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**68th Session of the
United Nations General Assembly**

6th Committee

Agenda Item 81:

Report of the International Law Commission

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

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

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 p

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 (thos

