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Reservations and Time: Is There Only One Right Moment to Formulate and to React to Reservations?

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Abstract

Time is an important element in the process of reservations to treaties and, consequently, in the legal regime established by the Vienna Conventions for reservations and reactions thereto. The very definition of reservations, embodied in Article 2(1)(d) of the 1969 and 1986 Vienna Conventions, as well as in Article 2(1)(j) of the 1978 Vienna Convention, and incorporated in the definition adopted by the International Law Commission in its Guide to Practice, includes precise indications and limits concerning the moment in time for a reservation to be formulated. In practice, however, reservations have been made before and after this peculiar moment. The work of the International Law Commission has shown that these are still reservations, even if they are not contemplated by the Vienna regime. But they can nevertheless deploy their purported effects under some additional conditions. The same holds true with regard to objections to reservations which can be formulated prematurely or late. They are still objections even if their concrete legal effects may be affected. Whereas time is important for the legal consequences attached to reservations and reactions thereto, it plays a less important role in the overall process of reservations dialogue.

Time is an important, but also difficult and complex, element in the legal regime of reservations. The Articles concerning reservations in the 1969 and 1986 Vienna Conventions[1] seem to imply a clear timeline which has to be respected in order for a

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1 Vienna Convention on the Law of Treaties (VCLT) (Vienna, 23 May 1969), 1155 UNTS 331 (1969 Vienna Convention); VCLT between States and International Organizations or between International Organizations (Vienna, 21 Mar. 1986) (1986 Vienna Convention).

reservation to become effective and to produce some effects concerning the establishment and the content of the treaty relationship(s). The first step is the formulation, at a specific moment in time, of a reservation respecting some substantial validity criteria (Article 19). Then, the formulated reservation has to be accepted by other states (Article 20). Only after these two steps have been taken can the effects of the reservation and its acceptance (or its objections, as the case may be) be determined (Article 21). Article 22 addresses the issue of withdrawal of the reservation, i.e., the end of the reservation regime.

The work of the International Law Commission on the issue of reservations to treaties during the last 15 years has shown that reservations and the reactions of others thereto are not always so straightforward in content and in time. The Vienna Conventions and, most importantly, practice provide for or have developed interesting shortcuts and quite important modifications in the ideal timeline of a reservation. This has rendered '[t]he issue of reservations ... very complex and at times chaotic'.[2]

The Guide to Practice[3] tries to put some order into the chaos and the uncertainties resulting from the Vienna regime, its lacunae, and the practice which has been developed alongside the Vienna Conventions. It gives useful guidance for such difficult issues as lateness in the formulation of reservations, the moment of making acceptances and objections, the moment of the entry into force of the treaty for the author of a reservation, etc. However, even within the guidelines, there remain some temporal zones of uncertainty. One of these quite important gaps concerns the concrete implementation, in time, of guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty), and in particular the possibility for the author of an invalid reservation to 'express *at any time* its intention not to be bound by the treaty'.[4]

The present article is, however, limited to the role of time in the formulation of reservations (1) and the making of reactions thereto (2). The often very passionate discussions in the ILC have shown the complexities and the almost unlimited scope of the problem. The Guide to Practice, as voluminous as it already is, addresses most of these issues in a useful way (especially with regard to those directly concerned, i.e., states and international organizations). Without opening Pandora's Box again, especially at the end of this long-lasting process of analysis, discussion, and compromise, the Guide to Practice is certainly not immune to discussion and criticism. But one should always keep in mind, that the Guide is not aimed at constituting a comprehensive assessment of all *theoretical* problems which might arise with regard to reservations. Above all, it is a guide for practitioners.[5]

[2] Provisional Summary Record, 2917th meeting, 10 May 2007, A/CN.4/SR.2917, at 14 (Candioti).

[3] Guide to Practice on Reservations to Treaties, in Official Records of the General Assembly, 66th Session, Supp. No. 10 (A/66/10/Add. 1).

[4] *Ibid.*, Guideline 4.5.3(3) (emphasis added). See also the contribution by Alain Pellet to this Symposium.

[5] Guide, *supra* note 3, Introduction, para. 2.

1 Time and the Formulation of a Reservation

It seems to be obvious[6] that a reservation, in order to produce its effects, must have been formulated[7] at a particular moment in time. Given its ultimate objective, i.e., to exclude or to modify the legal effect of certain provisions of the treaty in their application to the author of the reservation, a reservation must be formulated, or at least formally confirmed, when its author expresses its consent to be bound by the treaty. This conclusion is not only implied in Article 23(2) of the Vienna Conventions; it follows from one of the most basic rules of the law of treaties: *pacta sunt servanda*. A party to a treaty instrument, bound by the obligations contained therein, cannot alter its commitments unilaterally to the detriment of other parties or otherwise call into question its treaty obligations.[8]

The question remains, however, whether a reservation, in the proper legal sense of the term, can be formulated only at this peculiar moment in time. If the answer to this question is affirmative, every declaration, irrespective of its purported effect on the treaty, which has been made prior to or after its author's consent to be bound by the treaty is not a reservation and, therefore, not submitted to the legal rules applicable to such. If, on the contrary, the answer is negative, a reservation is still a reservation independently of the moment in time at which it was formulated and subject to the validity conditions – including time – imposed by the law of treaties and the law of reservations. Or, in other words, does international law recognize only timely reservations, or is there room for 'less perfect', non-valid reservations too? Is time a necessary element of the definition of reservations, or is it simply one of several conditions which need to be met in order for the reservation to produce its purported effects?

A quick reading of Article 2(1)(d) of the 1969 and 1986 Vienna Conventions, and Article 2(1)(j) of the 1978 Vienna Convention seems to resolve the issue. These legal definitions of the term 'reservations' include time as a criterion and suggest that there is only one ideal category of reservations, i.e., timely reservations. The Guide to Practice defines the notion of 'reservation' in the same way, combining the definitions of the three Vienna Conventions with regard to the time element, in guideline 1.1 (Definition of reservations).[9] A second look at these instruments and at the relevant practice suggests, however, that there are also other reservations which do not match

[6] The Special Rapporteur on reservations to treaties, Alain Pellet, considered that the rule concerning the time at which a reservation can validly be made 'was not open to doubt and must be interpreted rigorously': *Yrbk ILC* (2000), I, 2651st meeting, 3 Aug. 2000, at 320, para. 69.

[7] Art. 2 (1)(d) of the 1969 and the 1986 Vienna Conventions, as well as Art. 2(1)(j) of the Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 Aug. 1978), 1946 UNTS 3 (1978 Vienna Convention) are, in this regard, slightly inconsistent with Art. 19 of the 1969 and 1986 Vienna Conventions which use the more adequate term 'formulate' rather than 'made'. Sir Humphrey Waldock explained the difference clearly (*Yrbk ILC* (1962), II, at 65 (para. 9 of the commentary on draft Art. 17); see also commentary on guideline 3.1, *supra* note 3, at paras 6–7, but this subtle difference was not taken care of by the Drafting Committee when redrafting the definition (see *Yrbk ILC* (1962), I, 666th meeting, 22 June 1962, at 239, para. 1).

