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The Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions (Part 2)

Agenda item 81

S T A T E M E N T

BY

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Mr. Chairman,

1. Looking at the final version of *the Guide to Practice on Reservations to Treaties,* adopted by the International Law Commission, we find this document as an in-depth study, which definitely fills a number of *lacunae* and clarifies certain ambiguities of the 1969 and 1986 Vienna Conventions on the Law of Treaties. It clears up many issues arising from the state practice regarding both substantive and procedural matters. On this occasion, we would like to commend the Special Rapporteur, Professor Alain Pellet, for his dedicated work on the topic in question and bringing it to a successful conclusion.

2. We welcome with satisfaction that the Commission has made some modifications in the text, so that the guidelines are closer to the views and approaches presented by the States. Particularly we strongly welcome removing from the text some controversial guidelines: solution provided in the guideline 3.3.3., that an impermissible reservation could have become permissible by the unanimity in abstaining from objecting by contracting states or contracting organization, or the guideline 2.1.8., concerning an assessment of permissibility of a reservation by the depositary.

3. Now let me focus on those areas which seem to be the most sensitive and important. One of them is the problem of permissibility of so called "late reservations". We support replacement in *the Guide to Practice* of the expression "late reservation" by the wording "late formulation of a reservation" or "a reservation formulated late" as indicating, more clearly, that it is <u>not</u> a new, separate category of reservations, but rather "declarations which are presented as reservations, but which are not in keeping with the time periods during which they may, in principle, be considered as such, since the times at which reservations may be formulated are specified in the definition of reservations itself"[1]. Although such declarations seem still to be contrary to the very concept of reservations, we find the conditions, under which they could be formulated effectively, as adequate to safeguard the basic principle of *pacta sunt servanda* (which means i.a. that a State

[1] *Guide to Practice with Commentary*, pt 1, pp. 173-174.

could not at any time unilaterally reduce the scope of its obligations after it expressed its consent to be bound by the treaty). According to the guideline 2.3., a State may not formulate a reservation after that moment, "unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation". We agree with the Commission that this requirement of unanimity, passive or tacit, makes the exception to the principle acceptable and limits the risk of abuse. This element of the derogation is already observable in current practice and "consistent with the role of "guardian" of the treaty that State Parties may collectively assume".

4. For the same reasons we consider acceptable the rules regarding widening of the scope of reservations – which are generally the same according to the guideline 2.3.4. The modification of an existing reservation so as to widen its scope by one of the State Parties without opposition by any of other contracting States should be treated as "agreement between the parties", in the meaning of art. 39 of the Vienna Convention. According to the general rule regarding amendments to treaties, it is always possible for the parties to a treaty to modify its obligations by unanimous agreement at any time. We agree with the Commission that "it follows that they may also, by unanimous agreement, authorize a party to modify, again at any time, the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to that party".

5. To summarize, by accepting the rules regarding "late formulation of a reservation" and "widening the scope of a reservation" the principle *pacta sunt servanda* would not be undermined since an indissociable condition for its effectiveness is the unanimous consent of the States Parties to the treaty.

6. We also would like to express the position on probably the most important issue in the *Guide to Practice*: invalidity of reservations. Polish delegation would like to reiterate its position presented earlier during the session of UN Sixth Committee on the crucial issue in this regard – objective character of the invalidity of reservations. The Commission rightly assumed that reservations,

which do not meet the conditions of formal validity and permissibility are null and void, independently from the reactions of other contracting states. Thus, we support in principle the wording of the guideline 4.5.1. The objective character of invalidity of reservations seems to be in conformity with wording of the Vienna Convention (art. 19 and 20 par. 4).

7. We are aware of the fact that there is no objective mechanism to assess this objective invalidity of reservations. The guidelines proposed by the Commission constitute an attempt to solve this problem, but it is hardly likely that they will properly "work" in practice: there is more than one subject which is competent to assess such permissibility (and consequently–validity) of reservations. Although States, treaty bodies and dispute settlement bodies will act "within their respective competences", they could have different opinions about possibility of a particular reservation, what may lead to many practical problems.

8. The most difficult issue connected with invalidity of reservations is the status of the author of an invalid reservation in relation to a treaty. According to the guideline 4.5.3. this status should depend on the intention expressed by the reserving State. This solution could be also assessed as well–balanced and theoretically very reasonable, although there are some ambiguities concerning the effect of the statement by which the author of an invalid reservation expresses its intention not to be bound by the treaty without the benefit of the reservation (especially that it can make such a statement "at any time"). Is this a new condition which state may invoke as invalidating its consent to be bound by a treaty?

9. To summarize, Mr. Chairman, the Commission has made significant efforts to find compromise between different positions and practice of States and treaty bodies concerning the invalid reservations. Now it would seem expedient, according to the Commission, to simply "let practice evolve in this regard".

Thank you Mr. Chairman.