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ON THE REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-THIRD AND SIXTY-FIFTH SESSIONS
SIXTH COMMITTEE
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Reservation to treaties

General Comments

Thank you, Mr. Chairman.

The Government of Japan wishes to express its sincere appreciation to the Special Rapporteur, Professor Alain Pellet, for his invaluable work on the topic of “reservations to treaties”. We are aware that Professor Pellet has dedicated his efforts to this topic over a long period of time, ever since his appointment by the International Law Commission as the Special Rapporteur on the topic in 1994. Japan congratulates Professor Pellet on having completed a full set of the Draft Guidelines during the sixty-third session of the Commission in 2011.The VCLT has left open a number of uncertainties regarding reservations and these open questions have had practical implications. Given the complexity of the subject, this Guide to Practice based on in-depth study over two decades is particularly welcome. We have undertaken a thorough analysis of the Draft Guidelines in light of Japan’s own practice on reservations and interpretative declarations, and hereby submit the following comments.

Before commenting on the substance, Japan notes that this Guide to

Practice at times goes beyond the reflection of State practice. Some clarification on the status of the “Guide to Practice” is therefore called for. For reasons of practicality, simplification may be desirable.

Interpretative declarations have been utilised on the assumption that any provision of an international treaty is subject to certain interpretations. As interpretative declarations, unlike reservations, do not have any legal effect, subjecting interpretative declarations to the test of permissibility is rare in State practice and appears to constitute a process of legislation rather than of codification. A question arises in relation to interpretative declarations when a de facto reservation is made under the name of an interpretative declaration. In this case, the prevailing practice is for States to make a determination on permissibility by considering the interpretative declaration in question as constituting a reservation and then making a decision concerning the legal effect of the de facto reservation and the treaty relation with the reserving State. In that light, it seems sufficient to state in the Draft Guidelines that the provisions on reservations apply to such interpretative declarations considered as constituting de facto reservations. Furthermore, the VCLT contains no provisions on formal confirmation of conditional interpretative declarations formulated when signing a treaty or late formulation of an interpretative declaration, and nor has a uniform and widespread practice of States been established concerning these questions. We therefore have certain doubts as to the necessity of these guidelines.

Comments on Specific Sections of the Guide to Practice

1. Guideline 2.3

Japan objects to late formulation of reservations going beyond the definition set out under the VCLT. Guideline 2.3. establishes a condition of unanimous acceptance (i.e. absence of opposition by all parties to the treaty within 12 months). However, it leaves room for doubt that such a condition would be sufficient to safeguard against any act by State that wishes to modify the scope of obligation incumbent upon it at any time after expressing its intention to be bound by the treaty.

2. Guidelines 2.1.3, paragraph 2 (d), and 2.5.4, paragraph 2 (c)

The guidelines stipulate that when heads of permanent missions to an international organization formulate or withdraw a reservation relating to a treaty between the accrediting States and that organization, said heads of permanent missions fall under the definition of persons who are considered as representing their States without having to produce full powers. In State practice, heads of permanent missions to the United Nations have signed letters relating to reservations to those treaties drafted in the United Nations the depositary function of which is entrusted to the Secretary-General of the United Nations. Therefore, we propose that guidelines 2.1.3, paragraph 2 (d), and 2.5.4, paragraph 2 (c), should add, for example, the following words at the end of the respective paragraphs: “, as well as a treaty to which the accrediting States are parties and of which the organization is a depositary”.

3. Guideline 2.4.2

This guideline only provides that “an interpretative declaration must be formulated by a person who is considered as representing a State … for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State … to be bound by a treaty”. In State practice, when the depositary of the treaty in question is an international organization, in particular the United Nations, interpretative declarations are usually submitted to the international organization by the State formulating the interpretative declaration with a letter signed by the head of the permanent mission to the international organization in question. Therefore, in addition to the statement referred to above, the guideline should add, for example, the following words at the end of the guideline: “, and heads of permanent missions to the international organization, when formulating an interpretative declaration to a treaty to which the accrediting States are parties and of which the organization is a depositary”.

4. Guideline 2.6.3

This guideline refers to “any State and any international organization that is entitled to become a party to the treaty” as an author who may formulate an objection to a reservation. However, in light of Articles 20 to 22 of the VCLT, it is reasonable to conclude that the regime for objections to reservations is primarily envisaged to apply between States Parties to the treaty in question. We take the view that, as the regime for reservations and objections to reservations is

intended to regulate the legal effect of the provision or provisions to which the reservation or objection is made, with regard to the relation between the reserving State and other States Parties to the treaty, it is questionable to include the objections formulated by non-party States to the treaty in question under the concept of objections to reservations. As States Parties to a treaty are under the obligation to implement the rights and obligations under said treaty, a State Party can be directly affected by a reservation formulated by another State Party, which is quite different from a situation, because non-party States are not directly affected by the said reservation. From that point of view, it is questionable to treat both objections formulated by States Parties and views expressed by non-party States under the same concept of "objections to reservations". Even if these two are treated under the same concept of "objections to reservations", as guideline 2.6.3, paragraph (ii), explicitly stipulates, a view of a non-party State regarding a reservation "does not produce any legal effect", as long as that State is not a party to the treaty to which the reservation was made, and thus it carries a legal weight quite different from observations formulated by States Parties. Although the commentary to this guideline explains this aspect to some extent, the explanation is not sufficient (to establish the validity of this view of "objections to reservations"). The same problems arise with regard to guidelines 2.6.12 and 2.8.3.