[8] Commentary on guideline 1.1, *supra* note 3, at para. 7.

[9] *Supra* note 3.

this ideal type, but are still reservations able to produce legal effects once they are 'perfected'. Such reservations can be formulated before the ideal moment in time (A) as well as after this peculiar moment (B).

A *Premature Formulation of Reservations*

The Guide to Practice leaves only very little room for the 'premature' formulation of reservations relying on an almost literal interpretation of the definition of 'reservations' contained in the Vienna Conventions.

The Special Rapporteur's fifth report dealt extensively with the question of the moment for formulating a reservation as part of procedure (and not of the definition).[10] It distinguished, *inter alia*, between the possibility, based on Article 23(2) of formulating reservations at signature subject to ratification,[11] on the one hand, and the possibility of formulating reservations when negotiating, adopting, or authenticating the text of the treaty, i.e., before signature (draft guideline 2.2.2).[12] The first possibility did not cause great difficulties to the Commission.[13] The second, however, met with some concern. Curiously, with one remarkable exception,[14] the critical observations did not relate to the proposition in its entirety. They concerned mainly the question whether a state can formulate a proper reservation during negotiations, especially because, at that particular stage, the text of the treaty is not yet definitely adopted.[15]

The Drafting Committee, nevertheless, proposed the deletion of the entire draft guideline 2.2.2. Its chairman, who had personally expressed concerns in the plenary discussion,[16] explained:

> Many members of the Commission had already expressed doubts in plenary about whether reservations formulated when negotiating a treaty actually existed. The Committee had also feared that the retention of the draft guideline might give the impression that there was a new category of reservations made when adopting or authenticating the text of a treaty, i.e.

[10] Fifth report on reservations to treaties, by Alain Pellet, A/CN.4/508 and Add. 1–4, *Yrbk ILC* (2000), II(2), at 139, 183–199, paras 230–332.

[11] See *ibid.*, draft guideline 2.2.1, at 187, para. 251. Draft guideline 2.2.1 reproduces literally Art. 23(2) of the 1986 Vienna Convention. Guideline 2.2.1 of the Guide to Practice (*supra* note 3) is identical to the Special Rapporteur's 2000 proposal.

[12] 5th report on reservation to treaties, *supra* note 10, at 187, para. 256 ('If formulated when negotiating, adopting or authenticating the text of the treaty, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.')

[13] See, e.g., *Yrbk ILC* (2001), I, 2678th meeting, 22 May 2001, at 75, para. 8 (He); *ibid.*, at 75, para. 16 (Economides); *ibid.*, 2679th meeting, 23 May 2001, at 77, para. 7 (Pambou-Tchivounda); *ibid.*, at 78, para. 13 (Hafner); *ibid.*, at 80, para. 32 (Kamto); *ibid.*, at 82, para. 44 (Rodríguez Cedeño); *ibid.*, at 84, para. 62 (Tomka).

[14] *Yrbk ILC* (2001), I, 2679th meeting, 23 May 2001, at 84, para. 62 (Tomka) (arguing that 'the guideline was contrary to the basic provision on reservations in article 19 of the 1969 Vienna Convention').

[15] See, e.g., *Yrbk ILC* (2001), I, 2678th meeting, 22 May 2001, at 75, para. 16 (Economides); *ibid.*, 2679th meeting, 23 May 2001, at 77, para. 6 and at 78, para. 8 (Pambou-Tchivounda); *ibid.*, at 79–80, para. 25 (Melescanu); *ibid.*, at 80–81, para. 32 (Kamto); *ibid.*, at 82, para. 44 (Rodríguez Cedeño); *ibid.*, at 86, para. 74 (Pellet). For a contrary view on this particular issue see *ibid.*, at 83, para. 47 (Yamada).

[16] See *supra* note 14.

> "premature" reservations, which did not entirely correspond to the definition already adopted (guideline 1.1.1). Declarations which were made when negotiating, adopting or authenticating the text of a treaty, and which expressed an intention to make a reservation should be dealt with in the commentary (probably to guideline 2.2.1). They could be mentioned in the context of the pedagogical purpose of the Guide to Practice without being the subject of a separate draft guideline, which might create more problems than it would solve.[17]

The commentaries joined by the Commission to the Guide to Practice make only very little out of 'premature' reservations. Interestingly, no reference to this question is contained in the commentary on guideline 1.1 (Definition of reservations). Only the commentary on guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty) contains some references to the question in order to justify the exclusion of the reservations formulated prematurely from the Guide:

> [G]uideline 2.2.1 does not cover the possible case where a reservation is formulated not at the time of signature of the treaty, but before that. While there is nothing to prevent a State or an international organization from indicating formally to its partners the "reservations" it has with regard to the adopted text at the authentication stage or, for that matter, at any previous stage of negotiations, such an indication does not correspond to the definition of reservations contained in guideline 1.1.[18]

There is indeed some merit in the proposition that it is hardly possible to formulate a reservation during negotiations. The question is not so much one of time. Rather, the problem might be the missing object for a reservation, i.e., a treaty and its provisions. In that regard, the exclusion of the very possibility of making reservations during negotiation is understandable, even if it is far from being self-evident.[19]

The absolute position of the Commission to exclude all reservations formulated prematurely, i.e., before the signature of the treaty, is, however, regrettable. Contrary to what was suggested by the Drafting Committee and in the commentaries, this solution is not at all imposed by the definition of 'reservations', as the Commission's own conclusions have indeed demonstrated.

In this regard, it is noteworthy that the Commission had no difficulty in accepting the principle that a reservation formulated at signature subject to ratification is indeed a reservation in the sense of the definition; it is simply subject to formal confirmation by the author when consenting to be bound by the treaty.[20] This position of the Commission seems indeed to be based on the wrong premise that under Article 2(1)(d)

[17] *Yrbk ILC* (2001), I, 2694th meeting, 24 July 2001, at 179, para. 5 (Tomka).

[18] Commentary on guideline 2.2.1, *supra* note 3, at para. 13.

[19] See also the comments made by the ILC in 1966: '[t]hus, a reservation is not infrequently expressed during the negotiations and recorded in the minutes. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. The Commission, however, considered it essential that the State concerned should formally reiterate the statement when signing, ratifying, accepting, approving or acceding to a treaty in order that it should make its intention to formulate the reservation clear and definitive. Accordingly, a statement during the negotiations expressing a reservation is not, as such, recognized in article 16 as a method of formulating a reservation and equally receives no mention in the present article': *Yrbk ILC* (1966), II, at 208, para. 3 of the commentary on draft Art. 18.

