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Institutional Aspects of the Guide to Practice on Reservations

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Abstract

The aim of the Guide to Practice on Reservations to Treaties is to assist practitioners of international law, who are often faced with sensitive problems concerning, in particular, the validity and effects of reservations to treaties, and interpretative declarations. The chief interest in the Guide will be in the light it shines on the many difficult substantive and procedural issues concerning reservations and declarations left open by the Vienna Conventions. But the institutional aspects are also of considerable practical interest. The present contribution considers some of the institutional or cooperative bodies that may assist practitioners: depositaries; treaty monitoring bodies; the reservations dialogue; and 'mechanisms of assistance'. The first two are well-established. The third and fourth are innovative, and it remains to be seen whether they will be adopted by states and, if so, how useful they will be. In any event, the Special Rapporteur has shown considerable foresight in proposing what became the annex to the Guide to Practice on the reservations dialogue, as well as the Commission's resolution on 'mechanisms of assistance'.

1 Introduction

If treaties are important, so too are reservations and interpretative declarations. There are few multilateral treaties to which reservations and interpretative declarations have not been made by at least a few, and often many, contracting states.[1] Yet the attention paid to reservations and declarations is limited. When a state or international organization is formulating a reservation or a declaration, close attention will (one hopes)

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1 Exceptions are those with restricted membership, like the EU Treaties, and those that expressly prohibit reservations, like the UN Convention on the Law of the Sea, 1982 (Art. 309); the latter has spawned a host of interpretative declarations, some of which may be impermissible reservations.

be paid to the matter. But unless they are parties to one of the relatively rare cases involving reservations (or interpretative declarations) that come before international courts and tribunals,[2] most states seem not to concern themselves much with reservations and declarations made by others. This can be seen in their failure to react to reservations or declarations that may in some cases seriously threaten a multilateral treaty regime. There are, no doubt, many reasons for this. One must surely be that increasingly hard-pressed foreign ministries, including their lawyers, simply do not have the resources to devote to what can be a time-consuming and difficult matter. This seems to be the case for states, large and small. For most states the question of reservations or declarations made by other states is apparently hardly seen as a priority, even in the field where most attention is given: reservations to human rights treaties. The resource issues are compounded by the 'highly technical and complex nature of the issues raised'[3] and, on some occasions at least, by political sensitivities involved in objecting to reservations.

The International Law Commission's 2011 Guide to Practice on Reservations to Treaties is to be found in the Addendum to the International Law Commission's Report for 2011, which contains the guidelines themselves (including an annex entitled 'Conclusions on the reservations dialogue'), a short Introduction to the Guide, the guidelines with commentaries, and finally a bibliography.[4] Chapter IV of the first part of the Commission's 2011 Report describes in formal terms, but hardly does justice to, the work of the Commission on the topic in 2011, and in addition to reproducing the guidelines with their annex, includes the 'Recommendation of the Commission on mechanisms of assistance in relation to reservations to treaties'.[5] So for the full picture of the Commission's final output on the topic it is necessary to have both parts of the Commission's 2011 Report to hand.

The aim of the Guide to Practice is to assist states in formulating reservations and interpretative declarations, and reacting thereto. It does this by spelling out with care and in detail the substantive and procedural law and practice in this field, and by suggesting good practice in certain areas.[6] The Guide has been described as 'a code of recommended practice' designed to 'guide' the practice of states, and thus contains some provisions which would not have a place in an international convention.[7] In drawing up the Guide, in addition to addressing comprehensively substantive and procedural issues, the Commission considered it appropriate to explain and

2 For a recent example see *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment* [2009] ICJ Rep 61, at 76–78, paras 35, 39, 42 ('Romania's declaration as such has no bearing on the Court's interpretation').

3 Guide to Practice, Introduction, at para. 8: *Report of the International Law Commission on the Work of Its Sixty-Third Session, Addendum* (A/66/10/Add. 1), at 36.

4 *Ibid.* Hereafter, footnote references will generally be to the part of the Guide to Practice concerned – Introduction, commentary to specific guideline etc. – without giving the page number of the Addendum to the Report itself (which in any case will vary depending on the language version being used).

5 *Ibid.* The Recommendation is at 18–19.

6 For a useful indication of the different nature of the various guidelines see Guide to Practice, Introduction, at para. 9.

7 Guideline 3.2.2, commentary (2).

recommend certain institutional or collective procedures whereby states can work together and to some extent share the burden of determining appropriate responses to reservations.

The Guide to Practice is a formidable achievement, for which the Special Rapporteur, Professor Alain Pellet, must take enormous credit.[8] The 179 guidelines, and the commentaries to these guidelines, reflect a wealth of learning and practice on points large and small. The Guide is *the* resource to which international lawyers will turn, for years – decades – to come, whenever they have to deal with a difficult question concerning reservations or interpretative declarations.

