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Reservations to treaties

Comments and observations received from Governments

Addendum

The present addendum reproduces written replies from the following States: Republic of Korea (dated 15 February 2011); United Kingdom of Great Britain and Northern Ireland (23 February); France (4 March); Malaysia (17 March); and New Zealand (23 March).

II. Comments and observations received from Governments

A. General comments and observations

France

[Original: French]

1. At the outset, France would like to commend once again the high-quality, in-depth work of the International Law Commission and its Special Rapporteur on this topic. The Guide to Practice on Reservations to Treaties will be an essential practical tool for States and international organizations.

[...]

2. France has followed with great interest the Commission's work on this topic and has made oral comments at meetings of the Sixth Committee of the General Assembly throughout this process. The Secretary-General will find below, in response to the aforementioned request, France's comments and observations on the set of draft guidelines constituting the Guide to Practice, provisionally adopted on first reading by the Commission in 2010.

[...]

3. After 15 years of work on the topic, France would like to recall its general assessment of the Guide to Practice (I), as well as its comments at meetings of the Sixth Committee regarding specific draft guidelines (II).

I. General observations

4. France, which remains committed to the reservations regime enshrined in the 1969 Vienna Convention on the Law of Treaties, welcomes the Commission's decision to take that regime as a model and address its shortcomings without calling it into question; indeed, the Vienna regime seems to lend itself to all types of treaties, irrespective of their object or purpose, including human rights treaties. The Guide to Practice will thus provide a valuable addition to the provisions of the Vienna Convention relating to reservations to treaties (arts. 19 to 23).

5. While the purpose of the Guide to Practice is to help States, it is not meant to culminate in an international treaty. France reiterates its strong preference for a document to which States can look for guidance, if they so wish, and to which they can refer if they deem it necessary.

6. As the French delegation has already mentioned in the Sixth Committee, the French term "*directive*" does not seem the most appropriate one to describe the provisions of a non-binding guide to practice. The term "*lignes directrices*" would be more satisfactory.

II. Comments on specific guidelines

7. In addition to these general observations, France would like to recall its more specific comments on a number of draft guidelines, [...] which were updated in 2011.[1]* It nevertheless reserves the right to make further comments on certain draft guidelines between now and the conclusion of the Commission's second reading of the Guide to Practice.

Malaysia

[Original: English]

1. Malaysia recognizes that the 1969 Vienna Convention on the Law of Treaties, the 1978 Vienna Convention on Succession of States in Respect of Treaties, and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which set out the core principles concerning reservations to treaties, are silent on the effect of reservations on the entry into force of treaties, problems pertaining to the particular object of some treaties, reservations to codification treaties and problems resulting from particular treaty techniques. Therefore, Malaysia appreciates the work being

[1] See the comments and observations made by France, reproduced in section B below.

* *Translator's note*: It will be recalled that the Commission's preference as to the English translation of the French "validité", particularly in Part 3 of the Guide to Practice, has changed over time. In its comments, France quotes extensively from its delegation's statements at meetings of the Sixth Committee during previous sessions of the General Assembly as reported in the summary records of those meetings. In order to bring these quotations into line with the current wording of the relevant draft guidelines, the translator has, in some cases, changed "validity" and "non-validity" to "permissibility" and "non-permissibility".

undertaken by the International Law Commission to clarify and develop further guidance on these matters.

2. In this regard, Malaysia supports the Commission's work on the Guide to Practice on Reservations to Treaties. The crystallizing of the draft guidelines already shows that the guidelines promise to be useful for assisting States in their formulation and interpretation of reservations to treaties. Malaysia notes that during its sixty-second session, the Commission has provisionally adopted the entire set of draft guidelines of the Guide. Malaysia further recalls the invitations previously made to States to make further observations on the entire set of the provisionally adopted draft guidelines on this topic in chapter IV of the 2010 report of the Commission (A/65/10). Malaysia thus appreciates the opportunity given by the Commission for States and international organizations to make further observations and believes that a universally acceptable set of draft guidelines can only be developed by the Commission if States play their part by providing comments and practical examples of the effects of the draft guidelines on State practice.

[…]

3. Malaysia wishes to reiterate its views, as expressed at the sixty-fourth and sixty-fifth sessions of the General Assembly in relation to international organizations. In this respect, since the power to make treaties by international organizations largely depends on the terms of the constituent instrument of the international organization and the mandate granted to the international organization, international organizations do not necessarily have authority or responsibility similar to that of States. Thus, Malaysia is of the view that a separate regime for international organizations should be developed to address these entities and should not be made part of the draft guidelines at this juncture.

4. Malaysia also wishes to draw the attention of the Commission to the fact that, previously, States have only had the benefit of studying the draft guidelines within the context of what had been provided by the Commission. It is Malaysia's view that the entire draft guidelines on the matter should be read in their entirety to ensure that all concerns have been addressed as a whole since they are interrelated. This is especially pertinent, as the work on the draft guidelines has continued for a period of 12 years and the entire set of provisionally adopted draft guidelines has only been recently made available for States to study since the sixty-second session of the Commission. However, in view of the limited period of time to really examine the draft guidelines in their entirety, Malaysia would like to reserve the right to make further statements on all the draft guidelines.

5. As such, Malaysia would like to take this opportunity to urge all States to share their invaluable inputs in relation to the matter in order to improve the current international regime on reservations to treaties as well as to assist the Commission in completing the guidelines.

New Zealand

[Original: English]

1. New Zealand appreciates the large amount of work that lies behind the Guide to Practice on Reservations to Treaties and wishes to express its thanks in particular to the Special Rapporteur, Professor Alain Pellet.

2. The Guide to Practice will be an extremely valuable resource for States in this complex aspect of treaty law. That said, New Zealand understands that it remains a guide to the practical application of the Vienna Conventions on the Law of Treaties of 1969 and 1986, and does not purport to modify them.

[…]

3. New Zealand appreciates the opportunity to comment on the International Law Commission's Guide to Practice on Reservations to Treaties, and thanks the Commission for its work.

Republic of Korea

[Original: English]

1. The Republic of Korea has made reservations to about 27 multilateral treaties, 24 of which are still in effect.

2. The reservations can be divided into several categories: special circumstances with regard to North Korea; reciprocity with foreign Governments; harmony with domestic legislation; exclusion of privileges or immunities for nationals working for international organizations or foreign Governments inside the country; and alleviation of responsibilities that severely hamper national interests.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Introduction

1. The United Kingdom thanks and congratulates Professor Pellet and the Drafting Committee for the work that has gone into these guidelines and commentaries. The 16 reports have captured a wealth of material and practice, and sought to chart a practical course through a series of complex issues. The United Kingdom has made various comments over the years at the debates of the International Law Commission. We would ask that the Commission bear these in mind. This note reinforces some of the main observations of the United Kingdom, as well as making new comments on the basis of the entire work taken as a whole.

General remarks

2. The title "Guide to Practice" is ambiguous and should be clarified; it is a guide to practice to be followed, that is, practices considered desirable, both old and new. This is confirmed by the General Assembly and the Special Rapporteur when they state that the guidelines are intended "for the practice of States and international organizations in respect of reservations".

3. There should be an introductory section to the commentaries setting out the approach that has been taken and the intended purpose and/or legal status of the guidelines. In particular, there should be a clear statement confirming that the guidelines constitute guidance for States, based on the study of the practice that the International Law Commission has undertaken, but that in themselves they do not constitute normative statements. Such an introductory section could also helpfully include a statement on the relationship of the Guide to the Vienna Conventions on the Law of Treaties of 1969 and 1986. The United Kingdom understands the Guide

to Practice as being intended to provide guidance on the operation in practice of the framework of the Vienna Conventions, i.e., to give guidance on the application and interpretation of that framework and, where necessary, to offer guidance to supplement it, but not to propose amendments to it.

4. Furthermore, as is often the case with instruments of the International Law Commission that contain elements of both codification and progressive development, there are aspects of the Guide which constitute a description of existing practice and others in which proposals for new practice are made. The United Kingdom does not consider that this Guide to Practice constitutes the *lex lata*. To the extent that proposals for new practice are made, there should be an introductory section to include a clear statement that such proposals are intended as guidance for future practice only and are not intended to have any effect on any examples of existing practice that do not accord with such proposals. Moreover, the United Kingdom believes the Commission should include in the commentaries in relation to each of the guidelines a statement on the degree to which they reflect existing practice or constitute proposals for new practice.

5. A further general observation point concerns the expected users of the guidelines. The present draft guidelines are of considerable complexity and make some fine distinctions in their terminology (for example, “permissibility” and “validity”, “formulation” and “establishment”, “objections”, and “reactions” and “opposition”). While the United Kingdom fully appreciates the complexity of the subject matter, we think that to the degree to which the text is over-elaborate it risks losing a general reader and thus risks depriving the work of some of its undoubted practical utility. The United Kingdom therefore urges the Commission, where possible, to seek to simplify the text to ensure its maximum accessibility and utility (for example, see comments below on “conditional interpretative declarations”, and chapter 5 on succession).

6. In line with the practical orientation of the work, the United Kingdom supports the Commission’s approach of including model clauses (with appropriate guidance on their use) alongside some of the guidelines. Indeed, we urge the Commission to seek to provide model clauses more consistently throughout the Guide, as this will enhance the practical utility of the work and contribute to bringing clarity to the practice of States.

7. Finally, the United Kingdom notes that the real crux of the issue in these guidelines, and the topic of reservations to treaties more generally, is the status of invalid reservations dealt with in guideline 4.5.2. We have noted the views expressed by States in the 2010 International Law Commission debate and we return to this topic [*see the observations made below in respect of draft guideline 4.5.2*] to expand on our views expressed in the Sixth Committee […].

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

Section 1 (Definitions)

France

[Original: French]

1. [Observation 1998; revision 2011] The definition of reservations and their "permissibility" must not be confused. The definition of a unilateral statement as a reservation is obviously without prejudice to its "permissibility". It is only after a unilateral statement has been deemed to constitute a reservation that it is possible to assess its "permissibility". Some unilateral statements are clearly reservations. They are not necessarily permitted under the treaty to which they relate, but that is a separate issue.

2. [Observation 2000] The Special Rapporteur has pursued the task of defining concepts and France welcomes that approach. Many of the issues raised to date originated in vague definitions which require clarification. The distinction between a "reservation" and an "interpretative declaration" is important, but a useful distinction has also been made between reservations and other types of acts which were previously scarcely or poorly defined. Insofar as the current study focuses on definitions, it seems important that legal terms should be used with the utmost rigour. In particular, the word "reservation" should be used only for statements matching the precise criteria of the definition in draft guideline 1.1. The ongoing work of definition is especially important and will determine the scope of application of the reservations regime. Nevertheless, it is necessary to stress that any new guidelines adopted must complement articles 19 to 23 of the Vienna Convention on the Law of Treaties of 1969 and should not fundamentally alter their spirit.

Draft guideline 1.1 (Definition of reservations)

France

[Original: French]

1. [Observation 1998] A reservation is a unilateral act (a unilateral statement) that is formulated in writing when a State or international organization expresses its consent to be bound by a treaty, and that purports to exclude or to modify the legal effect of certain provisions of the treaty. While the first criterion (a unilateral act formulated in writing) does not raise any particular issues, the other two criteria (timing and purpose) are doubtless more problematic. With regard to timing, it seems necessary to prevent States and international organizations from formulating reservations at any time of their choosing, as that might result in considerable legal uncertainty in treaty relations. It is therefore essential to make an exhaustive, rigorous list of the times at which a reservation may be formulated. The definitions contained in the Vienna Conventions do not provide such a list as various potential scenarios have been omitted. On the issue of purpose, it can be assumed that a reservation purports to limit, modify and sometimes even exclude the legal effect of certain treaty provisions. The definition used by the Special Rapporteur in his report appears to cover all these scenarios. It would, however, be preferable to use the term "restrict" rather than "modify" as modification of the legal effect entails a restriction.

2. It would doubtless be preferable to clearly identify the author of a reservation, specifically, whether it is a State or an international organization, in order to avoid any confusion. Acts of formal confirmation, for instance, concern international organizations, not States, while ratifications concern States, not international organizations. Two paragraphs relating to States and international organizations, respectively, are therefore necessary.