5. Guideline 2.9

In light of State practice concerning interpretative declarations, cases in which a State has approved an interpretative declaration formulated by another State are rare. In most cases, a State formulates an objection to an interpretative declaration formulated by another State for the reason that it in fact constitutes a de facto reservation and is also incompatible with the object and purpose of the treaty (which [situation] is regulated by guideline 2.9.3). Japan has formulated objections to interpretative declarations formulated by another State in two cases. The first case was its objection dated 4 August 2003 to the interpretative declaration of Pakistan dated 13 August 2002 to Article 2 (1) (b) of the International Convention for the Suppression of the Financing of Terrorism. The second case was its objection dated 14 July 2005 to the interpretative declaration of Jordan dated 28 August 2003 to the International Convention for the Suppression of Terrorist Bombings. In both objections, Japan stated explicitly that "such declaration constitutes a reservation which is incompatible with the

object and purpose of the Convention", and that Japan, therefore, "objects to the aforementioned reservation" made by the State concerned. It appears that, as the above-mentioned two cases evidence, States formulate objections to an interpretative declaration when they consider that the interpretative declaration constitutes a de facto reservation and is thus not acceptable to the objecting State. The practice of Japan in the above-cited two cases is consistent with guidelines 2.9.3 to 2.9.7, and thus can be regarded as supporting those guidelines.

6. Guideline 2.9.9

In most cases, silence in response to an interpretative declaration merely denotes lack of relevance to the affairs of the non-responding State, rather than positive approval or negative opposition. Furthermore, States which do not react to an interpretative declaration usually do not explain the reasons for their decision not to respond. Thus, it is extremely difficult to determine whether a State has no reaction to an interpretative declaration as a result of the State's judgment that the interpretative declaration is not relevant to its interests, or as a result of its intentional choice to remain silent despite some concerns about the declaration. We therefore consider that, in principle, silence in response to an interpretative declaration should not be construed as approval of or acquiescence in the declaration. In light of the above consideration, the current text of guideline 2.9.9 and the commentary thereto duly reflect our concerns.

7. Furthermore, although guideline 3.2.1, paragraph 2, clarifies the limit of the legal effects of the assessment by treaty monitoring bodies by stipulating that "the assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it", it must be pointed out that the conclusions formulated by treaty monitoring bodies often have been construed as an authoritative assessment of the provisions of the treaty in question, even when those conclusions are not legally well founded, and thus have caused an unexpected or undesirable situation for a State Party to the treaty in question. The current text of this guideline is not sufficient to ease such serious concerns of States Parties.

8. Guidelines 3.2.2-3.2.4

If the treaty in question explicitly confers its treaty monitoring body with the power to assess the permissibility of reservations, the principles enshrined in these guidelines are applicable. However, this is not clearly stated in the current text of the guidelines. These guidelines therefore may generate the misunderstanding that all treaty monitoring bodies are conferred with the power to assess the permissibility of reservations.

9. Guidelines 4.2.1 and 4.2.2

According to Article 20 of the VCLT, a reserving State becomes a party to the treaty in question when a period of 12 months has passed after it expressed its consent to be bound by the treaty in question, if no objection to the reservation in question is raised. However, in State practice and, significantly, the practice of the Secretary-General of the United Nations, the date on which a State becomes a party to a treaty has not been differentiated according to whether the State has formulated a reservation or not, but rather has been the same for both categories of States, namely, the date on which the State expresses its consent to be bound by the treaty in question. Although it is true that Guideline 4.2.2, paragraph 2, takes current State practice into account, as explained in the commentary thereto, the last part of the paragraph, which states, “if no contracting State or contracting organization is opposed”, implies that, if only one contracting State or contracting organization is opposed to the reserving State’s being included in the number of parties to the treaty in question, that reserving State cannot be considered as a party to the treaty. In this sense, the current text of guideline 4.2.2 diverges from State practice and thus is problematic.

10. Guideline 4.3.6

This guideline indicates that, when a State formulates a reservation to a provision of a treaty and another State objects to the reservation, not only the provision to which the reservation was made but also any provision of the treaty to which the reservation does not relate but which has a sufficient link with the provision or provisions to which the reservation does relate, is inapplicable between the reserving State and the objecting State. We take the view that the VCLT does not contain any provision which regulates such a case and that no uniform and widespread State practice has emerged to support this guideline. Another problem of this guideline is the question of what party shall make the

determination as to which provision has a sufficient link with the provision or provisions to which the reservation relates. On that basis, Japan doubts whether this guideline should be included in the Draft Guidelines.

11. Guideline 4.5

In most cases, a State aims to regulate a treaty relation with another State through the regime for reservations and objections to reservations without making a determination on the validity of an impermissible reservation. Furthermore, it seems that, with the exception of certain States, it is more common for States, including Japan, to place importance upon (achieving) the universality of the treaty by inducing more States to become parties to the treaty, even at the risk of diminishing the integrity of the treaty to some extent, and to forgo formulating an objection to a reservation, even if the reservation is considered to be impermissible. Such practice is not unreasonable, in light of the diversity of States in the international community today.

12. Guideline 5.2.3

With regard to Japan's practice in this area, when Japan joined the Convention on the Territorial Sea and the Contiguous Zone on 10 June 1968, it formulated an objection to the reservation made by Czechoslovakia, which was later divided into two States: the Czech Republic and the Slovak Republic. When Czechoslovakia was divided, both the Czech Republic and the Slovak Republic notified the Secretary-General of the United Nations that they considered their countries to be bound by multilateral treaties to which Czechoslovakia had been a party, including reservations and declarations attached thereto. The objection made by Japan is still considered to be maintained in its treaty relation with both the Czech Republic and the Slovak Republic, the successor States of Czechoslovakia. This fact is in conformity with this guideline.

Thank you, Mr. Chairman.