Fully to understand the Guide to Practice, of which the commentaries form an integral part,[9] it is necessary to have regard to the 17 reports of the Special Rapporteur (many with addenda), produced between 1995 and 2011;[10] such debates within the Commission as are on the record;[11] the comments of Governments and international organizations;[12] the draft guidelines and commentaries adopted provisionally between

[8] As must the Special Rapporteur's hard-pressed assistants, most recently Daniel Müller and Alina Miron. The Commission's traditional tribute to the Special Rapporteur is particularly well merited in the present case, and is worth recalling: the Commission expressed 'its deep appreciation and warm congratulations to the Special Rapporteur, Mr. Alain Pellet, for the outstanding contribution he has made to the preparation of the Guide to Practice on Reservations to Treaties through his tireless efforts and devoted work, and has no doubt that the Guide to Practice will be a valuable tool in solving numerous problems posed by reservations to treaties and interpretative declarations': *Report of the ILC, supra* note 3, at para. 74.

[9] '[T]he commentaries are an integral part of the Guide and an indispensable supplement to the guidelines, which they expand and explain': Guide to Practice, Introduction, at para. 2. However, as is almost always the case with the Commission's commentaries, very little time was available within the Commission to consider the commentaries in depth. The Commission is well aware of this defect in its procedures as regards commentaries, as is clear from the recommendations of a Working Group on Methods of Work contained its 2011 Report: *Report of the ILC, supra* note 3, at paras 379–382. But in practice it seems difficult to remedy the matter.

[10] The Special Rapporteur's reports were written in French, which often formed the basis of the guidelines and the commentaries, and the French text of the reports should be seen as authoritative. The ILC's Drafting Committee and Working Group worked on texts in French and English. Considerable efforts were made to ensure some measure of accuracy and readability in the English and other language texts of the guidelines and commentaries. Particular thanks in this regard are due to the tireless efforts of the UN Codification Division. It remains the case, however, that the French text is likely to shed particular light in the event that the meaning of a guideline or commentary remains unclear.

[11] The summary records of the plenary meetings of the Commission are available in vol. i of the Commission's *Yearbook*. In 2011, the Commission requested the UN Secretariat immediately to put the provisional summary records on the website. This is an important development in terms of the transparency of the Commission's work, since previously states and members of the public had to await publication of the edited summary records in the Commission's *Yearbook*, which would routinely take a number of years: *Report of the ILC, supra* note 3, at para. 404. As with most of the Commission's work, much of the debate on the Guide to Practice took place in the Drafting Committee or (in 2011) in the open-ended Working Group on Reservations to Treaties. These bodies met in private, and no records are available, though this is to a large extent compensated for by the (often lengthy) reports of the Chairmen of these Groups, which are a valuable element in the *travaux préparatoires*. The verbatim texts of the reports of the Chairman of the Drafting Committee are available on the UN Secretariat's website on the International Law Commission, and they are also fully reflected in the summary records of the plenary meetings at which they are read out.

[12] See, most recently, A/CN.4/626 and Add.1.

1998 and 2010;[13] the reports of the Chairmen of the Drafting Committee and of the open-ended Working Group on Reservations to Treaties;[14] and the writings of those who took part in the exercise, not least of Professor Pellet himself.[15]

The Guide to Practice is formidable in its learning, and in its length and complexity, and the length and complexity of its elaboration within the Commission.[16] It takes up 630 pages in the ILC's 2011 Report (English text),[17] and has no fewer than 2,770 footnotes. The Guide is not, at present, entirely user-friendly. To become familiar with it requires considerable effort – even for those who were involved in its preparation (and of course very few were involved throughout). The task will be somewhat easier when, as is envisaged, the Guide is published with a good critical apparatus, including an index, and cross-references to the reports of the Special Rapporteur, the reports of the Chairmen of the Drafting Committee and the Working Group, and the comments of states and organizations.[18]

The question of reservations and interpretative declarations is part of the law of treaties, in which the principle of consent is paramount. The whole of the Guide therefore reflects residual rules and practices, rules and practices that apply in the absence of special provision agreed by the contracting states to a particular treaty.[19]