3. [Observation 2002] The Commission's definition of reservations appears to be exhaustive and to provide a valuable addition to the relevant treaties.

Draft guideline 1.1.1 (Object of reservations)

France

[Original: French]

1. [Observation 1998] France fully agrees with the wording proposed by the Special Rapporteur, namely, that a reservation may relate to one or more provisions of a treaty or, more generally, to the way in which a State or an international organization intends to implement the treaty. A reservation can be referred to as having a general scope if it applies to more than one or several provisions of the treaty to which it relates. This issue concerns the definition of reservations rather than their permissibility. Nevertheless, for a State to make such a reservation inevitably casts doubt on its commitment, good faith and willingness to implement the treaty effectively. In practice, the reservations that pose the greatest problems are not those which concern a single or a few provisions of a treaty, but more general reservations.

2. [Observation 1999] France is in favour of this draft guideline. Across-the-board reservations that, on the basis of their wording, cannot be linked to specific treaty provisions and yet do not divest the treaty of its very purpose are thus taken into consideration. The usefulness of these reservations has been demonstrated in practice and it was necessary to distinguish them from general reservations that completely vitiate the commitment made.

3. [Observations 1999 and 2002] Draft guideline 1.1.5, on statements purporting to limit the obligations of their author, and draft guideline 1.1.6, on statements purporting to discharge an obligation by equivalent means, are satisfactory in terms of their substance. Nevertheless, it might be wondered whether it is really useful to present them as separate guidelines. They clarify the meaning of the word "modify" as used in the guidelines that define reservations (1.1) and specify their object (1.1.1), as do the draft guidelines on statements purporting to undertake unilateral commitments (1.4.1) and on unilateral statements purporting to add further elements to a treaty (1.4.2). All these provisions confirm that the word "modify" cannot be understood, in the context of the definition of reservations, as purporting to extend either the reserving State's treaty obligations or its rights under the treaty. Unless a modification introduced by a reservation establishes an equivalent means of discharging an obligation, it can only serve to restrict the commitment. It would therefore seem that draft guidelines 1.1.5 and 1.1.6 could become new paragraphs of draft guideline 1.1.1 on the object of reservations.

Draft guideline 1.1.3 (Reservations having territorial scope)

France

[Original: French]

[Observation 1998] The Special Rapporteur's conclusions on what he refers to as "reservations having territorial scope", a complex and controversial subject if ever there was one, are acceptable. Indeed, if the purpose of a unilateral statement is in fact to exclude or modify the legal effect of certain provisions of a treaty in relation to a particular territory, that statement must be understood as constituting a reservation. Thus, a State that formulates a statement on the application *ratione loci* of a treaty could be considered as having made a reservation to the treaty in question. The 1969 Vienna Convention does not state that reservations must relate solely to the implementation *ratione materiae* of a treaty. Reservations certainly may relate to the implementation *ratione loci* of a treaty. According to the Special Rapporteur, a State consents to application of a treaty as a whole *ratione materiae*, except with regard to one or more territories that are nonetheless under its jurisdiction. Absent such a reservation, a treaty to which a State becomes a party is applicable to the entire territory of that State pursuant to article 29 of the 1969 Vienna Convention, which establishes the principle that a treaty is binding upon each party in respect of its entire territory, unless a different intention appears from the treaty or is otherwise established. On the one hand, this article does not prohibit a State from limiting the territorial scope of its commitment. On the other, the article is without prejudice to the issue of the legal definition of the statement made by the State. "Reservations having territorial scope" do not have to be authorized expressly by the treaty. Article 29 of the Vienna Convention must not be interpreted too narrowly.

New Zealand

[Original: English]

1. New Zealand wishes to offer a specific comment on guideline 1.1.3 [1.1.8] […] New Zealand does not consider that this guideline accurately reflects established State practice on the extension of treaty obligations to territories.

2. New Zealand has had international responsibilities in respect of a number of territories throughout the twentieth century. The relevant territories are the Cook Islands, Niue, Tokelau and the former Trust Territory of Western Samoa. Since 1 January 1962, Samoa has been a fully independent sovereign State, assuming treaty-making responsibility. The Cook Islands and Niue, following acts of self-determination supervised by the United Nations, are self-governing in free association with New Zealand and have developed a separate treaty-making capacity in their own right.[2] Tokelau remains on the United Nations list of Non-Self-Governing Territories (following two referendums, supervised by the United Nations, which failed to reach the requisite majority in order for Tokelau to become self-governing in free association with New Zealand).

[2] By a note of 10 December 1988 to the Secretary-General of the United Nations, New Zealand advised that from that date forward no treaty signed, ratified, accepted, approved or acceded to by New Zealand would extend to the Cook Islands or Niue unless the treaty was signed, ratified, accepted, approved or acceded to expressly on behalf of the Cook Islands or Niue.

3. New Zealand has on many occasions over the years made declarations regarding the application of treaties to these territories, even when reservations have been expressly prohibited or restricted. New Zealand accepts that a declaration as to the territorial application of a treaty which purports to apply only part of a treaty to a territory may be regarded as a reservation for the purposes of article 2 (d) of the Vienna Convention on the Law of Treaties 1969 ("the Convention"). However, New Zealand does not support the proposition that a declaration excluding an entire treaty from application to a territory should be characterized as a reservation. In New Zealand's view, such a declaration does not concern the legal effect of the treaty in its application to New Zealand. It merely determines how "New Zealand territory" is to be interpreted for the purposes of that treaty. The legal obligations imposed by the treaty are unaltered to the extent that they have been assumed by New Zealand. New Zealand considers that a declaration excluding an entire treaty from application to a territory merely establishes a "different intention" as to the territorial application of the treaty, in accordance with article 29 of the Convention, and excludes entirely the operation of the treaty in the territory in question.

4. If territorial exclusions were to be treated as reservations this would not only be contrary to long established State practice and United Nations treaty practice, but it would have practical effects that would be at odds with policy objectives supported by the United Nations. For example, in the case of Tokelau, it would mean either (a) that New Zealand would be prevented from becoming party to a treaty unless and until Tokelau was ready to be bound by it, or (b) that New Zealand's decision would be imposed on Tokelau, which would be contrary to the constitutional and administrative arrangements between Tokelau and New Zealand, on which New Zealand continues to report to the United Nations under Article 73 of the Charter of the United Nations.

5. It is New Zealand's understanding that the practice of other States which have been responsible for the international affairs of territories (such as the United Kingdom, Denmark and the Netherlands) closely corresponds to that of New Zealand.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

1. The United Kingdom commented extensively on this guideline in 1999 and we maintain our strong concerns expressed there. In the view of the United Kingdom, a declaration regarding the extent of the territorial application of a treaty does not constitute a reservation to that treaty. As the Vienna Convention makes clear, a declaration or statement is capable of constituting a reservation if "it purports to exclude or modify the legal effect of *certain provisions* of the treaty in their application to [the State concerned]" (emphasis added). A declaration or statement which excludes entirely a treaty's application to a given territory would not therefore constitute a reservation, since it does not concern the legal effect of provisions of the treaty. Rather, it is directed towards excluding the "residual rule" on territorial application incorporated in article 29 of the Vienna Convention on the Law of Treaties (which falls outside section 2 of part II on reservations), namely, "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." The effect of this provision is clear that, unless a different intention is established, a treaty will be

binding upon a party in respect of its non-metropolitan as well as its metropolitan territory.

2. The United Kingdom considers that the procedure whereby, on ratification, a State makes a declaration as to the territorial effect or extent of the act of ratification, which has long been known and accepted in State practice, expressly establishes a "different intention", in the words of article 29 of the Vienna Convention. The essential features of this practice are as follows:

(a) Where a multilateral treaty contains no express provision regarding its territorial application, the practice of the United Kingdom and that of a number of other States with non-metropolitan internally autonomous territories (such as Denmark, the Netherlands and New Zealand) is to name expressly in their instruments of ratification or accompanying declarations, the territories to which the treaty is to apply (or, occasionally, to specify those territories to which the treaty is not to apply);

(b) When a non-metropolitan territory not named at the time of ratification wishes eventually to participate in the treaty, separate notification is thereupon sent to the depositary;

(c) The same practice is followed in cases where the treaty concerned either prohibits reservations or restricts them to specific provisions.

3. Some examples of this practice were cited in the observations of the United Kingdom to the International Law Commission in 1999. The United Kingdom is not aware of any cases in which a State has made a counter-statement or objected to a declaration or form of words in an instrument of ratification put forward by another State concerning the territorial application of a treaty (except where it challenges the inclusion of a particular named territory, by reason of a competing claim to sovereignty over it).

4. It has been the long-standing practice of the United Kingdom (since at least 1967), in relation to multilateral treaties which are silent on territorial application, to specify in the instrument of ratification (or accession) the territories in respect of which the treaty is being ratified (or acceded to). Territories may be included (or excluded) at a later stage by means of a separate notification made by the United Kingdom to the depositary power. It is notable that such "declarations" have also been treated separately from "reservations" by the United Nations in performing depositary functions.

Draft guidelines 1.1.5 (Statements purporting to limit the obligations of their author), 1.1.6 (Statements purporting to discharge an obligation by equivalent means) and 1.1.8 (Reservations made under exclusionary clauses)

Malaysia

[Original: English]

With respect to draft guidelines 1.1.5, 1.1.6 and 1.1.8, Malaysia is of the view that the wording of the guidelines seems to provide the instances where a unilateral statement made amounts to a reservation. It is Malaysia's opinion that the definition in these guidelines should not in any way prejudge the nature of the unilateral statement in question in the very beginning itself, as reference must be made to the effects that these unilateral statements might intend to produce in order to determine

its status. Furthermore, in order to determine the character/status of such unilateral statement, Malaysia is of the opinion that States could possibly fall back on guidelines 1.3.1, 1.3.2 and 1.3.3, which deal with "Method of implementation of the distinction between reservations and interpretative declarations", "Phrasing and name" and "Formulation of a unilateral statement when a reservation is prohibited". Thus, these definitions may be inappropriate as they tend to restrict States at the very initial stage by imposing that such unilateral statements are tantamount to reservations even though that may not have been the intention of the States.

Draft guideline 1.1.5 (Statements purporting to limit the obligations of their author)

France

[Original: French]

1. [Observation 1998] This draft guideline is a positive development. A unilateral statement purporting to limit the obligations imposed on a State by a treaty or, similarly, to limit the rights that other States may acquire under the same treaty does, in fact, constitute a reservation.

2. Where a unilateral statement effectively extends the obligations of the declaring State, it would be somewhat difficult to speak of a "reservation". Rather, it is a unilateral commitment by the State to go beyond that which is required of it under the treaty. The unilateral statement in question does not purport to exclude, limit or even modify — not restrictively in any case — certain provisions of the treaty.

3. The problem is somewhat different, however, if the State purports, on the basis of a unilateral statement, to expand its rights, that is, the rights conferred on it by the treaty. This unlikely scenario is obviously not covered by the provisions of the 1969 Vienna Convention. Treaty law must be distinguished from customary law; it is impossible to imagine that a State might modify, in its favour, customary international law as codified in the treaty to which it becomes a party by formulating a reservation to that end. As for treaty law, the scenario is not unrealistic and the Commission should consider it, as well as the ways in which other States parties to the treaty might object to such a situation. Nevertheless, it is difficult to speak of a "reservation" in this case, especially as such statements, if it was agreed to define them as "reservations", would have serious consequences for those States which, having remained silent, would be deemed to have accepted them after a certain period of time, as is the case with reservations.

4. [Observation 1999] The draft guideline on statements purporting to limit the obligations of their author does not pose any particular difficulties in terms of substance. Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties of 23 May 1969 states that a reservation "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State", without providing further details on the modification effected by the reservation. The draft guideline rightly points out that this modification may be a limitation. Such information could certainly be included during the drafting of a Guide to Practice, which allows for further elaboration than a treaty.

5. See the comments on draft guideline 1.1.1.

Draft guideline 1.1.6 (Statements purporting to discharge an obligation by equivalent means)

France

[Original: French]

1. [Observation 1999] In terms of substance, the wording of this draft guideline is acceptable. A State may be permitted to discharge a treaty obligation by equivalent means only if the other States parties are in a position to agree to those means. The mechanism of reservations and objections offers such an opportunity.

