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Reservations to treaties

Comments and observations received from Governments

I. Introduction

1. At its sixty-second session (2010), the International Law Commission completed the provisional adoption of the set of draft guidelines constituting the Guide to Practice on Reservations to Treaties.[1] The Commission indicated, in its report to the General Assembly, that it intended to adopt the final version of the Guide to Practice during its sixty-third session (2011) and that, in so doing, it would take into consideration the observations made, since the beginning of the examination of the topic, by States, international organizations and the organs with which the Commission operates, together with any further observations received by the secretariat of the Commission before 31 January 2011.[2] Also at its sixty-second session, the Commission indicated in its report that it would particularly welcome comments from States and international organizations on the draft guidelines adopted that year, and drew their attention in particular to the draft guidelines in sections 4.2 (Effects of an established reservation) and 4.5 (Consequences of an invalid reservation) of the Guide to Practice.[3]

2. In paragraph 3 of its resolution 65/26 of 6 December 2010, the General Assembly drew the attention of Governments to the importance for the Commission of having their views on the various aspects of, inter alia, the topic "Reservations to treaties", in particular on all the specific issues identified, with regard to that topic, in chapter III of the Commission's report on its sixty-second session. Furthermore, in paragraph 4 of the same resolution, the Assembly invited Governments to submit

[1] See A/65/10, para. 45. The text of the entire set of draft guidelines as provisionally adopted by the Commission is reproduced in paragraph 105 of the Commission's report (A/65/10), where reference is also made, in footnotes, to the relevant portions of the reports of the Commission reproducing the text of the commentaries to the various draft guidelines constituting the Guide to Practice.

[2] A/65/10, para. 45.

[3] Ibid., para. 25.

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to the secretariat of the Commission, by 31 January 2011, any further observations on the entire set of draft guidelines constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission at its sixty-second session, with a view to finalizing the Guide at the sixty-third session.

3. The present report reproduces comments and observations that were received by the secretariat of the International Law Commission from the Governments of the following States: El Salvador (dated 6 January 2011); Portugal (6 January); Bangladesh (17 January); Australia (31 January); Finland (31 January); Germany (31 January); Norway (1 February); Switzerland (1 February); Austria (9 February); and the United States of America (14 February). Any additional replies will be reproduced in an addendum to the present document.

4. The comments and observations reproduced below are organized thematically, starting with general comments and observations, and continuing with comments and observations on specific sections of the Guide to Practice and on specific draft guidelines.

II. Comments and observations received from Governments

A. General comments and observations

Australia

[Original: English]

5. Australia welcomes the International Law Commission's draft guidelines constituting the Guide to Practice on Reservations to Treaties which were provisionally adopted at its sixty-second session. Australia would like to express its gratitude to the Commission for the work undertaken in producing the draft guidelines as reflected in the report of the Commission (A/65/10). Australia is of the view that the draft guidelines will have an important and practical role for States in establishing and maintaining treaty relationships by clarifying one of the most difficult issues of treaty law, namely the effects of a reservation and an acceptance or objection thereof. We have some concerns with the guidelines in their current form and hope that our comments below will assist in their finalization by the Commission.

[…]

6. Australia […] congratulates the Commission on its achievements to date. We hope these comments will assist the Commission as it seeks to finalize the guidelines with a view to their adoption at its sixty-third session. The Commission's Guide to Practice, together with its commentaries, should prove to be of great benefit to States and international organizations.

Austria

[Original: English]

7. Austria's previous statements during the debates in the Sixth Committee of the General Assembly concerning the work of the Commission on the topic "Reservations to treaties" […] continue to reflect Austria's position in detail. The

present comments focus on those areas Austria considers especially important, looking at the guidelines as a whole from today's perspective. In addition, Austria offers observations regarding a number of guidelines on which the Commission specifically requested comments from States.

Complex formulation and structure

8. What practitioners in legal offices of foreign ministries and international organizations really need is a concise guide on reservations. As regards the application of the draft guidelines in practice, we wonder whether it might be difficult to work with them, owing to their very comprehensive character and the existence of so many cross-references. The more complex the guidelines, the less likely their acceptance and application in practice. We therefore suggest that further thought be given on how to enhance their user-friendliness and strongly encourage the Commission to streamline the present guidelines. Very generally, Austria suggests to define and distinguish more clearly the concepts of established, permissible and valid reservations, including their legal effects and the effects on them of reactions thereto. In addition, it would be useful to make very clear which guidelines are interpretative guidelines to clarify provisions of the 1969 Vienna Convention on the Law of Treaties,[4] and which guidelines constitute new recommendations, which go beyond the obligations under the Vienna Convention.

Bangladesh

[Original: English]

9. The question of reservations is one of the thorny issues of the law of treaties. Although the conditions and consequences of reservations have been fairly well laid down in the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[5] many things have remained ambiguous, as subsequent developments have demonstrated. This especially relates to reactions and objections of the other parties to impermissible and invalid reservations. The International Law Commission has rightly taken up the issue to shed light on these and other problems primarily based on the State's intention and practices.

10. The draft guidelines presented in the Commission's report on its sixty-second session are hugely useful to better understand the provisions of the conventions on reservations.

Finland

[Original: English]

11. The Government of Finland wishes to express its gratitude to the International Law Commission and to the Special Rapporteur, Alain Pellet, for their dedicated work on the subject of reservations to treaties, and thanks the Commission for the opportunity to comment on the draft guidelines of the Guide to Practice. The subject

[4] United Nations, *Treaty Series*, vol. 1155, No. 18232.

[5] Not yet in force. See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February-21 March 1986*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.94.V.5), document A/CONF.129/15.

of impermissible reservations has been of particular interest to Finland, and the following contribution focuses on this important issue.

[…]

12. Once more, we want to express our gratitude to the Commission and the Special Rapporteur for their expert work in producing these draft guidelines. We look forward to the adoption of the final guidelines later this year.

Germany

[Original: English]

13. Germany expresses great appreciation for the Commission's tremendous achievements in the complex matter of reservations to treaties. The Commission's draft guidelines and reports on the subject will be a comprehensive manual to international jurisprudence, State practice and literature for years to come. The in-depth analysis contained in the reports and the Guide to Practice has already contributed to clarifying many legal and academic debates in this area.

Norway

[Original: English]

14. Norway considers the quality of the work carried out under the topic "Reservations to treaties" by the Special Rapporteur, Alain Pellet, to be remarkable. Its result will mark the conclusion of a particularly important piece of work of the International Law Commission. Norway is convinced that the draft guidelines adopted by the Commission and the reports prepared by the Special Rapporteur will prove useful to States and international organizations.

[…]

15. Norway finds that the work of the Commission and the Special Rapporteur on this topic, as well as the resulting set of draft guidelines, are sufficiently clarifying and build on a careful balance. They may therefore help States in their future practice concerning reservations. Norway is of the opinion that the current text provides, with the possibility of minor refinements, a solid basis for consideration and final adoption of the Guide to Practice during the sixty-third session of the Commission in 2011.

Portugal

[Original: English]

16. The Commission should be praised for having provisionally adopted the entire set of draft guidelines of the Guide to Practice on Reservations to Treaties. Portugal would also like to pay tribute to Mr. Pellet for his contribution to the topic and for the quality of the work undertaken. This masterwork will be of the utmost utility for both States and international organizations in dealing with the complex issue of reservations.

17. Portugal greatly supports the Guide to Practice as a whole. In responding to the request by the Commission for States to provide observations on the draft guidelines, Portugal will offer specific comments on some subjects which, in its

view, may deserve a final consideration by the Commission before adopting the Guide to Practice.

Switzerland

[Original: French]

18. At the outset, Switzerland would like to express its gratitude to the Commission, as well as its admiration for the enormous amount of work that is being completed. It is convinced that the Guide [to Practice] will be highly useful for the development of treaty law.

[…]

19. Switzerland stresses that its comments should under no circumstances be understood as criticisms of the work of the Commission, but as constructive contributions to the Guide to practice in the field, in the hope that it can be completed in the very near future.

United States of America

[Original: English]

20. The United States extends its highest compliments to the Special Rapporteur on the impressive work that has gone into the provisionally adopted draft guidelines on reservations to treaties. After a closer review of the Guide to Practice provisionally adopted by the Commission, the painstaking efforts undertaken by both Mr. Pellet and the Commission members are clearly evident. The United States very much appreciates the opportunity to provide its further observations on the draft guidelines and accompanying commentary. The following comments are intended to elaborate on our statement made in the Sixth Committee during the sixty-fifth session of the General Assembly, in particular regarding the issues on which we strongly encourage further deliberation by the Commission, as well as to provide a few technical suggestions to improve the Guide to Practice before final adoption by the Commission.

[…]

21. [One of our] substantive concern[s] relates to the treatment of interpretative declarations, and in particular conditional interpretative declarations. Regarding interpretative declarations generally, we do not support the creation of a rigid structure along the lines of what has been proposed, as we believe it is likely to undermine the flexibility with which such declarations are currently employed by States.

[…]

22. The United States also would like to raise several technical questions and comments about the draft guidelines. […] [T]he United States supports the Commission's efforts in many instances to clarify when its proposed guidelines are intended to reflect existing State practice or, alternatively, are intended to go beyond such State practice. In that vein, we continue to encourage the Commission to clarify its approach throughout the guidelines.

[…]

23. Although the guidelines have been in development for a substantial period of time, the United States strongly encourages the Commission to undertake appropriate additional consideration of the issues raised [by the United States in its comments] and by other States before finalizing its work. Lastly, while the [United States'] comments highlight several of [its] main remaining concerns with the guidelines, the United States will continue to review the Commission's work and offer any additional comments, if appropriate.

B. Comments and observations on specific sections of the Guide to Practice and on specific draft guidelines

Sections 2 (Procedure) and 2.3 (Late reservations)

Austria

[Original: English]

Late reservations

24. According to guidelines 2.3.1 and 2.3.2, a "late reservation" (that is, a reservation formulated after the expression of consent to be bound by that treaty) shall in principle be possible on the condition that no other contracting party objects to it within a period of 12 months. Austria remains concerned about guidelines that would render the whole regime of treaty reservations applicable also to so-called "late reservations". We must be aware of the fact that such late reservations do not fall under the definition of reservations, as it is reflected in article 2, paragraph 1 (d) and article 19 of the Vienna Convention on the Law of Treaties. The Commission itself has elaborated a definition of reservations in guideline 1.1 with the clear intention not to deviate from the Vienna Convention. According to this definition, a "reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to them. As this definition contains a clear reference to the point in time when a reservation can be made, it is evident that a so-called "late reservation" is in contrast to this basic definition.

25. Therefore, even if it is called a reservation, a "late reservation" really constitutes a different kind of declaration that should be distinguished from true reservations in order not to blur the quoted definition of reservations. Of course the States parties to a given treaty have the possibility to agree to the application of the regime of reservations also to "late reservations" made in regard to that treaty, subject, however, to the limits defined in that treaty and in the applicable law of treaties. But, in Austria's view, declarations that do not meet the requirements of the definition should not be treated as reservations since ominous consequences would ensue that should not be encouraged. It must be pointed out that by accepting "late reservations" and by treating them in basically the same way as reservations, the basic principle of *pacta sunt servanda* as expressed in article 26 of the Vienna Convention would be undermined since a State could at any time unilaterally reduce the scope of its obligations under a treaty by means of a reservation. Apart from that, the application of the regime on "late reservations" as proposed in the

guidelines would result in the creation of a system of treaty amendment that is contrary to the regime established by articles 39 to 41 of the Vienna Convention.

Section 2.6 (Formulation of objections)
Draft guideline 2.6.1 (Definition of objections to reservations)

Finland

[Original: English]

26. We agree with the Commission on the point that, even though an analytical distinction can be made between the act of opposing a valid reservation and that of opposing an invalid one, both these acts should be referred to as "objections", since this is the consistent practice of States and there seems to be no real danger of confusion. However, we are less convinced by the Commission's reasoning according to which the definition of "objection" in draft guideline 2.6.1 is sufficiently wide to cover objections to invalid reservations in addition to those made to valid ones. According to draft guideline 2.6.1, an objection is "a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization *purports to* exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization" [emphasis added]. The verb "purport", of course, would imply a purpose or intention on the part of the objecting State, in this case the specific purpose or intention of modifying or excluding the effects of the reservation. A State could not, however, have any such intention when it considers the reservation to lack any legal effects to begin with; the purpose of objecting is merely to point out the invalidity and consequent lack of legal effects of the reservation.