[13] The draft guidelines and commentaries as they were provisionally adopted were reproduced in *Report of the International Law Commission on the Work of Its Sixty-Second Session* (A/65/10), at paras 105 and 106. There are a good number of important substantive and drafting changes between the provisionally adopted guidelines (of which there were 199 in all) and the guidelines as finally adopted in 2011. This is unsurprising, given the length of time that elapsed between provisional and final adoption, with significant changes in the membership of the Commission. More importantly, it reflects the care with which the Special Rapporteur and Commission members listened to the comments of states over the years: for an account of this process see Pellet, 'The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur', in this issue, at 1061. A good example is guideline 1.1.3. As finally adopted in 2011 both the text and the commentaries to the guideline are radically different from those of draft guideline 1.1.3 as provisionally adopted in 1998. This has brought the Guide to Practice into line with the general understanding of the effect of Art. 29 VCLT. Another very significant change between the provisionally adopted guidelines and those finally adopted appears in guideline 4.3.6, which was changed between 2010 and 2011 to take account of strongly held views in the Sixth Committee: see Ziemele and Liede, 'Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6', in this issue, at 1135. And, as is described below, the provisional draft guidelines on the role of treaty monitoring bodies were significantly changed. All this goes to show the potential risks when courts and tribunals rely on texts provisionally adopted or adopted on first reading by the Commission.

[14] For the two reports of the Chairman of the Working Group on Reservations to Treaties in 2011 see A/CN.4/SR. 3090 (Provisional), at 3–7; A/CN.4/SR. 3114 (Provisional), at 16–17.

[15] The Guide is accompanied by an extensive bibliography (A/66/10/Add. 1, at 603–630). For further writings see the various commentaries on the VCsLT, in particular the commentaries to Arts 19 to 23 by A. Pellet and D. Müller in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties. A Commentary* (2011).

[16] The account by Alain Pellet in this issue sheds much light on the process, including the early 'human rights excursion', as he puts it.

[17] The French text has 660 pages.

[18] It is understood that Alain Pellet and Daniel Müller have in mind the preparation of such a work. James Crawford's publication of the State Responsibility Articles could be a useful model, though the Guide to Practice is of course much longer: J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (2002).

[19] Guide to Practice, Introduction, at para. 5.

Moreover, reservations to treaties are first and foremost a matter for the states and organizations participating in the particular treaty. The role of others is limited. The present contribution seeks to highlight a number of institutional issues that are to be found throughout the Guide to Practice, issues where bodies other than the states and organizations directly concerned may have a role, in particular treaty depositaries, treaty bodies, and certain international organizations.

The stated purpose of the Guide to Practice is:

> to provide assistance to practitioners of international law, who are often faced with sensitive problems concerning, in particular, the validity and effects of reservations to treaties … and, to a lesser extent, interpretative declarations ….[20]

The practitioners concerned will often be the legal advisers to states and international organizations, as well as counsel before international courts and tribunals. They may also be judges, national as well as international, arbitrators, members of treaty bodies, as well as legal advisers to non-governmental organizations and private persons.

For the most part, these practitioners are likely to work alone on the 'sensitive problems' involved. But there are a series of institutional or cooperative bodies that may be involved, and may indeed assist the practitioners. The present contribution considers some such bodies, referred to in or in connection with the Guide to Practice: I. Depositaries; II. Treaty bodies; III. The reservations dialogue; and IV. Mechanisms of assistance. The first two are well-established institutional bodies, and the first in particular has little to contribute. The third and fourth are innovative, if thus far largely unformed, concepts introduced late in the process on the initiative of the Special Rapporteur.

2 Role of Depositaries (Guidelines 2.1.7, 2.3.1)

One might have thought that the depositaries of multilateral treaties would have been a useful and well-informed source of assistance to states in matters concerning reservations and interpretative declarations.[21] But this is rarely the case, and indeed attempts in the past by depositaries to take on such a role have led to great controversy.[22]

[20] Guide to Practice, Introduction, at para. 2.

[21] There is an extensive literature on the functions of depositaries: see, with further references, Caddell, 'Depositary', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012); A. Aust, *Modern Treaty Law and Practice* (2nd edn, 2007), ch. 18; M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), Arts 76–78; O. Corten and P. Klein, *The Vienna Conventions on the Law of Treaties. A Commentary* (2nd edn, 2011), Art. 76 (L. Caflisch), Art. 77 (F. Ouguergouz, S. Villalpando, J. Morgan-Foster), Art. 78 (R. Daoudi); O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (2012), Arts 76–78 (H. Tichy, P. Bittner); Hinojal-Oyarbide and Rosenboom, 'Managing the Process of Treaty Formation: Depositaries and Registration', in D. Hollis (ed.), *Oxford Guide to Treaties* (2012). For writings specifically on the role of depositaries in relation to reservations see Kappeler, 'Praxis der Depositare multilateraler Staatsverträge gegenüber Vorbehalten', 20 *Schweizerisches Jahrbuch für internationales Recht* (1963) 21; Kohona, 'Reservations: Discussion of Recent Developments in the Practice of the Secretary-General of the United Nations as Depositary of Multilateral Treaties', 33 *Georgia J Int'l and Comp L* (2005) 415; Kohona, 'Some Notable Developments in the Practice of the UN Secretary-General as Depositary of Multilateral Treaties: Reservations and Declarations', 99 *AJIL* (2005) 433.

