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Reservations to Treaties

Statement by

Gregor Schusterschitz

Head of the Department of International Law
Ministry for European and International Affairs

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Mr. Chairman,

A long lasting work has finally come to a result. We recognize the effort and work the Special Rapporteur Professor Pellet has put into this topic. *He convincingly revealed the deficiencies of the regulation of the Vienna Convention on the Law of treaties of 1969 (VCLT) regarding reservations, which was a compromise struck between the traditional view and the Soviet view based on the full sovereignty of states to formulate any reservation, irrespective of object and purpose of a treaty. Although this compromise had the merit to permit the adoption of the text of the VCLT and to offer a solution for quite a number of issues connected with reservations, it, nevertheless, created unclear situations, left loopholes and had its deficiencies.*

Reservations are a frequently used legal tool for opening multilateral treaties to a maximum number of parties, but pose also many problems in practice.

We are now faced with a great number of guidelines proceeding from the strict adherence to the Vienna Conventions concerning treaty law, the VCLT, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 as well as the Vienna Convention on Succession of States in respect of Treaties of 1978.

Although the guidelines prepared by the Special Rapporteur may become an important instrument to guide the practice of states, they cannot remove all uncertainties, ambiguities and deficiencies from the regime of reservations. Sometimes they create even additional problems or, at least, require additional explanations and specifications. A streamlining of these guidelines would undoubtedly contribute to their better understanding.

Permit me, now, Mr. Chairman, to address in this oral statement only some issues, others are referred to in the written version of this statement which will be available on the UN PaperSmart portal.

1) A general issue is the use of the term "reservation" throughout the whole text of the guidelines. This term is often used without any further qualification to encompass both valid and invalid reservations. But in some of these cases "reservation" can only relate to valid reservations, such as, for instance, guideline 2.6.12 on the time period for formulating objections.

We are not convinced that the definition of reservations in guideline 1.1 needs to be split up in two paragraphs. There is a certain overlap between these two paragraphs, as para. 1 refers to reservations to certain provisions of a treaty and para. 2 equally to such reservations and, in addition, to reservations to the treaty as a whole with respect to certain specific aspects.

As to guideline 1.1.3 addressing reservations relating to the territorial application of a treaty, we wonder whether the regime of reservations as defined in these guidelines is applicable to them; it seems that certain issues connected with reservations like objections cannot be applied to such reservations in the same manner as to other valid reservations. Accordingly the question arises whether such declarations can still be called reservations or whether a different legal regime has to be applied to such reservations.

Guidelines 1.5 and 1.5.1 dealing with unilateral statements other than reservations and interpretative declarations and statements of non-recognition are not strictly necessary as they are not dealing with issues relating to reservations.

2) Regarding guideline 2.1.3 on representation for the purpose of formulating a reservation we do not believe that it is necessary, to go into that detail, sometimes problematic detail. The text as it stands now also refers, in paras. 2 b, c and d, to heads of delegations and missions as being entitled to formulate reservations; we have serious doubts as to whether this is really the case. The same applies to guideline 2.5.4 on representation for the purpose of withdrawing a reservation and to guideline 2.8.9 on the competent organs of international organisations. In all these cases, a shorter text reflecting Article 7 of the Vienna Convention on the Law of Treaties would be more appropriate.

Guidelines 2.1.5 and 2.1.6 should be merged in order to reflect better the practice that multilateral treaties normally have a depositary through which the communication is made – the present guideline 2.1.5 is highly theoretical.

3) Although guideline 2.1.6 para. 2 on reservations becoming effective after their receipt by a state or organisation is taken from Article 78 of the Vienna Convention, we do not believe that this guideline adequately reflects international practice. For the communication of a reservation to be considered as having been made, the receipt by the depository should be sufficient.

4) As we have indicated earlier on several occasions, Austria has constantly opposed the idea of permitting late reservations. Late reservations would violate the principle of pacta sunt servanda and they are not foreseen by the Vienna Convention on the Law of Treaties. Even if there were some cases where late reservations were admitted, this scarce practice should not be used for creating a general rule. Otherwise, treaties could no longer serve as a basis for stable and predictable relations among states. Accordingly, guideline 2.3 on late reservations should be rephrased and reduced to only „may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty", without a further text. Consequently, in our opinion, also guidelines 2.3.1 to 2.3.4 should be deleted.

In our opinion, interpretative declarations made at the time of signature require, like reservations, subsequent confirmation if the signature was subject to a later expression of consent to be bound by a treaty. States would be overburden when they had to recall all the interpretative declarations that were made at any time during the process of the conclusion of a treaty. Therefore guideline 2.4.6 should be adapted to the wording of guideline 2.2.1 where this rule is laid down for reservations.