2. See the comments on draft guideline 1.1.1.

Draft guideline 1.1.8 (Reservations made under exclusionary clauses)

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Guideline 1.1.8, in defining all statements made pursuant to so-called exclusionary clauses as reservations, is in our view too wide and inconsistent with other guidelines. Where a treaty envisages that some of its provisions may not apply at the choice of a party, this may simply mean that in exercising its right to choose, the State is implementing the treaty in accordance with its terms rather than excluding or modifying their effect. Guideline 1.1.8 at its broadest also appears to be inconsistent with 1.4.6 and 1.4.7 (exercise of options or choice between two provisions). Furthermore, the commentary suggests that where a statement is made pursuant to an exclusionary clause after the State in question has become bound by the treaty, such a declaration is not to be considered a late reservation (para. (17) of the commentary to draft guideline 1.1.8[3]). In our view, therefore, the definition of reservations in the case of exclusionary clauses should be confined to those treaty provisions which "specify" the exclusion as being by way of reservation.

Draft guideline 1.2 (Definition of interpretative declarations)

France

[Original: French]

[Observations 1999 and 2002] France is particularly interested in this draft guideline. It is useful for the Commission to clarify what practice has shown to be a thorny issue. The criterion of "purpose" — the objective pursued — used to define interpretative declarations is completely satisfactory as it makes it possible to distinguish clearly between interpretative declarations and reservations. Interpretative declarations "purport to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions", whereas reservations purport "to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects". This criterion applies irrespective of the name given by the State to its statement; as with reservations, therefore, any nominalism should be eschewed.

[3] See A/55/10, chap. VII.C.2.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

1. In broad terms the United Kingdom welcomes the definition of "interpretative declarations", which is clearly important in enabling a distinction to be drawn between an interpretative declaration properly so-called and their use as a form of "disguised reservation". In our view, the definition of an interpretative declaration is helpful, particularly when combined with the method of implementation of the distinction between reservations and simple interpretative declarations in guideline 1.3.l and with the process of re-characterization in guidelines 2.9.3 ff.

2. However, the United Kingdom has concerns with the latter part of paragraph (34) of the commentary,[4] which suggests that the definition should include both interpretative declarations and conditional interpretative declarations. The consequence of this approach is not clear. We would therefore delete this aspect of the commentary in line with our suggestion for the removal of reference to a category of "conditional interpretative declarations" separate from reservations and interpretative declarations *simpliciter* (see comments on guideline 1.2.1 below).

Draft guideline 1.2.1 (Conditional interpretative declarations)

France

[Original: French]

1. [Observations 2000 and 2002] Unless draft guideline 1.2.1 is more precisely worded, there would seem to be no criterion for drawing a definite distinction between an interpretative declaration and a conditional interpretative declaration. Nothing is said about the procedure by which authors of conditional interpretative declarations can make their consent to be bound subject to a specific interpretation of the treaty or some of its provisions. That will has to be explicitly expressed. The fact that an interpretative declaration made on signature, or at some previous time during negotiations, is confirmed when consent to be bound is expressed is not in itself a criterion.

2. [Observation 2002] The Commission's definition of conditional interpretative declarations is, in fact, akin to that of reservations. Conditional declarations are considered to be nothing more than reservations formulated in terms that clearly show the indissociable link between the commitment itself and the reservation. The term therefore seems poorly chosen. Moreover, while conditional declarations might constitute a subcategory of reservations, the wisdom of making them a separate category might be disputed. The submission of conditional declarations under the reservations regime is hardly questionable. Furthermore, if the regime of reservations is identical to that of conditional declarations, it would be simpler to liken such declarations to reservations, at least for this part of the draft.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom has consistently questioned the utility of the inclusion of separate provisions in the guidelines dealing with conditional interpretative

[4] See A/54/10, chap. VI.C.1.

declarations. The United Kingdom notes that in response the Special Rapporteur suggested that it would be worth maintaining their inclusion pending completion of the work, at which point a fully informed view could be taken on the question. With the benefit now of the full set of draft guidelines and in the light, in particular, of the guidelines which enable the differentiation of interpretative declarations and reservations, (1.3 ff.) and guideline 2.9.3 on re-characterization, the United Kingdom sees no need for separate guidelines on conditional interpretative declarations. Removal of the separate guidelines in this respect would help to simplify the text in line with our general comments above [*see the comments of the United Kingdom reproduced in, section A above*].

Draft guideline 1.3 (Distinction between reservations and interpretative declarations)

France

[Original: French]

1. [Observation 2002] The Commission adopted the legal effect which the statement was intended to produce as the criterion for distinguishing interpretative declarations from reservations. This criterion is acceptable provided it is based on the objective effects of the statement rather than the subjective intentions of the State making it, which are difficult to determine. Specifically, the use of such a criterion should be based on an objective comparison of the meaning of the statement with the meaning of the text to which the statement applies. [...]. France welcomes the Commission's decision to exclude the criterion of timing from its definition of interpretative declarations. However, for the sake of legal certainty it would be desirable for such declarations to be made except under highly unusual circumstances, within a limited period from the date when the State concerned was first bound.

2. See the comments on guideline 2.4.3.

Draft guideline 1.3.2 (Phrasing and name)

France

[Original: French]

[Observation 2002] France questions the appropriateness of making the phrasing or name given to a unilateral statement a criterion for establishing the intended legal effect of its author. Besides the fact that such phrasing cannot be considered a reliable indicator of the intended legal effect, this criterion introduces a nominalism that has, with good reason, been eschewed elsewhere.

Draft guideline 1.4.1 (Statements purporting to undertake unilateral commitments)

France

[Original: French]

See the comments on draft guideline 1.1.1.

Draft guideline 1.4.2 (Unilateral statements purporting to add further elements to a treaty)

Malaysia

[Original: English]

With regard to draft guideline 1.4.2, Malaysia understands that under the draft guideline, a unilateral statement made by a State which purports to add further elements to a treaty merely constitutes a proposal to modify the content of the treaty and therefore is outside the scope of the present Guide to Practice. Thus, Malaysia wishes to emphasize that as long as such statement does not modify the content of the treaty in such a way as to modify or exclude the effects of the treaty or the provisions of the treaty altogether — in which case the statement may be regarded as a reservation — such statement could be effectively excluded from the present Guide to Practice.

Draft guideline 1.4.3 (Statements of non-recognition)

France

[Original: French]

[Observation 1999] France is in favour of excluding statements of non-recognition from the scope of application of the Guide to Practice. Specifically, while it is true that a unilateral statement whereby a State expressly excludes application of the treaty as between itself and the entity that it does not recognize is similar to a reservation in many ways, it nevertheless does not purport to exclude or to modify the legal effect of certain provisions of the treaty as they apply to that State. It purports to deny the entity in question the ability to be bound by the treaty and, consequently, purports to rule out any treaty relationship with that entity. The reservations regime is, moreover, completely unsuited to statements of non-recognition and their assessment on the basis of criteria such as the object and the purpose of the treaty would be meaningless.

Draft guideline 1.4.4 (General statements of policy)

France

[Original: French]

[Observation 1999] In the absence of sufficiently close links to the treaty, it is appropriate that general statements of policy should lie outside the scope of the Guide to Practice.

Draft guideline 1.4.5 (Statements concerning modalities of implementation of a treaty at the internal level)

France

[Original: French]

[Observation 1999] This draft guideline, as currently drafted, raises a significant problem. While it has been noted that such a statement lies outside the scope of the Guide to Practice so long as it "does not purport as such to affect [the] rights and obligations [of its author] towards the other contracting parties" and is

purely informative, no such information is provided regarding statements which, without purporting to have such an effect, are nevertheless likely to affect the rights and obligations of the State that formulates them vis-à-vis the other contracting parties. These declarations generally give rise to questions regarding their compatibility with article 27 of the Vienna Convention on the Law of Treaties, which states that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Practice has shown that it is very difficult to assess the true scope of such statements as they require a solid understanding of the statement and extensive knowledge of both the internal law of the State and the treaty provisions in question. A statement made by a State concerning its implementation of a treaty at the internal level can constitute a genuine reservation even if the desire to modify or exclude the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects as they apply to that State is not immediately clear. To exclude such statements from the Guide to Practice and to consider so categorically that they are not reservations could, moreover, provide an incentive for States to not take the necessary steps in internal law before committing themselves at the international level. It would doubtless be prudent to consider that a statement concerning implementation of the treaty at the internal level is strictly informative if it does not, as such, purport to affect the rights and obligations of the State formulating the statement vis-à-vis the contracting parties and, in addition, is not likely to have such an effect.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Guideline 1.4.5 excludes from the scope of the Guide statements indicating how the maker intends to implement a treaty within its internal legal order. This is intended to cover only a statement given to provide information on implementation. However, the words designed to achieve this are somewhat opaque, namely, "without purporting as such to affect its rights and obligations towards the other Contracting Parties". If the manner of implementation indicated in the statement showed something manifestly at odds with the treaty's requirements, the statement might not "purport" to affect the State's rights and obligations, but it would show an intent to implement a modified form of the treaty. The quoted words should therefore be deleted and at the end (after "outside the scope of the present Guide to Practice") the following added: "unless such manner of implementation could only conform to the provisions of the treaty by excluding or modifying the legal effect of those provisions".

Section 1.5 (Unilateral statements in respect of bilateral treaties)
Draft guideline 1.5.1 ("Reservations" to bilateral treaties)

France

[Original: French]

[Observations 1999 and 2000] This category of statement is not a reservation since it does not result in modification or exclusion of the legal effect of certain provisions of the treaty, but rather in a modification of these treaty provisions that constitutes a genuine amendment. The title of this draft guideline should therefore

be changed in order to make it clear that the statements in question are those that purport to modify a bilateral treaty.

Section 1.7 (Alternatives to reservations and interpretative declarations)
Draft guidelines 1.7.1 (Alternatives to reservations) and 1.7.2 (Alternatives to interpretative declarations)

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom does not consider these guidelines to be useful as they go well beyond the current topic, and therefore we suggest their deletion.

Draft guidelines 1.7.1 (Alternatives to reservations)

Malaysia

[Original: English]

On the proposed draft guideline 1.7.1, Malaysia notes that draft guideline 1.7.1 is restricted to provide for two procedures which are not mentioned elsewhere and are sometimes characterized as "reservations", although they do not by any means meet the definition contained in draft guideline 1.1. Malaysia's concern is that confusion may arise in differentiating these alternative procedures from reservations. Therefore, Malaysia is of the view that the mechanism for the formulation of such alternatives and the means to differentiate them from reservations will need to be clearly specified to avoid confusion.

Section 2 (Procedure)
Section 2.1 (Form and notification of reservations)
Draft guideline 2.1.1 (Written form)

France

[Original: French]

[Observation 2001] This draft guideline reproduces the rule set out in article 23 of the 1969 Vienna Convention on the Law of Treaties. It does not give rise to any special difficulties. The conditions that may be attached to the expression of consent to be bound must be formulated in writing as this is the only way to ensure the stability and security of contractual relationships.

Draft guideline 2.1.2 (Form of formal confirmation)

France

[Original: French]

[Observation 2001] Formal confirmation of a reservation, where needed, must also be made in writing.

Draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations)

France

[Original: French]

[Observation 2002] The Commission is proposing a draft guideline that states, on the one hand, that procedure shall be determined by internal law and, on the other, that failure to follow it has no consequences at the international level. France supports this solution because it would be inappropriate to include a guideline, based on article 46 of the 1969 Vienna Convention, which would make it possible, in the event of a clear violation of a fundamental rule of internal law, to invoke conflict with domestic law as grounds for declaring a reservation invalid. Since the State still has the option of withdrawing its reservation, the only practical effect of such a provision would be to allow the State that made the reservation without respecting its own national procedure to retroactively require other States to implement, in its regard, the treaty provision that was the subject of the reservation. It is, to say the least, difficult to find a basis for such a situation in positive law.