[22] Guideline 2.1.7, commentary (7).

The practice of depositaries, and particularly that of the UN Secretary-General[23] and the Council of Europe, influenced the formulation of a number of the guidelines, as is reflected in the commentaries. In one case, however, the Guide to Practice, anchored as it is in the Vienna Conventions on the Law of Treaties,[24] and in light of their Article 20(4)(a) and (c), adopts a position different from that adopted in the practice of the UN Secretary-General (which is 'probably the predominant practice of depositaries'[25]). The UN Secretary-General treats a reserving state as a contracting state as soon as the instrument has been received, without waiting for the reservation to be 'established'.[26] In fact, guideline 4.2.2[27] provides that a reserving state shall be counted for the purposes of general entry into force only 'once the reservation is established'.[28] But it is drafted so as to accommodate the Secretary-General's practice. It goes on to say that the reserving state may be counted at an earlier date 'if no contracting State or contracting organization is opposed'.[29] The purpose is 'to take into account a practice [that of the UN Secretary-General] which, up until now, does not seem to have caused any particular difficulties'.[30]

In addition, the Guide to Practice contains important indications as to the role, the limited role, of the depositary in relation to reservations. As is stated in the commentary to guideline 3.2, 'in accordance with the widely prevailing principle of the "letter box depositary" endorsed by article 77 of the 1969 Vienna Convention, in principle the depositary can only take note of reservations of which it has been notified and transmit them to the contracting States without ruling on their permissibility'.[31] A proposal by the Commission that would have given the depositary a more active role in relation to reservations failed at the 1969 session of the Vienna Conference.[32] Similarly, a proposal for such a role in the guidelines as provisionally adopted was not pursued in the face of opposition in the Sixth Committee.[33] It seems clear that states attach importance to the purely administrative role of the depositary. While we do not

[23] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, Prepared by the Treaty Section of the Office of Legal Affairs* (ST/LEG/7/Rev. 1, last revised in 1994). An update of this very useful Secretariat study is long overdue. It is to be hoped that this will now be done following the adoption of the Guide to Practice.

[24] 'In a consensus decision reached in 1995 and never subsequently challenged, the Commission considered that there was no reason to modify or depart from the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions [*Yrbk ILC* (1995), II (2), at para. 467] in drafting the Guide to Practice, which incorporates all of them': Guide to Practice, Introduction, at para. 6.

[25] Guideline 4.2.2, commentary (3).

[26] Guideline 4.2.1, commentaries (6)–(8).

[27] A/66/10/Add.1, *supra* note 3, at 451–452.

[28] Guidelines 4.1 to 4.1.3 explain when a reservation is 'established'. For the resolution of the problem the term 'established' caused in Spanish see A/CN.4/SR.3124 (Provisional), at 8 (Escobar Hernández).

[29] This clause 'safeguards the application of the principle … should any one contracting State or contracting organization be opposed to that inclusion [of the reserving state in the number of contracting states]': guideline 4.2.2, commentary (5).

[30] Guideline 4.2.2, commentary (3).

[31] Guideline 3.2, commentary (10).

[32] Guideline 3.2, commentary (9).

[33] Guideline 2.1.7, commentary (13).

know what happens informally, the Guide to Practice itself does not contribute anything to the potential role of depositaries in assisting states in this field, even by way of mild encouragement.

3 Assessment by Dispute Settlement and Treaty Monitoring Bodies (Guidelines 3.2; 3.2.1–3.2.5; 4.5.3, para. 4)

A good deal has been written about the role of treaty monitoring bodies, particularly those in the field of human rights, including in connection with reservations to treaties,[34] and there have been a number of *causes célèbres* giving rise to heated debate.[35] It is unsurprising therefore that their role was a delicate matter during the elaboration of the Guide to Practice, and that some significant improvements were made between the guidelines as provisionally adopted (and more particularly the somewhat unusual 'preliminary conclusions' adopted by the Commission in 1997[36]), and those contained in the final version of the Guide.

The Guide contains a number of useful and realistic provisions on this subject. Guideline 3.2 states the basic principle: that dispute settlement bodies and treaty monitoring bodies may 'assess, within their respective competences, the permissibility of reservations to treaties'. The limited role of such bodies is clear, first, from the use of the very general term 'assess' (*apprécier*, in French), which 'is neutral and does not prejudge the question of the authority underlying the assessment',[37] and above all by the emphasis on any assessment being within the competence of the body concerned, which 'indicates that the competence of the dispute settlement and monitoring bodies to carry out such an assessment is not unlimited but corresponds to the competences accorded to these bodies by States'.[38] These notions are further clarified, as regards treaty monitoring bodies, by guideline 3.2.1, which first states that such bodies may make the assessment 'for the purpose of discharging the functions entrusted to them', and then goes on to affirm that such assessment 'has no greater legal effect than that of the act which contains it'.[39] As commentary (6) to guideline 3.2 states, 'the Human Rights Committee and other international human

[34] Pellet and Müller, 'Reservations to Human Rights Treaties: Not an Absolute Evil …', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma* (2011), at 521, 542–544; Shelton, 'The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies', in H. Hestermeyer *et al.* (eds), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (2012), at 553–575. For a brief description of some of elements leading to controversy instigated by positions adopted by treaty monitoring bodies see guideline 3.2, commentary (5).