As to guideline 2.4.7 regarding late declarations – the title of which is certainly misleading since the guideline is not dealing with late declarations as such but with declarations made at a moment different from the one specified in a treaty – we favour the reduction of this guideline to its first part, deleting the wording starting with "unless". The solution proposed by that wording would amount to an amendment of the treaty and would have to be treated accordingly.

It should be made clear that guideline 2.5.9 on setting the date of withdrawal of a reservation is the exception to the general rule laid down in guideline 2.5.8. Para. b of this guideline is obviously meant to address only those withdrawals the date of which is set prior to reception

of the notification by the other state parties. It remains also open whether after the reception the withdrawal that adds to the rights of the withdrawing state becomes effective. A clarification would certainly be very useful.

As to guideline 2.5.11 on the effects of a partial withdrawal of reservations, its para. 2 is not easy to comprehend. It is to be asked why an objection is possible only on the condition that the withdrawal has a discriminatory effect and not if other effects of a partial withdrawal are caused. It could, for instance, be imagined that such a partial withdrawal could entail other effects that are undesirable to the other parties to the treaty or even human rights violations. The VCLT does not address this issue so that the question arises why an objection is possible to the partial withdrawal of a reservation if it has discriminatory effect whereas otherwise no objection is possible. The term "discriminatory effect" is also somewhat ambiguous; according to the commentary it means discrimination among the parties to the treaty. However, the commentary also does not quote any practical example of this situation so that it would be better to drop this part of the guideline in order to avoid further complications.

What is also important is the question whether a state that had made a qualified objection (or with maximum effect) to a reservation is now entitled to withdraw its objection so that the treaty enters into force as is already provided for with regard to the total withdrawal of a reservation in guideline 2.5.7. Another problem arises if the original reservation was considered inadmissible (because being against object and purpose) and the withdrawal now removes this ground for inadmissibility. The newly formulated reservation would become a licit reservation to which the normal regime (including objections) would apply.

According to guideline 2.6.7 the intention to preclude the entry into force of a treaty "shall" be made before the treaty would otherwise enter into force. We propose to change this to "should", in view of article 20 para. 5 of the Vienna Convention and guideline 2.6.12 which allow for a time limit of twelve months.

5) The wording of guideline 2.6.13 on late objections is problematic since it is unclear what is meant by stating that a late objection "does not produce all the legal effects of an objection". There is no indication which legal effects are produced or not produced; the guideline, therefore, is not very helpful.

A further para. 3 should be added to guideline 2.7.7 on the partial withdrawal of an objection, specifying that the partial withdrawal may also have effects relating to the non-existence of treaty relations.

6) With regard to guideline 2.8.11 on the acceptance of a reservation to a constituent instrument of an international organisation we would have preferred a solution allowing to take the views of the competent organs of the international organisation into account once the organisation is established. *In this context, we recall the position Austria took at the Conference in Vienna: Austria proposed a particular solution for this problem: "When the reservation is formulated while the treaty is not yet in force, the expression of the consent of the state which has formulated the reservation takes effect only when such competent organ is properly constituted and has accepted the reservation." Although this proposal was not accepted we are still of the view that such a situation would be in a greater conformity with the VCLT that always requires the consent of the organ concerned and would, as the commentary quite rightly points out, ensure a control of the organization over the reservations.*

Guideline 2.8.12 on the non-preclusion of the reaction of member states of international organisation does not seem to be strictly necessary.

For guideline 2.9.3, recharacterization of an interpretative declaration, we would propose to use the wording "regards the interpretative declaration to be a reservation and to treat it accordingly". This would underline that the recharacterization is the result of a legal assessment, not of an arbitrary decision as the qualification of a declaration as a reservation is a matter of the effect of this declaration, but not of a unilateral arbitrary decision.

We find it not easy to understand guideline 3.1.4 on the permissibility of specified reservations, as we believe that any reservation expressly envisaged in a treaty cannot be against object and purpose of that treaty, even if it is "without defined content". Under which circumstances would such a specified reservation nevertheless, according to the guidelines, be against object and purpose if the reservation relates only to the relevant specific provision of the treaty?

7) We see guideline 3.1.5.1 on the determination of the object and purpose of a treaty as consisting of two steps. The first sentence gives priority to a literal interpretation and the second sentence provides subsidiary means of interpretation. The reference only to the possibility of resorting to subsidiary means leaves it open under which circumstances this is appropriate. In our view resorting to subsidiary means of interpretation should – in analogy to Article 32 of the Vienna Convention on the Law of Treaties – be restricted to situations where the literal interpretation does leave the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. This hierarchy should be clearly expressed in the guideline.