27. For these reasons, we propose to the Commission that it consider the feasibility of refining the definition in draft guideline 2.6.1 so that it expressly includes both types of objections, perhaps by adding to it the phrase "or whereby the objecting State or international organization expresses its view that the reservation is invalid and without legal effect".

Draft guideline 2.6.3 (Freedom to formulate objections)

Austria

[Original: English]

Specified reservations

28. Guidelines 2.6.3 and 2.6.4 concern the freedom to formulate objections and the freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation, respectively. Of course, as is stated in guideline 2.6.3, an objection to any reservation should be possible. However, the effect of such objection remains unclear. What is the effect of an objection in the case of a reservation that is explicitly provided for in the treaty? One cannot assume that an objection to a specified reservation would nullify the reservation, especially since guideline 4.1.1 regulates the establishment of specified reservations without necessitating acceptance. Similarly, according to guideline 2.6.4, a State cannot exclude treaty relations with the reserving State by means of a qualified objection if the reservation

is provided for in the treaty. In comparison thereto, guideline 4.3 deals generally with the effect of an objection to a valid reservation which precludes the reservation from having its intended effects as against the objecting State. There seems to be no specific rule concerning the effect of an objection to a specified reservation. Thus, an attempt to determine the effect of an objection to a specified reservation by reference to at least three different guidelines leads only to an ambiguous result.

[See also the observations made below in respect of draft guideline 4.1.]

Portugal

[Original: English]

29. In Portugal's view, draft guideline 2.6.3 (Freedom to formulate objections) deserves some refinement. First of all, in the title, the word "freedom" does not seem to be the most appropriate one. Portugal shares the view that it should be considered to replace it by the expression "right". The same applies to draft guideline 2.6.4.

30. On the other hand, Portugal noted with satisfaction the replacement in due time, in the title of this draft guideline as well as in other draft guidelines, of the term "make" by the term "formulate", thus harmonizing the terminology with that employed in the Guide to Practice.

Draft guideline 2.6.4 (Freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation)

Austria

[See the observations made above in respect of draft guideline 2.6.3.]

Portugal

[See the observations made above in respect of draft guideline 2.6.3.]

Draft guideline 2.6.5 (Author)

Portugal

[Original: English]

31. Portugal maintains its doubts regarding [the provision of] draft guideline 2.6.5 conferring capacity to formulate objections on States and international organizations that are entitled to become a party to the treaty. Article 20, paragraph 5, of the Vienna Conventions of 1969 and 1986 stipulates that a State or an international organization may formulate an objection by the date on which it expresses its consent to be bound by the treaty. Thus, Portugal feels that it is neither accurate nor necessary to allow a State or an international organization to formulate objections at a moment when it is not yet a party to the treaty, even if it would produce effects only when it has expressed its consent to be bound by the treaty.

Draft guideline 2.6.10 (Statement of reasons)

Portugal

[Original: English]

32. Even if it is not mandatory, it is understood that it would be valuable to let the reasons for the objection be known, for the sake of clarity and certainty.

33. The adoption of the expression "to the extent possible" is a progress over the expression "whenever possible". Nevertheless, Portugal suggests the simple deletion of that expression; the term "should" is enough for the purpose.

Draft guideline 2.6.14 (Conditional objections)

Portugal

[Original: English]

34. Portugal fears that this solution could lead us beyond the reservations dialogue provided for in the Vienna Conventions. Furthermore, in some cases, when standing before a given reservation, conditional objections may not have a sufficiently well-determined content and uncertainty may arise as to [whether] an objection was indeed formulated. Nevertheless, it is fair to say that the current version of this draft guideline was improved, offering additional consistency to the provision when compared with the former "pre-emptive objection" version of the draft guideline.

Draft guideline 2.6.15 (Late objections)

Portugal

[Original: English]

35. Since one is dealing with a mitigated concept it would be prudent to be more certain in clarifying which legal effects a late objection produces, if any at all.

Section 2.8 (Formulation of acceptances of reservations)

Portugal

[Original: English]

36. In general, the draft guidelines on the subject follow the procedural lines traced by the Vienna Conventions and the practice of States. Nevertheless, Portugal would like to comment on some questions that arise.

[See the observations made below in respect of draft guidelines 2.8.0, 2.8.1, 2.8.7 and 2.8.8.]

Draft guideline 2.8.0 (Forms of acceptance of reservations)

Portugal

[Original: English]

37. Portugal favours retaining the expressions "express acceptance" and "tacit acceptance" as enunciated in the twelfth report of the Special Rapporteur.[6] Portugal

[6] See A/CN.4/584, paras. 186-224.

takes due note of the position of the Commission as reflected in the commentary to this draft guideline. Nevertheless, Portugal is of the opinion that this distinction may have some relevance in practice since it confers greater conceptual clarity on the subject.

Draft guideline 2.8.1 (Tacit acceptance of reservations)

Portugal

[Original: English]

38. Portugal welcomes the preference for the draft guideline 2.8.1 in a similar drafting as proposed in 2007, concurring with the Special Rapporteur in finding the then draft guideline 2.8.1 bis superfluous. Portugal also welcomes the retaining of the expression "unless the treaty otherwise provides", since article 20, paragraph 5, of the Vienna Convention also admits that a treaty can derogate the general rule on tacit acceptance of reservations.

Draft guideline 2.8.7 (Acceptance of a reservation to the constituent instrument of an international organization)

Portugal

[Original: English]

39. It is Portugal's opinion that acceptance is required not only from the competent organ of an international organization, but also from the members of the organization and therefore parties to the constituent instrument. When article 20, paragraph 3, of the Vienna Conventions states that a reservation requires the acceptance of the competent organ of the organization, it is including the competent organ rather than excluding the parties to the constituent instrument.

40. In 2007, there were two core problems concerning this matter that Portugal felt deserved further consideration by the Commission. Firstly, there was the question concerning the case in which a reservation is formulated before the constituent instrument enters into force and thus before any organ exists with competence to determine whether the reservation is permissible; these are the most frequent cases (article 19 and article 20, paragraph 5, of the Vienna Conventions). Secondly, concerning draft guideline 2.8.9 as initially proposed by the Special Rapporteur[7] (draft guideline 2.8.8 in the current version), the competence of an organ may have to be established in its constituent instrument, in accordance with the principle of conferred powers. Both questions seem to find a more adequate answer in the present drafting. Nevertheless, States and international organizations should not be put aside from the reservations dialogue.

Draft guideline 2.8.8 (Organ competent to accept a reservation to a constituent instrument)

Portugal

[See the observations made above in respect of draft guideline 2.8.7.]

[7] A/62/10, note 54.

Section 2.9 (Formulation of reactions to interpretative declarations)

Portugal

[Original: English]

41. As is clearly stated in the draft guidelines, reservations and interpretative declarations are two different legal concepts. If a "reservation" is intended to modify or exclude the legal effects of certain provisions of a treaty, an "interpretative declaration" has the purpose of specifying or clarifying the meaning or the scope attributed by the declarant to a treaty or to certain of its provisions. Therefore, if a reservation has direct legal effects, an interpretative declaration is most of all related with the methodological problem of interpretation, although having associated legal consequences.

42. Since they are two different legal concepts, they should be treated separately except where they interrelate with each other. Recalling that the Vienna Conventions on the Law of Treaties do not deal with interpretative declarations, Portugal has been advocating a cautious approach since the Commission is dealing with issues that fall out of their scope.

Draft guideline 2.9.1 (Approval of an interpretative declaration)

Portugal

[Original: English]

43. We feel that the word "approval" has a strong legal connotation that is not coherent with the matter being dealt with. Portugal would prefer a softer expression like "consent". This expression would have to be used in a uniform manner in other draft guidelines, as appropriate.

[See also the observations made below in respect of draft guideline 3.6.]

Draft guideline 2.9.2 (Opposition to an interpretative declaration)

El Salvador

[Original: Spanish]

44. The International Law Commission's stance as set out in this guideline is noteworthy, as it provides for the possibility that States and international organizations might react negatively to the formulation of an interpretative declaration through a statement of "opposition", which differs from an "objection", the latter being understood to refer only to reservations. In that light, we support guideline 2.9.2 with regard to the definition of opposition.

45. However, we would like to refer to the last phrase of the guideline, namely, the possibility of "formulating an alternative interpretation".

46. The stance of the State or international organization in expressing its opposition may vary significantly, as pointed out by the Special Rapporteur: "A negative reaction to an interpretative declaration can take varying forms: it can be a refusal, purely and simply, of the interpretation formulated in the declaration, a

counter-proposal of an interpretation of the contested provision(s), or an attempt to limit the scope of the initial declaration, which was, in turn, interpreted".[8]

47. With regard to the specific case of a counter-proposal — referred to as an "alternative interpretation"[9] in the Guide to Practice — it is our understanding that such an interpretation can also take different forms, depending on the wording used and the intentions of the State formulating it. Thus, the intention behind an alternative interpretation might be a refusal, accompanied by an interpretation seeking merely to make a recommendation to the State which formulated the initial interpretative declaration; on the other hand, it might be a refusal through which the opposing State or international organization seeks to formulate its own interpretative declaration. Our delegation considers that in the latter case we would be faced with an entirely new declaration formulated by a State other than the State which formulated the initial interpretative declaration, and which therefore should be subject to the entire set of rules on interpretative declarations in general.

48. The potential scenarios referred to above are not covered in the relevant guideline or its commentary. It may be that no reference has been made to them because the issues involved are not relevant to simple statements of opposition, which are a mere rejection of the interpretation formulated. Nevertheless, it would be useful to clarify, in the guideline or its commentary, the way in which alternative declarations and their corresponding effects should be handled, in order to avoid any possible gaps in its practical application.

Portugal

[Original: English]

49. Portugal welcomes the improvement made in comparison with the 2008 version[10] by deleting the expression "excluding or limiting its effect". This expression could be misleading when trying to make a clear distinction between reservations and interpretative declarations. However, we question if the proposition of an alternative interpretation would not be in fact a new interpretative declaration with a rejection effect rather than a mere opposition.

Draft guideline 2.9.3 (Recharacterization of an interpretative declaration)

El Salvador

[Original: Spanish]

50. El Salvador recognizes the importance of this guideline, which arose primarily out of the need to regulate the fairly common practice of States and international organizations of formulating a unilateral statement the content of which does not conform to the name given it, in other words, to regulate the tendency to label reservations "interpretative declarations" and vice versa.

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[8] A/CN.4/600, para. 297.

[9] See A/64/10, p. 262, commentary to draft guideline 2.9.2, para. (13): "The Commission considered how it could most appropriately qualify oppositions that reflected a different interpretation than the one contained in the initial interpretative declaration. It rejected the adjectives 'incompatible' and 'inconsistent', choosing instead the word 'alternative' in order not to constrict the definition to oppositions to interpretative declarations unduly."

[10] See A/63/10, note 189.

51. Even more complicated are situations in which a statement is given the name "declaration" without expressing or providing any indication of its true nature. This, as pointed out by the Special Rapporteur in his third report, "[focuses] attention on the actual content of declarations and on the effect they seek to produce".[11]

52. With regard to this crucial aspect, we support the position of the Special Rapporteur on the establishment of indifference to nominalism as an element of the definitions of reservations and interpretative declarations, as set out in guidelines 1.1 and 1.2, respectively. We understand it to mean the absence of any connection between the name given to a declaration and its actual nature, implying that a declaration retains its nature independently of the name and title under which it is formulated.

53. The guideline as a whole is complemented by guidelines 2.9.4 to 2.9.7, which seek to establish rules on when a recharacterization may be formulated and state that it should preferably be formulated in writing and should, to the extent possible, indicate the reasons why it is being made. However, we note with concern the absence of one element which is of great importance, in our view: that of stipulating the practical implementation of the recharacterization once formulated.