[20] See *supra* note 13.

of the 1969 and 1986 Vienna Conventions, as well as under Article 2(1)(j) of the 1978 Vienna Convention, a reservation can be formulated at exactly two moments in time: on signature, on the one hand, and together with the expression of consent to be bound by the treaty, on the other hand. But this is not what the definition of 'reservation' actually says. In the past, the ILC had already erred in this regard introducing – albeit provisionally – in draft Article 2(1)(d) of what became the 1986 Vienna Convention a sharp distinction between signature and expression of consent to be bound;[21] this error was later remedied by the inclusion of a more comprehensive list along the lines of the 1969 definition.[22] Indeed, Article 2(1)(d) and 2(1)(j) point to one single moment in time, i.e., the moment the author of the reservation expresses its consent to be bound by the treaty.[23] The reference to 'signature' is not meant to be 'signature subject to ratification', but 'signature' in the sense of Article 11 of the Vienna Conventions, as a means of expressing consent to be bound by the treaty.[24] Yet, the Commission had adopted exactly that interpretation of the definition as shown in draft guideline 1.1.2,[25] which did not refer to signature separately but as part of the means of consent to be bound. Even if this guideline was deleted in second reading, its rationale has survived in the wording of guidelines 1.1.1 (Statements purporting to limit the obligations of their author), 1.1.2 (Statements purporting to discharge an obligation by equivalent means), and 1.1.6 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty).[26]

[21] *Yrbk ILC* (1974), II(1), at 157, 294, and 295, paras 3–4 of the commentary.

[22] *Yrbk ILC* (1981), II(2), at 121 and 123, para. (14) of the commentary to draft Art. 2.

[23] See also commentary on guideline 2.3, at para. (2) ('Unless otherwise provided by a treaty … , the expression of consent to be bound constitutes, for the contracting States and organizations, the last (and, in view of the requirement of formal confirmation of reservations formulated during negotiations and upon signature, the *only*) time when a reservation may be formulated' (emphasis added).

[24] The concordance of the definition of reservations and the definition of all means of expressing consent to be bound by the treaty was indeed perfect in the 1962 draft Arts (see draft Art. 1 (1)(d) and (f), *Yrbk ILC* (1962), II, at 157, 161). This perfect concordance was, however, lost throughout the modification of the draft during the second reading (Fourth report on the law of treaties, by Sir Humphrey Waldock, A/CN.4/177 and Add. 1–2, *Yrbk ILC* (1965), II, at 3, 14; see also *ibid.*, at 157, 160) and at the Vienna Conference (see, in particular, the introduction to Art. 11 on the basis of the amendments submitted by Poland and the USA (A/CONF.39/C.1/L.88 and Add. l) and Belgium (A/CONF.39/C.1/L.111), see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions*, Vienna, 26 Mar.–24 May 1968 and 9 Apr.–22 May 1969, *Documents of the Conference*, A/CONF.39/11/Add.2, at 124, paras 103, 104, and 106).

[25] Draft guideline 1.1.2 (Instances in which reservations may be formulated) was formulated in the following way: '[i]nstances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organization or between International Organizations': *Yrbk ILC* (1998), II(2), at 103–104. This draft guideline was deleted during the second reading 'since it had been felt that the issue had already been covered in the definition of reservations': Provisional Summary Record, 3090th meeting, 20 May 2011, A/CN.4/SR.3090, at 3 (Vázquez-Bermúdez).

[26] All these guidelines refer to '[a] unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty …'. See also commentary on guideline 1.1.1, *supra* note 3, at para. 12.

Reliance on the definition of 'reservations' therefore suggests that any unilateral statement which has not been made at the moment of expressing consent to be bound is not a reservation. Consequently, the Commission should also have excluded reservations made on signature, subject to ratification. But, of course, it has rightly not done so. Indeed, despite the very narrow definition in Article 2 limited to an ideal, timely reservation, the Vienna Conventions and state practice have a larger understanding of the moment when a reservation can be formulated and do not exclude the 'premature' formulation of reservations.

On the contrary, premature reservations constitute a possibility that the Vienna Conventions contemplate.[27] They even provide for some rules concerning a certain type of 'premature' reservations in Article 23(2), i.e., reservations made at signature subject to ratification. Moreover, the *travaux* of the 1969 Vienna Convention suggest that the timeframe within which premature reservation can be made is much broader than what is now embodied in Article 23(2). Draft Article 18(2) of the Draft Articles on the Law of Treaties adopted in second reading put on the same footing reservations made on signature subject to ratification and reservations formulated 'on the occasion of the adoption of the text' of a treaty,[28] regardless of the fact that the latter clearly did not fall under the general definition of an ideal idea of reservations. The reference to reservations formulated 'on the occasion of the adoption of the text' was, however, dropped 'mysteriously'[29] during the 1968–1969 Vienna Conference. Despite this unfortunate deletion, there is no compelling reason to treat differently reservations upon signature subject to ratification and any other reservations formulated before the expression of the consent to be bound by the treaty. They are simply not perfect with regard to time, and need to be reconfirmed in order to be able to produce the legal effects contemplated in Article 21(1).

A too strict interpretation of the Vienna Conventions in this regard would also produce the surprising result that reservations can only be formulated at the precise moment when signing subject to ratification. There is, however, no reason to exclude the possibility for a state to formulate a reservation after having signed a treaty, but before ratification. Indeed, as has been suggested during the discussion in the ILC concerning the moment of formulating a reservation, 'a reservation could be formulated at any time prior to the expression of consent to be bound. The point was that, if it was formulated earlier, it must be confirmed.'[30] The expression of consent to be bound is perhaps the latest moment at which a reservation can be made under the Vienna regime,[31] but it is certainly not the only one.[32]

[27] For the contrary position see 5th Report on reservations to treaties, *supra* note 10, at 188, para. 257.

[28] *Yrbk ILC* (1966), II, at 208.

[29] Ruda, 'Reservations to Treaties', 146 *Recueil des cours* (1975-III) 95, at 195.

[30] *Yrbk ILC* (2001), I, 2679th meeting, 23 May 2001, at 78, para. 13 (Hafner).

[31] Gaja, 'Unruly Treaty Reservations', in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (1987), i, at 307, 310.

[32] This is suggested in the commentary to guideline 2.3, *supra* note 3, at para. 2. See also *supra* note 23.