[35] Notably the Human Rights Committee's General Comment No. 24, and its views in *Rawle Kennedy v. Trinidad and Tobago*; and *Belilos v. Switzerland* before the ECtHR.

[36] 'Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties': *Yrbk ILC* (1997), II(2), at para. 157.

[37] Guideline 3.2, commentary (9).

[38] *Ibid.*

[39] The same thought was included in conclusion 8 of the 'Preliminary conclusions of the International Law Commission', *supra* note 36.

rights treaty bodies which do not have decision-making power do not acquire it in the area of reservations'. Guideline 3.2.2 is a wish that states should specify 'the nature and the limits of the competence of [treaty monitoring bodies] to assess the permissibility of such reservations', while guideline 3.2.3 provides that the authors of the reservation shall 'give consideration' (*tenir compte*, in French) to a treaty monitoring body's assessment.[40] Guideline 3.2.4 is a saving clause for the competence of contracting states to assess the permissibility of reservations. Finally, guideline 3.2.5 recalls that when a dispute settlement body is empowered to adopt binding decisions, any assessment that is necessary for the discharge of its competence is binding on the parties to the proceedings.

A particular role is foreseen for treaty monitoring bodies in guideline 4.5.3, paragraph 4, which reads:

> 4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.

This is merely a policy recommendation, as is clear from the word 'should'. As the commentary explains, if 'the findings of the treaty body in question are not binding – as is usually the case – the State or international organization concerned must give consideration to this assessment, but it is not obliged to act on it, nor, consequently, to express its intention as indicated in paragraph 4'.[41] Nevertheless the paragraph has some value as an element in the balance sought to be achieved in this important guideline between respecting the will of states, and ensuring the integrity of certain multilateral conventions.

4 Conclusions on the Reservations Dialogue

Linked to the Guide to Practice,[42] the Commission has set out, not as guidelines, but in an annex, nine 'conclusions' on the 'reservations dialogue', and recommended that:

> The General Assembly call upon States and international organizations, as well as monitoring bodies, to initiate and pursue such a reservations dialogue in a pragmatic and transparent manner.

The Sixth Committee will presumably address this recommendation of the Commission when it continues its debate on the Guide to Practice in the autumn of 2013. Whatever decision the General Assembly comes to, the conclusions will remain annexed to the Guide to Practice.[43]

[40] In the guideline as provisionally adopted authors of a reservation were required to 'cooperate' with the treaty monitoring body, but this vague but potentially far-reaching requirement was dropped in 2011.

[41] Guideline 4.5.3, commentary (51) (footnotes omitted). In English the sentence begins '[w]hile the findings …', which is a mistranslation of the (original) French '*Si les constatations …*'.

[42] *Report of the ILC, supra* note 3, at 32–33 (repeated at 601–602).

[43] For an assessment by the Special Rapporteur see Pellet, *supra* note 13, at 1074–1075.

The conclusions originated in the first part of the Special Rapporteur's 17th report,[44] which was introduced by him on 15 July 2011.[45] After a short debate in plenary,[46] the text proposed by the Special Rapporteur was referred to the Working Group, which proposed a redraft.[47] The Commission adopted the text proposed by the Working Group, with minor changes, on 10 August 2011.[48]

The term 'reservations dialogue' is not a term of art in international law. It was introduced into the legal discourse on reservations by the Special Rapporteur in the addendum to his eighth report, where he referred to 'the whole intermediate procedure, which may or may not culminate in withdrawal or in an intermediate solution, consisting of a dialogue between the reserving State and its partners which are urging it to abandon the reservation. This procedure … may be termed the "reservations dialogue" and … is probably the most striking innovation of modern procedure for the formulation of reservations'.[49] According to the Special Rapporteur, it 'simply meant that, irrespective of the substantive and procedural rules applicable to reservations in the absence of specific provisions in a given treaty, contracting states or contracting international organizations could, and in many cases did, engage in an informal dialogue concerning the permissibility, scope, and meaning of another party's reservations or objections to a reservation'.[50] In other words, the term refers to the informal exchanges that may take place between the reserving state and a state or states that have concerns about a reservation or an interpretative declaration,[51] and may be considering reacting either bilaterally or in a wider or institutional forum. The term seems to signal that such exchanges should be regarded not so much as a 'dispute' as a constructive effort to resolve differences, a 'pragmatic dialogue with the author of the reservation', as the seventh preambular paragraph of the conclusions puts it.