54. We are concerned that no guideline has been drafted on the course of action to follow when a State recharacterizes a declaration; there are no specific provisions on when its status may be considered to have been modified, although it is understood, pursuant to the commentary to this guideline, that "a 'recharacterization' does not in and of itself determine the status of the unilateral statement in question". Accordingly, one might ask what effect can in fact be generated by such an attempt at or proposal for recharacterization, if it clearly "does not bind either the author of the initial declaration or the other contracting or concerned parties".[12]

55. It should be noted that the commentaries to this guideline in the relevant report of the International Law Commission as well as the thirteenth report of the Special Rapporteur establish that "A divergence of views between the States or international organizations concerned can be resolved only through the intervention of an impartial third party with decision-making authority".[13] While they do therefore provide some indication of how the situation could be resolved, they nevertheless provide too little clarity on the degree to which the arrangements for reservations actually apply in such cases.

Portugal

[Original: English]

56. Portugal has doubts regarding [the provisions of] draft guideline 2.9.3 (Recharacterization of an interpretative declaration) giving the idea that a State or an international organization can recategorize through a unilateral statement the nature of the declaration to which they respond. This may be just a question of semantics, but Portugal believes it would be convenient to clearly set aside any voluntarist approach in this matter. Moreover, understanding that a "disguised reservation" is in fact a reservation and not an interpretative declaration, we feel

[11] A/CN.4/491/Add.4, para. 258.

[12] A/64/10, p. 268, commentary to draft guideline 2.9.3, para. (6).

[13] Ibid.

that the Commission should reflect further if this chapter is the correct place for such a provision.

57. Nevertheless, Portugal recognizes the evolution in the drafting of the draft guideline itself when comparing it with its initial version. For instance, the use of the term “recharacterization” instead of “reclassification” is welcome.

Draft guideline 2.9.4 (Freedom to formulate approval, opposition or recharacterization)

Portugal

[Original: English]

58. Portugal has some concerns regarding the simple statement that an interpretative declaration can be formulated at any time. For instance, a State or international organization should not be able to formulate an interpretative declaration in regard to a treaty or certain of its provisions in a context of a dispute settlement process involving their interpretation. Hence, a reference to the principle of good faith would be a prudent solution.

Draft guidelines 2.9.8 (Non-presumption of approval or opposition) and 2.9.9 (Silence with respect to an interpretative declaration)

Portugal

[Original: English]

59. We agree that draft guidelines 2.9.8 and 2.9.9 deal with two different though related questions.

60. There seems to be no doubt that, contrary to what happens with reservations, in this case neither approval nor opposition can be presumed. Furthermore, it is a principle of law that silence cannot be considered as a declaratory means unless it can be clearly inferred otherwise. Regarding interpretative declarations, there is no general rule on the value of silence as a declaratory mean, nor is there a general legitimate expectation of an express reaction to such a declaration. As such, so far as interpretative declarations are concerned, silence should only have a meaning when its value can be clearly inferred from a treaty provision.

61. Having this in mind, Portugal finds the second paragraph of draft guideline 2.9.9 in need of some refinement in order to clarify what meaning the expression “exceptional cases” could have. Paragraph 5 of the commentary thereto could be further elaborated to provide additional guidance.

[Draft guideline 2.9.10 (Reactions to conditional interpretative declarations)][14]

Portugal

[Original: English]

62. Portugal shares the view that conditional interpretative declarations cannot be regarded as simple interpretative declarations. However, they also cannot be

[14] The guidelines on conditional interpretative declarations have been placed by the Commission in square brackets, pending a final determination by the Commission on whether the legal regime of such declarations entirely follows that of reservations.

considered as reservations since they make participation in the treaty conditional on a particular interpretation, whereas reservations are intended to exclude or to modify the legal effects of the treaty. Their unclear legal position can bring uncertainty to the treatment of this subject, thus harming the reservations dialogue, which should be carefully preserved.

Section 3 (Permissibility of reservations and interpretative declarations)
Draft guideline 3.1.12 (Reservations to general human rights treaties)

El Salvador

[See the observations made below in respect of draft guideline 4.2.5.]

Draft guideline 3.2 (Assessment of the permissibility of reservations)

Austria

[Original: English]

Multitude of actors regarding assessment of illegality of reservations

63. The multitude of competent actors listed in guideline 3.2 entails the risk of divergent evaluations. All the actors listed in this guideline are, under given conditions, entitled to an assessment of permissibility, but its effects differ from actor to actor. While an assessment by a party to the treaty can take effect only for the party itself, the evaluation of a treaty body may affect all parties, provided the body possesses the necessary competence (which, however, may only rarely be beyond doubt). A judgment by a dispute settlement body has effect only for the parties to the dispute. If the various actors disagree in their assessment a rather complicated situation may arise. As already indicated in the commentary, such disagreement is not very conducive to the application of the treaty itself. Obviously, there is still a need for further clarifications in this matter.

64. Regarding the time limit, it must be questioned why a party should be bound by a 12-month rule whereas a dispute settlement body can conduct its assessment at any time. Of course, the need for stabilized treaty relations requires a certain time limit. But does this time limit imply that a party to the treaty is precluded from invoking the impermissibility of a reservation before a dispute settlement body after 12 months have elapsed? It seems that a party can circumvent this time limit by bringing the matter before a dispute settlement body, which it is free to do at any moment. Such proceedings are, however, undoubtedly connected with higher costs.

Draft guideline 3.3 (Consequences of the non-permissibility of a reservation)

Germany

[See the observations made below in respect of draft guideline 4.5.1.]

Draft guideline 3.3.2 (Effect of individual acceptance of an impermissible reservation)

Germany

[See the observations made below in respect of draft guideline 4.5.1.]

El Salvador

[Original: Spanish]

65. Guidelines 3.3.2 (Effect of individual acceptance of an impermissible reservation) and 3.3.3 (Effect of collective acceptance of an impermissible reservation) are examined together in this paragraph because our comments relate to issues contained in both guidelines.

66. First, it should be noted that the content of both guidelines is fully consistent with the basic principles and underpinnings of reservations. Guideline 3.3.2 is based on the widely recognized premise that acceptance of a reservation cannot cure its impermissibility, because the reasons for that impermissibility — express prohibition of the reservation or its incompatibility with the object and purpose of the treaty — apply ipso facto and cannot be reversed by mere acceptance by a State or by an international organization.

67. The situation is different when, as reflected in guideline 3.3.3, all States and international organizations — not just one State or one international organization — accept the reservation. This would constitute unanimous agreement which, following the logic used in the case of an amendment to a treaty by a general agreement between the parties, would be permitted pursuant to article 39 of the Vienna Convention on the Law of Treaties.[15]

68. We now wish to comment on the difference which we have noted between the scope of guideline 3.3.2 and that of guideline 3.3.3, and specifically on the implications of including the concept of "permissibility" in guideline 3.3.2, for a consistent interpretation of the Guide to Practice.

69. It should be pointed out that guideline 3.1 establishes three specific conditions limiting the scope of the "permissibility of a reservation": "[...] (a) The reservation is prohibited by the treaty; (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

70. The same scope can be inferred from the content of guideline 3.3.2, which includes the concept of permissibility, thereby incorporating the three conditions referred to in guideline 3.1. However, unlike guidelines 3.1 and 3.3.2, which encompass three conditions limiting the scope of permissibility, guideline 3.3.3 only covers two of those conditions. This, in our view, limits the effect and hence the scope of the "collective acceptance of an impermissible reservation".

71. In the light of the foregoing, we feel that it is extremely useful to include in the commentaries an explanation of the difference mentioned above and, in the event that this difference is not substantial, we propose that similar language should be found to show the equivalence of the concepts.

[15] Vienna Convention on the Law of Treaties, article 39: "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide."

Draft guideline 3.3.3 (Effect of collective acceptance of an impermissible reservation)

Australia

[Original: English]

72. Draft guidelines 3.3.3 and 3.4.1 appear to create two separate regimes regarding the permissibility of acceptance of an impermissible reservation: one regime for an express acceptance and another for a tacit acceptance. This is not found within the existing Vienna Convention regime. It is unclear why 3.4.1 should prohibit the express acceptance of impermissible reservations, yet 3.3.3 should allow for a collective tacit acceptance of impermissible reservations. Draft guideline 3.3.3 does not specify a time limit for contracting States to object, but presumably the 12-month period in 2.6.13 applies. This could be clarified. Moreover, if collective acceptance of impermissible reservations is allowed under 3.3.3, this should be allowed for in draft guideline 3.4.1.

73. The underlying premise of 3.3.3 set out in the Commission's commentaries is also questionable, namely that a tacit acceptance of the impermissible reservation could constitute a subsequent agreement among the parties modifying the original treaty. Australia queries whether a subsequent agreement could arise among the contracting parties through mere silence or inaction. Furthermore, it is unlikely that 3.3.3 would ever operate in practice, given that a State would be unlikely to ask the depositary to bring the reservation to the attention of other contracting States and then fail to object to it. Further clarification of these provisions would be desirable.

74. The interaction between these provisions regarding the acceptance of impermissible reservations and section 4.5 relating to the consequences of an invalid reservation is even less clear. The commentary to the draft guidelines indicates that section 4.5 establishes an objective regime for assessing the invalidity of a reservation which is not dependent upon the reactions of other States. This appears inconsistent alongside guideline 3.3.3 and makes guideline 3.4.1 redundant.

Austria

[Original: English]

Collective acceptance of impermissible reservations

75. Austria still has major concerns regarding guideline 3.3.3 on the effect of collective acceptance of an impermissible reservation. This guideline seems to invite States to make reservations prohibited by a treaty, since they can formulate the reservation and then wait for the reaction of other States. Is it really intended that, in the case of non-objection or silence by other States, the reservation is deemed permissible? Should the contracting States really have the power to override the object and purpose of a treaty irrespective of the attempt of an objective definition of object and purpose? This is certainly not in conformity with the idea of the Vienna Convention on the Law of Treaties.

76. Also, the question of an evaluation of the effect of silence is certainly still unanswered. Paragraph 5 of the commentary[16] seems to indicate that silence cannot be equated with acceptance of the reservation. This conclusion would be in

[16] A/65/10, p. 84.

accordance with draft guideline 3.3.2, according to which the nullity cannot be remedied by unilateral acceptance. However, it remains doubtful whether there exists something like the collective position of States parties in general multilateral treaties, in particular in view of the fact that no moment is indicated when this collective attitude must be established and that the States parties vary in time. Which States, therefore, are decisive for silent approval to exist?

77. Moreover, the time element also remains unclear, since no reference is made to the time limit in guideline 2.6.13. Although the commentary explains that the time period was left open on purpose, practical problems nevertheless call for it: For instance, what happens, if a State accedes to a treaty ten years after its entry into force and, after being informed by the depositary of the existence of an impermissible reservation, objects to this reservation as the only State party? Should the reservation be deemed impermissible only after this objection? The present wording of the guidelines seems to warrant such a conclusion. This raises another problem: Would the reservation become null and void *ex nunc* or only *ex tunc*?

78. More generally, this guideline seems to contradict guidelines 4.5.1 and 4.5.3 since, according to these guidelines, the nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization. Austria is of the view that, particularly regarding reservations contrary to the object and purpose of a treaty, collective acceptance by silence does not reflect established rules of international treaty relations.

El Salvador

[See the observations made above in relation to draft guideline 3.3.2.]

Switzerland

[Original: French]

79. Proposed guideline 3.3.3 provides a procedure whereby an impermissible reservation may be deemed permissible. Switzerland is aware of the advantages of such a proposal, but a basic question arises: would such a text not be in conflict with the provision of article 19 of the Vienna Convention of 23 May 1969 on the law of treaties, which embodies the principle that impermissible reservations should not be formulated to start with ("A State may … formulate a reservation unless: …")? Proposing such a procedure might risk encouraging the deposit of impermissible reservations, including reservations that would be incompatible with the object and purpose of the treaty as noted under subparagraph (c) of that article.