Furthermore, one might wonder if it is useful to admit premature reservations. In any event, they need to be confirmed and, according to the second sentence of Article 23(2), 'shall be considered as having been made[33] on the date of [their] confirmation'. However, even if such premature reservations are, in a sense, incomplete, they are no less reservations and have a certain usefulness for their authors and for other states and international organizations entitled to become parties to the treaty. The most obvious effect is implicitly recognized in Article 23(3) of the Vienna Conventions. Despite their incomplete nature, premature reservations can be objected to, just like any other ideal reservation. Of course, neither the premature reservation nor its objection can produce any of the legal effects contemplated by the Vienna Conventions, just because the author of the reservation is, by definition, not yet a party to the treaty. Nevertheless, the author of the premature reservation will be warned that, in the event that it confirms its reservation when ratifying the treaty, it will be met with an objection.[34] It might even consider not confirming its reservation, or modifying it. Admitting premature reservations as proper reservations and submitting them to the same formal conditions is therefore a useful element of the reservations dialogue.[35]

Finally, the Commission's rather surprising inflexibility with regard to premature reservations remains in sharp contrast to the way it has dealt with 'late' reservations.

B *Late Formulation of Reservations*

Much clearer than in the case for premature reservations, a reservation formulated after the expression of consent to be bound neither falls under the Vienna definition, nor is it regulated or implied by any other provisions in the Conventions. It constitutes a possibility that was never contemplated during the elaboration of the Vienna Conventions.[36]

In practice, however, the possibility of late formulation of reservations was never entirely excluded. In his fifth report, the Special Rapporteur refers to numerous examples of treaties which expressly permit late reservations,[37] but also to the prevailing practice of states and depositaries in this regard.[38] The phenomenon is indeed quite rare and

[33] Again, 'formulated' would have been the better term. A reservation is made only once it has been accepted by other parties to the treaty. See *supra* note 7.

[34] See, *mutatis mutandis*, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion* [1951] ICJ Rep 15, at 29 ('[u]ntil this ratification is made, the objection of a signatory State can therefore not have an immediate legal effect in regard to the reserving State. It would merely express and proclaim the eventual attitude of the signatory State when it becomes a party to the Convention. The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation.').

[35] See 17th report on reservations to treaties, by Alain Pellet, A/CN.4/647, in particular at paras 8–27.

[36] P.-H. Imbert, *Les réserves aux traités multilatéraux* (1979), at 12.

[37] 5th report on reservations to treaties, *supra* note 10, at 193, para. 289. See also commentary on guideline 2.3, *supra* note 3, at para. 4.

[38] 5th report on reservations to treaties, *supra* note 10, at 194–195, paras 294–302. See also commentary on guideline 2.3, *supra* note 3, at paras 9–16.

limited in scope,[39] but it clearly exists in practice even in the absence of an express provision.[40] The entire indifference of the Vienna Conventions is therefore surprising.[41]

Against this background, the place made by the Commission in its Guide for this existing and accepted practice must certainly be welcomed. This is so in particular because, far from encouraging the late formulation of reservations, guideline 2.3 (Late formulation of reservations) reflects clearly that it constitutes an exceptional possibility, subject to acquiescence by other contracting states and contracting organizations, and not a discretionary right of the author of the reservation.[42]

The interesting point for present purposes is less the fact that the Commission, painfully,[43] decided to re-consider the legal framework[44] of late reservations, but the way it finally addressed the issue in the Guide to Practice. The title and the formulation of the pertinent guideline are in this regard revealing:

> 2.3 Late formulation of reservations
>
> A State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation.

[39] *Ibid.*, at para. 16.

[40] A recent example of a late formulation of a reservation is that the Republic of Mozambique ratified the 2003 UN Convention against Corruption, on 9 Apr. 2008, without formulating any reservations (depositary notification C.N.266.2008.TREATIES-8, 10 Apr. 2008 (Mozambique: Ratification)). On 4 Nov. 2008, Mozambique communicated to the Secretary-General a reservation excluding the application of Art. 66(2) of the 2003 Convention, concerning the compulsory jurisdiction of the International Court (depositary notification C.N.834.2008.TREATIES-32, 5 Nov. 2008 (Mozambique: Communication)). In his depositary notification, the Secretary-General drew attention to the lateness of the reservation and proposed receiving the reservation (communication) in question for deposit in the absence of any objection on the part of one of the contracting states. Having not received any objection within the period of one year, the Secretary-General finally accepted the reservation in deposit taking effect on 4 Nov. 2009 (depositary notification C.N.806.2009.TREATIES-34, 10 Nov. 2009 (Acceptance of the Reservation made by Mozambique with respect to Art. 66, para. 2, of the Convention)). See also *Multilateral Treaties deposited with the Secretary-General*, available at: http://treaties.un.org/ (chap. XVIII, 14).

[41] This is particularly true with regard to the 1986 Vienna Convention. The ILC did not take into account the change of position of the Secretary-General concerning late reservation which occurred in 1978, i.e., when the Commission had reopened the subject of the law of treaties: see F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (1988), at 42; see also Fifth report on reservations to treaties, *supra* note 10, at 194–195, para. 296.

[42] See commentary on guideline 2.3, *supra* note 3, at para. 18.

[43] See also the contribution by Alain Pellet to this Symposium.

[44] This does not mean, however, that the Commission established a complete set of rules able to address all difficulties which might occur in the context of late reservations. This is, e.g., the case of the possible effects of objections to a reservation the late formulation of which has been accepted unanimously. Can a contracting state or a contracting organization having accepted the late formulation of the reservation but opposed to the content of the reservation still oppose the entry into force of the treaty between itself and the author of the reservation? If the answer to this question were in the affirmative, a previously existing treaty relationship between the author of the reservation and the author of the objection would disappear, which is clearly a troubling result (see also guideline 2.7.9(2) (Widening of the scope of an objection to a reservation)). If the answer were in the negative, the right of a state to make a maximum objection would be clearly limited (see guideline 2.6.6 (Right to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation)). See also the comments of Prof. Crawford on this point: *Yrbk ILC* (2001), I, 2679th meeting, 23 May 2001, at 80, para. 30.

The guideline speaks unmistakably of reservations, and not something else. The commentary even reinforces this conclusion by adding that the Commission consciously chose not to use the more commonly employed term 'late reservations' but 'preferred to speak of the "late formulation of reservations", ... in order to indicate clearly that what is meant is not a new or separate category of reservations'.[45] Despite their lateness, these declarations are still reservations, and this independently of the (too) restrictive definition of guideline 1.1 (Definition of reservations) copied from the Vienna Conventions.