Draft guideline 2.1.5 (Communication of reservations)

France

[Original: French]

[Observations 2001: revision 2011] This draft guideline is based on article 23 of the Vienna Convention and is a valuable addition thereto since it also refers to reservations made to the constituent instruments of international organizations. The wording proposed by the Special Rapporteur is, on the whole, acceptable. In the second paragraph, however, the precise meaning of "an organ that has the capacity to accept a reservation" should be clarified.

Draft guideline 2.1.7 (Functions of depositaries)

Malaysia

[Original: English]

With regard to draft guideline 2.1.7, Malaysia notes that this draft guideline purports to allow the depositaries to examine whether a reservation is in due and proper form. Furthermore, the draft guideline seems to widen the scope of functions of the depositaries by allowing them to examine whether a reservation is in due or proper form rather than confining them to examine whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form. Malaysia is concerned that this draft guideline would give the impression that a reservation formulated by a State needs to pass two stages, the depositary and then only the other contracting States, before it is established. This is also in view of Malaysia's observation on draft guideline 2.1.8, which recognizes the role of the depositary in determining impermissible reservations. Malaysia is of the view that this draft guideline could also be viewed as superseding the 1969 Vienna Convention on the Law of Treaties by purporting to give an active role to the depositary in interpreting an impermissible reservation. As such, this draft guideline does not represent the general practice according to which the States usually decide whether a reservation constitutes an impermissible reservation. In this regard,

Malaysia is of the opinion that this draft guideline would allow the depositary to intervene on the question of compatibility of the reservation, which may cause the State to respond. This situation will prolong the problem and would not be helpful for the resolution of the problem. As such, Malaysia is of the view that the function of depositary should be confined to the ambit of article 77 of the 1969 Vienna Convention. Malaysia considers that, in the event that the contracting party finds a reservation made by a party to be incompatible with that treaty, the right to make objections to such reservation should be demonstrated by the contracting parties themselves and circulated through the depositary. Thus, it is recommended that the draft guideline 2.1.7 should follow precisely the wording of article 77(1) (d) and (2) of the 1969 Vienna Convention so as to confine the scope of functions of the depositaries to matters involving examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form.

Draft guideline 2.1.8 (Procedure in case of manifestly impermissible reservations)

France

[Original: French]

1. [Observation 2002] Draft guidelines 2.1.6 and 2.1.7 focus — in France's view, correctly — on the purely "administrative" role of the depositary. Draft guideline 2.1.8 nevertheless purports to grant depositaries a power foreign to their recording function: that of assessing, to some extent, the permissibility of reservations. The Commission's approach is not without legitimacy. However, at the current stage of international positive law, depositaries are not empowered to conduct even a summary assessment of permissibility. In the exercise of their administrative functions, depositaries must therefore limit themselves to recording and communicating a reservation even if they consider it to be manifestly impermissible.

2. [Observation 2006] Draft guideline 2.1.8, the text of which was adopted in 2002, was slightly modified in 2006. However, this new wording does not, in France's view, reflect current law and practice concerning the functions of the depositary. The draft guideline purports to grant depositaries the capacity to assess, to some extent, the permissibility of reservations and, where appropriate, to draw to the attention of interested parties reservations that, in their view, pose legal problems. In the absence of an express provision allowing them to perform such functions, depositaries cannot, however, be authorized to conduct even a summary assessment of the permissibility of reservations. In the exercise of their administrative functions, depositaries should therefore limit themselves to recording and communicating a reservation even if, to repeat the language used by the Commission, they consider it to be "manifestly impermissible".

Malaysia

[Original: English]

See, above, observations made in respect of draft guideline 2.1.7.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

1. There is insufficient clarity as to when a reservation is considered "manifestly impermissible", particularly as this provision purports to extend to all three categories of impermissible reservations in article 19. Does this provide the treaty depositary discretion? It is not evident to the United Kingdom why the depositary, rather than the States parties, is in a position to determine whether a particular reservation is incompatible with the object and purpose of the treaty.

2. Our view is that, in principle, the function of the depositary is to communicate to the contracting States any act, notification or communication relating to the treaty. However, where a purported reservation is made in the face of a treaty provision prohibiting all reservations, or reservations of that type, there can be no doubt whatsoever as to the invalidity of such a reservation. In that situation it is permissible for the depositary in the first instance to query it with the reserving State. Only if the reserving State is still of the view that the reservation is valid would the depositary communicate it to the contracting States for their views.

3. The guideline also does not consider the possible implications of this change. In the view of many States, the role of the treaty depositary is to transmit the text of reservations to the treaty parties and to remain neutral and impartial. Moreover, there is no reference in the commentary to the actual practice of treaty depositaries in this context, or any consideration of the practical and/or resource implications for treaty depositaries.

Section 2.2 (Confirmation of reservations)
Draft guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty)

France

[Original: French]

[Observation 2000] This draft guideline does not give rise to any special difficulties as it is consistent with French practice.

Section 2.3 (Late reservations)
Draft guideline 2.3.1 (Late formulation of a reservation)

France

[Original: French]

[Observation 2000] Draft guidelines 2.3.1 and 2.3.3 purport to establish two complementary rules. These two innovatory proposals contribute to the progressive development of law and do not therefore constitute a mere codification exercise. France welcomes the fact that neither draft guideline is designed to permit frequent or "normal" recourse to late reservations in the future because, on the one hand, just one objection by a State party to the treaty is enough to render the reservation inapplicable to all the States parties and, on the other, the State raising an objection to the reservation will not be obliged to state the reasons therefor, if it does not wish to do so, other than to note that the reservation was formulated late. Thus, the draft guidelines do not purport to establish a general derogation from the basic rule,

commonly accepted by States, that reservations must be made, at the latest, when consent to be bound by a treaty is expressed; what is at stake is the security of legal undertakings voluntarily given by States, an issue to which France attaches great importance. Apart from the indisputable case where the formulation of reservations after the expression of consent to be bound is explicitly authorized by a treaty, the aim of the draft guidelines is therefore to cope with particular situations, which are not necessarily hypothetical but might be described as exceptional, where a State, acting in good faith, has no alternative other than to denounce the treaty in question for want of being able to formulate a late reservation.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

1. The United Kingdom reiterates its opposition in principle to reservations formulated late, because they depart from the definition of "reservations" under the Vienna Convention on the Law of Treaties and would potentially cause disruption and uncertainty to treaty relations. The United Kingdom therefore believes that the guidelines must emphasize above all the need for proper discipline in the making of reservations. If the guidelines are to address the exceptional circumstances in which the late formulation of reservations is permissible, for example, where the treaty itself so permits, then such circumstances must be clearly set out. The United Kingdom would therefore prefer guideline 2.3.1 to be amended as follows:

> "If a State or international organization formulates a reservation after it has expressed its consent to be bound, the reservation shall have no effect unless the treaty provides otherwise or all of the other contracting parties expressly accept the late formulation of the reservation".

2. Accepting this proposal would entail consequential deletion of draft guideline 2.3.2.

Draft guideline 2.3.2 (Acceptance of late formulation of a reservation)

United Kingdom

[Original: English]

See, above, observations made in respect of draft guideline 2.3.1.

Draft guideline 2.3.3 (Objection to late formulation of a reservation)

France

[Original: French]

See the comments on draft guideline 2.3.1.

Draft guideline 2.3.4 (Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations)

Malaysia

[Original: English]

In connection with guideline 2.3.4 concerning subsequent exclusion or modification of the legal effect of a treaty by means other than reservations, it is

unclear whose interpretation of a reservation this guideline intends to refer to in paragraph (a). In our view, paragraph (a) seems to suggest that the said interpretation may come from the other contracting States, or the reserving State. As such, Malaysia considers that paragraph (a) needs clarity in terms of to whom it is addressed.

Draft guideline 2.3.5 (Widening of the scope of a reservation)

France

[Original: French]

[Observation 2003; revision 2011] Widening of the scope of a reservation goes beyond the time limit set for the formulation of a reservation under article 19 of the 1969 and 1986 Vienna Conventions. France does not, however, consider that widening the scope of a reservation necessarily constitutes an abuse of rights that should not be authorized. It is therefore useful that the Guide to Practice mentions the possibility of widening and purports to clarify — in, moreover, a convincing manner — the legal uncertainties surrounding it. On the one hand, although fortunately unusual, attempts to enlarge the scope of a reservation exist in treaty practice. The commentary offers several examples that stem less from the abuse of rights than from a desire to take into consideration technical constraints or specific aspects of internal law. That does not mean, of course, that such enlargement is lawful. Furthermore and above all, the possibility of widening the scope of a reservation is still subject to very strict conditions: an attempt to widen the scope of a reservation will be unsuccessful with respect to all parties to the treaty if even one of them formulates an objection to the modification envisaged. Within this strict legal framework, the draft article appears to be part of the progressive development of law: it does not encourage this practice but does permit recourse to it, rarely and subject to conditions, in order to give a State acting in good faith an option besides denunciation of the treaty in question. France wonders whether it would be appropriate to move the definition of “widen”, contained in paragraph (7) of the commentary, to an earlier point in the draft guidelines.

Malaysia

[Original: English]

On the proposed draft guideline 2.3.5, Malaysia notes that the application of this draft guideline would arise in a situation whereby the reservation made amounts to the formulation of an entirely new reservation. However, Malaysia is of the view that any modification which would widen the scope of a reservation but does not touch on the substance of the commitments of the State to a treaty should not be defeated merely upon a single objection. As such, Malaysia is of the view that there is a need to have a proper mechanism to assess the “widened reservation” as it should not be determined solely by an objection received. In furtherance, Malaysia recommends that the permissibility test should be applied in determining such reservation.

Section 2.4 (Procedure for interpretative declarations)

France

[Original: French]

[Observation 2001] It would be preferable to simplify the procedure by making it clear that the "guidelines" in relation to reservations would apply, *mutatis mutandis*, to conditional interpretative declarations.

Draft guideline 2.4.0 (Form of interpretative declarations)

France

[Original: French]

[Observation 2001] This draft guideline is acceptable. Like reservations, interpretative declarations must be formulated in writing, even when they are "conditional".

Malaysia

[Original: English]

See, below, observations made in respect of draft guideline 2.4.9.

Draft guideline 2.4.3 (Time at which an interpretative declaration may be formulated)

France

[Original: French]

[Observations 1999, on draft guideline 1.2, and 2011] It would be preferable to confine interpretative declarations to a limited period of time, which could be the same as that for formulating a reservation. As the term used is not always sufficient to distinguish between a reservation and an interpretative declaration, allowing States parties to a treaty to formulate interpretative declarations at any time, including after expressing their consent to be bound, might lead some of them to formulate, perhaps long after they had expressed their consent to be bound, interpretative declarations through which they purported to produce, in fact or in law, the same legal effects as reservations. Such a practice, should it emerge, might raise increasing doubts about the conditions under which reservations are formulated at the time of consenting to be bound. Moreover, removing any mention of a limited period of time from the definition of an interpretative declaration could ultimately weaken the time element characteristic of reservations; legal insecurity could result. It therefore seems insufficient for time limits on the formulation of interpretative declarations to be contingent on the will of States. It should be stated, either in the definition (1.2) or in a specific provision (2.4.3), that an interpretative declaration must be formulated not later than the time at which the author's consent to be bound is expressed.

Draft guideline 2.4.4 (Non-requirement of confirmation of interpretative declarations made when signing a treaty)

France

[Original: French]

1. See the comments on draft guideline 2.4.3.

2. [2011] Since France considers it necessary to place time limits on State's ability to formulate interpretative declarations, there is no reason to set out separate rules applicable to reservations.

[Draft guideline 2.4.5 (Formal confirmation of conditional interpretative declarations formulated when signing a treaty)][5]

France

[Original: French]

[2011] As the legal regime for conditional interpretative declarations appears to be patterned on the one for reservations, France is in favour of deleting the draft guidelines on conditional interpretative declarations.