The third preambular paragraph, as revised in the Working Group, encapsulates the main policy considerations at play when considering reservations, and does so in a well-balanced way:

> *Bearing in mind* the need to achieve a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein[52].

The nine 'conclusions' have the character of policy views or considerations of the Commission.[53] Notwithstanding the title of the annex, they go beyond the 'reservations

[44] A/CN.4/647, at paras 2–68.

[45] A/CN.4/SR. 3099 (Provisional), at 3–5.

[46] *Ibid.*, at 5–7.

[47] Second oral report by the Chairman of the Working Group on Reservations to Treaties, A/CN.4/SR. 3114 (Provisional), at 16–17.

[48] A/CN.4/SR. 3124 (Provisional), at 13–14.

[49] A/CN.4/536, Add. 1, at para. 70; see also the third report (A/CN.4/491).

[50] A/CN.4/SR. 3099 (Provisional), at 3.

[51] While the annex refers only to reservations, a dialogue may of course be equally useful in the case of questionable interpretative declarations: an example is given in the 17th report (A/CN.4/647, at para. 20).

[52] See also conclusions 2 and 3 of the 'Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties': *Yrbk ILC* (1997), II(2), at para. 157.

[53] The operative words are '[t]he International Law Commission … *Considers* that'.

dialogue' proper, and include elements that, it is hoped, will contribute to making a reservations dialogue more fruitful in practice.

The first four conclusions are addressed to the author of the reservation (or interpretative declaration) and seek to influence its behaviour. The first conclusion, for example, reads:

> States and international organizations intending to formulate reservations should do so as precisely and narrowly as possible, consider limiting their scope and ensure that they are not incompatible with the object and purpose of the treaty to which they relate.

The second conclusion advises clarity in respect of interpretative declarations. The third encourages the author to state reasons for the reservation. And the fourth says that states should periodically review reservations with a view to limiting their scope or withdrawing them.

It remains to be seen how far, in practice, states and international organizations will follow the Commission's recommendations. It is important, for the reservations regime under the law of treaties that they do so. But the somewhat cavalier attitude of many states towards reservations does not give grounds for optimism. Perhaps the adoption of the Guide to Practice will encourage states to take reservations more seriously. The need to do so could be taken up in the various international bodies concerned with reservations, such as the CAHDI or treaty monitoring bodies. And where a state has failed to follow one or more of the recommendations in the Commission's Conclusions on the reservations dialogue, for example as to clarity, that may be something others will bring to its attention, possibly with reference to what the Commission has said.

The remaining five conclusions describe the reservations dialogue proper. They are addressed both to the participants in the treaty and to any monitoring body. They are gentle, almost diplomatic admonitions; their subtlety can best be captured by quoting them in full:

> 5. The concerns about reservations that are frequently expressed by States and international organizations, as well as monitoring bodies, may be useful for the assessment of the validity of reservations;
> 6. States and international organizations, as well as monitoring bodies, should explain to the author of a reservation the reasons for their concerns about the reservation and, where appropriate, request any clarification that they deem useful;
> 7. States and international organizations, as well as monitoring bodies, if they deem it useful, should encourage the withdrawal of reservations, the reconsideration of the need for a reservation or the gradual reduction of the scope of a reservation through partial withdrawals;
> 8. States and international organizations should address the concerns and reactions of other States, international organizations and monitoring bodies and take them into account, to the extent possible, with a view to reconsidering, modifying or withdrawing a reservation;
> 9. States and international organizations, as well as monitoring bodies, should cooperate as closely as possible in order to exchange views on reservations in respect of which concerns have been raised and coordinate the measures to be taken.

It is not entirely clear whether the Commission intends that its recommendations as such will be endorsed by the General Assembly. The actual recommendation to the

Assembly is somewhat vague in this regard, but there seems no reason why it should not do so.[54] In response to a question, the Special Rapporteur said that 'for historical reasons dating back to 1997, he thought it prudent not to prejudge the form to be taken by the text … he hoped that the General Assembly itself would adopt it as a draft resolution'.[55]