We are not convinced of the need of guideline 3.1.5.4 on reservations concerning rights from which no derogation is permissible. It may be asked how a reservation could be permissible if it relates to such rights. The relation between such rights, object and purpose of the treaty and ius cogens needs clarification since it could also be argued that the content of the guideline seems to be already reflected in the provisions on ius cogens and object and purpose.

8) Guideline 3.2 on the assessment of the permissibility of reservations refers to contracting states, dispute settlement bodies and treaty monitoring bodies in a sequence. Is this sequence meant to establish a hierarchy ? We believe this to be the case; otherwise divergences between the assessments by the different bodies would endanger the stability of treaty relations.

9) Guideline 3.2.3 on the assessment of the permissibility of reservations needs to be supplemented, as treaty monitoring bodies may be entitled to make binding assessments – in that case the mere consideration of their assessments would not be enough. Therefore we suggest to say that states and organisations shall "accept or" give consideration to such assessments. *It has further to be taken into account that the decision of a dispute settlement body has effect only between the parties to the dispute; if such a body comes to the conclusion that a certain reservation is impermissible, this decision would not exclude that other states parties may still consider this reservation as permissible. In contrast, the decision of a treaty body that takes up this matter proprio motu, could perhaps have an effect erga omnes partes. Again, this effect depends on the particular legal setting of the treaty body. Accordingly, this guideline should reflect the variety of the different effects of the assessment of reservation by treaty bodies. Furthermore, we think that the present guideline 3.2.5 should be placed before the present guideline 3.2.1.*

We have also doubts as to guideline 3.3.2 as we believe that it could not be excluded that there may be cases where the formulation of an impermissible reservation could have effects on the international responsibility of its author.

10) Guideline 4.1 on the establishment of a reservation needs to be supplemented in order to ensure that it also covers cases of implied acceptance and cases where no acceptance is necessary, such as when a reservation is expressly authorized. *We would therefore suggest adding, after "has accepted it", the following words: "in accordance with the provisions of guidelines 2.8.1 to 2.8.13, unless it is a reservation expressly authorized by a treaty".*

11) In Austria's view, reservations to treaties with a limited number of negotiating states require explicit and not just any sort of acceptance. Guideline 4.1.2 should be amended accordingly.

12) Guideline 4.2.1 on obtaining the status of a reserving state or organisation as contracting state or organisation does not conform to international practice which normally does not wait for the expiration of the twelve months period to grant that status. At least a text like that of guideline 4.2.2 para. 2 on obtaining that status at a prior date if there is no opposition thereto should be added to guideline 4.2.1. *The same problem also affects guideline 4.2.3.*

Guideline 4.2.5 on non-reciprocal application is also not easy to understand, at least the second sentence of that guideline, which should be deleted. Why should the other parties be bound by a provision when reciprocal application is not possible – and the reserving state is not bound?

13) Guideline 4.3 on the effect of an objection to a valid reservation raises two fundamental questions: The first concerns the meaning of the term "valid reservation" since the guidelines lack a definition of the qualifier "valid" which is used in guideline 4.3 for the first time. A meaning can only be derived by opposing that term to the term "invalidity" used in guideline 4.5.1. Since the commentary is also not very revealing in this regard, it would be necessary to include such a definition in the guidelines. Generally speaking, the guidelines use a number of closely related terms like "validity", "permissibility", "formal validity" and "established reservation" the relationship of which remains unclear. The second question is whether objections can be raised to any reservation, even to those that are explicitly authorized by a treaty.

At least as to the effect of objections, Article 20 (4) VCLT clearly distinguishes between the reservations under its first three paragraphs (those expressly authorized, those to treaties with a limited number of parties those to constituent instruments of international organizations) and other ones and establishes the particular effect of objections only with regard to the latter. The first part of guideline 4.3 is only compatible with the VCLT if it is understood as meaning that with the expression "reservation that has been established with regard to an objecting state or organization" it implicitly addresses those reservations that are addressed by the first three paragraphs of Article 20 VCLT, the objections to which have no effect to the establishment of reservations. However, the commentary singles out only the case of the constituent instrument of an international organization and does not refer to the other two kinds of reservations under Article 20 VCLT.

Guideline 4.3.1 should specify that the objection does not preclude the entry into force of the treaty „minus the provision affected by the reservation".

As to guideline 4.3.2 on objections to late reservations Austria reiterates its principal disagreement with this kind of reservations. However, irrespective of this position, Austria understands this guideline as relating only to states or organizations that became parties after the reservation became operative.

Since the title of guideline 4.3.5 refers to objection with maximum effect the text of the guideline should specify that such objections are meant. This clarification can easily be achieved by adding in brackets "objection with maximum effect" at the end of the sentence.

