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Statement by

H.E. Ambassador Dr. Martin Ney
German Federal Foreign Office
The Legal Adviser

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Reservation to treaties

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Madam Chairwoman/Mr Chairman,

Germany reiterates its highest compliments and great appreciation for the Commission's tremendous achievement in the matter of reservations to treaties, expressed in our earlier comments on the draft guidelines. The Commission's Guide to Practice including the commentaries has already contributed to clarifying legal debate on a number of issues and contains most valuable practical guidance. In this context, I want to mention Guideline 2.5.11 Para. 2 as an example. It provides very useful and practical guidance on the question of whether the partial withdrawal of a reservation may be used as an opportunity to make a new objection - it may not. This may appear to be mere technicality – however, the question frequently comes up in practice and is subject to discussion. I am convinced that widespread appreciation for all aspects of this invaluable instrument, the "Guide to Practice", will come with time, but it will come.

Germany would also like to take the opportunity to reiterate its concerns regarding the Commission's conclusions as to the legal effect and consequences of non-permissible reservations on treaty relations.

Guideline 4.5.1 proposes that "a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect." Considering an impermissible reservation null and void allows for the reservation to be severed from a State's consent to be bound and permits complete disregard for the reserving State's declaration. The nullity and severability of an impermissible reservation is combined with the "positive presumption" proposed in Guideline 4.5.3 Para. 2, under which a State making an impermissible reservation will be considered a contracting State without the benefit of its reservation.

Nullity or invalidity as a consequence of impermissibility would be a new and a remarkably sharp and drastic verdict on a State's reservation, especially where its permissibility is challenged on the grounds that it does not meet the compatibility test of art. 19 lit. c) VCLT, a test open to wide interpretation and debate. The positive presumption - albeit rebuttable - most certainly amounts to a proposal for a new rule in international treaty law. It clearly goes beyond a mere guideline to established practice within the framework of existing international law.

It continues to be Germany's firm position that the ILC's proposal of severability and positive presumption cannot be deduced from existing case law or State practice as a general rule equally valid for all cases of impermissible reservations or with respect to all treaties or treaty settings. Germany confirms its reluctance already expressed earlier to accept the commission's conclusions as a new rule.

We believe that the positive presumption as formulated in the Guide to Practice could hamper treaty relations between States – a concern that has also been voiced by others. It seems to us, that the positive presumption is in its effect far less clear and straightforward than it appears to be; that it raises more questions than it aspires to solve.

Allow me to highlight three aspects in this regard:

One: The rebuttable positive presumption can lead to uncertainty as to whether a reserving State has become a party to a treaty. This is the case, when doubt has been cast on the permissibility of the State's reservation and the State does not intend to be bound to the treaty without the reservation. Such uncertainty would continue until the permissibility or impermissibility of the reservation could be formally established. The question is - which mechanism would and could lead to such clarification? Most treaty settings do not provide for an adjudicatory or monitoring body to deal with that kind of legal question.

Two: If eventually - possibly after an extended period of time - it were established that a reservation was in fact impermissible and a State were to decide that it did not want to be bound without the reservation – what effect would this have on the contractual relationship of all sides concerned? Will the effect be retroactive, meaning that the State was never a Party to the treaty concerned? What if it was that particular State's consent to be bound that allowed the treaty to enter into force? Will a contractual relationship ever have existed between the reserving State and the others? What will happen in treaty settings which create a web of mutual obligations between States? Will the reserving State be entitled to a refund of its financial contributions made under the treaty?

Three: Previous discussion on the matter has shown that the principle of consent underlying international treaty law demands that the positive presumption has to be rebuttable; in other words, a reserving State has to be able to refuse attachment to a treaty if its reservation turns out to be impermissible and hence invalid. As a consequence, every debate on the permissibility of a reservation can, and most likely will, turn into a discussion about the legal attachment of the reserving State to the treaty. The debate on the content of treaty relations between Parties to a treaty - as we know it - is transformed by the Guide to Practice into a discussion on the status of the reserving State as a Party. Some States have even expressed concern that a discussion on the permissibility of a particular reservation could be misused as an easy excuse to end treaty relations any time.

Germany acknowledges that the lack of legal clarity in dealing with impermissible reservations may not be satisfactory. We also are aware of the undesirable effect that impermissible reservations have on the integrity of the general application of Human Rights Standards. And we admit that there are treaty settings which allow for an approach as proposed by the Guide to Practice - as for instance in the context of the European Convention on Human Rights. However, at this point in time Germany is not willing to accept the solution offered by the ILC with regard to the impermissibility of a reservation and the consequences thereof as a general rule of public international law.

Allow me to finish by saying that I hope that these remarks are perceived as a positive contribution to an ongoing debate. By no means they are meant to diminish our admiration for the tremendous achievement of the ILC and its Special Rapporteur Alain Pellet in the area of reservations to treaties.

Thank you.