Draft guideline 2.4.6 (Late formulation of an interpretative declaration)

Malaysia

[Original: English]

Malaysia understands that the draft guideline applies in the case where the treaty specifies the time limit for the formulation of interpretative declarations. Malaysia also takes note that reference must be made to draft guideline 2.4.3 on the general rule relating to the time to formulate interpretative declarations. Malaysia would like to seek clarification on the legal effect that draft guideline 2.4.6 has on a treaty. Malaysia is of the view that, based on the understanding of how draft guideline 2.4.6 is to work, the draft guideline will have the effect of overriding a treaty provision concerning the time limit required to formulate an interpretative declaration. Furthermore, Malaysia would like to request clarification on the application of this draft guideline in relation to the issue of succession of States. Malaysia understands that the application of the draft guideline would allow a successor State to formulate a new interpretative declaration when the interpretative declaration receives no opposition as to the late formulation thereof.

[Draft guideline 2.4.7 (Formulation and communication of conditional interpretative declarations)][6]

France

[Original: French]

See the comments on draft guideline 2.4.5.

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[5] 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.

[6] See footnote 5 above.

[Draft guideline 2.4.8 (Late formulation of a conditional interpretative declaration)][7]

France

[Original: French]

See the comments on draft guideline 2.4.5.

Draft guideline 2.4.9 (Modification of an interpretative declaration)

Malaysia

[Original: English]

Malaysia notes that by virtue of draft guideline 2.4.3, since an interpretative declaration may be formulated at any time, it follows that the modification thereof should also be allowed to be made at any time unless the treaty itself specifies the time for formulation and modification of an interpretative declaration. However, Malaysia is concerned about the application of draft guideline 2.4.0 in relation to draft guideline 2.4.9.

[Draft guideline 2.4.10 (Limitation and widening of the scope of a conditional interpretative declaration)][8]

France

[Original: French]

See the comments on draft guideline 2.4.5.

Section 2.5 (Withdrawal and modification of reservations and interpretative declarations)
Draft guideline 2.5.3 (Periodic review of the usefulness of reservations)

France

[Original: French]

[Observation 2002] France has doubts about the usefulness of the proposal contained in this draft guideline, which seems out of place in a guide that is intended to set out the legal rules governing the identification, regime and effects of reservations.

Draft guideline 2.5.4 (Formulation of the withdrawal of a reservation at the international level)

France

[Original: French]

[2011] This draft guideline should be revised in light of draft guideline 2.1.3. The expression “is competent” should be replaced by “is considered as representing”.

[7] See footnote 5 above.
[8] See footnote 5 above.

[Draft guideline 2.5.13 (Withdrawal of a conditional interpretative declaration)][9]

France

[Original: French]

See the comments on draft guideline 2.4.5.

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

France

[Original: French]

1. [Observation 2003] The search for a definition of objections addresses the need to fill a gap in the 1969 and 1986 Vienna Conventions, which do not contain such a definition. Nevertheless, it is possible to discern the principal elements of the definition of objections from the objectives pursued, as contemplated in articles 20 and 21 of the two Conventions. An objection is a reaction to a reservation, but it is a specific reaction, one that is intended to make the effects of the reservation inoperative. The intention of the party reacting to the reservation is therefore determinant for the legal characterization of that reaction. The evaluation of the intention of the objecting State takes place within a specific framework. For example, the reaction of a party seeking to modify the content of a reservation cannot be classified as an objection. The objection should be characterized by the declared intention of the State to produce one of the objective effects set out in the Vienna Conventions: it should either make the provision to which it refers inapplicable or prevent the entry into force of the treaty between the parties involved. In that perspective, it is useful to know the intentions of the objecting State. A narrow definition of objections to reservations has several advantages. In terms of form, it responds to the aim of the Guide to Practice, which seeks to supplement the provisions of the Vienna Conventions without fundamentally modifying their spirit. France stands by this approach. In terms of substance, a strict definition of objections leaves more room for what the Special Rapporteur refers to as "reservations dialogue"; in other words, the discussions between the author of a reservation and its partners, intended to encourage the former to withdraw the reservation.

2. [Observation 2004] France favours a narrow definition of objections to reservations that focuses on the effects of objections as defined in articles 20 and 21 of the 1969 and 1986 Vienna Conventions. However, the Commission appears to be seeking a broader definition, which does not seem satisfactory. The expression "purports to exclude or modify the effects of the reservation in relations between the author of the reservation and the author of the objection" appears to be particularly ambiguous. According to the Commission, the proposed definition would not prejudge the validity or invalidity of an objection; like the definition of reservations, it is neutral. Nonetheless, the problem here is very different depending on whether it involves the definition of a reservation or the definition of an objection. A reservation always has the same effect: it "purports to exclude or modify the legal effect of certain provisions of a treaty" (draft guideline 1.1.1). The incompatibility of a reservation with the object and purpose of a treaty stems not only from the

[9] See footnote 5 above.

effect of the reservation but also from the treaty provision(s) to which it relates. By contrast, in the case of an objection, the very effect it seeks to engender might render it invalid. Furthermore, the alleged invalidity of a reservation may be challenged by an objection, while the possibility of reacting to an objection, the effects of which may be considered as exceeding the right to object, appears doubtful. A narrow definition of an objection, specifying its effects, would remove the ambiguities concerning the admissibility of an objection which purports to have other effects.

3. With regard to so-called objections with "super maximum effect", whereby the objecting State purports to neutralize the effects of the reservation by considering that the treaty in its entirety must apply in full in its relations with the reserving State, such an objection would exceed the limits of the consensual framework underlying the Vienna Conventions and could not produce such an effect without compromising the basic principle of consensus underlying the law of treaties. In practice, recognition of the "super maximum effect" would inevitably discourage States from participating in some of the most important agreements and treaties. It is therefore preferable not to suggest in the definition that an objection could have "super maximum effect"; however, the phrase "exclude or modify the effects of the reservation" allows for this type of objection.

4. France is of the view that a compromise between a broad definition of objections to reservations and a narrow definition, referring expressly to the effects set forth in the Vienna Conventions, may be one that defines an objection as a reaction purporting to make the effects of the reservation non-opposable in relations between the objecting State and the reserving State. Such a definition would be flexible enough to meet the requirements of objections with "intermediate effect", which, while not preventing the entry into force of the treaty between the parties, seek to render inapplicable between the two parties not only the provision covered by the reservation but other provisions of the treaty as well. As the effect sought by the objection is less than the maximum effect allowed by the Vienna Conventions, the validity of this type of objection does not appear to raise any difficulties. A State may consider that the reservation affects other treaty provisions and accordingly, decide not to be bound not only by the provision objecting to the reservation, but also by these other provisions. A definition limiting the effect of the objection to the non-opposability of the effects of the reservation in respect of the objecting State would, however, exclude the so-called objections with "super maximum effect" mentioned above. Such an objection does not purport to render the effects of a reservation non-opposable, but simply to ignore the existence of the reservation as if it had never been formulated.

Draft guideline 2.6.2 (Definition of objections to the late formulation or widening of the scope of a reservation)

France

[Original: French]

[Observation 2004] This draft guideline is undeniably useful because it clears up the potential ambiguity of the two usages of the term "objection" in the Guide to Practice: either an objection to the late formulation or widening of the scope of a reservation or an objection to the reservation itself. This definition should thus

avoid the risk of confusion between the two types of objections, which have separate effects.

Draft guideline 2.6.14 (Conditional objections)

France

[Original: French]

[Observation 2007] France doubts that these are objections in the true sense of the word. The risk of such a guideline is that it could encourage States, on the pretext of making pre-emptive objections, to increase the number of their declarations — with uncertain legal effects — when they become parties to a treaty.

Section 2.8 (Formulation of acceptances of reservations)
Draft guideline 2.8.1 (Tacit acceptance of reservations)

France

[Original: French]

[Observation 2007] France finds it hard to perceive a tacit acceptance, once 12 months have passed following the notification of a reservation, as a "presumption" of acceptance in the legal sense of the term. The texts of draft guidelines 2.8.1 and 2.8.2, which reflect that of article 20, paragraph 5, of the Vienna Convention, in that it applies to cases in which a reservation is "considered to have been accepted", do not seem to mean that an acceptance could, in itself, be "reversed".

Draft guideline 2.8.11 (Reaction by a member of an international organization to a reservation to its constituent instrument)

France

[Original: French]

[Observation 2007] France doubts it is appropriate to include this draft guideline in the Guide to Practice. Although it concerns the more or less indisputable right of member States of an international organization to take an individual position on the validity of a reservation to the constituent instrument of that organization, there is a risk that such a draft guideline might, in practice, lead to interference with the exercise of the powers of the competent organ and respect for the proper procedures.

Section 2.9 (Formulation of reactions to interpretative declarations)

France

[Original: French]

[Observation 2008] The classification of different reactions to interpretative declarations seems quite acceptable and encompasses the various scenarios encountered in practice: silence, approval, opposition and recharacterization. It is important to note that these different forms of reaction give rise to different difficulties, from the point of view of their effects.

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

France

[Original: French]

[2011] France considers that, for purposes of legal security, it would be preferable for States to have the power to formulate an approval, opposition or recharacterization in respect of an interpretative declaration only within 12 months following the date on which they were notified of the interpretative declaration.

Draft guideline 2.9.6 (Statement of reasons for approval, opposition and recharacterization)

Malaysia

[Original: English]

With regard to draft guideline 2.9.6, Malaysia understands that the draft guideline does not require States to give reasons for their responses. It is noted that draft guideline 4.7.1 provides that an approval of or opposition to an interpretative declaration can be considered in treaty interpretation in order to determine the weight to be given to the said interpretative declaration. Thus, given the fact that such responses will have an effect on States' interpretative declarations, it is only for the responding States to state their reasons for approval and opposition. Although recharacterization does not affect the permissibility or the effect of an interpretative declaration, it would also be useful for any act of recharacterization to be accompanied by a statement of reasons, which would prevent States from approving, opposing or recharacterizing an interpretation proposed by other States without any valid reasons. Furthermore, Malaysia is of the view that States should be granted the right to know why their interpretative declarations are being approved, opposed or recharacterized. Thus, Malaysia proposes that the requirement to state reasons for approval, opposition and recharacterization be made mandatory.

Draft guideline 2.9.9 (Silence with respect to an interpretative declaration)

France

[Original: French]

[Observation 2008] France considers that there could be circumstances where silence could constitute acquiescence to an interpretative declaration. Nonetheless, the principle adopted must, of course, be that acceptance of an interpretative declaration can not be presumed and cannot be inferred from mere silence. The key is the circumstances, and even the unique and even exceptional circumstances in which the silence or conduct of a State with a direct and substantial interest in the detail or clarification provided by the interpretative declaration of another contracting State will inevitably be taken into account for the purposes of interpretation of the treaty, for example, in the event of a dispute between two contracting States. When it does not constitute acquiescence to an interpretative declaration, silence does not appear to play a role in the legal effects that the declaration can produce. In any case, the option open to contracting States to clarify or specify the meaning of a treaty or of certain provisions thereof should not be overlooked.

New Zealand

[Original: English]

New Zealand considers that silence should not necessarily mean acquiescence to an interpretative declaration and acquiescence should be determined according to general international law. The second sentence of guideline 2.9.9 appears to alter this by placing an onus on States to respond to an interpretative declaration in order to avoid being bound by it. The possibility of being bound by such declarations, even if limited to exceptional circumstances, would simply place too large an administrative burden on States, especially smaller States, to consider each interpretative declaration and provide a response in order to protect their position. New Zealand therefore does not support the second sentence of guideline 2.9.9.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom does not agree that silence as a response to an interpretative declaration necessarily constitutes acquiescence. The second paragraph of guideline 2.9.9 should be deleted, thus leaving the issue of acquiescence to be ascertained by reference to international law. The commentary provides no examples of where exceptionally silence can or has been taken as acquiescence. Given that an interpretative declaration lacks formal legal status, we are doubtful that firm conclusions can be drawn from the silence of existing States parties.

Draft guideline 2.9.10 (Reactions to conditional interpretative declarations)[10]

France

[Original: French]

See the comments on draft guideline 2.4.5.