Yet, the obvious inconsistency between guideline 2.3 and the definition of reservation has not simply been overlooked. During the discussion in plenary, Professor Gaja pointed to the fact that 'the definition of reservations in guideline 1.1 excluded late reservations' and proposed to employ the term 'tentative reservations'.[46] Mr Hafner made the point that 'either ... the definition was wrong or ... the acts in question were not reservations',[47] and concluded finally that 'there was no other choice but to call the instruments in question something other than reservations'.[48] Mr Tomka proposed a new formulation using the more cumbersome description of 'declaration intended to have the legal effect of a reservation formulated by a State or international organization after expressing its consent to be bound by the treaty' in order to avoid the denomination 'reservation'.[49] The statement of the chairman of the Drafting Committee finally indicates that the contradiction with the definition was clearly an issue in the discussions, but that it had been decided – contrary to the firm position concerning premature reservations[50] – to pass over it:

> The Drafting Committee had looked into whether late reservations were not actually an attempt by States to renegotiate the treaty and, if so, whether they should be considered true reservations. It had concluded, however, that, if the other contracting parties did not oppose the procedure, there was no reason for such declarations not to be considered reservations. Although the draft guideline might seem incompatible with the definition of reservations in guideline 1.1 (Definition of reservations), the Committee had decided not to ignore something that was tolerated under certain circumstances, but remained an exceptional practice.[51]

The commentaries joined by the Commission to guideline 2.3 are eloquently silent about the apparent contradiction with guideline 1.1. They simply recall that the timing condition for reservations is reflected in the definition and generally recognized,[52]

[45] See commentary on guideline 2.3, *supra* note 32, at para. 1.

[46] *Yrbk ILC* (2001), I, 2678th meeting, 22 May 2001, at 74, para. 3 (Gaja). See also *ibid.*, 2679th meeting, 23 May 2001, at 80, para. 29 (Economides) (speaking of 'proposals for reservations').

[47] *Ibid.*, 2679th meeting, 23 May 2001, at 78, para. 16 (Hafner). See also *ibid.*, at 85, para. 66 (Kateka); *ibid.*, 2694th meeting, 24 July 2001, at 181, para. 28 (Hafner); *ibid.*, at 182, para. 36 (Galicki). See also the position of Austria (A/CN.4/639), at paras 24–25.

[48] *Yrbk ILC* (2001), I, 2679th meeting, 23 May 2001, at 79, para. 18 (Hafner). See also *ibid.*, at 83, para. 48 (Yamada).

[49] *ibid.*, at 85, para. 65 (Tomka).

[50] See *supra* note 17 and accompanying text.

[51] *Yrbk ILC* (2001), I, 2694th meeting, 24 July 2001, at 179, para. 10.

[52] See commentary on guideline 2.3, *supra* note 3, at para. 2.

and go on to refer to a statement of Professor Flauss to the effect that this part of the definition '*n'a pas valeur d'ordre public*'.[53] This affirmation alone shows that the condition concerning the moment for the formulation of a reservation is a poor criterion for a definition.

The Special Rapporteur himself expressed some doubts about timing as part of the definition of reservations:

> The idea of including limits *ratione temporis* to the possibility of formulating reservations in the definition itself of reservations is not self-evident and, in fact, such limits are more an element of their legal regime than a criterion *per se*: a priori, a reservation formulated at a time other than that provided for in article 2, paragraph 1, of the Vienna Conventions is not lawful, but that does not affect the definition of reservations.[54]

Indeed, a reservation is not a reservation because it has been made at a particular moment in time. The distinctive feature, the *differentia specifica*,[55] is the legal effect the author of the declaration purports to produce.[56] Reservations are therefore a phenomenon which can and does occur at any moment in time. Their qualification depends exclusively on their intended effects.

The moment at which a reservation was formulated is, however, not irrelevant. It is indeed quite important in order to determine whether the reservation is perfect and able to produce the legal effects attached to reservations, or if it needs to be perfected by its author (a premature reservation) or through the acquiescence of others (a late reservation), as the case may be. But this is an issue of regime, comparable to other formal requirements, not of definition.

These considerations do not render the Vienna definition wrong or useless. It is simply not a general definition, but one limited for the specific purposes of the Conventions, as is recalled by the opening sentence of Article 2(1). The Conventions address only an ideal view of reservations,[57] though not all possible reservations, especially those which are not able to produce legal effects. There was simply no need to give a general definition of reservations addressing all possible instances. In this regard, it is indeed quite questionable[58] whether the definition is valid outside the Vienna regime and its lacunae, as the Commission seemed to imply by re-copying the Vienna definitions of a non-neutral ideal idea of reservation into guideline 1.1 (Definition of reservations). Even if it is understandable that the Commission did not wish to depart from the provisions of the Vienna Conventions, which constituted in many regards the basis of

[53] See *ibid.*, at paras 2 and 3, referring to Flauss, 'Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6 § 1', 5 *RUDH* (1993) 297, at 302.

[54] 3rd report on reservations to treaties, by Alain Pellet, A/CN.4/491 and Add. 1–6, *Yrbk ILC* (1998), II(1), at 247, para. 132. See also Provisional Summary Record, 2916th Meeting, 9 May 2007, A/CN.4/SR.2916, at 16 (Pellet).

[55] See Horn, *supra* note 41, at 40–41.

[56] See guideline 1.3, *supra* note 3.

[57] The only exceptions are reservations formulated on signature subject to reservations contemplated in Art. 23(2), which are nevertheless named reservations rather than 'untrue' reservations.

[58] See also Gaja, *supra* note 31, at 308.

the work on reservations to treaties,[59] a second thought on the definition would have been useful. The Guide to Practice is not comparable to the Conventions and addresses much more than an ideal view of effect-producing reservations. It is related to reservations as they appear in practice. In this regard, it is regrettable that the Commission retained the time-limit for formulating a reservation as part of the definition, and did not include it as a matter of procedure or formal validity only, as was done for the reactions to reservations.

2 Time and Reactions to Reservations

Despite the central role attached to objections and acceptances as necessary instruments for establishing a reservation in the sense of Article 21,[60] the Vienna Conventions do not propose a definition and contain only marginal indications concerning the moment at and the time-frame within which the consent instruments can be made. This is in sharp contrast to the very detailed provisions concerning acceptances and objections and, in particular, the moment an acceptance should be made, contained in Sir Humphrey's first report[61] and in draft Article 19 adopted by the Commission in 1962.[62] Almost all these very detailed provisions were sacrificed in a general effort to simplify the formulation[63] and the extensive revision of the Draft Articles 'with the object of eliminating from them such purely descriptive elements as might be appropriate in a "code" but out of place in a convention'.[64] As a result, Article 20, which is the most important provision concerning acceptances and objections, if not of the entire reservations regime of the Vienna Conventions,[65] addresses almost exclusively issues of substance rather than form.

A notable exception is paragraph 5 which survived the simplification and was attached to Article 20. This provision indirectly gives some indication of the moment

[59] For an explanation of the approach chosen by the Commission see 1st report on the law and practice relating to reservations to treaties, by Alain Pellet, A/CN.4/470, *Yrbk ILC* (1995), II(1), at 121, 153, para. 165.

[60] *Reservations to the Genocide Convention*, *supra* note 34, at 21 ('It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto.') For a more general presentation of consent in the framework of reservations see Müller, 'Article 20 (1969)', in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) 489, at 496–498, paras 18–22.

[61] 1st report on the law of treaties, by Sir Humphrey Waldock, A/CN.4/144, *Yrbk ILC* (1962), II, at 27, 61–62 (draft Arts 18 and 19).