80. Moreover, the proposed procedure would allow an impermissible reservation to be deemed permissible simply by tacit acceptance. Article 20, paragraph 5, of the aforementioned Vienna Convention, which provides that a reservation is considered to have been accepted in the absence of an objection to it, does not provide that such a silence should have for effect the acceptance of an impermissible reservation. Does the solution adopted for late reservations, which the Commission drew upon in drafting this directive, apply as well to impermissible reservations? In the case of late reservations, it is only the reservation's characteristic of lateness that is "cured" by the tacit acceptance of the Parties. Could a late reservation that was materially impermissible also be deemed permissible by such tacit consent?

81. This proposed guideline raises another fundamental question. The proposed procedure would also permit the material alteration of the treaty itself, by means of the treaty reservation mechanism, as recognized in the commentary (subparagraphs (8) and (11) for example[17]). Switzerland doubts whether it would be appropriate to create, within a reservation system that is already complex, a new amendment procedure applicable to all treaties. Would it not be preferable, especially for purposes of legal security, for the Parties wishing to modify a treaty to be constrained to follow the paths provided in the final clauses of the treaty itself?

82. Finally, the absence of a deadline for objections raises many questions and could put the depositary in a very difficult position. In addition to increasing the burden on the depositary, the proposed procedure would result in the depositary (and by extension all other Parties) having to wait for a long time, not to say indefinitely, to find out if the reservation had been rendered permissible or not.

83. Switzerland is therefore of the view that there are still several issues to be clarified before committing to the principle that an impermissible reservation can be deemed permissible by tacit acceptance, whether collectively or with the artifices provided under draft directive 3.3.3. At the very least, the problem of the absence of a deadline for objections must be resolved.

United States of America

[Original: English]

Collective acceptance of impermissible reservations

84. Proposed guideline 3.3.3 provides that a reservation that is impermissible (prohibited by the treaty or incompatible with its object and purpose), "shall be deemed permissible" if no party objects to it after having been expressly informed of its invalidity by the depositary at the request of a party. The theory behind this guideline, the commentary explains, is that such tacit acceptance of the reservation can constitute a subsequent agreement among the parties modifying the original treaty and enabling the particular reservation to be made.

85. There are two points worth noting regarding the guideline's approach. First, the practicality of this guideline is questionable. The circumstances under which another State would ask the depositary to bring attention to the fact that the reserving State's reservation is invalid, but not object to it, are not apparent. The commentary cites as State practice the unanimous acceptance by parties to the Covenant of the League of Nations of a neutrality reservation by Switzerland despite the prohibition on reservations in the Covenant.[18] However, the commentary provides no indication that this acceptance occurred according to the process envisioned by guideline 3.3.3.

86. Second, and more importantly, if a subsequent agreement can be made among the parties through a tacit acceptance of the invalid reservation in order to "deem" the reservation permissible, it appears as though this should be true regardless of whether the depositary had separately circulated a second notice at the request of a contracting State indicating that the reservation is invalid. In other words, the logic of this guideline appears to lead to the conclusion that any reservation that is

[17] A/65/10, pp. 78-79.

[18] See A/65/10, pp. 84-85, commentary to draft guideline 3.3.3, para. (6).

invalid, which has been circulated and not objected to by the parties, has been "collectively accepted" and thus "shall be deemed permissible". The Commission's commentary moreover fails to support the distinction it advocates in its guidelines. The commentary rejects the contention that an invalid reservation can be deemed permissible if no parties object to it after an initial depositary notice on the grounds that (a) silence in the first instance does not mean that a State is taking a position on the permissibility of the reservation, and (b) monitoring bodies are still able to assess the permissibility of the reservation.[19] Yet in justifying why the same invalid reservation may be "deemed" permissible after a second depositary notice, the commentary favourably cites the same factors. It relies on the absence of objections after a second notice as evidence of unanimous acceptance of the reservation. Further, it later explains that reservations addressed by 3.3.3 are "deemed" permissible rather than made permissible, in part because competent monitoring bodies can assess such a reservation later in time. In short, if the reservations contemplated by guideline 3.3.3 are only deemed permissible and are still "impermissible in principle", it appears that such a rationale should apply to any reservation that is suspected of being invalid, not just those reservations that are subject to a second depositary notice.[20]

[…]

[See also the observations made below concerning draft guideline 3.4.1.]

Section 3.4 (Permissibility of reactions to reservations)
Draft guideline 3.4.1 (Permissibility of the acceptance of a reservation)

Australia

[See the observations made above in respect of draft guideline 3.3.3.]

Germany

[See the observations made below in respect of draft guideline 4.5.1.]

United States of America

[Original: English]

87. To the extent that 3.3.3 remains in the guidelines, we believe that its relationship with guideline 3.4.1 may merit further clarification. As discussed above, guideline 3.3.3 permits invalid reservations to be "deemed permissible" when no parties object to the reservation after a second notice from the depositary. Guideline 3.4.1 in turn provides that the express acceptance of an impermissible reservation is itself impermissible. The commentary leaves unclear whether an express acceptance could have some legitimate effects on the later assessment of a reservation's permissibility.[21] To the extent a competent third party is charged with

[19] See A/65/10, p. 84, commentary to draft guideline 3.3.3, para. (5).

[20] The commentary raises a related issue as well. If the legal theory underlying this proposal is that the parties have agreed, at least tacitly, to a subsequent amendment modifying the original treaty, then it is not clear why the reservation would continue to be "impermissible in principle". Rather, amending the treaty and tacitly accepting the reservation should cause the original restrictions on making such a reservation, i.e. the restrictions that would make a reservation impermissible, to fall away.

[21] See A/65/10, p. 87, commentary to draft guideline 3.4.1.

assessing permissibility, it seems that such State practice towards the subject reservation should be taken into consideration. Also, the United States would like to better understand the legal theory underlying 3.4.1. The commentary reaffirms that collective tacit acceptance creates agreement among the parties to modify the treaty, but article 41(1) of the Vienna Convention also permits two parties to modify the treaty as between themselves. While the Commission may believe that express acceptance of an impermissible reservation would fail to meet the requirements of article 41, it would be helpful to be able to understand the Commission's analysis in this regard. […]

[Draft guidelines 3.5.2 (Conditions for the permissibility of a conditional interpretative declaration) and 3.5.3 (Competence to assess the permissibility of a conditional interpretative declaration)][14]

Portugal

[Original: English]

88. One should be aware of the unclear legal nature of conditional interpretative declarations, which may bring uncertainty to the analysis, thus harming the "reservations dialogue" which should be carefully preserved. Portugal would favour further comprehensive analysis of this matter in order to clearly establish the legal nature of conditional interpretative declarations as well as to identify the legal effects and procedures associated with it and also to decide on the opportunity to deal with them in this context. We took note that the Commission's report still mentions draft guideline 2.9.10 (Reactions to conditional interpretative declarations) within brackets.

United States of America

[Original: English]

89. [One of our] substantive concern[s] relates to the treatment of interpretative declarations, and in particular conditional interpretative declarations. Regarding interpretative declarations generally, we do not support the creation of a rigid structure along the lines of what has been proposed, as we believe it is likely to undermine the flexibility with which such declarations are currently employed by States. Further, with regard to conditional interpretative declarations, which already have been the subject of considerable debate, we note that guidelines 3.5.2 and 3.5.3 address this issue by placing the entire issue of conditional interpretative declarations under the legal regime of reservations. We continue to have serious concerns regarding this treatment. If the content of a conditional interpretative declaration purports to modify the treaty's legal effects with regard to the declarant then it is a reservation. If the content of a conditional interpretative declaration merely clarifies a provision's meaning, then it cannot be a reservation, regardless of whether it is conditional. We disagree with the view that an interpretative declaration that would not otherwise qualify as a reservation could be considered a reservation simply because the declarant makes its consent to be bound by the treaty subject to the proposed interpretation. Subjecting conditional interpretative declarations, regardless of whether they are in fact reservations, to a reservations framework is inappropriate and could lead to overly restrictive treatment of such issues as temporal limits for formulation, conditions of form, and subsequent reactions regarding such declarations.

Draft guideline 3.6 (Permissibility of reactions to interpretative declarations)

Portugal

[Original: English]

90. As we have already stated in commenting on draft guideline 2.9.1 (Approval of an interpretative declaration), in Portugal's view the word "approval" has a specific legal meaning that is not coherent with the matter being dealt with. It could even be misleading in suggesting that an interpretative declaration may have to fulfil the same domestic legal requirements for the formulation of a reservation.

91. Portugal would welcome a clearer explanation for the use of this term to be included in the commentary to draft guideline 2.9.1.

Section 4 (Legal effects of reservations and interpretative declarations)
Draft guideline 4.1 (Establishment of a reservation with regard to another State or organization)

Austria

[Original: English]

92. […] Also, the procedure concerning the establishment of reservations as provided in guideline 4.1 cannot relate to reservations that are explicitly authorized by the treaty as defined in 4.1.1. Accordingly, guideline 4.1 needs a clarification to this effect.

Section 4.2 (Effects of an established reservation)

Australia

[Original: English]

93. Australia notes that section 4.2 builds upon the regime of the Vienna Conventions, particularly article 20(4)(c) of the 1969 Vienna Convention on the Law of Treaties, and seeks to provide some further certainty on when a reserving State may be considered among the contracting parties.

Bangladesh

[Original: English]

94. The guidelines on the effects of an established reservation (section 4.2) are logical and based on the actual State practices and understanding. It should not be difficult for any party to follow these guidelines to apply the relevant provisions of the Conventions.

Draft guideline 4.2.1 (Status of the author of an established reservation)

Australia

[Original: English]

95. The effect of this guideline is that the author of a reservation does not become a contracting party until at least one other contracting State has accepted the reservation either expressly or tacitly (through the expiration of the 12-month time period in guidelines 2.6.13 and 2.8.1). At the same time, the guidelines could define

with greater precision the status of the reserving State during the period between the formulation of its reservation, and up to and in the event of its reservation being established.

El Salvador

[Original: Spanish]

96. As can be seen, this guideline is based on the provisions of article 20, paragraph 4, of the Vienna Convention on the Law of Treaties, which sets out a general rule that: "(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States; (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State; (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one of the contracting States has accepted the reservation".

97. In practice, this provision has not been applied uniformly, a fact which created considerable difficulty for the Commission in taking a specific stance as to the status of the author of an established reservation. Nonetheless, it should be acknowledged that although the final formulation of the guideline is based on the Vienna Convention, it does not merely repeat the language of that Convention, but adopts a broader approach by referring to the "establishment of a reservation", thereby, as the Commission pointed out, covering situations in which reservations do not require acceptance as well as those in which they do.

98. It is also worth noting that the language concerning the status of the author of a reservation has been reformulated, such that the author is classified as a "contracting" entity, in general terms, and a distinction is drawn as to the effects of the reservation depending on whether the treaty has entered into force or not. In that connection, a State will be classified as a "contracting" State when the treaty has not yet entered into force, and a "party" — as originally set out in the Vienna Convention — when the treaty has entered into force.

Portugal

[Original: English]

99. […] In Portugal's view, the Guide could provide a more precise definition of the moment when the author becomes a contracting State or organization. Should that moment coincide with the establishment or with the formulation of the reservation? In other words: is there a retroactivity of effects to the earlier moment of formulation of the reservation? These are some questions that may arise in daily practice and could receive clearer guidance from the commentaries.

[See also the observations made below in respect of draft guideline 4.2.2.]

Draft guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty)

Australia

[Original: English]

100. As noted by the Commission, a divergent practice exists concerning the practice adopted by the Secretary-General, in his capacity as depositary of multilateral treaties, whereby all States that have deposited instruments (whether or not accompanied by reservations) are included in the number of instruments required for entry into force. States retain the discretion to draw their own legal consequences from any reservations, including whether or not the treaty enters into force between itself and the reserving State. To avoid further divergent practice and with a view to providing further certainty, the Commission could adopt a view on the practice taken by the Secretary-General.

El Salvador

[Original: Spanish]

101. This guideline is similar to the rule set out above [in guideline 4.2.1], but is formulated here for the specific case of a treaty which has not yet entered into force.

