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UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

UNITED NATIONS GENERAL ASSEMBLY, SIXTH COMMITTEE,
AGENDA ITEM 81,
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY THIRD SESSION: PART II
(A/66/10/Add.1)
RESERVATIONS TO TREATIES
(NEW YORK: 30 OCTOBER – 1 NOVEMBER 2013)

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30 OCTOBER – 1 NOVEMBER 2013

Check against delivery

Mr Chairman,

Introduction

Tribute to Alain Pellet

Mr Chairman,

The UK would like to take this opportunity to pay tribute to Professor Pellet and the members of the Commission, past and present, over the last twenty years, for their efforts in producing this work. Professor Pellet's assistants over the years must also take a large amount of credit for the completion of this project.

We also take this opportunity to congratulate Professor Pellet on his distinguished twenty years with the International Law Commission. During that time, he has been involved in some of the Commission's most important work. We thank him for his contribution to the advancement of international law during this time.

What is the Guide

Mr Chairman,

In 2010, we suggested that the Guide to practice would benefit from an introduction, explaining the Guide's intended purpose and the legal status of the guidelines, including their relationship to the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties.

We are pleased to now see such an introduction, explaining in detail the purpose of the Guide. We note that, first, the Commission does not intend the Guide to replace, amend or in any way depart from the Vienna Conventions. Second, the Guide intends to provide assistance and possible solutions to practitioners of international law who are faced with tricky issues relating to reservations. We presume this includes, as well as government lawyers, judges, civil society and academics. In this regard, the research and analysis of past practice as set out in the commentaries is an invaluable part of the Guide.

Third, while the Guide as such is not a binding instrument, it includes a range of provisions which vary in terms of their obligatory nature. Some of the guidelines reflect binding rules, through reproduction of the relevant provisions of the Vienna Conventions, some are intended to be suggestions *de lege ferenda*, and others are simply recommendations for good practice put forward by the Commission but which are in no way binding on States.

Guidelines

Mr Chairman,

I now turn to the Guidelines themselves. The UK has over the years commented in detail on the draft guidelines as they appeared in successive Annual Reports of the Commission. In 2010, we provided extensive written comments on the draft guidelines adopted on first reading. It is of course not possible in a single statement to the Sixth Committee to set out the UK's definitive and final position on each of the guidelines. As a starting point, we would refer to our previous written and oral comments, in so far as they remain relevant to the final version of the Guide.

For the purpose of this statement, we intend to comment on three areas. First, the issue of reservations relating to territorial application of a treaty; second, reservations and treaty bodies; and, third, the status of an invalid reservation.

Territorial application

Guideline 1.1.3 deals with reservations relating to the territorial application of a treaty.

When guideline 1.1.3 first appeared in its original form in 1999, the UK provided extensive comments, detailing its practice since 1967. We considered and continue to consider that this is consistent with Article 29 of the Vienna Convention on the Law of Treaties. We reiterated our position in 2010 in our written comments.

The UK's position, like that of other States with overseas territories, is that a declaration regarding the extent of the territorial application of a treaty does not constitute a reservation to that treaty. The Vienna Convention on the Law of Treaties makes clear that 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]". A declaration or statement which has the effect of excluding entirely a treaty's application to a given territory would not therefore constitute a reservation, since it does not concern the legal effect of certain 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 states that "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. It has been the long-standing practice of the UK, in relation to treaties which are silent on territorial application, to make clear 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 at a later stage by means of a separate notification made by the UK to the depositary.

The UK's practice is consistent with paragraph 5 of the accompanying commentary, which we believe sets out the correct position in law. We are grateful to the Commission for taking on board comments made by the most interested States in this respect, and amending the guideline and commentary accordingly.

Treaty monitoring bodies

Mr Chairman,

In relation to the competence of treaty monitoring bodies, as set out in the guidelines 3.2.1 to 3.2.5, the UK notes the changes made by the Commission in the final Guide. The UK 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 provisions of the treaty concerned; and that these same provisions are the product of free negotiation between States and other subjects of international law. 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 provisions.

Absent an express treaty provision, the UK also does not accept that treaty monitoring bodies are "competent to rule on the validity" of reservations. We refer to the UK's observations on the Human Rights Committee's General Comment No.24, referenced in the commentary to Guideline 3.2, 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 UK 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 enable a treaty monitoring body to carry out its substantive functions.

In relation to guideline 3.2.2, the UK 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.