[62] *Yrbk ILC* (1962), II, at 157, 176. It must, however, be remarked that the detailed provisions of draft Art. 19(2) exclusively concerned express acceptance. Even if it seems to indicate precise moments when an express acceptance can be made, it is certainly aimed at guaranteeing the appropriate form and publicity of an express acceptance rather than imposing time-limits. The ILC has considered in its commentaries that this provision does 'not appear to require comment': *ibid.*, at 180, para. 18.

[63] *Yrbk ILC* (1965), II, at 159, para. 26.

[64] *Ibid.*, at 158, para. 22.

[65] Müller, *supra* note 60, at 490, para. 1; Bowett, 'Reservations to Multilateral Treaties', 84 *British Yrbk Int'l L* (1976–1977) 67, at 84.

at which an objection must be made in order to produce its effects,[66] even if its principal aim was not to set a time limit for making objections.[67] Paragraph 5 rather contemplates the possibility of tacit or implied acceptance through the absence of objection,[68] and fixes the necessary temporal frame within which the presumption of tacit acceptance operates.[69] It is, however, questionable whether a time-limit for objections is mandatory with regard to the rules governing treaty relations,[70] as is the case for the formulation of reservations. Sir Humphrey himself explained that:

> [i]t has, of course, to be admitted that there may be a certain degree of rigidity in a rule under which tacit consent will be presumed after the lapse of a fixed period. It is also true that, under the 'flexible' system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent.[71]

In his point of view, it was, however:

> very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State under a treaty of universal concern. … [G]ood faith in the application of the procedural provisions of the treaty, and especially those dealing with participation in the treaty, would seem to require that States adopting a plurilateral or multilateral treaty should take note of the formulation of reservations and voice any objection that they may have to the reservation with reasonable expedition in order that the position of the reserving State under the treaty may be clarified.[72]

Therefore, the rigid time-frame for making objections suggested by Article 20(5) of the Vienna Conventions can be explained by the specific aim of those instruments: bringing clarity and legal certainty to the status of the author of the reservation and the legal effects of the reservation with the necessary swiftness. In practice, however, objections are much more than an instrument through which a state refuses its consent (its acceptance) to a reservation – which is indeed the only function contemplated by the Vienna Conventions[73] – they are also part of a process – the reservations

[66] See commentary on guideline 2.6.12, *supra* note 3, at paras 1–2.

[67] This is, in particular, expressed by the formula 'unless the treaty otherwise provides' which was included on the initiative of the USA at the Vienna Conference (A/CONF.39/C.1/L.127, in *Documents of the Conference*, *supra* note 24, at 136, para. 179 (vi) (a)). This amendment was directly aimed at permitting a more flexible understanding of the time-limit set in Art. 20(5). See also commentary on guideline 2.6.12, *supra* note 3, at para. 7.

[68] See also the commentary on guideline 2.8.2, *supra* note 3, at paras 9–10. See also Müller, *supra* note 65, at 504, para. 44.

[69] Sir Humphrey Waldock had noted in his first report that the same result was indeed achieved in treaty practice 'by limiting the right of objection' to a certain time period: *supra* note 61, at 66–67, para. 14 of the commentary to draft Art. 18.

[70] On the interesting practice of the Secretary-General see *ibid.*, at 503–504, para. 43.

[71] First report on the law of treaties, *supra* note 61, at 67, para. 15 of the commentary on draft Art. 18.

[72] *Ibid.* See also Horn, *supra* note 41, at 126.

[73] The Vienna Conventions do not contemplate legal rules concerning reservations that are incompatible with the validity criteria contained in Art. 19, including their legal effects and the possibility, procedure, and function of reactions of other states. See 15th report on reservations to treaties, by Alain Pellet, A/

dialogue[74] – with the overall objective of universality and integrity of the treaty. The definition of 'objections to reservations' given by the Guide to Practice seems indeed to be influenced by such a large understanding of the phenomenon: objections are determined only with regard to their *purported* effects,[75] not their actual legal effects under the Vienna regime. For this reason, time is not part of the definition.[76] Members of the Commission nevertheless found it difficult to admit, as a matter of principle, that an objection can be a proper objection even if it does not produce the legal effects provided for in Articles 20 and 21 of the Vienna Conventions. This is true in particular with regard to premature or anticipated objections (A) and late objections (B), which are neither contemplated nor forbidden by the Vienna Conventions.

A *Premature Formulation of Objections*

An issue on which the Vienna Conventions remain eloquently silent is the moment from which an objection can be formulated. Article 20(5), at best, indicates the moment at which the 12-month period starts to run, i.e., the date on which a state or an international organization received the notification of the reservation. It does not, however, preclude that an objection can be made before this particular date.[77] On the contrary, the Vienna Conventions imply the possibility that an objection can be made even before the 12-month period starts. This must be the case with objections contemplated by Article 23(3), i.e., objections made before the formal confirmation of a reservation made at signature subject to ratification. Such an objection, which does not need to be formally confirmed,[78] has necessarily to be made before the Article

CN.4/624/Add.1, paras 386–402 and, concerning objections, para. 507. See also Gaja, 'Il regime della Convenzione di Vienna concernente le riserve inammissibili', in *Studi in onore di Vincenzo Starace* (2008), at 349; Simma, 'Reservations to Human Rights Treaties: Some Recent Developments', in G. Hafner *et al.* (eds), *Liber Amicorum, Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday* (1998), at 659, 664–669.

74 17th report on reservations to treaties, *supra* note 35. On the Conclusions on the reservations dialogue annexed to the Guide to Practice see also the contribution by Sir Michael Wood to this Symposium.

75 See guideline 2.6.1 (Definition of objections to reservations) and its commentary, *supra* note 3, at paras 9–27.

76 The justification given by the ILC in the commentaries is, to say the least, vague: '[i]t appeared to the Commission in particular that it would be better not to mention the time at which an objection can be formulated; the matter is not clearly resolved in the Vienna Conventions, and it is preferable to consider it separately and endeavour to respond to it in a separate guideline': para. 4 of the commentary on guideline 2.6.1, *supra* note 3.

77 The English version of para. 3 of draft guideline 2.1.6 (Procedure for communication of reservations), adopted in 2002, was misleading in that regard. This provision, which was finally deleted (*Official Records of the General Assembly, 63rd Session, Supplement No. 10* (A/63/10), at 183, para. 75, and 174), did not refer to the date on which the 12-month period for the purpose of the presumption of Art. 20(5) started, but to '[t]he period during which an objection to a reservation may be raised …': *Yrbk ILC* (2002), II(2), at 38 and 42, para. 24 of the commentary; see also *Yrbk ILC* (2002), I, 2733rd meeting, 22 July 2002, at 152, para. 43 (Gaja). The French version, more correctly, referred to the '*délai pour formuler une objection à une réserve …*' (*Annuaire CDI*, 2002, ii(2), at 39–40).