102. In our view, the most significant part of guideline 4.2.2 is paragraph 2, which recognizes the common practice adopted by depositaries to give effect to the final deposit of the instrument of ratification or accession containing a reservation before any other State has accepted the reservation, without giving consideration to the validity or invalidity of the reservation. Adapting this guideline to reality is therefore a highly important element which reinforces a well-established and well-accepted practice among States and international organizations.

Portugal

[Original: English]

103. As regards draft guideline 4.2.2, the Vienna Conventions of 1969 and 1986 both state that the author of a reservation does not become a contracting State or organization until at least one other contracting State or contracting organization accepts the reservation, either expressly or tacitly. That could represent a 12-month delay. However, the depository practice often does not go in this direction. For instance, the Secretary-General of the United Nations does not wait for any acceptance to be received before accepting the definitive deposit of an instrument of ratification or accession accompanied by a reservation (see *Summary of practice of the Secretary-General as depositary of multilateral treaties*, ST/LEG/7/Rev.1).

104. There are other specific examples of divergent practice of depositaries regarding reservations that can be provided. For instance, Portugal submitted its instrument of accession to the Convention on the Privileges and Immunities of the Specialized Agencies, adopted in New York on 21 November 1947, for deposit with the Secretary-General on 20 March 2007, formulating a reservation to section 19.B (on tax exemptions) of the Convention. However, on 24 April 2007 the depositary notified that in accordance with “established practice”, the instrument would only be deposited with the Secretary-General upon receipt of the approval of the reservation by the concerned specialized agencies. The deposit of the instrument of accession

was suspended, thus lacking the last international act necessary for Portugal to become bound by the Convention. However, the Secretary-General is guided in the performance of depository functions mainly by relevant provisions of the Convention, customary international law and article 77 of the Vienna Convention of 1969. Thus, the *Summary of practice* is not a source for the performance of depository functions by the Secretary-General, but rather a relevant record of practice. The Guide to Practice itself states that the permissibility of reservations may be assessed only by contracting States or contracting organizations, dispute settlement bodies or treaty monitoring bodies. Neither the depositary nor the specialized agencies are included in any of those categories.

105. These observations intend to underline that the draft guidelines could indeed take a stance on the correctness of the depository practice (contrary to the intention of the Commission as stated in paragraph 11 of the commentary to draft guideline 4.2.1[22]). It would be important not to void the effects of the Vienna Conventions in favour of divergent practices.

[See also the observations made above in relation to draft guideline 4.2.1.]

Draft guideline 4.2.3 (Effect of the establishment of a reservation on the status of the author as a party to the treaty)

El Salvador

[Original: Spanish]

106. This guideline, which indicates the establishment of treaty relations between the author of a reservation and the State that has accepted it, has been recognized on several occasions by all special rapporteurs, from J. L. Brierly to Alain Pellet. This is why the Commission has taken the view that it makes good sense. Given the exhaustiveness of the Guide to Practice, its inclusion stands as acknowledgement of a basic principle in the area of reservations.

Draft guideline 4.2.4 (Effect of an established reservation on treaty relations)

El Salvador

[Original: Spanish]

107. While El Salvador does not see the need to make any formal or substantive comments concerning this guideline, it recognizes the wisdom of including in the guideline other elements which are not found in the Vienna Conventions. This helps to improve understanding of the effects of reservations on treaty relations, including consideration of reservations with exclusionary effects and their corresponding contraregularity effect; the stipulation that a reservation does not modify the provisions of a treaty, except its legal effects; and recognition that these effects could apply not only to certain provisions of the treaty, but also to the treaty as a whole in respect of certain aspects.

[22] A/65/10, p. 129.

Draft guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates)

El Salvador

[Original: Spanish]

108. This guideline recognizes that the principle of reciprocity is not absolute, based on an increasingly well-established trend in legal writings and jurisprudence, which has determined that not all treaties involve the exchange of obligations between States. The clearest example of this exception is human rights treaties, which, in contrast to other types of treaty, are primarily intended to benefit persons within their jurisdiction.

109. The view has been expressed that the current system of reservations is entirely inadequate to treaties whose ultimate beneficiaries are human beings, not Contracting Parties.[23] The International Court of Justice said much the same over half a century ago in its Advisory Opinion on "Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide", pointing out that "the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions".[24]

110. Therefore, in view of the importance of recognizing the sui generis nature of human rights treaties, and considering that, with regard to the issue of reservations, the Commission does not intend to draft a Convention, but rather a Guide to Practice for illustrative purposes, we would propose the inclusion of an explicit reference to such treaties in this guideline, as an example not intended to be exhaustive. As the Commission pertinently indicates in its report: "[Reciprocity] is also absent from treaties establishing obligations owed to the community of contracting States. Examples can be found in treaties on commodities, in environmental protection treaties, in some demilitarization or disarmament treaties and also in international private law treaties providing for uniform law."[25]

111. Furthermore, it would be worth considering the inclusion in guideline 3.1.12, on reservations to human rights treaties, of a direct reference to the guideline in question, which would successfully provide explicit recognition of the non-reciprocal application of obligations in human rights treaties. Such recognition, while not intended to minimize the non-reciprocal application of other treaties, is needed for the special case of human rights treaties, given the emergence of both regional and international human rights treaties, which, despite signifying a momentous achievement in the protection of the individual with regard to State power, are regrettably often attended by declarations by some States that modify or annul a basic right recognized in the treaty, or that render their fulfilment of the

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[23] Inter-American Court of Human Rights, *Blake* v. *Guatemala* (reparations), Series C, No. 48, 22 January 1999, Separate opinion of Judge A. A. Cançado Trindade, para. 15.

[24] International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 23.

[25] A/65/10, p. 145, commentary to draft guideline 4.2.5, para. (6).

treaty contingent on the actions of another State, with the intention of protecting their own interests rather than those of the persons under their jurisdiction.

Draft guideline 4.3 (Effect of an objection to a valid reservation)

United States of America

[Original: English]

112. Guideline 4.3 provides that "[u]nless a reservation has been established with regard to an objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or organization". This guideline appears to reaffirm the relatively straightforward proposition that an objection counters a reservation's intended effects. However, the initial clause in this guideline seems unnecessary and could cause confusion as to the operation of the guidelines. If a reservation must be accepted by a State to be established with regard to that State, as guideline 4.1 expressly provides, then it would not seem possible for a reservation to have been established vis-à-vis an objecting State. Thus, we would recommend the deletion of the initial clause of guideline 4.3 or that the commentary further explain the intent behind this clause.

Section 4.5 (Consequences of an invalid reservation)

Australia

[Original: English]

113. Australia welcomes the formulation of section 4.5. This will provide important clarity and guidance for States given that this is a significant lacuna within the treaty regime established by the Vienna Conventions. Australia agrees with the objective regime established by draft guidelines 4.5.1 and 4.5.3, whereby reservations that do not meet the conditions of formal validity and permissibility are null and void, independent from the reactions of other contracting States. This is consistent with the conditions set out in the Vienna Conventions and builds on existing State practice.

114. However, Australia is particularly concerned with the current rebuttable presumption in draft guideline 4.5.2, namely that a reserving State will become a party to the treaty without the benefit of the invalid reservation absent a contrary intention.

[See also the observations made below in respect of draft guideline 4.5.2.]

Bangladesh

[Original: English]

115. The effects of an invalid reservation are more problematic [than the question addressed in section 4.2 of the Guide to Practice]. The provisions of the Convention are not very clear on this. Therefore, the draft guidelines of the International Law Commission are more useful for understanding the impact and consequences of the invalid reservations. The guidelines have been drafted based on serious research and analysis of numerous State practices and views of authoritative individuals and institutions. It is quite understandable and acceptable that the main thrust of the

guidelines is not towards excluding the reservation-making parties from treaty relations but to limit the relations. This position is closer to the views and approaches of the overwhelming majority of the States.

116. The provision for reservations promotes the goal of maximum participation of the States in the multilateral treaties. However, this must not undermine the very object and essence of the treaty. While the decision to make reservation rests with the reservation-making State, other States' reactions and responses are immensely significant for the establishment of treaty relations with the reserving States, this being especially important in the cases of impermissible and invalid reservation and any special mention about reservations in the text of the treaty. The draft guidelines of the International Law Commission are based on the rational understanding of the spirit and idea of the provisions on reservations in the Conventions. To follow these guidelines would mean to promote a better realization of the objectives of the treaties and healthy treaty relations.

Finland

[Original: English]

117. According to article 19 of the Vienna Convention on the Law of Treaties, States may not make a reservation to a treaty when such a reservation is prohibited by the treaty; or when the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or if, in any other case, the reservation is incompatible with the object and purpose of the treaty.

118. But what happens when a State puts forward an impermissible reservation? As the Special Rapporteur has correctly argued, we must distinguish between two analytically separate questions: (a) what are the legal effects, if any, of an impermissible reservation, and (b) what are the consequences of the act of making an impermissible reservation on the existence or non-existence of a contractual relationship between the reserving State and others.

[See also the observations made below in respect of draft guidelines 4.5.1, 4.5.2 and 4.5.3.]

Draft guideline 4.5.1 (Nullity of an invalid reservation)

Australia

[See the observations made above in respect of section 4.5.]

El Salvador

[Original: Spanish]

119. Despite the fact that this guideline and the section on invalid reservations as a whole constitute a critical aspect of the issue of reservations, the consequences of an invalid reservation were not stipulated in the Vienna Conventions, creating a gap that caused serious practical problems. While the assumption existed that an invalid reservation could not have the same effects as a valid reservation, there was no consistent position as to how such effects should be handled.

120. Thus, the Guide to Practice in our view rightly indicates that the consequences of this type of reservation should be governed by the objective criterion of whether

a reservation is "null and void", implying that the reservation's consequences, or lack thereof, are not governed by the opinions of States or international organizations.

[See also the observations made below in respect of draft guideline 4.5.3.]

Finland

[Original: English]

Legal effects of an impermissible reservation

121. As to the legal effects of an impermissible reservation, the Vienna Convention itself offers no specific guidance. Article 21 of the Convention explicitly deals with permissible reservations only. However, we find it easy to agree with the argumentation of the Commission that an impermissible reservation, as well as a reservation which does not fulfil the criteria of formal validity as codified in Article 23 of the Convention, must be considered null and void. This is a consequence of the impermissibility of the reservation by definition; as the Commission notes, "nullity" is the defining characteristic of a legal act which would have certain legal effects but for the lack of its conformity with formal or substantial requirements placed upon such acts.

122. A reservation, again by definition, is a legal act which purports to have the legal effect of modifying the extent or content of an obligation a treaty would, in the absence of such a reservation, place upon the State. It would seem reasonable, then, to argue that when a reservation does not conform with the substantial requirements (as listed in article 19 of the Vienna Convention) or with the formal requirements (article 23 of the same) placed upon reservations as legal acts, the reservation is null and void. The consequence of this nullity is that the reservation is incapable of having the legal effects it purports to have, i.e., to alter the extent or content of the reserving State's contractual obligations.

[…]

123. We, therefore, wish to express our continued support for draft guideline 4.5.1 […].

Germany

[Original: English]

124. The following comments focus on what is probably the most important aspect of the Commission's draft Guide to Practice, the Commission's conclusions with regard to the permissibility of reservations and, in particular, to the legal effects and consequences of non-permissible reservations on treaty relations. The issue has been much discussed by legal experts. This issue of international law remains unresolved.

Impermissibility of a reservation not compatible with the object and purpose of a treaty

125. With regard to the question of the permissibility of a reservation, the draft guidelines propose to settle an ongoing legal debate.

126. Draft guideline 4.5.1 establishes that "a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide

to Practice is null and void, and therefore devoid of legal effect". Draft guideline 3.3.2 clarifies that "[a]cceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation". According to draft guideline 3.4.1, "the express acceptance of an impermissible reservation is itself impermissible". Draft guideline 3.3 finally makes it clear that the legal consequences of an impermissible reservation are the same, whatever the reason for such impermissibility. The draft guidelines specify impermissibility with guideline 3.1 being a verbatim quote of article 19 of the Vienna Convention.