Status of the author of an invalid reservation

Mr Chairman,

The issue dealt with in guideline 4.5.3 is the most contentious and debated area of reservations practice. The first version of this guideline appeared in 2009 and the UK has followed the debate within the Commission and the Sixth Committee on this with interest. We tried to engage constructively with the text as it appeared in 2009, and suggested a solution which sought to achieve an alternative middle ground between the polarised positions which exist on the status of the author of an invalid reservation.

The UK's position has always been that, in accordance with the ICJ's Advisory Opinion on Reservations to the Genocide Convention, if a State has made an invalid reservation, it has not validly expressed its consent to be bound. And so treaty relations cannot arise. We consider this to be the *lex lata*.

As well as in our comments to the Commission, we have set out our view in detail in our observations on the Human Rights Committee's General Comment 24. There, the UK made the obvious point that treaty relations are based on consent and the only result of an invalid reservation is that treaty relations will not arise between the reserving and objecting States.

In 2009, the Commission suggested that there should be a presumption that a State entering an invalid reservation would nevertheless become a party to a treaty without the benefit of its invalid reservations. That presumption could, however, be rebutted on the basis of non-exhaustive criteria.

Although we responded positively to the sentiment behind the Commission's thinking, we considered the listed criteria vague, and, as such, voiced the opinion that the guideline as then drafted would lead to a lack of legal certainty.

The current guideline 4.5.3 is much closer to the suggested draft we put forward in our written comments in 2010. With regards paragraph 1, we would agree that whether the reserving State wishes to be bound without the benefit of its reservation or considers it is not bound by the treaty at all if its reservation is deemed invalid depends on the intention of the reserving State. Paragraph 2 does not, in our view, reflect the *lex lata*, and does not purport to do so. There is a real question – dealt with in the commentary – as to whether paragraph 2 would have been better setting out the reverse presumption. However, we appreciate that a choice had to be made, and that the Commission has put forward its proposals in guideline 4.5.3 for future practice in an effort to strike a reasonable balance.

Paragraph 3 looks at the issue of a State's "intention". Under this paragraph, a State can state "at any time" that it does not wish to be bound by a treaty if its reservations are considered invalid. This would enable a reserving State to say that it does not consider itself bound by a treaty when, for example, a reservation is the subject of litigation many years or even decades after the offending reservation was entered. This again creates a lack of legal certainty.

Paragraph 4 is clearly a recommendation of the Commission. We have already set out our view on the limited role of treaty bodies, which apply equally here. To reiterate, a treaty body, unless it is given a specific power to that effect, cannot definitely rule on the validity of reservations.
Other issues

<u>Reservations dialogue</u>

Mr Chairman,

The UK fully supports the Commission's recommendation on the reservations dialogue.

Regrettably, it is the experience of the UK that it is rare that, where inquiries are made as to the basis of a reservation, any kind of meaningful response as to its rationale is received. This is not conducive either to the smooth operation of treaty relations or legal certainty. The Commission's recommendation sets out a clear process which can be followed by States and international organisations entering reservations, as well as by those States and international organisations who wish either to understand more clearly the basis of a reservation or to object to such a reservation.

The key to the 'reservations dialogue', which is not of course a term of art, is that it is flexible and not prescriptive. We think that the Commission's recommendation retains these qualities. In addition, it contains elements – such as a recommendation that States and international organisations explain the basis of their reservations – which can only be helpful to contracting parties in assessing that reservation's validity.

The UK will respond positively to requests from other States to explain the basis for any reservations which it might make, and it urges other States to take a similarly cooperative stance.

Reservations assistance mechanism

Mr Chairman,

We note with interest the recommendation for a reservations assistance mechanism. In fact, this consists of two distinct ideas. The first is a reservations observatory. The inspiration for this is the "observatory" of the Council of Europe Committee of Legal Advisers (CAHDI). We agree that an adaptation of this may be an idea worth pursuing within the Sixth Committee. We would be interested in hearing other States' views on this, in particular, any thoughts on how this could be developed. The Council of Europe observatory has proven to be a useful forum within which States can discuss reservations and potential objections, and coordinate positions.

The second is a proposal for a new institution referred to as a 'reservations assistance mechanism'. The UK is prepared to hear the views of other States on whether they would consider such a tool useful. But we would note that there will be budgetary considerations which will need to be tackled.

Conclusion

Mr Chairman,

We would like to end our statement by thanking, once again, Professor Pellet and the Commission for producing such a comprehensive and thoroughly researched piece of work. Like the 1969 Vienna Convention on the Law of Treaties, we are confident it will stand the test of time, and that the work will prove to be the definitive guide to reservations for decades to come.

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