5 Recommendation on Mechanisms of Assistance

On 11 August 2011, the Commission – after only a very brief discussion because of time pressure at the end of the session – decided to transmit to the General Assembly a 'recommendation of the Commission on mechanisms of assistance in relation to reservations to treaties'.[56] The recommendation had its origin in the addendum to the Special Rapporteur's 17th report,[57] where it was discussed under the heading 'Dispute settlement in the context of reservations'.[58] The Rapporteur explained that the mechanism he had in mind 'should be as flexible and as easy to use as possible and should help [states] find a solution rather than offering an additional dispute settlement mechanism'.[59] He nevertheless suggested that states might, if they so wished, 'undertake to accept the mechanism's proposals as binding'.[60] Having in mind what he termed 'the highly technical nature' of most problems concerning 'the interpretation, the permissibility or the effects of a reservation or an objection (or an acceptance)', and the need to help 'small States with administrations that are ill-equipped to consider the often-complex questions raised', the Special Rapporteur proposed a 'reservations and objections to reservations assistance mechanism',[61] a third-party

[54] The Chairman of the Working Group explained that '[a]fter careful consideration, and in the light of past Commission practice, the Working Group had agreed that it was more appropriate for the Commission to elaborate a set of conclusions on the question of the reservations dialogue, to be followed by a recommendation to the General Assembly, rather than to address direct recommendations to States': A/CN.4/SR. 3114 (Provisional), at 16.

[55] A/CN.4/SR. 3099 (Provisional), at 7. In 1997, the Commission had declined to follow his proposal, and had adopted 'preliminary conclusions' instead: see *supra* note 37.

[56] *Report of the International Law Commission 2011*, A/66/10, at para. 73. For an assessment of this outcome by the Special Rapporteur see Pellet, *supra* note 13.

[57] A/CN.4/647, at para. 101.

[58] A/CN.4/647/Add. 1, at paras 69–101. The original proposal, in para. 101 of the addendum, also reproduced in *Report of the International Law Commission 2011*, A/66/10, n. 21, was somewhat clearer than that eventually adopted by the Commission. After recalling that states must first of all, as with any international dispute, seek a solution through the means referred to in Art. 33 of the UN Charter, the proposal recommended that a reservations and objections to reservations mechanism should be established, and suggested that it should take the form described in the annex ('10 governmental experts, selected on the basis of their technical competence and their practical experience in public international law and, specifically, treaty law'; 'to consider problems related to the interpretation, permissibility and effects of reservations, or objections to and acceptances of reservations, that are submitted to it by concerned States or international organizations' – it could 'suggest that States trust it to find solutions', and states could 'undertake to accept its proposals as compulsory'; provision of 'technical assistance in formulating reservations' etc.).

[59] A/CN.4/647/Add.1, at para. 70.

[60] Draft recommendation, annex, at para. 3: A/CN.4/647/Add. 1, at para. 101.

[61] This unwieldy description became known within the Commission, briefly, as RORAM (*RAMRO*, in French).

mechanism with 'the necessary technical competence', with a 'joint function', to provide both assistance with the settlement of disputes and technical assistance.[62] The Special Rapporteur found inspiration for this proposal in the 'European Observatory on Reservations to Multilateral Treaties' which is carried out by the Council of Europe's *Ad Hoc* Committee of Legal Advisers on Public International Law (CAHDI),[63] and the similar exercise that is conducted by the European Union's *Comité Juridique* (Working Party on Public International Law – COJUR[64]), particularly the former, though neither really acts as a third-party dispute settlement body or a technical assistance one. As the Special Rapporteur acknowledged, the CAHDI mechanism, for a whole series of reasons, 'could not simply be universalized'.[65]

The addendum to the 17th report was introduced by the Special Rapporteur on 13 July 2011,[66] just four weeks prior to the conclusion of work on the topic, at a time when the Commission was occupied with finalizing its work for the quinquennium and adopting its very extensive report.[67] There was little time for consideration of his proposals, which proved to be quite controversial within the Commission. There was a short debate at a single plenary meeting on 15 July 2011. While the Special Rapporteur's proposals received strong support from some members,[68] others felt they needed more thought,[69] still others were rather negative.[70] Issues that were raised concerned the difficulty of combining dispute settlement and technical assistance; the resource implications for the UN budget; and the idea that the mechanism would consist of government experts. Notwithstanding the doubts, the proposal was referred to the Working Group on Reservations to Treaties, which likewise had very little time to review the matter. In the event, however, in light of the flexibility shown by all concerned, the Working Group was able to adopt a revised text, based closely on a revised draft prepared by the Special Rapporteur following the plenary debate.[71] As the Special Rapporteur said, in light of the plenary debate, 'the point was merely to launch the idea'.[72]

The principal changes made by the Working Group were:

– The recommendation took the form of a suggestion, a suggestion moreover that was drafted in general terms 'so as to leave largely open the modalities of any

62 A/CN.4/647/Add. 1, at paras 81–82.

63 *Ibid.*, at paras 83–94, especially at paras 88–92. On CAHDI in general see Wood, 'Committee of Legal Advisers on Public International Law (CAHDI)', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012).