127. The relationship of the different grounds for impermissibility of a reservation as defined in article 19 of the Vienna Convention and the consequences thereof is the object of discussion in legal literature and a matter of concern for any pragmatic approach by contracting States. It is the criterion of impermissibility under article 19 (c) of the Vienna Convention (draft guidelines 3.1 (c)) which is at the core of this discussion. Incompatibility with the object and purpose of a treaty is a complex matter and generally more difficult to assess than the other criteria for impermissibility established in article 19 of the Vienna Convention. And while the compatibility requirement in article 19 (c) of the Vienna Convention is an objective criterion, it is undisputed that it is up to the individual contracting States to assess — with possibly diverging results — whether a particular reservation meets the test or not. The difficulty of determining the compatibility or incompatibility of a reservation has led to a differentiated State approach to dealing with those reservations that do not meet the compatibility test. States still seem to be following the guidance of the International Court of Justice in its opinion on the Genocide Convention[26] when they — in finding that a particular reservation is incompatible with the object and purpose of a treaty — say so by objecting to the reservation, while others, that do not find such incompatibility, may expressly or tacitly accept it.

128. The Commission's guidelines as referred to above would represent a radical change in this approach, since it would leave no room for differing results of the compatibility test. How radical and problematic such a change in approach would be becomes clear when we take a closer look at the Commission's conclusions with regard to the legal consequences of an impermissible reservation and its severability, and the resulting "positive presumption".

[See also the observations made below in relation to draft guideline 4.5.2.]

Norway

[Original: English]

129. Experience shows that the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations have a number of lacunae and ambiguities to be found in their articles 20 and 21. Guideline 4.5.1, which concerns in part the nullity of an impermissible reservation, aims to fill one of the major gaps in the Vienna Conventions. It is firmly grounded in State practice and is, moreover, in line with the logic of the Vienna regime.

[26] International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951,* p. 24.

Portugal

[Original: English]

130. Draft guideline 4.5.1 is important since it fills an existing gap in the Vienna Conventions. Another gap that the Commission could fill in relation to the latter is connected to the consequences of acts having nevertheless been performed in reliance on a null reservation.

Draft guideline 4.5.2 (Status of the author of an invalid reservation in relation to the treaty)

Australia

[Original: English]

131. […] Australia is particularly concerned with the current rebuttable presumption in draft guideline 4.5.2, namely that a reserving State will become a party to the treaty without the benefit of the invalid reservation absent a contrary intention. Notwithstanding the factors set out in 4.5.2 for ascertaining that intention, we envisage practical difficulties for States other than the reserving State determining the extent of the reserving State's consent to be bound. This is particularly so in the absence of a third-party adjudicative body providing a determination that is binding for all the contracting States. This could lead to the situation whereby the reserving State considers its reservation valid, whereas an objecting State does not but nevertheless considers that the presumption applies, with the result that there would be no consensus as to whether the reserving State was bound to the treaty and, if so, whether the reservation applied. Consequently the presumption may be difficult to apply in practice and could lead to uncertainty among States in their treaty relations.

132. Australia would prefer a reversal of the presumption in 4.5.2, whereby a reserving State would not be considered a party to the treaty unless it indicated to the contrary. This would ensure that the intention of the reserving State remains the key determinant as to whether it becomes a party to the treaty, provides greater certainty for States and preserves the voluntary nature of the regime of treaties. Reversing the presumption also appropriately leaves the responsibility for taking action with the reserving State — either to modify or withdraw its reservation to remove its inadmissibility, or to forgo becoming a party to the treaty. A further advantage of this approach enables objecting States to maintain a treaty relationship with the reserving State, even with the invalid reservation, rather than have no treaty relationship at all.

Austria

[Original: English]

Invalid reservations

133. Guideline 4.5.2 is undoubtedly the heart of the matter of invalid reservations. According to this guideline the author of an invalid reservation becomes a party to the treaty without the benefit of the reservation, "unless a contrary intention of the said State or organization can be identified". Austria fully concurs with the general rule expressed in paragraph 1 of this draft guideline, but would suggest a further look into its exceptions. Austria is of the view that the intention of the author of the

reservation cannot be ascertained from the list of factors contained in paragraph 2. To take just one example: how can subsequent reactions of other contracting States express or reflect the intention of the author of the reservation? Moreover, it is not clear who shall "identify" the author's intention as required in paragraph 1. These problems could be avoided simply by requiring that the author of the reservation clearly expresses his intention not to be bound if the reservation is null and void. We therefore propose to delete the second paragraph of draft guideline 4.5.2 and replace the words "unless a contrary intention of the said State or organization can be identified" by the expression "unless the said State or organization expresses a contrary intention". Austria is of the view that it would not be appropriate to force the author of a reservation to become bound by the terms of a treaty when the reservation is null and void.

El Salvador

[Original: Spanish]

134. We express our support for the contents and phrasing of this guideline for the following reasons.

135. With regard to the status of the author of an invalid reservation, it is indisputable that the nullity of a reservation does not affect the consent of a State or an international organization to be bound by the treaty. The author of such a reservation is therefore fully subject to the treaty obligations and is considered a "party" to the treaty, or, if the treaty is not yet in force, a "contracting party".

136. This was precisely the position expressed by the European Court of Human Rights in *Belilos* v. *Switzerland*:[27] "[…] it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration". This position was subsequently reiterated in *Loizidou* v. *Turkey*.[28] At the regional level, the Inter-American Court of Human Rights continued that trend by indicating, in the case of *Hilaire* v. *Trinidad and Tobago*, that "Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American

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[27] European Court of Human Rights, *Case of Belilos* v. *Switzerland*, Judgment of 29 April 1988, para. 60: "In short, the declaration in question does not satisfy two of the requirements of Article 64 (art. 64) of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. Moreover, the Swiss Government recognised the Court's competence to determine the latter issue, which they argued before it. The Government's preliminary objection must therefore be rejected."

[28] European Court of Human Rights, *Case of Loizidou* v. *Turkey*, Preliminary Objections, Judgment of 23 March 1995, paras. 97 and 98:

"97. The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Article 25 and 46 (art. 25, art. 46) declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.

98. It follows that the declarations of 28 January 1987 and 22 January 1990 under Articles 25 and 46 (art. 25, art. 46) contain valid acceptances of the competence of the Commission and Court."

Convention, because this limitation is incompatible with the object and purpose of the Convention. Consequently, the Court considers that it must dismiss the second and third arguments in the preliminary objection submitted by the State insofar as they refer to the Court's jurisdiction".[29]

Finland

[Original: English]

The existence of a contractual relationship

137. The fact that an impermissible reservation cannot have its intended legal effect does not as such determine whether the State or the international organization which has made the impermissible reservation becomes a party to the treaty in question. As the Commission points out, two opposite outcomes are consistent with the lack of legal effects of the reservation: either the reserving State or organization becomes a party to the treaty without benefiting from its reservation, in which case the reservation of course does not have its purported effect; or the State or organization does not become a party to the treaty at all, in which case the reservation also lacks its intended effects, since no treaty relation exists in the first place. The Vienna Convention is silent on this crucial matter.

138. It is well known that Finland, together with an increasing number of other States, has favoured what has been called the "severability" approach. As noted in the report of the Commission, an objection based on this approach would first acknowledge that the reservation is impermissible and then go on to state that the objection does not preclude the entry into force of the treaty between X and Y and that the treaty enters into force without Y benefiting from its reservation. Although in increasing use, not all States have adopted this approach — as evidenced in the Commission's report, some States prefer merely to state that the treaty in question will enter into force regardless of the objection, and say nothing about what effect the reservation and the subsequent objection have on the extent and content of their treaty obligations, if any. As the Commission points out, however, these approaches seem to have little or no difference as to their ultimate outcome: surely a State using the latter formulation would not be of the opinion that, despite the objection and the impermissibility of the reservation itself, the reserving State has still in fact succeeded in modifying the treaty obligations in question.

139. The other solution would be to determine that in cases where a State makes an invalid reservation, it does not in fact become a party to the treaty at all. Most supporters of this approach would likely argue that any other solution would contradict the consensual foundation of treaty law: no State may become bound by contractual obligations against its will. There is no doubt that any solution to the problem at hand must respect this fundamental principle.

140. Indeed, any difference of opinion surrounding the subject matter of draft guideline 4.5.2 will surely not stem from disagreement as to this fundamental principle; rather, the question is what should be the legal presumption in cases where the actual intent of the reserving State or organization is unclear. There are, obviously, two alternative presumptions from which to choose: first, that in case of

[29] Inter-American Court of Human Rights, *Case of Hilaire* v. *Trinidad and Tobago*, Preliminary Objections, Judgment of 1 September 2001, Series C, No. 80, para. 98.

uncertainty, we should assume that any reservation is an integral part of that State's acceptance of the treaty obligations in question, and therefore, should the reservation be deemed not to have the desired effects, the State would not wish to be bound. The second possible presumption is, of course, the opposite one: that in the lack of clear evidence to the contrary, we presume that the State is willing to be bound nevertheless.

141. Some have argued that the second approach would make a mockery of the principle of consent and that it would in fact lessen States' interest in becoming parties to multilateral treaties for fear of inadvertently becoming bound by obligations that they would not voluntarily accept. The force of this argument is lessened, however, by the fact that the reserving State may easily refute this presumption by making it known that the reservation forms an integral part of its willingness to become a party to the treaty. On the whole, we fully agree with the Commission that the second presumption will yield far superior practical benefits compared with the first one. The Commission explains these benefits in a laudable manner,[30] and draws deserved attention to the widespread State practice in support of this presumption; neither argument needs to be repeated here in detail. However, we wish to make one additional point in favour of the second presumption: that of effectiveness.

142. Where a State makes to a multilateral treaty a reservation the permissibility of which can reasonably be questioned, the reservation inevitably leads to some degree of legal uncertainty with regard to the contractual relations of the reserving State and the States parties to the treaty. This uncertainty is, presumably, unwanted and harmful, so it is in the interest of the States parties to reduce this uncertainty the best they can. We are of the opinion that, other things being equal, the preferable solution to such an issue is to place the responsibility for the uncertainty on the party who can resolve it with the least effort, that is to say, most efficiently.

143. The generally accepted principle of consent means that the only relevant factor as to whether a State becomes bound by the treaty in case of an invalid reservation is its own intent, that is to say, whether its consent to be bound was, at the time it was given, conditional on the validity of its reservation. This being the case, the only entity capable of resolving the issue beyond any doubt is, in the absence of an outside arbitrator, the reserving State itself. It alone has access to its intentions, while others can only conjecture. Therefore, the most efficient solution is to place the responsibility for any uncertainty resulting from a potentially impermissible reservation on the reserving State.

144. To require the reserving State to make it clear when a reservation is a sine qua non of its consent, in order to avoid the risk of being bound by the entire treaty, would create a powerful incentive for States to produce more reasoned reservations, and therefore reduce future uncertainty.

145. For all these reasons, we remain firmly supportive of draft guideline 4.5.2 and are of the opinion that it is the best compromise available to us.

[30] A/65/10, pp. 204-205.

Germany

[Original: English]

146. The following comments focus on what is probably the most important aspect of the Commission's draft Guide to Practice, the Commission's conclusions with regard to the permissibility of reservations and, in particular, to the legal effects and consequences of non-permissible reservations on treaty relations. The issue has been much discussed by legal experts. This issue of international law remains unresolved.

[…]

The positive presumption

147. Draft guideline 4.5.2 introduces a general presumption that — in case of an impermissible reservation — the reserving State becomes a party to the treaty without the benefit of the reservation that it has submitted unless there is clear indication that the State in question did not want to be bound by the treaty under these circumstances.

148. This positive presumption is based on the Commission's finding in draft guideline 4.5.1, stating that "a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect", and that it thus can be severed from a State's consent to be bound by a treaty.

149. The positive presumption represents, in Germany's view, a proposal for a new rule in international treaty law. It clearly goes beyond a mere guideline to existing practice within the framework of existing international law.

