parties to the Conventions;
- Other rules contained in the Vienna Conventions are binding on the parties thereto, but their customary nature is open to question;⁶ reproducing them in the Guide to Practice should help establish them as customary rules;
- In some cases, guidelines included in the Guide supplement Convention provisions that are silent on modalities for their implementation but these rules are, in themselves, indisputably customary in nature⁷ or are required for obvious logical reasons;⁸
- In other cases, the guidelines address issues on which the Conventions are silent but set out rules that are clearly customary in nature;⁹
- At times, the rules contained in the guidelines are clearly set out *de lege ferenda*¹⁰ and, in some cases, are based on practices that have developed in the margins of the Vienna Conventions;¹¹

² This range is too great, and the distribution of guidelines among the various categories is too imprecise, to make it possible to follow a frequent suggestion — made, *inter alia*, during discussions in the Sixth Committee of the General Assembly — that a distinction should be made between guidelines reflecting *lex lata* and those based on *lege ferenda*.

³ This is the case, for example, of the fundamental rule that a State or international organization may not formulate a reservation that is incompatible with the object and purpose of the treaty; it is set out in article 19 (c) of the 1969 and 1986 Conventions and reproduced in guideline 3.1.

⁴ See, for example, guideline 2.5.1 (Withdrawal of reservations), which reproduces the rules set out in article 22, paragraph 1, and article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions, respectively.

⁵ The rule set out in guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), which reproduces, *mutatis mutandis*, article 23, paragraph 2, of the Vienna Conventions, appears to have acquired customary status since the adoption of the 1969 Convention.

⁶ This is largely true of guidelines 2.1.3 (Formulation of a reservation at the international level); 2.1.5 (Communication of reservations), which reproduces, *mutatis mutandis*, the wording of articles 7 and 23 of the 1986 Vienna Convention; and 2.6.13 [2.6.12] (Time period for formulating an objection).

⁷ The definition of reservations “determined” by guideline 3.1.2 may be said to have acquired customary status. See also guideline 3.1.13 [3.1.5.7] (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty).

⁸ See, for example, guideline 2.8.2 [2.8.7] (Unanimous acceptance of reservations), which draws the obvious conclusion from article 20, paragraph 3, of the 1969 and 1986 Conventions.

⁹ See, for example, guideline 4.4.2 (Absence of effect on rights and obligations under customary international law).

¹⁰ See, for example, guidelines 1.2.2 [1.2.1] (Interpretative declarations formulated jointly) and 3.4.2 (Permissibility of an objection to a reservation).

¹¹ See, for example, guidelines 4.2.2 (Effect of the establishment of a reservation on the entry into force of the treaty) and 4.3.6 [4.3.7] (Effects of an objection on provisions other than those to which the reservation relates — objections with “intermediate effect”).

- Other rules are simply recommendations and are meant only to encourage.¹²

(4) This last category of the guidelines highlights one of the key characteristics of the Guide to Practice. Such provisions would not have been included in a traditional set of draft articles intended to be transformed, if appropriate, into a treaty: treaties are not drafted in the conditional tense.¹³ But the problem here is somewhat different: as the title and the word “guidelines” indicate, it is not a binding instrument but a *vade mecum*, a “toolbox” in which the negotiators of treaties and those responsible for implementing them should find answers to the practical questions raised by reservations, reactions to reservations and interpretative declarations on the understanding that under positive law, these answers may be more or less correct, depending on the question, and that the commentaries indicate doubts that may exist as to the correctness or appropriateness of a solution.

(5) In light of these characteristics, it goes without saying that the rules set out in the Guide to Practice in no way prevent States and international organizations from setting aside, by mutual agreement, those that they consider inappropriate to the purposes of a given treaty. Like the Vienna rules themselves, those set out in the Guide are, at best, residual and voluntary. In any event, since none of them has a binding or *jus cogens* nature, a derogation to which all interested States (or international organizations) consent is always an option.

(6) In a consensus decision reached in 1995 and never subsequently challenged, the Commission considered that there was no reason to modify or depart from the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions¹⁴ in drafting the Guide to Practice, which incorporates all of them. But this also had implications for the very concept of the Guide and, in particular, for the commentaries to the guidelines.

(7) In so far as the intent is to preserve and apply the Vienna rules, it was necessary to clarify them. For this reason, the commentaries reproduce extensively the *travaux préparatoires* to the three Conventions, which help clarify their meaning and explain the gaps contained therein.