78 Despite some uncertainties in the state practice (see commentary to guideline 2.6.10, *supra* note 3, at para. 4), the Guide to Practice did not put into question this rule which is recalled by guideline 2.6.10 (Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation). The guideline had raised little comment and attention from the members of the Commission (Provisional Summary Record, 2919th meeting, 15 May 2007, A/CN.4/SR.2919, at 5 (Pellet)).

20(5) period starts, given the fact that the reservation is considered to be made only at the date of its formal confirmation (Article 23(2)) and that only the notification of this formal confirmation can validly trigger the 12-month time-period. This hypothesis alone is sufficient to show that, even in the understanding of the Vienna Conventions, the 'right' to formulate objections is not limited to the Article 20(5) 12-month time-period, and this independently of the fact that such an 'anticipated' objection cannot produce any legal effect as long as the reservation has not been formally confirmed.

The Commission nevertheless had some difficulty in accepting the idea that objections made too early to produce legal effects are still 'true' objections. This is true in particular with regard to objections formulated by a state or an international organization which has not yet expressed its consent to be bound by the treaty. Even if this question arises primarily in relation to the problem of 'who' can make an objection,[79] it can also be presented as a timing issue: can a state or an international organization make an objection *before* it has expressed its consent to be bound by the treaty?

Some members of the Commission expressed doubts whether a state or an international organization has a right to make an 'objection' to a reservation before it has expressed its consent to be bound by the treaty.[80] One of the stated reasons was that such an objection could not produce any effects[81] and was not included in the Vienna regime. It has been argued in that respect that Article 20(4)(b) refers only to 'an objection by a contracting State or by a contracting organization to a reservation …'.[82] This fact is simply explained: only such objections indeed produce the effects contemplated. But this does not as such imply that there cannot be objections that do not produce these effects, e.g., because they have been formulated prematurely.[83] It is one thing to determine whether an objection produces some legal effects; it is yet another to determine whether a particular declaration made at a particular time can be identified as an objection.

Interestingly, paragraph (1)(a) of draft Article 19 proposed by Sir Humphrey in 1962 and entirely devoted to the question of objections recognized that 'any State which is or is entitled to become a party to a treaty shall have the right to object to any reservation not specifically authorized by the terms of the treaty'.[84] State practice also supports the view that states can and do formulate objections even before having ratified the treaty instrument.[85] Most importantly, the International Court of Justice

[79] See guideline 2.6.3 (Author of an objection), which is based on the Special Rapporteur's draft guideline 2.6.5 (11th report on reservations to treaties, by Alain Pellet, A/CN.4/574, at para. 84).

[80] Provisional Summary Record, 2915th meeting, 8 May 2007, A/CN.4/SR.2915, at 15 (Hassouna); *ibid.*, 2916th meeting, 9 May 2007, A/CN.4/SR.2916, at 4 (Escarameia); *ibid.*, at 7 (Kolodkin); *ibid.*, at 10 (Xue); *ibid.*, at 11–12 (Nolte).

[81] See Provisional Summary Record, 2916th meeting, 9 May 2007, A/CN.4/SR.2916, at 4 (Escarameia); *ibid.*, 2918th meeting, 11 May 2007, A/CN.4/SR.2918, at 7 (Hmoud).

[82] Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination against Women', 85 *AJIL* (1991) 281, at 297.

[83] See also Müller, *supra* note 60, at 510, para. 56.

[84] 1st report on the law of treaties, *supra* note 61, at 62.

[85] See, in particular, commentary on guideline 2.6.5, *supra* note 3, at para. 6.

was specifically asked about the legal effects of an *objection* – and this is the term used by the General Assembly[86] and the Court – formulated by a signatory or a state that is entitled to sign or to accede, but has not yet done so.[87] Of course, the Court held that, in the first case, the objection can produce legal effects only upon ratification,[88] and, in the second case, the objection is without legal effects.[89] At no point, however, did the Court consider that a state has no right to formulate such an objection or that such declarations are not objections.

In regard to these elements, guideline 2.6.3 (Author of an objection) clearly adopts the overall right position in admitting that states or international organizations entitled to become parties to the treaty can also formulate objections,[90] irrespective of the fact that such objections do not immediately produce the legal effects contemplated in Article 21.

A further question debated by the ILC concerned the issue whether an objection can be made even before a reservation has been formulated. At first sight, this hypothesis seems to be odd; an objection is usually considered to be a reaction to a reservation and can therefore hardly be made before it. This idea was indeed included in the definition of 'objections': '"[o]bjection" means a unilateral statement ... made by a State or an international organization *in response to* a reservation formulated by another State or international organization ...'.[91] In practice, however, states have formulated objections that, according to their terms, apply not only to a particular formulated reservation, but also to future reservations of a particular content and kind. An example is the objections made by Chile to reservations relating to Article 62(2) of the 1969 Vienna Convention:

> The Republic of Chile formulates an objection to the reservations *which have been made or may be made in the future* relating to article 62, paragraph 2, of the Convention.[92]

There is indeed nothing in the Vienna Conventions that would, as such, exclude such anticipated objections which, of course, can produce their effects only once a corresponding reservation has been made. The situation is not so very different from

[86] GA Res. 478 (V), 16 Nov. 1950, at point 1.

[87] *Reservations to the Genocide Convention*, *supra* note 14, at 16.

[88] *Ibid.*, at 30. The Court added that pending ratification such an objection 'merely serves as a notice to the other State of the eventual attitude of the signatory State': *ibid.* See also *supra* note 34.

[89] *Reservations to the Genocide Convention*, *supra* note 14, at 30.

[90] It is regrettable that the French and the Spanish versions of guideline 2.6.3 seem to put some doubt on the legal qualification of such a premature objection in using the word '*déclaration*' and '*declaración*'. It must be noted, however, that when adopted in 2008, the English version of draft guideline 2.6.5 also used 'declaration' rather than 'objection' (*Official Records of the General Assembly, 63rd Session, Supplement No. 10* (A/63/10), at 189) (the same is true for the Russian version). There is no hint in the records why the English version (or the Russian version) was changed on second reading. This is particularly troubling, given the fact that the Drafting Committee had opted for the term 'declaration' as part of the compromise solution between the positions expressed by the members: see Provisional Summary Record, 2974th meeting, 7 July 2008, A/CN.4/SR.2974, at 5 (Comissário Afonso).

[91] Guideline 2.6.1 (Definition of objections), *supra* note 3.