64 Hoffmeister, 'Comité Juridique (COJUR)', in *ibid.* Further references are given in A/CN.4/647/Add. 1, nn. 151 and 152.

65 A/CN.4/647/Add. 1, at para. 93.

66 A/CN.4/SR.3104 (Provisional), at 11–13 (Pellet).

67 The ILC Report for 2011 contains three final outcome texts, on 'Responsibility of international organizations'; on 'Effects of armed conflict on treaties'; and on 'Reservations'. The English version extends to 998 pages.

68 A/CN.4/SR.3106 (Provisional), Dugard (at 6–7), Vasciannie (at 8), Hmoud (at 9), Galicki (at 10).

69 *Ibid.*, McRae (at 7), Petrič (at 8), Saboia (at 9), Fomba (at 10), Escobar Hernández (at 10).

70 *Ibid.*, Wood (at 3–4), Nolte (at 4–5).

71 A/CN.4/L.795. Second oral report by the Chairman of the Working Group on Reservations to Treaties: A/CN.4/SR.3114 (Provisional), at 17; see also A/CN.4/SR.3125 (Provisional), at 16–18.

72 A/CN.4/SR.3106 (Provisional), at 10.

mechanism that could be established'.[73] It was no longer suggested that the assistance mechanism be composed of 'government' experts.

– A recommendation for 'observatories' was added that could draw inspiration from the activity of the CAHDI.

The Working Group's text was duly adopted by the Commission, without further debate, on the penultimate day of the 2011 session.

This text is less ambitious than the Special Rapporteur's original proposal, at least in the sense of being more tentative. Unlike the Conclusions on the reservations dialogue, it is not annexed to the Guide to Practice. The recommendation as adopted includes two quite distinct ideas: a reservations assistance mechanism which could be established by the General Assembly; and reservations 'observatories' within the Sixth Committee and elsewhere. In its recommendation, the Commission:

> *Considering* that the adoption of the Guide to Practice could be supplemented by the establishment of flexible mechanisms to assist States in the implementation of the legal rules applicable to reservations,
> *Suggests* that the General Assembly:
> 1. Consider establishing a reservations assistance mechanism, which could take the form described in the annex to this recommendation;
> 2. Consider establishing within its Sixth Committee an 'observatory' on reservations to treaties, and also recommends that States consider establishing similar 'observatories' at the regional and subregional levels.

The annex to the recommendation seeks to illustrate, in a tentative way, what a 'reservations assistance mechanism' might look like. It suggests, by way of example, that the mechanism 'could consist of a limited number of experts, selected on the basis of their technical competence and their practical experience in public international law and, specifically, treaty law'.

The mechanism would have essentially two tasks: to 'make proposals to requesting States in order to settle differences of view concerning reservations', proposals which states could undertake to accept as compulsory; and to provide states with 'technical assistance in formulating reservations or objections to reservations'.

It remains to be seen if the notion of a 'reservations assistance mechanism' will find favour with states. The idea of 'observatories' may be worth pursuing, since it has already achieved a degree of success within the Council of Europe. In the Sixth Committee, Council of Europe member states may wish to explain in more detail what is entailed in its reservations observatory, which seems not to be fully understood by the wider UN membership.[74]

[73] A/CN.4/SR.3114 (Provisional), at 17.

[74] Some information may be gleaned from the reports of the CAHDI meetings, which are available, once approved (that is, with a half year's delay), on the CAHDI website. See, for example, Meeting Report, 44th meeting, Paris, 19–20 Sept. 2012 (CAHDI (2012)20), at paras 41–48.

6 Concluding Remarks

The Special Rapporteur showed considerable foresight in proposing what became the annex to the Guide to Practice on the reservations dialogue, as well as the Commission's resolution on 'mechanisms of assistance'. If the outcome did not entirely live up to expectations, that may be explained by the inevitable haste with which these ideas were taken up in July and August 2011,[75] leaving little time for detailed consideration of substance and drafting. It is to be hoped, nevertheless, that states and international organizations will find the Commission's suggestions helpful, and that they will eventually be taken forward in one form or another so as to go some way to overcome what has been termed 'state inertia' in this regard.[76]

The chief interest in the Guide to Practice on Reservations to Treaties will undoubtedly be on the light it shines on the many difficult substantive and procedural issues concerning reservations and interpretative declarations left open by the Vienna Conventions. But the institutional issues are also of considerable practical interest. It has been the aim of this contribution to draw attention to these aspects of the Guide, in the hope that in the future they may prove to be of real assistance to states, international organizations, and others. At any rate, the importance of the institutional aspects of the Pelletian *magnum opus* should not be overlooked.

[75] For an account of the marathon efforts of the Commission to complete work on the topic in 2011 see Pellet, *supra* note 13.

[76] Guide to Practice, n. 1814.