(8) Generally speaking, the commentaries are long and detailed. In addition to an analysis of the *travaux préparatoires* to the Vienna Conventions, they include a description of the relevant jurisprudence, practice and doctrine¹⁵ and explanations of the wording that was ultimately adopted; these commentaries provide numerous examples. Their length, which has often been criticized, appears necessary in light of the highly technical and complex nature of the issues raised. The Commission hopes that practitioners will indeed find answers to any questions that arise.¹⁶

(9) The Guide to Practice is divided into five parts (numbered 1 to 5), which follow a logical order:

¹² These are always drafted in the conditional tense; see, for example, guidelines 2.1.9 (Statement of reasons) [Statement of reasons for reservations] and 2.5.3 (Periodic review of the usefulness of reservations).

¹³ There may be exceptions to this; see article 7 of the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, concluded in Ramsar (Islamic Republic of Iran), and article 16 of the 2004 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; they are rarely justified.

¹⁴ *Yearbook ... 1995*, vol. II, Part Two, para. 467.

¹⁵ As considerable time had passed between the inclusion of the topic in the Commission’s agenda and the final adoption of the Guide to Practice, the commentaries were reviewed and, to the extent possible, updated as at 31 December 2010.

¹⁶ It is also for this reason that the Commission did not hesitate to allow a certain amount of repetition to remain in the commentaries in order to facilitate consultation and use of the Guide to Practice.

- Part 1 is devoted to the definition of reservations and interpretative declarations and to the distinction between these two types of unilateral statement; it also includes an overview of various unilateral statements, made in connection with a treaty, that are neither reservations nor interpretative declarations and possible alternatives to both; as expressly stated in guideline 1.6 [1.8], “The[se] definitions ... are without prejudice to the validity and [legal] effects” of the statements covered by Part 1;
- Part 2 sets out the form and procedure to be used in formulating reservations and interpretative declarations and reactions thereto (objections to and acceptances of reservations and approval or recharacterization of, or opposition to, interpretative declarations);
- Part 3 concerns the permissibility of reservations and interpretative declarations and reactions thereto and sets out the criteria for the assessment of permissibility; these are illustrated by examples, with commentary, of the types of reservations that most often give rise to differences of opinion among States regarding their permissibility. Some guidelines also specify the modalities for assessing the permissibility of reservations and the consequences of their impermissibility;
- Part 4 is devoted to the legal effects produced by reservations and interpretative declarations, depending on whether they are valid (in which case a reservation is “established” if it has been accepted) or not; this part also analyses the effects of objections to and acceptances of reservations;
- Part 5 supplements the only provision of the 1978 Vienna Convention on Succession of States in respect of Treaties that deals with reservations — article 20 on the fate of reservations in the case of succession of States by a newly independent State — and extrapolates and adapts solutions for cases of uniting or separation of States; this last part also covers the issues raised by objections to or acceptances of reservations and by interpretative declarations in relation to succession of States;
- Lastly, two annexes reproduce the text of the recommendations adopted by the Commission on the subject of, on the one hand, the reservations dialogue and, on the other, technical assistance and assistance with the settlement of differences of view concerning reservations.

(10) Within each part, the guidelines are divided into sections (introduced by a two-digit number where the first represents the part and the second the section within that part¹⁷). In principle, the guidelines carry a three-digit number within each section.¹⁸

¹⁷ For example, section 3.4 deals with the “Permissibility of reactions to reservations”; the number 3 indicates that it falls under Part 3 and the number 4 refers to section 4 of that Part. Where a section is introduced by a guideline of a very general nature that covers its entire content, that guideline has the same title and the same number as the section itself (this is true, for example, of guideline 3.5 (“Permissibility of an interpretative declaration”).

¹⁸ In the rare case of the guidelines designed to illustrate, through examples, the manner of determining a reservation’s compatibility with the object and purpose of the treaty (the subject of guideline 3.1.6 [3.1.5]), these illustrative guidelines have a four-digit number. Thus, in the case of guideline 3.1.6.1 [3.1.5.2] (Vague and general reservations), the number 3 refers to Part 3; the first number 1 refers to section 1 of this part (“Permissible reservations”); the number 6 [5] refers to the more general guideline 3.1.6 [3.1.5] (Determination of the object and purpose of the treaty) and the second number 1 indicates that this is the first example illustrating that general guideline.