Para. 2 of guideline 4.3.6 could be improved by qualifying the treaty relations by the term "mutual". Para. 3 that reflects the reciprocal effect of reservations and objections raises the question of its relations to guideline 4.2.5 that addresses non-reciprocal situations. It would be difficult to derive from the expression "as intended to be modified by the reservation" that it applies to a non-reciprocal situation since this situation does not result from the intention of the reservation but from the content of the treaty.

The reference to the criterion "sufficient link" in guideline 4.3.7 regarding the effect on other provisions than those directly addressed by the reservation is too broad and runs the risk of endangering the predictability of treaty relations. Even the commentary does not explicitly specify what should be understood by this term. Accordingly this guideline should be deleted in its entirety unless this link is specified.

The wording of the fundamental guideline 4.5.1 regarding the nullity of an invalid reservation, with which Austria concurs in substance, is still unclear as the guidelines do not clearly explain what is meant under "formal validity and permissibility". The expression "formal validity" is used in this guideline for the first time. This deficiency could be removed by simply deleting "of formal validity and permissibility".

14) As to guideline 4.5.2 on reactions to a reservation considered invalid, Austria can accept most of its substance although there are difficulties in establishing the intention of the reserving state. Para. 3 of this guideline, however, is problematic: We cannot accept that the intention not to be bound by a treaty can be expressed at any time. Such a solution would pose a considerable risk to the stability of treaty relations since the other parties to a treaty would never be sure whether or not the reserving state or organization has become party to a treaty. It is also open whether the effect of the expression of such an intention is *ex nunc* or *ex tunc*. To avoid such an unclear situation Austria proposes that the intention not to be bound by a treaty must be expressed in immediate connection with the reservation. If that is not the case, the reserving state or organization should be bound without the benefit of the reservation. *In this context Austria refers to the dialogue that Austria tried to introduce into treaty practice; for the case that such a dialogue was started it could even be stated that the intention must be expressed within not more than twelve months after the reserving state or organization has received the request for a clarification by another party.*

Guideline 4.7.1 on the effect of interpretative declarations contains a number of vague expressions and only proves that these declarations and their relation to the interpretation of a treaty under Article 31 VCLT are not totally clarified. According to para. 1 such a declaration only "may" constitute an element for treaty interpretation: this possibility is certainly defined by Article 31 VCLT regarding the interpretation of treaties so that if falls outside the scope of these guidelines. In order to escape the risk of interfering with Article 31 VCLT Austria suggests dropping this latter part of para. 1 after "thereof". Similarly, Austria is of the view that para. 2 lacks sufficient precision in order to serve as a rule for the conduct

of states; neither the expression "account shall be taken" nor the term "as appropriate" offers clear guidance. For this reason, Austria proposes to delete this paragraph in its entirety.

In guideline 4.7.3 on the approval of interpretative declarations, it is debatable what "approval" means in this context. It is, in particular, not clear whether approval in the sense of guideline 2.9.1 means that the approving state identifies itself with this interpretation or accepts it in the sense of Article 31 VCLT so that an approval by all parties serves as the context of a treaty, which has to be taken into account for the purpose of interpretation according to Article 31 VCLT, or whether the approving states only accepts that this interpretation resulting from this declaration exclusively applies to the declaring state. It must also be taken into account that Article 31 VCLT speaks of acceptance, but not of approval so that the question arises as to the synonymous nature of these two expressions.

15) Austria would like to confine its remarks regarding the question of reservations and interpretative declaration in the case of succession of states to a general comment: We doubt the usefulness of this part of the guidelines which is based on the Vienna Convention on Succession of States in respect of Treaties. We are not of the opinion that this convention, which is binding on a few states only, reflects customary international law. The category of "newly independent states" and their particular treatment is hardly appropriate in present times, as the process of decolonisation and the need to consider special circumstances arising therefrom in the context of state succession lie in the past. Also the Commission itself has ceased using this distinction. *Its Articles on the Nationality of Natural Persons in relation to the Succession of States (Annex to General Assembly resolution 55/153 of 12 December 2000) no longer contain a reference to "newly independent states". For this reason, it does not seem worthwhile to base such guidelines on the Vienna Convention of 1978. It would also be difficult to establish rules of customary international law regarding this issue since practice is not sufficiently unequivocal.* **For this reason, it would be preferable to restrict the guidelines regarding succession in treaties to general statements leaving sufficient room for a particular treatment of the individual cases of state succession.**

Finally, Austria reserves the right to make additional comments if these guidelines are further discussed within any international forum.

Thank you, Mr. Chairman.