150. And while the Commission's proposal is an intriguing attempt to resolve the issue of the legal consequences of impermissible reservations which was not addressed by the Vienna Conventions, Germany is not convinced by the Commission's conclusions on this issue and would be hesitant if not opposed to introduce such a new rule in the draft guidelines.

151. It is Germany's position that the Commission's proposal of a positive presumption cannot be deduced from existing case law or State practice — certainly not as a general rule equally valid for all cases of reservations impermissible under article 19 of the Vienna Convention or with respect to all treaties.

152. State practice remains ambiguous in this area; it would be difficult to identify a consistent State approach even in the more specific field of human rights treaties.

153. Upon closer examination of the cases most often referred to in support of the Commission's proposal of the positive presumption (the *Belilos* and *Loizidou* cases before the European Court of Human Rights[31]), it becomes clear that these need to be evaluated within their specific context, which is the Council of Europe: a rather close regional group of States sharing and upholding common social and political values, most prominently formulated in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Its member States are willing to subject themselves to the scrutiny and authoritative interpretation of a mandatory judicial system that even allows for individual claims. In its decisions to consider

[31] See notes 27 and 28 above.

member States bound to their contractual commitment without the benefit of their reservations, the Court refers to this "special character of the Convention as an instrument of European public order". It stresses "the consistent practice of the Contracting Parties" and the States' active participation within this system which imply "the inherent risk" (for a member State making a reservation) that "Convention organs might consider the reservation impermissible" and that it will be bound anyhow.

154. There may be other very special treaty settings or treaties of fundamental significance where similar conclusions as to the possibility of a positive presumption as suggested by the Commission in its draft guidelines may be drawn. However, it is Germany's position that this is not the case in general.

155. In Germany's view, in the case of an impermissible reservation it cannot be assumed that the State in question is then fully bound by a treaty. Such an interpretation would not take into account the State's evident intention that it does not intend to be fully bound.

156. Germany would like to express its concern that the proposed positive presumption in chapter 4.5 of the draft guidelines may actually harm treaty law development in the long run and could hamper contractual relations between States.

157. The draft Guide's proposed positive presumption claims that an impermissible reservation is devoid of legal effect (draft guideline 4.5.1) and that, as a result, the reserving State is considered a contracting party without the benefit of its reservation unless a contrary intention of the said State can be identified.

158. We fear that a broad positive presumption would make States more reluctant to adhere to treaties. Numerous States make reservations for constitutional reasons, such a reservation being a condition for parliamentary approval. These States, Germany included, would be forced — as a matter of routine — to expressly clarify that their consent to be bound by a treaty is dependent on their reservations. Chances are that over time most reservations would be accompanied by such a clarification. In case of the impermissibility of such a reservation, such a State thus would not become a party to the international agreement in question.

159. This gives rise to a number of questions and uncertainties: first, how to determine the impermissibility of a reservation in these cases, especially with regard to the compatibility test. The draft guidelines state the obvious in guideline 3.2 by allowing contracting States, dispute settlement bodies or treaty monitoring bodies to assess a reservation's permissibility. Among the contracting States, however — and this would not be unusual — there may exist diverging views in this regard. One objection alone, on the grounds that a reservation did not meet the compatibility test (article 19 (c) of the Vienna Convention), would suffice to cast doubt on the reserving State's status as a party to the treaty. Individual acceptance of the reservation by other States — tacitly or express — would and could not settle the matter, as acceptance of an impermissible reservation also is impermissible (draft guideline 3.3.2). An option might be to resort to the collective acceptance as proposed in draft guideline 3.3.3. That procedure, however, requires unanimity, which could be difficult to reach, considering the objection already made. The procedure also presupposes that the reservation is impermissible, which is the question under dispute. The matter of whether a reserving State had become a party to a treaty or not would need to be taken before a dispute settlement body in these

cases. The individual States, or even a majority of them, would no longer be in a position to define the contractual relations for themselves and/or remedy the situation.

160. Whether a reserving State has become a Party to a treaty or not is of particular interest in cases where it is that State's consent to be bound which would allow the treaty to enter into force or not. Yet another matter is to consider the resulting implications for the treaty relations while the reservation is in limbo.

161. Germany is concerned that, instead of contributing to legal clarity, a general positive presumption as proposed in the draft guidelines would create uncertainty in treaty relations and in fact, hamper the development of treaty relations. States might refrain from making objections at all, for fear of the consequences, although they are entitled to making objections to reservations they do not wish to accept, whatever the reason.

162. Germany is fully aware that it is not offering a solution to the issue. However, at this point in time Germany is not willing to accept the solution offered by the Commission with regard to the impermissibility of a reservation and the consequences thereof as a rule under public international law.

Norway

[Original: English]

163. Guideline 4.5.2 does not purport to identify and codify a consistent practice. Nor is it an attempt to generalize a specific European treaty context, based on Strasbourg standards, although the guidance should not run counter to it, in its specific context. Rather, it proposes a middle solution that takes into account existing sources and practices. It subtly bridges a divergence of views. It does so in a spirit of intellectual honesty, in seeking to promote legal certainty. A careful reading shows, moreover, that it does so in keeping with the logic of the Vienna regime. States will, on the basis of such guidance, be motivated to clarify their intentions, as appropriate, when issuing a reservation. A combination of factors combined with a rebuttable presumption may, at the same time, serve as a guide to authorities based on enhanced clarity. If relevant, they may express the premises for their consent to be bound.

Portugal

[Original: English]

164. As regards draft guideline 4.5.2, Portugal tends to concur with the view that the nullity of a reservation also affects its author's consent to be bound by the treaty.

165. This conclusion derives from the Vienna Conventions in the sense of it stating that the author of a reservation does not become a contracting State or contracting organization until at least one other contracting State or organization accepts the reservation. The reservation is thus presumed to be an essential condition for the consent to be bound.

166. Therefore, the starting point should be the assumption that a treaty does not enter into force for the author of a null reservation. The principle of consent (and consequently intention) remains the cornerstone of this subject matter. In any case, we would arrive at a conclusion similar to the one proposed by the Commission. It

would, however, be more consistent with the options taken in the Vienna Conventions.

Switzerland

[Original: French]

167. Switzerland will focus its observations more briefly on proposed guideline 4.5.2, as follows:

168. The question of knowing whether the author of a reservation can be considered, when the reservation proves impermissible, as bound by the treaty without the benefit of the reservation, or if on the contrary that author must be considered as entirely unbound by the treaty, is one for which an answer is needed. It would be regrettable to allow it to remain unresolved simply because of the difficulty of the problem it presents.

169. It would seem indisputable that the intention of the author of the reservation must serve as the basis, and that this issue arises only in the event that such intention cannot be established. The converse argument that if the intention of the author of a reservation cannot be established, that author is not bound by the treaty, does not appear desirable and could even raise additional issues. Switzerland also wonders whether a solution could be found in maintaining the presumption of proposed guideline 4.5.2, but at the same time reducing the degree of plausibility required for considering that the intention of the reservation's author has been established. A guideline on the topic that included such a presumption would have, inter alia, the certain advantage, in the case of an impermissible reservation, of strongly encouraging the author of the reservation to reveal his intentions rather than staying silent or continuing to insist, without further explanation, on the validity of that reservation.

United States of America

[Original: English]

Consequences of an invalid reservation

170. Our chief concern regarding the draft guidelines, which also was highlighted by a number of States during Sixth Committee discussions last year, relates to the consequences of making an invalid reservation that is not collectively accepted by the parties to a treaty. Draft guideline 4.5.2 provides that when an invalid reservation has been formulated, the reserving State is considered a party to the treaty without the benefit of the reservation, unless the reserving State has expressed a contrary intent. After having studied this provision and the related commentary more closely, we fundamentally disagree with the conclusion reached by the Commission on this guideline.

171. In examining the Commission's reasoning more closely, we concur with the statements made by both Germany and Hungary during the Sixth Committee that the Commission places far too much reliance on State practice and tribunal precedents that are limited both substantively and regionally. The tribunal precedents cited by the Commission come almost exclusively from the area of human rights,[32] and, in

[32] See A/65/10, pp. 194-197, commentary to draft guideline 4.5.2, paras. (6)-(13).

terms of State practice, the Commission only appears to rely on a handful of European States that have lodged objections with so-called "super-maximum" effect.[33] Regardless of the character of other State practice, it is insufficient in our view to rely on limited practice in one area of international law and from one geographic region to propose such an important generally applicable guideline.

172. The commentary also too quickly rejects the opposite approach for dealing with invalid reservations. Namely, the commentary describes the approach in which an invalid reservation prevents a State from becoming a party as a "radical solution",[34] even though it is based on the relatively uncontroversial proposition that a reservation is a reflection of the extent to which a State consents to be bound. Further, the commentary asserts legal conclusions that are not necessarily justified by State practice. Specifically, the commentary expressly acknowledges that "in virtually all cases" States objecting to a reservation as invalid "have not opposed the treaty's entry into force".[35] Because an invalid reservation is null and void, the Commission arrives at the legal conclusion that it "can only mean that the reserving State is bound by the treaty as a whole without benefit of the reservation".[36] However, the commentary's admission that there is "no agreement" among States on the approach to this issue[37] seems to undermine such a conclusion. Indeed, such varied State practice is not sufficient to support this conclusion.

173. Even though the Commission arrives at what it considers to be a compromise approach — establishing a rebuttable presumption that a reserving State is bound without the benefit of its invalid reservation — such an approach is nevertheless inconsistent with the bedrock principle of consent. It is the long-standing view of the United States that any attempt to assign an obligation expressly not undertaken by a country, even if based on an invalid reservation, is inconsistent with the fundamental principle of consent, which is the foundation upon which the law of treaties is based, as the Special Rapporteur himself has recognized. Moreover, when the principle of consent is combined with a good-faith assumption that States do not make reservations lightly and should be presumed to do so only when such reservations are an essential condition of the reserving State's consent to be bound by the treaty, the presumption in the proposed guidelines should point in the opposite direction. In other words, when an invalid reservation has been formulated, the reserving State should only be considered a party to the treaty without the benefit of the reservation if the reserving State has expressly indicated that upon objection, the reserving State would effectively withdraw the reservation and thus be a party without the benefit of the reservation.

174. Indeed, none of the factors cited by the Commission to support its proposed presumption is persuasive. The Commission first notes that because a reserving State is taking the significant action of becoming a party to the treaty, the importance of the reservation itself should not be overestimated.[38] But this view of reservations ignores the crucial role they often play for a State. For example, a reservation may arise from domestic restrictions in a State's fundamental law, which

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[33] See A/65/10, pp. 193-194, commentary to draft guideline 4.5.2, paras. (3)-(5).

[34] See A/65/10, p. 198, commentary to draft guideline 4.5.2, para. (16).

[35] See A/65/10, p. 193, commentary to draft guideline 4.5.2, para. (2); see also pp. 199-200, para. (19).

[36] See A/65/10, p. 193, commentary to draft guideline 4.5.2, para. (2).

[37] See A/65/10, p. 199, commentary to draft guideline 4.5.2, para. (19).

[38] See A/65/10, p. 204, commentary to draft guideline 4.5.2, para. (35).

a treaty provision cannot override as a domestic law matter. Further, many States must obtain the approval of their legislative bodies to become party to a treaty and such entities can play a role in determining what reservations are necessary. Thus, if a reservation is formulated to take into account the limits of a State's Constitution or the concerns of the State's legislature, a State's desire to become a treaty party does not automatically outweigh reservations tailored to address domestic concerns. In fact, such reservations are critical to the State's consent. Second, the Commission argues that it is better to presume a reserving State to be part of the circle of contracting parties in order to resolve problems with the invalid reservation within the context of the treaty regime.[39] Again, however, this assumes that such reservations can be resolved by discussions among parties. While this might be the case with some types of reservations, if a reservation is made to accommodate a basic constitutional limitation or address a serious concern of the legislature, the reserving State likely will not be in a position to work with other countries to alter its reservation.