Section 3 (Permissibility of reservations and interpretative declarations)

France

[Original: French]

1. [Observation 2004; revision 2011] France is of the view that a distinction must be made between two concepts: permissibility and opposability. A permissible legal act is one that meets all the conditions of form and substance needed to produce legal effects. A reservation that does not comply with the provisions of article 19 of the Vienna Conventions would therefore be non-permissible. In international law, the permissibility of a reservation is assessed subjectively by each State for its own benefit. As a consequence of this well-known characteristic of international law, the same reservation may be considered non-permissible by some States and permissible by others. Under these circumstances, nullity, which is the penalty for non-permissibility in domestic law, does not appear to be an appropriate outcome of the non-permissibility of a reservation in international law. “Opposability”, or more precisely “non-opposability” makes for a more appropriate characterization of the penalty for such non-permissibility, as subjectively assessed. In this regard, a State

[10] See footnote 5 above.

which deems a reservation to be non-permissible could declare its effects non-opposable to it.

2. [Observation 2005; revision 2011] France wishes to reiterate its preference for the expression "opposability of reservations". On the one hand, the concept of "permissibility" does not seem truly neutral; it seems to refer to a form of objective examination that does not square with the well-known practice in international law of subjective assessments by individual States. On the other hand, and more crucially, the concept of "opposability" seems to better reflect the reality of relations as between the reserving State and the other contracting parties arising from the formulation of a reservation. Much will depend on the latter's reactions. By focusing too much on the permissibility of reservations, the Commission might encourage the questionable idea that the parties to a treaty could deny the very existence of a reservation which, in their view, is non-permissible. Nevertheless, France welcomes the general thrust of the draft guidelines dealing with the "permissibility of reservations".

Draft guideline 3.1 (Permissible reservations)

France

[Original: French]

[Observation 2005] France endorses the Commission's decision to reproduce the text of article 19 of the Vienna Conventions on the Law of Treaties in draft guideline 3.1 without attempting to change its wording substantially. Changing the wording of this well-known provision would undoubtedly result in harmful and unnecessary confusion.

Draft guideline 3.1.1 (Reservations expressly prohibited by the treaty)

France

[Original: French]

[Observation 2005] Draft guidelines 3.1.1 to 3.1.4 seem quite relevant as they bring needed clarity to the issues of interpretation raised by article 19.

Draft guidelines 3.1.2 (Definition of specified reservations), 3.1.3 (Permissibility of reservations not prohibited by the treaty) and 3.1.4 (Permissibility of specified reservations)

France

[Original: French]

See the comments on draft guideline 3.1.1.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

1. Guideline 3.1.2 attempts to clarify what is meant by the term "specified reservations". While the United Kingdom welcomes the flexible approach adopted by the Commission, we remain concerned that the definition may not capture all the circumstances in which a reservation may be "specified". A key feature of the

problem is the lack of precision in the provision over what degree of detail makes a treaty provision one which indicates "specified reservations". If a treaty provision is precise as to the exact nature of the reservation (see, for example, Additional Protocol No. 2 of the 1929 Warsaw Convention), and a reservation is formulated exactly in line with it, it seems inappropriate to superimpose an assessment of whether the reservation is compatible with the object and purpose of the treaty. If, however, the treaty provision simply authorizes reservations to enumerated articles and excludes other enumerated articles, the content of any reservation formulated with regard to an article in the permitted list may nevertheless be objectionable.

2. The United Kingdom also agrees with guidelines 3.1.3 and 3.1.4, which provide that any reservation that is not prohibited by the treaty, or not a "specified" reservation, must be compatible with the object and purpose of the treaty. However, we query the reference in the commentary concerning the applicability of article 20, paragraphs 2 and 3, of the Vienna Convention;[11] it is the view of the United Kingdom that this article does not apply, or applies only by analogy, to impermissible reservations.

3. We note, however, that the incompatibility of a reservation with the object and purpose of a treaty may only become apparent, or established, many years from such a reservation being formulated, perhaps only in the context of litigation. We therefore do not accept the suggestion in the commentary to guideline 4.5.2 that declarations made subsequently by the author of a reservation, or in the context of judicial proceedings, should necessarily be "treated with caution".[12]

Draft guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty)

France

[Original: French]

[Observation 2005 and 2006; revision 2011]. The definition proposed in this draft guideline is useful, particularly as it continues to treat the object and the purpose of a treaty as one. It would undoubtedly be possible to make a theoretical distinction between the object of a treaty and its purpose. However, apart from the difficulty of making such distinction in each individual case, this appears inconsistent with in practice; contracting parties tend to assess the opposability or, to use the term employed in the Guide, the "permissibility" of a reservation in the light of its object and purpose, taken as one. France welcomes the amendments to this draft guideline made by the Commission in 2006. The new definition of the "object and purpose of a treaty" is a marked improvement from the original version. The addition of a reference to the "general thrust" of the treaty addresses the concerns raised by France in its 2005 comments. The mere reference to essential elements of the treaty is not sufficient since it may prove difficult to determine indisputably the nature of those elements, which, if affected, could impair the *raison d'être* of the treaty. For example, some parties to a treaty may, unlike others, consider that the substantive provisions of the treaty are indissociable from the clauses relating to implementation mechanisms and that a reservation to such clauses would remove the *raison d'être* of the treaty. Furthermore, associating the

[11] See A/61/10, chap. VIII, C.2.

[12] See A/65/10, chap. IV, C.2.

purpose and object of the treaty with essential elements thereof could make reservations to provisions that, while perhaps less important, contribute fully to the balance of the treaty, less questionable. The final definition chosen associates the key elements of the treaty with its "general thrust", thereby maintaining the spirit, letter and balance of the treaty.

Draft guideline 3.1.6 (Determination of the object and purpose of the treaty)

France

[Original: French]

[2011] This draft guideline is a valuable addition to draft guideline 3.1.5, which defines "object and purpose of the treaty". France considers it important for the object and purpose of the treaty to be determined not only by the wording of the treaty, but also by its "general thrust".

Draft guideline 3.1.7 (Vague or general reservations)

France

[Original: French]

[2011] France welcomes the Commission's efforts, in paragraph 4 of the commentary to this draft guideline,[13] to establish a link between this draft guideline and the one that deals with reservations relating to internal law (draft guideline 3.1.11, which states that a reservation by which a State purports to "preserve the integrity of specific norms of the internal law of that State [...] may be formulated only insofar as it is compatible with the object and purpose of the treaty"). In practice, reservations relating to the application of internal law are frequently formulated in vague and general terms. France takes the position that such reservations may give rise to significant problems since they often do not allow the other parties to determine the true extent of the reserving State's commitment to the treaty and may lead among these parties to fear that, as the internal law of the reserving State develops, its commitment may wane.

Draft guideline 3.1.8 (Reservations to a provision reflecting a customary norm)

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The first paragraph of this guideline provides that the fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation. The United Kingdom is not convinced by this. As we said in our observations on the Human Rights Committee's general comment No. 24,[14] "there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law." The United Kingdom does, however, agree with the second paragraph of that draft guideline, which states that such a

[13] See A/62/10, chap. IV, C.2.

[14] Human Rights Committee, general comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6.

reservation does not affect the binding nature of the relevant customary norm, which shall continue to apply.

Draft guideline 3.1.9 (Reservations contrary to a rule of *jus cogens*)

France

[Original: French]

[2011] The reference to peremptory norms of general international law (*jus cogens*) raises the issue of the scope of that notion, the content of which remains to be clarified.

Draft guideline 3.1.11 (Reservations relating to internal law)

France

[Original: French]

See the comments on draft guideline 3.1.7.

Draft guideline 3.1.12 (Reservations to general human rights treaties)

United Kingdom of Great Britain and Northern Ireland

[Original: English]

With respect to draft guideline 3.1.12, the United Kingdom does not agree that human rights treaties should be treated any differently from other international agreements. It is our firmly held view that reservations to normative treaties, including human rights treaties, should be subject to the same rules as reservations to other types of treaties. The United Kingdom sees no legal or policy reason for treating human rights treaties differently. Any suggestion that special rules on reservations may apply to treaties in different fields, such as human rights, would not be helpful. It is important to remember that the law on reservations to treaties owes its origin to the Advisory Opinion of the International Court of Justice of 28 May 1951 on Reservations to the Genocide Convention.[15] We therefore suggest that this guideline be deleted. The United Kingdom notes, in fact, that the Special Rapporteur's second report on the topic of reservations to treaties (A/CN.4/477/Add.1) is in line with the views expressed above.

Draft guideline 3.1.13 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty)

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom observes that this draft guideline may be redundant. This is because it merely confirms that such reservations as described in the guideline are to be assessed in accordance with their compatibility with the object and purpose of the treaty in question, which should already be apparent from the content of draft guidelines 3.1.5 and 3.1.6.

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[15] 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. 15.

Draft guideline 3.2 (Assessment of the permissibility of reservations)

France

[Original: French]

[Observation 1997] The creation of monitoring bodies by many human rights treaties poses particular problems, notably with regard to assessment of the "permissibility" of reservations formulated by States. Although these problems were not envisaged when the 1969 Vienna Convention was drafted, it does not seem impossible today to set up such bodies, which can, moreover, prove very useful and effective. However, monitoring bodies can only assess the "permissibility" of reservations formulated by States if this was expressly envisaged in the treaty. The common desire of States to endow these bodies with such competence must be expressed in the text of the treaty. The European human rights system clearly illustrates this possibility and this requirement. Absent such mechanisms, the reserving State must determine the consequences of the incompatibility of its reservation with the object and purpose of the treaty, just as the objecting State must determine the consequences of its decision for its continued treaty relations with the reserving State. The monitoring body is a judicial or analogous body which exists solely by virtue of the treaty. It cannot assume competencies other than those endowed to it explicitly by the States parties. If the States wish to confer on the monitoring body certain competencies to assess or determine the "permissibility" of a reservation, it is indispensable that such clauses should be explicitly spelled out in multilateral treaties, particularly those related to human rights. If the treaty is silent on the matter, only the States alone can amend the treaty, supplement it, if necessary, with a protocol in order to set up an appropriate and often useful and effective monitoring body, or react to a reservation they consider incompatible with the object and purpose of the treaty.

Draft guidelines 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations), 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations), 3.2.3 (Cooperation of States and international organizations with treaty monitoring bodies), 3.2.4 (Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body) and 3.2.5 (Competence of dispute settlement bodies to assess the permissibility of reservations)

United Kingdom of Great Britain and Northern Ireland

[Original: English]

1. In relation to the competence of treaty monitoring bodies, as set out in guidelines 3.2.1 to 3.2.5, the United Kingdom believes that any role performed by a treaty monitoring body to assess the validity of reservations (or any other role) should derive principally from the legally binding provisions of any given treaty, and that these same provisions are the product of free negotiation between States and other subjects of international law. The United Kingdom therefore questions the wisdom of attempting to create a very high-level permissive framework for such activity when it is best left to the negotiating States to decide what powers should be assigned to any treaty monitoring body on a case-by-case basis. Similarly, the legal effect of any assessment of the validity of reservations made by a monitoring body

should be determined by reference to the functions it derives under the treaty articles.

2. Absent an express treaty provision, the United Kingdom does not accept that treaty monitoring bodies are "competent to rule on the validity" of reservations. We refer to the observations of the United Kingdom on the Human Rights Committee's general comment No. 24,[16] which sets out our position in full. Any comments or recommendations from a treaty monitoring body should be taken into account by a State in the same way as other recommendations and comments on their periodic reports. The United Kingdom does, however, accept that a treaty monitoring body may have to take a view on the status and effect of a reservation where necessary to permit a treaty monitoring body to carry out its substantive functions.

Draft guideline 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations)

France

[Original: French]

[Observation 2006; revision 2011] Contrary to the suggestion in this draft guideline, France wishes to point out that in order for a treaty monitoring body to be able to assess the "permissibility" of a reservation, it must be endowed with that competence by the States or international organizations involved. It would therefore be preferable to find a formulation that does not establish such an automatic link between the possibility of monitoring the implementation of a treaty and assessing the permissibility of reservations. The second competence does not flow from the first.

Draft guideline 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations)

France

[Original: French]

[Observation 2006; revision 2011] France considers that this draft guideline should establish more clearly the fundamental nature of the clauses in a treaty or additional protocol that confer on bodies the competence to assess the permissibility of reservations, thereby allowing States and international organizations to spell out the competence that they grant to a treaty monitoring body regarding assessment of the "permissibility" of reservations.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom considers that where there is an express intention on behalf of negotiating States to endow a treaty monitoring body with such a role, they will act appropriately to ensure treaty provisions reflect this. The absence of any specific reference in treaty provisions to powers to assess the validity of reservations should not under any circumstances be interpreted as permitting a legally binding role in this respect.