175. Third, the Commission argues that its proposed presumption will provide legal certainty. The commentary states that the presumption can resolve uncertainty "between the formulation of the reservation and the establishment of its nullity; during this entire period (which may last several years), the author of the reservation has conducted itself as a party and has been deemed to be so by the other parties".[40]

176. The proposed presumption arguably would provide little clarity during the potentially long period between the formulation of the reservation and establishment of its nullity. Indeed, the presumption, as currently set forth, would be difficult to apply in practice and could undermine the stability of treaty obligations that the Vienna Conventions were designed to foster. For example, given the subjectivity inherent in assessing a reservation's validity and the good-faith assumption that a reserving State intends to make permissible reservations, it is quite likely that a reserving State would consider its reservation valid, despite an objecting State's view that it is not permissible. If the objecting State does not find the presumption rebutted, both States would agree that they have a treaty relationship, but the scope of that relationship would be disputed. Alternatively, if the objecting State decided on its own that the presumption had been overcome by the reserving State based on the factors listed in the draft guideline, there would be no consensus between these two States regarding whether the reserving State was bound at all to the treaty. The reserving State would continue to maintain that the reservation was valid and therefore that it remains a party to the treaty, while the objecting State would take the view that the reserving State cannot be party to the treaty.

177. The proposed presumption also arguably would do little to facilitate certainty for the period after an invalid reservation is established, unless the presumption is particularly difficult to overcome. Improved legal certainty would seem to come, at least in part, from the application of a strong presumption and anticipated continued treaty relations without the benefit of the reservation. If, however, the presumption can be easily rebutted once invalidity is established, or States can take action in advance to ensure that they can rebut it, treaty relations between the reserving State and objecting State would end. Thus, if the presumption is easy to rebut, States

[39] See A/65/10, p. 204, commentary to draft guideline 4.5.2, para. (36).
[40] See A/65/10, p. 205, commentary to draft guideline 4.5.2, para. (37).

could not have reasonable certainty in advance that whatever the ultimate characterization of the reservation, treaty relations would continue.

178. Furthermore, the presumption proposed by the Commission arguably creates undesirable incentives in the treaty practice of States. In order to most effectively rebut the presumption, the reserving State would presumably indicate when making a reservation whether it is willing to be bound without benefit of the reservation if it turns out that the reservation is considered invalid. Yet, to do so would suggest that the reserving State is concerned that the reservation is invalid. Thus, to most effectively rebut the presumption a State is, in a sense, forced to concede that its actions may be impermissible. It is not obvious to us that this approach is practical or would improve the process for clarifying the effect of reservations in treaty relations among States.

179. It also is worth noting that the draft guidelines leave the reserving State that has made an invalid reservation with only two choices: to become a party without the benefit of the reservation consistent with the presumption, or to refrain from becoming party to the treaty at all. This does not allow for the possibility that the objecting State may prefer to have a treaty relationship even with the invalid reservation than to have no treaty relationship at all, assuming the reserving State has overcome the presumption. The commentary explains that such treatment would amount to giving impermissible reservations the same effect as permissible reservations.[41] Whether or not the negotiators of the Vienna Convention would have anticipated this result, it should not be rejected out of hand. Because there is an element of subjectivity in judging the compatibility of a reservation with a treaty's object and purpose, as the United Kingdom has accurately pointed out in its Sixth Committee statement, and because "the vast majority of objections are based on the invalidity of the reservation to which the objection is made",[42] it seems that the system for dealing with reservations characterized as invalid should be as flexible as possible. From a practical perspective, there are times when it may be better to continue to have a treaty relationship with a State, despite the existence of an impermissible reservation.[43]

180. It is also worth echoing a point articulated by the United Kingdom in its Sixth Committee statement regarding the threshold for triggering the presumption. Namely, to the extent any presumption is retained, the commentary should make clear that one party's objection cannot initiate the presumption such that it applies for all parties, an outcome that could be inferred from the current guidelines and commentary. Judging the permissibility of a reservation can be a very subjective exercise and, as a result, the guidelines or commentary should clarify that one objection does not erect any presumption applicable to all parties.

181. In addition to concerns regarding the existence and direction of the presumption, the United States has concerns with the Commission's approach to

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[41] See A/65/10, p. 187, commentary to draft guideline 4.5.1, para. (16).

[42] See A/65/10, p. 209, commentary to draft guideline 4.5.3, para. (3).

[43] One alternative approach may be for an invalid reservation simply to drop out of treaty relations between the reserving State and the objecting States, which arguably creates greater certainty than either of the presumptions discussed by the Commission. In such a case, the reserving State can retain treaty relations with other parties and, in the event its reservation is found to be impermissible, the provisions to which the reservation relate fall out of the treaty relations between the reserving State or other parties.

determining the intent of the author of a reservation. The Commission acknowledges that determining the intention of the author may be challenging and sets forth a non-exhaustive list of factors to be considered.[44] That list includes several factors: the reservation's wording, the reserving State's statements at the time it consents to be bound, subsequent conduct of the reserving State, the reactions of other contracting States, the provisions to which the reservation relates, and the treaty's object and purpose. However, it is not clear why the express views of a reserving State made at the time it expresses consent to be bound would not always trump other factors. The United States also questions the relevance of the subsequent conduct of the reserving State to the intent determination. As discussed above, the reserving State presumably formulates its reservation to be valid. Thus, the fact that a reserving State engages in treaty relations with other parties should not be taken as evidence that the State desires to be bound without the benefit of the reservation, as it is equally if not more likely that such engagement is simply a reflection that the State assumes it has a valid reservation. Further, even actions by a reserving State to act consistently with a treaty provision on which it has formulated a reservation do not necessarily validate the proposed presumption, as States may take a reservation for certain reasons related to their internal allocation of authorities, but in practice still generally act consistently with the relevant obligations.

182. As we explained in our 2010 Sixth Committee statement, the questions being addressed in these guidelines are of fundamental importance. Proposed guideline 4.5.2 addresses an issue not clearly articulated in the Vienna Conventions and on which, as is noted in the commentary, there are widely varying views and thus no customary international law rules to codify. Under such circumstances, we believe this issue deserves more discussion before final adoption occurs.

Draft guideline 4.5.3 (Reactions to an invalid reservation)

Australia

[See the observations made above in respect of section 4.5.]

El Salvador

[Original: Spanish]

183. As noted by the International Law Commission itself, the first paragraph of this Guideline is "a reminder […] of a fundamental principle […] according to which the nullity of an invalid reservation depends on the reservation itself and not on the reactions it may elicit", and "is perfectly consistent with guideline 3.1 […], guideline 3.3.2 and guideline 4.5.1".[45]

184. Therefore, we consider the first paragraph of the guideline to be superfluous, as it reiterates the contents of guideline 4.5.1, on the nullity of an invalid reservation. The subsequent commentary highlights the point that that nullity does not depend on the objection or acceptance of a contracting State or organization.

185. While the second paragraph of guideline 4.5.3 likewise follows the same logic as preceding guidelines, it does add something new by establishing the deterrent requirement for States and international organizations to state their reasons for

[44] See A/65/10, p. 206, commentary to draft guideline 4.5.2, paras. (41) ff.
[45] A/65/10, p. 209, commentary to draft guideline 4.5.3, paras. (1) and (2).

considering a reservation to be invalid, thus enhancing the stability and transparency of the legal positions of States and international organizations in their treaty relations. However, this paragraph could be moved to become the second paragraph in guideline 4.5.1, given that, as already noted, the first paragraph of guideline 4.5.3 is superfluous.

Finland

[Original: English]

186. As draft guideline 4.5.3 rightly explains, the lack of conformity with the formal and/or substantial requirements placed on the act is in itself sufficient to render the reservation null and devoid of legal effect. Nothing further, such as objection or any other opposing reaction by other contracting parties, is required. We support, however, the Commission's view that it may often be beneficial for contracting States, if appropriate, to make it officially known that they consider a reservation to be impermissible or formally invalid. While such a declaration is not legally speaking necessary, a reasoned opinion will draw wider attention to the issue and may contribute towards clarifying the existing legal situation.

187. We, therefore, wish to express our continued support for draft guideline 4.5.3.

[See also the observations made above in relation to draft guideline 4.5.1.]

188. We agree with the Commission also on the point that, even though an analytical distinction can be made between the act of opposing a valid reservation and that of opposing an invalid one, both these acts should be referred to as "objections", since this is the consistent practice of States and there seems to be no real danger of confusion. However, we are less convinced by the Commission's reasoning according to which the definition of "objection" in draft guideline 2.6.1 is sufficiently wide to cover objections to invalid reservations in addition to those made to valid ones. According to draft guideline 2.6.1, an objection is "a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization *purports to* exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization" [emphasis added]. The verb "purport", of course, would imply a purpose or intention on the part of the objecting State, in this case the specific purpose or intention of modifying or excluding the effects of the reservation. A State could not, however, have any such intention when it considers the reservation to lack any legal effects to begin with; the purpose of objecting is merely to point out the invalidity and consequent lack of legal effects of the reservation.

189. For these reasons, we propose to the Commission that it consider the feasibility of refining the definition in draft guideline 2.6.1 so that it expressly includes both types of objections, perhaps by adding to it the phrase "or whereby the objecting State or international organization expresses its view that the reservation is invalid and without legal effect".

Portugal

[Original: English]

190. Portugal welcomes the reminder in draft guideline 4.5.3. Portugal also welcomes the willingness of the Commission to be pedagogic by encouraging States and international organizations to react to invalid reservations.

191. Nevertheless, it is known that such a reaction would not be a real objection since an invalid reservation is void of legal effects. Hence, the reaction to it would not have any direct legal effects. Furthermore, the wording compels the Contracting States and international organizations to a reaction in a rather imposing manner which is not consistent with the complete freedom of making such a reaction. We therefore suggest changing the wording from "should (...) formulate a reasoned objection" to "may react (...) by making a corresponding reasoned statement".

United States of America

[Original: English]

192. Guideline 4.5.3 encourages States to formulate reasoned objections to invalid reservations as soon as possible, and the commentary explains that it is not indispensable that objections to impermissible reservations be formulated within 12 months, the time frame set forth in the Vienna Convention for objections to permissible reservations.[46] However, to the extent an impermissible reservation may have an even greater effect on treaty relations than a permissible reservation — i.e. by binding a reserving State without the benefit of its reservation or by preventing the reserving State from becoming party to the treaty — then it would appear to be quite important to establish a concrete time frame in which objections on such grounds should be made. As a result, the Commission might consider adding to the end of the second paragraph of guideline 4.5.3 the phrase "and preferably within twelve months of notification of the reservation".

Section 5 (Reservations, acceptances of and objections to reservations, and interpretative declarations in the case of succession of States)

Australia

[Original: English]

193. In relation to section 5, we note that these provisions involve both codification and the progressive development of international law.

Austria

[Original: English]

194. The guidelines concerning reservations and State succession seem to present, in Austria's view, a glass bead game as they refer to concepts which only partly reflect the current state of international law. They are based on the 1978 Vienna Convention on Succession of States in respect of Treaties,[47] which has only very few parties and is generally seen as only partly reflecting customary international

[46] See A/65/10, p. 213, commentary to draft guideline 4.5.3, para. (14).

[47] United Nations, *Treaty Series*, vol. 1946, No. 33356.

law. This convention — as well as the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts[48] — distinguishes between newly independent States and other successor States. Austria wonders whether the use of the category of "newly independent States" is still appropriate in present times, as the process of decolonization and the need to consider special circumstances arising therefrom in the context of State succession lie in the past. The Commission itself has ceased using this distinction: its articles on the nationality of natural persons in relation to the succession of States (annex to General Assembly resolution 55/153) no longer contain a reference to "newly independent States".

Portugal

[Original: English]

195. Portugal maintains its doubts on whether it is suitable to deal, in the Guide to Practice, with the question of reservations to treaties in the context of succession of States. The 1978 Vienna Convention on Succession of States in respect of Treaties, which has only 22 States parties, deals with this question in a superficial manner. Portugal fully acknowledges the practical relevance of dealing with the issue in the Guide to Practice. However, it should not be forgotten that the Commission has no mandate to enter into the progress of international law while developing this Guide to Practice.

[48] Not yet in force. See *Official Records of the United Nations Conference on Succession of States in respect of State Property, Archives and Debts*, vol. II (United Nations publication, Sales No. E.94.V.6).