[16] See above, footnote 14.

Draft guideline 3.2.3 (Cooperation of States and international organizations with treaty monitoring bodies)

United Kingdom of Great Britain and Northern Ireland

[Original: English]

This guideline is formulated as an obligation to cooperate. This is clearly *de lege ferenda*; while cooperation is desirable, an obligation to cooperate must come from an express treaty obligation. In addition, the requirement to "cooperate" with a treaty monitoring body, and to give "full consideration to that body's assessment of the permissibility of reservations that they have formulated" does not specify the extent or limits of such cooperation or consideration. It is open to question, therefore, to what extent this requirement could be deemed to be satisfied under this guideline.

Draft guideline 3.2.4 (Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body)

France

[Original: French]

[Observation 2006; revision 2011] This draft guideline assumes a lack of competition among monitoring bodies, but it does not address the scenario of a difference in assessment between the different bodies and parties that can assess the permissibility of a reservation. France considers that this point needs to be clarified.

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

France

[Original: French]

1. [Observation 2006] This is clearly a difficult question which the Vienna Conventions on the Law of Treaties did not resolve. For that very reason, the Commission should try to clarify the questions of the consequences of "non-permissibility" of a reservation and the effect of an objection to a reservation. If it fails to do so, the Guide to Practice would not fully meet the expectations that it has legitimately aroused […] The principle contained in this draft guideline is entirely acceptable, although its title ("consequences of the non-permissibility of a reservation") does not truly reflect the content of the draft guideline, which relates rather to the causes of non-permissibility.

2. [Observation 2007] The question of the consequences of "non-permissible" reservations is one of the most difficult problems raised by the Vienna Convention on the Law of Treaties. No provision of the 1969 Convention relates to the link between the rules on prohibited reservations and the rules on the mechanism of acceptance of or objections to reservations. France continues to have misgivings about the use of terms such as the "permissibility" or "impermissibility" of reservations, which take no account of the wide range of reactions by States to reservations by other States. Despite the term used, issues relating to the consequences of non-permissible reservations should be resolved primarily through the objections and acceptances communicated by States to the reserving State. A reservation may be found to be non-permissible by a monitoring body, but the

consequences of such a finding inevitably depend on the recognized authority of that body. The "opposability" of a reservation between States parties depends on the acceptances or objections by those parties.

Draft guideline 3.3.1 (Non-permissibility of reservations and international responsibility)

France

[Original: French]

1. [Observation 2006] This draft guideline usefully points out that reservations fall under the law of treaties, not the law of international responsibility.

2. See the comments on section 3.

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

France

[Original: French]

See the comments on draft guideline 3.4.1.

New Zealand

[Original: English]

New Zealand has a concern with draft guideline 3.3.3. New Zealand does not believe that an invalid reservation can become permissible simply because no contracting State or organization has recorded an objection to it.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

This provides for the possibility of an impermissible reservation being deemed permissible if no contracting State objects to it. The United Kingdom does not think that a lack of objections can in fact cure the nullity of an impermissible reservation, and we note that the commentary suggests that in any event such a lack of objection would not prevent the assessment of the permissibility of the reservation by a treaty monitoring body or the International Court of Justice. It would seem therefore that this guideline can, at most, only set up a presumption, as a matter of practice, that in the absence of objection by any contracting party to an impermissible reservation, the reserving party should be considered a party to the treaty with the benefit of its reservation. The United Kingdom does not agree with this. The guideline also seems at odds with guideline 3.3.2 which confirms that acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation. Nor does it seem reconcilable with the suggestion noted in the commentary to guideline 4.5.1 (at paragraph 12)[17] that the 12-month period for objections set out in article 20, paragraph 5, of the Vienna Convention is not applicable in relation to invalid reservations. We believe that there needs to be

[17] See A/65/10, chap. IV, C.2.

greater consistency in the treatment of nullity of invalid reservations in the guidelines.

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

France

[Original: French]

1. [Observation 2009] France has misgivings about this draft guideline. The wording suggests the possibility that the acceptance of a "non-permissible" reservation may itself be "non-permissible", but that would not always be the case. Based on the purely objective logic of "permissibility" used in this draft article — about which France continues to have very serious doubts — if the reservation is "non-permissible", should its acceptance not also be automatically "non-permissible"? In reality, the question should not be framed in these terms, but rather in terms of the effects that the acceptance should be deemed to produce. It is difficult to understand the justification for asserting that the express acceptance of a non-permissible reservation is "non-permissible". In that case, why should it not be said that implicit acceptance of a "non-permissible" reservation is also "non-permissible"? Nonetheless, the crux of the matter is that to affirm that an acceptance, whether express or not, of a "non-permissible" reservation is also "non-permissible" would directly undermine the ability of States, even collectively, to accept a reservation that some might deem non-permissible.

2. [Observation 2010] As regards the connection between draft guidelines 3.3.3 and 3.4.1, it is strange that the consequences of a collective acceptance of a non-permissible reservation are not taken into account in draft guideline 3.4.1. Thus, individual acceptance of a "non-permissible" reservation may itself be "non-permissible", but this would not always be the case, depending on whether this acceptance is express or tacit. Similarly, a "non-permissible" reservation could be "deemed to be permissible" if accepted by all the States. In this regard, it is difficult to understand justification of the affirmation that the express acceptance of a "non-permissible" reservation is "non-permissible". Does not such a statement undermine the possibility for States, albeit only collectively, to accept a reservation said to be "non-permissible"? As for this latter possibility, does not it also run directly counter to the purely objective logic of the concept of permissibility retained here and regarding which, incidentally, France still has misgivings?

Draft guideline 3.4.2 (Permissibility of an objection to a reservation)

France

[Original: French]

[Observation 2009] France sees little merit in subjecting objections to conditions for permissibility. The real problem lies in the effects of reservations and objections. Objections with so-called "intermediate effect" give rise to special problems, since they purport not only to exclude the effects sought by the reserving State, but also to modify the effect of other provisions of the treaty. In this regard, the question of the compatibility of the modification with the object and purpose of the treaty may arise. The analysis of practice in the matter would have to be approved, however. It demonstrates that the treaty provisions which the objecting

State seeks to modify often are closely related to the provisions to which the reservation applies. The practice in respect of objections with intermediate effect has developed in a very unique context. Other scenarios involving objections could also be envisaged: the reserving State may consider that the treaty provisions that the objecting State seeks to modify are not closely related to the reservation, or are even contrary to the object and purpose of the treaty, and may oppose the objection. Although this draft guideline does not resolve the question of the effects that such objections might produce, France considers it useful to emphasize that a State should not be able to take advantage of an objection to a reservation which it has formulated outside the allowable time period for formulating reservations to modify other provisions of the treaty which bear little or no relation to the provisions to which the reservation applies.

Draft guideline 3.5 (Permissibility of an interpretative declaration)

France

[Original: French]

[Observation 2009; revision 2011] For France, the assertion that a State "may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty" appears sufficient. On the one hand, the reference to peremptory norms of general international law (*jus cogens*) raises the issue of the scope of such a notion, the content of which is not defined and remains to be clarified. On the other hand, it appears that little more could be said about interpretative declarations and reactions to such declarations under the heading of permissibility; the subject has more to do with the specifics of the execution and implementation of treaty obligations, with all the attendant specificities in international relations, than with an objective fact that would govern the introduction and formulation of these obligations.

[Draft guidelines 3.5.2 (Conditions for the permissibility of a conditional interpretative declaration)][18]

France

[Original: French]

See the comments on draft guideline 2.4.5.

[Draft guidelines 3.5.3 (Competence to assess the permissibility of a conditional interpretative declaration)][19]

France

[Original: French]

See comments on draft guideline 2.4.5.

[18] See footnote 5 above.
[19] See footnote 5 above.

Draft guideline 3.6 (Permissibility of reactions to interpretative declarations)

France

[Original: French]

[Observation 2008] With regard to the consequences of an interpretative declaration for a State which expressly approves or opposes it, a general reference to customary rules on the interpretation of treaties should be sufficient. Generally speaking, reactions to interpretative declarations cannot be straitjacketed in formal or substantive rules. Except in cases where one or several other contracting States reclassify an interpretative declaration as a reservation, which shifts the debate towards the effects of reservations, there is an inherent flexibility in the system of interpretative declarations and the reactions that they produce, in accordance with the essential role played in the life of a treaty by the intention of the parties and their interpretation of the treaty.

Draft guideline 3.6.1 (Permissibility of approvals of interpretative declarations)

France

[Original: French]

See the comments on draft guideline 3.6.

Draft guideline 3.6.2 (Permissibility of oppositions to interpretative declarations)

France

[Original: French]

See the comments on draft guideline 3.6.

Section 4 (Legal effects of reservations and interpretative declarations)

France

[Original: French]

[Observation 2008] France considers that a clear distinction should be drawn between the effect of interpretative declarations and that of reservations, and that that distinction should be borne in mind when considering the question of reactions to declarations and reservations and their respective effects.

Draft guideline 4.1 (Establishment of a reservation with regard to another State or organization)

France

[Original: French]

See the comments on section 3 and draft guideline 4.2.1.

Section 4.2 (Effects of an established reservation)
Draft guideline 4.2.1 (Status of the author of an established reservation)

France

[Original: French]

[Observation 2010] The conditions for the entry into force of the agreement in respect of the reserving State or organization, envisaged in draft guidelines 4.2.1 to 4.2.3, need to be clarified. Article 2, paragraph 1 (f), of the 1969 Vienna Convention provides that "'contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force". In its current formulation, draft guideline 4.2.1 appears to contradict this provision, since it implies that a reserving State does not become a contracting State until its reservation is established (in other words, that it is valid and permissible and has been accepted within the meaning of draft guideline 4.1). France has serious doubts about this provision. The establishment of a reservation affects the applicability of the treaty only between the reserving State and the accepting State; it has no effect on the entry into force of the treaty. The system of reservations, acceptances and objections is subject to the rules of treaty law, the legal technicality of which is illustrated by the Commission's work.

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

France

[Original: French]

See the comments on 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)

France

[Original: French]

See the comments on draft guideline 4.2.1.

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

Republic of Korea

[Original: English]

Regarding draft guideline 4.2.5, it is better to exemplify feasible cases to which guideline 4.2.5 can be applied by including them in the commentary of the International Law Commission on this guideline. Guideline 4.2.5 is an exception to guideline 4.2.4. The exceptional clause should be provided in a restrictive and concrete manner. However, because of ambiguous expressions in guideline 4.2.5 such as "nature of the obligations", "object and purpose of the treaty", and "content of the reservation", it is uncertain whether the reservation cannot be applied to other parties of the treaty. Moreover, this uncertainty leads to legal instability concerning the application of reservations.

Draft guideline 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation)

France

[Original: French]

[Observation 2010; revision 2011] According to this draft guideline, an objection to a "valid" reservation by a contracting State does not preclude the entry into force of the treaty as between the objecting State and the reserving State. In reality, France considers that the issue is not one of effects on the entry into force of the treaty, but of effects on the applicability of the treaty as between the reserving State and the objecting State.

Section 4.4 (Effect of a reservation on rights and obligations outside of the treaty)
Draft guideline 4.4.3 (Absence of effect on a peremptory norm of general international law (*jus cogens*))

France

[Original: French]

[Observation 2010] The reference to peremptory norms of general international law (*jus cogens*) raises the issue of the scope of that notion, the content of which has yet to be determined.

Section 4.5 (Consequences of an invalid reservation)
Draft guideline 4.5.1 (Nullity of an invalid reservation)

France

[Original: French]

1. [Observation 2005; revision 2011] In practice, when faced with an "invalid" reservation, States may stipulate in their objection that the reservation is not opposable to them but still agree to recognize the existence of treaty relations with the reserving State. This midway position may seem paradoxical: how could a State object to a reservation that is incompatible with the object and purpose of the treaty — the essential elements that constitute its *raison d'être* — without concluding that the treaty cannot be binding on it in its relations with the reserving State? The paradox may be less profound than it appears; the objecting State may consider that while the reservation in question may undermine the object and purpose of the treaty, it will not prevent the application of important provisions as between itself and the reserving State.

2. It may also hope that its objection, as a sign of its opposition, will allow it to engage in a "reservations dialogue" and will encourage the reserving State to reconsider the necessity or the content of its reservation. It appears, however, that the objecting State cannot simply ignore the reservation and act as if it had never been formulated. Such an objection would create the so-called "super maximum effect", since it would allow for the application of the treaty as a whole without regard to the fact that a reservation has been entered, and would compromise the basic principle of consensus underlying the law of treaties.

3. [Observation 2007; revision 2011] For France, it is possible, in accordance with both the Vienna Convention and practice, that States that have objected to a

reservation they consider incompatible with the object and purpose of the treaty (or prohibited by a reservation clause) would not oppose the entry into force of the treaty between them and the reserving State. The scenario according to which a reservation incompatible with the object and purpose of the treaty could completely invalidate the consent of the reserving State to be bound by the treaty seems to run counter to both the will expressed by the reserving State and the freedom of the objecting State to choose whether or not the treaty should enter into force between itself and the reserving State. The latter may well be bound by some important provisions of the treaty, even though it has formulated a reservation to other provisions relating to the general thrust of the treaty, and hence incompatible with its object and purpose. France's practice is that, when it objects to a reservation prohibited by the treaty but does not oppose the entry into force of the treaty vis-à-vis the reserving State, it respects the intention expressed by that State. Moreover, in expressly recognizing that the objection does not prevent the entry into force of the treaty — which is not strictly necessary under the system envisaged by the Vienna Convention — the State means to emphasize the importance of the treaty relationship thus established and to contribute to the "reservations dialogue". It is true that the effects of such an entry into force may be extremely limited in practice, particularly for so-called "normative" treaties or in cases where the reservation is so general that few of the treaty's provisions have been truly accepted by the reserving State. France still believes that, unsatisfactory as such a solution might sometimes be, it is the one that best respects the characteristics of the international legal system and the only one to offer a practical response to questions that might prove to be insoluble in theory. A reservation might be "invalid", but the law of treaties can neither deprive a reservation of all its effects by recognizing the possibility of objections with "super-maximum" effect, nor deprive the consent of a State to be bound by a treaty of any scope on the grounds that its reservation is incompatible with the treaty from the moment that the objecting State consents to maintain a treaty relationship with it.

Republic of Korea

[Original: English]

Concerning draft guideline 4.5.1, the validity and permissibility of reservations should be evaluated by an independent administrative body. However, the author of the evaluation is none other than the author of the reservation. It is desirable that for each treaty, an impartial evaluator, such as an implementation committee or a contracting parties meeting should be established, which can decide upon the validity and permissibility of reservations.

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

France

[Original: French]

[Observation 2010] France reiterates the position it has expressed on many occasions as to the crucial importance of the principle of consensus underlying the law of treaties. It is not possible to compel a reserving State to comply with the provisions of a treaty without the benefit of its reservation, unless it has expressed a clear intention to that effect. In this respect, only the reserving State can clarify

exactly how the reservation affects its consent to be bound by the treaty. It is difficult for France to imagine how a State other than the reserving State could assess the extent of the latter's consent.

Republic of Korea

[Original: English]

Draft guideline 4.5.2 is mainly based upon the rulings of the European Court of Human Rights. However, the principle of separating the validity of a reservation and the contracting parties' status may not necessarily be applied to treaties other than those on human rights. Therefore, it is desirable to exemplify possible treaties that can follow the rulings of the European Court of Human Rights, even though these treaties are not characteristic of those on human rights.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

1. In our comments at the International Law Commission debate in 2010, the United Kingdom reiterated its long-standing view that if a State has made an invalid reservation, it has not validly expressed its consent to be bound and therefore treaty relations cannot arise. The United Kingdom committed to reflect on comments made by others during the debate and return to the issue with further views.

2. The issue of the status of an invalid reservation is central to the work of the Commission. In our view, the current situation arising from the "permissive" approach of the Vienna Convention on the Law of Treaties has certain advantages in encouraging wider treaty participation. However, it also brings with it risks of divergences in practice and *opinio juris* between States and thus raises concerns as to the integrity of treaties and legal certainty. The United Kingdom is firmly of the view that the current draft guidelines offer an important opportunity to seek to resolve the ambiguities and uncertainties that may arise from the current situation, which will prove acceptable to all States.

3. The United Kingdom continues to believe that "strict" position previously espoused, most notably in our observations to the Human Rights Committee's general comment No. 24,[20] is *lex lata*. However, we accept that this position is challenged by the practical difficulties as to where, when or by whom the impermissibility or invalidity of a reservation is established. Invalidity cannot always be readily ascertained objectively, particularly where the doubt is whether the reservation is consistent with the object and purpose of the treaty.

4. While the United Kingdom commends the Commission for the skilful way in which, through guideline 4.5.2, it has tried to strike a compromise between the "strict" position espoused by, among others, the United Kingdom, and the "super-maximum" effect of invalid reservations, we maintain the concerns previously expressed on the issue. The "rebuttable presumption" as set out in the guideline contains what appears to be an important safeguard for the reserving State in that it can rebut the presumption if it can show a contrary intention. The result of such rebuttal would be that the reserving State simply does not become a party to the treaty. However, it is not clear what evidence will be sufficient to establish that "the

[20] See footnote 14 above.

reservation is deemed to be an essential condition for the author's consent to be bound by the treaty". The United Kingdom remains unconvinced by the non-exhaustive but ultimately restrictive factors set out in the guidelines. Would, for example, a simple statement in an instrument of ratification that a State consents to be bound subject to a certain reservation constitute sufficient evidence? If not, what would be the standard of assessment?

5. For the purposes of encouraging progressive development of practice in this area, and in the spirit of seeking to inject greater legal certainty as to the legal consequences of what the Special Rapporteur has described as the "reservations dialogue", the United Kingdom would therefore propose as an alternative to guideline 4.5.2 the following:

> The reserving State or international organization must within 12 months of the making of an objection to a reservation on grounds of invalidity indicate expressly whether it either wishes to withdraw the reservation or its consent to be bound. In the absence of an express response, the reserving State or international organization will be considered to be a contracting State or a contracting organization without the benefit of the reservation.

6. In the case of an express response, this would be considered on a case-by-case basis. This proposal results in a better chance of clarity over treaty relations. It achieves a fair balance between the interests of the reserving and other States. It gives the author of the reservation an incentive to enter into a dialogue with the objecting State or international organization and revisit its reservation. It puts the onus on the author of the reservation to make clear its intention as to whether or not it wishes to be a party to the treaty if the reservation proves invalid. Finally, gives the proponent of the reservation sufficient latitude to encourage it to consider remaining a party.

Draft guideline 4.5.3 (Reactions to an invalid reservation)

Republic of Korea

[Original: English]

Guideline 4.5.3 seems redundant. Following article 20, paragraph 5, of the Vienna Convention on the Law of Treaties, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation. Other parties may raise objections based on this clause of the Vienna Convention.

Section 4.7 (Effect of an interpretative declaration)

France

[Original: French]

[Observation 2008] The effects of an interpretative declaration and possible reactions to it must be distinguished from the effects of a reservation, since interpretative declarations sometimes form part of a broader context than the single treaty to which they relate and touch generally on the way in which States interpret their rights and obligations in international law. It is also important to differentiate between approval of an interpretative declaration and agreement between the parties on the interpretation of the treaty.

Draft guideline 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration)

Malaysia

[Original: English]

1. Malaysia wishes to seek clarification on the intended function of an approval of or opposition to an interpretative declaration in interpreting a treaty in the second paragraph of draft guideline 4.7.1, i.e., whether it plays a role in determining how much weight and value should be given to the interpretation proposed by the interpretative declaration, or merely functions as an aid to interpret a treaty without having any implication on the interpretation proposed by the declaration. Malaysia is of the view that the approval of or opposition to an interpretative declaration should not determine the weight to be given to the interpretative declaration but be regarded merely as an aid to interpret a treaty. In expressing consent to be bound by a treaty, States have in their mind a certain understanding of the terms used in that treaty. Besides, a treaty calls upon its contracting parties to implement its provisions in their international relations between each other as well as in their own domestic affairs. Thus, it is necessary for the States to interpret the treaty in order to apply the provisions and meet their obligations. To have approval and opposition determine the admissibility of the interpretation proposed by the author State will hinder the implementation of treaty obligations by that State in its domestic and international affairs. For that reason, Malaysia is of the view that approval of or opposition to interpretative declarations should not determine the weight to be given to the interpretation proposed.

2. Malaysia notes that under draft guidelines 2.9.1 and 2.9.2 the terms “approval” and “opposition” refer to express approval and opposition. However, under draft guidelines 2.9.8 and 2.9.9, approval and opposition can also be inferred from the “silence” of contracting parties. Malaysia understands that the terms “approval” and “opposition” in draft guideline 4.7.1 should only include the definitions stipulated in draft guidelines 2.9.1 and 2.9.2. If, however, the rules laid down in draft guidelines 2.9.8 and 2.9.9 are also to be made applicable to draft guideline 4.7.1, it would follow that an interpretative declaration may be accepted or rejected simply on the basis that silence of contracting States may be inferred as an approval of or opposition to the declaration. The uncertainty of the legal status of silence on a specific interpretive declaration could consequently lead to an undesirable result. For this reason, Malaysia is of the view that this inference should not be simply drawn from the inaction of States, as it will have an effect on treaty interpretation, and that the terms “approval” and “opposition” in draft guideline 4.7.1 should refer to express approval and opposition.

Draft guideline 4.7.2 (Effect of the modification or the withdrawal of an interpretative declaration in respect of its author)

Malaysia

[Original: English]

On the proposed draft guideline 4.7.2, Malaysia understands that the draft guideline is based on the principle that a State should not be allowed to “blow hot and cold”. It cannot declare that it interprets certain provisions in one way and then take a different position later. Thus, States have to be cautious in proposing an

interpretation to a treaty. This would mean that States must be fully ready to comply with the obligations stipulated in the treaty before becoming a party, and be able to consider the possibility of future development such as a change of national policy before formulating any interpretative declaration. This is because the withdrawal or modification mechanism, though it is available, may not produce the effect intended by the States. Having said this, however, since the application of the draft guideline in relation to guideline 4.7.1 depends on whether the other States have relied on the interpretative declaration made by the declarant State, Malaysia is of the view that it may be necessary for the International Law Commission to provide explanations in the commentary to the draft guideline on the extent to which reliance by States on an interpretative declaration can prevent the withdrawal or modification of that declaration from producing the effects provided for under draft guideline 4.7.1.

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

France

[Original: French]

[Observation 2010; revision 2011] Section 5, which deals with "reservations, acceptances of and objections to reservations, and interpretative declarations in the context of succession of States", is a complex one involving both codification and the progressive development of international law. On this point, the lack of well-established practice on which to base such guidelines makes any attempt at systematization on the matter particularly difficult, given that succession of States is not governed by clear rules in international law. For example, it may be noted that the practice of States with regard to succession of States to treaties, and in particular that of France, shows that the principle that treaties continue in force in cases of separation of States, contained in article 34 of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, does not reflect the state of customary law on the topic. On the contrary, it appears that treaties do not continue to apply as between the successor State and the other State party unless these States agree expressly or implicitly thereto. While concern for legal security and the day-to-day requirements of international relations would suggest that to the extent possible, treaties concluded with the predecessor State should continue in force, it is difficult to assume more than a rebuttable presumption of continuity in case of succession.

Malaysia

[Original: English]

See the observations made above in respect of draft guideline 2.4.6.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The view of the United Kingdom is that there is insufficient clear practice on which to base such guidelines that purport to set out international law either as it is or as it should be. The lack of practice in this area is apparent from the small number of cases referred to in the commentary. The United Kingdom therefore does not see the merit in extending the Guide to succession of States and does not believe

that omission of chapter 5 will have any sort of detrimental effect on the work as a whole. We think that energies should instead be focused on the preceding chapters which represent the main focus of the topic and the work of the International Law Commission in this area over the past 15 years.