[92] *Multilateral Treaties*, *supra* note 40 (chap. XXIII, 1) (emphasis added).

the case referred to in Article 20(1), according to which a reservation expressly authorized by a treaty does not require any subsequent acceptance. This does not imply that these reservations do not need to be accepted. Simply, consent has already been given in the treaty,[93] i.e., before the reservation is made.[94] Such consent *in advance* was contemplated by Sir Humphrey Waldock in his first report.[95] Even if it might be inappropriate to qualify Article 20(1) as providing for 'early acceptance',[96] it constitutes a clear indication that consent may be expressed in advance. If this is true, there is no[97] reason to exclude the possibility of refusing consent (by an objection) in advance either.

Despite doubts expressed by some members of the Commission concerning premature (or, as proposed by the Special Rapporteur, 'pre-emptive') objections[98] and, in particular, their proper name,[99] the Commission included draft guideline 2.6.14 (Conditional objections)[100] which, albeit not expressly excluding the possibility of formulating premature objections 'to specific potential or future reservation[s]', emphasized only[101] that they do not produce the legal effects of an objection.

In 2011, however, this draft guideline was deleted by the Commission, since 'the inclusion of such a provision might be a source of confusion for the reader of the Guide to Practice'.[102] But in doing so the Commission did not rule out the possibility of formulating such premature or pre-emptive objections. Quite the contrary; this case, which responds to a clearly established state practice, was included in the

[93] *Yrbk ILC* (1966), II, at 207, para. 17 of the commentary on draft Art. 17 ('Paragraph 1 of this article covers cases where a reservation is expressly or impliedly authorized by the treaty; in other words, where the consent of the other contracting States has been given in the treaty.').

[94] See also Müller, *supra* note 65, at 515, para. 66; Greig, 'Reservations: Equity as a Balancing Factor?', 16 *Australian Yrbk Int'l L* (1995) 21, at 118.

[95] See 1st report on the law of treaties, *supra* note 61, at 66, para. 13 of the commentary on draft Art. 18 ('Paragraph 2 (*a*) [*sic*] recites the ways in which express consent to a reservation may be given in advance by the insertion in the treaty of an express authority to make the particular reservation in question.').

[96] See also 12th report on reservations to treaties, by A. Pellet, A/CN.4/584, at paras 187–188.

[97] A possible issue of concern could be legal certainty, especially in cases where a reservation is formulated long after the premature objection. See also Provisional Summary Record, 2917th meeting, 10 May 2007, A/CN.4/SR.2917, at 10 (McRae); *ibid.*, 2918th meeting, 11 May 2007, A/CN.4/SR.2918, at 7 (Nolte).

[98] Provisional Summary Record, 2917th meeting, 10 May 2007, A/CN.4/SR.2917, at 6 (Gaja); *ibid.*, at 13 (Xue); *ibid.*, 2918th meeting, 11 May 2007, A/CN.4/SR.2918, at 4 (Escarameia); *ibid.*, at 6 (Jacobsson).

[99] Some members proposed indeed not to speak about 'objections' as long as no 'matching' reservation had been formulated. See Provisional Summary Record, 2917th meeting, 10 May 2007, A/CN.4/SR.2917, at 14–15 (Candioti) ('communications'); *ibid.*, 2918th meeting, 11 May 2007, A/CN.4/SR.2918, at 4 (Escarameia) ('communications' or 'conditional objections'); *ibid.*, at 7 (Nolte) ('other objecting communications'); *ibid.*, at 8 (Vázquez-Bermúdez). Mr. Wisnumurti, however, rightly considered 'that the term "objection" should be used in preference to "communication", which seemed to be more an indication of form' (*ibid.*, at 6). See also the summary of the discussion made by the Special Rapporteur (*ibid.*, 2919th meeting, 15 May 2007, A/CN.4/SR.2919, at 6–8 (Pellet)).

[100] Official Records of the General Assembly, 63rd Session, Supplement No. 10 (A/63/10), at 218.

[101] See also the comments of the chairman of the Drafting Committee, Provisional Summary Record, 2970th meeting, 3 June 2008, A/CN.4/SR.2970, at 15–16 (Comissário Afonso).

[102] Provisional Summary Record, 3090th meeting, 20 May 2011, A/CN.4/SR.3090, at 4 (Vázquez-Bermúdez).

commentary on guideline 2.6.1 (Definition of objections),[103] suggesting that such declarations made before a reservation has actually been made are proper objections. Their concrete legal effects are merely 'suspended' up to the moment at which a matching reservation is formulated.[104]

B *Late Formulation of Objections*

Whether or not it is possible to formulate objections late, i.e., after the time-limit in Article 20(5) or any other time-limit fixed by treaty has elapsed, is a more difficult question. The issue is indeed not just one of lateness, which, as a formal condition, might be simply cured. Article 20(5) is more than a provision of pure form imposing a time-limit; according to that provision; the absence of objection within a certain time does amount to an acceptance of the reservation in the sense of the Vienna Conventions. The real question is therefore whether a state or an international organization which has accepted or is deemed to have accepted a reservation can nevertheless formulate an objection. This is a question of substance rather than form.

Under the provisions of the Vienna Conventions, acceptances and objections are mutually exclusive. Everything which is not an objection is necessarily an acceptance.[105] As was underlined during the 1968–1969 Vienna Conference, they are the

> obverse and the reverse side of the same idea. A State which accepted a reservation thereby surrendered the right to object to it; a State which raised an objection thereby expressed its refusal to accept a reservation.[106]

In addition, the acceptance of a reservation is irrevocable. The Guide to Practice includes this idea in guideline 2.8.13 (Final nature of acceptance of a reservation), which precludes withdrawal or modification of an acceptance to a reservation. Yet, a late objection would exactly mean this. A strict application of the Article 20(5) presumption leads to the conclusion that a state which has not expressed its objection within 12 months is deemed to have accepted the reservation. An objection formulated once the 12-month period has expired would necessary modify the tacit acceptance established under the law. The commentary on guideline 2.8.13 is explicit in this regard:

> [A]rticle 20, paragraph 5, of the Vienna Conventions and its *ratio legis* logically exclude calling into question a tacit (or implicit) acceptance through an objection formulated once the twelve-month time period stipulated in that paragraph (or of any other time period specified by the treaty in question) has elapsed: to allow a 'change of heart' that might call into question the treaty relations between the States or international organizations concerned many years after an acceptance had taken effect because a contracting State or an international organization had remained silent until one of the 'critical dates' had passed would pose a serious threat to legal certainty.[107]

[103] See commentary on guideline 2.6.1, *supra* note 3, at paras 29–34.
[104] *Ibid.*, at para. 34.
[105] Müller, *supra* note 65, at 504, para. 44.
[106] Official Records of the UN Conference on the Law of Treaties, First session, Vienna, 26 Mar.–24 May 1968, Summary Records of the Plenary, A/CONF.39/11, 22nd meeting, 11 Apr. 1968, at 116, para. 14.
[107] Commentary on guideline 2.8.13, *supra* note 3, at para. 2.

The right of a state or an international organization to make an objection to a reservation is, however, not unlimited. There are even instances where such a right to consent is more formal than real. This is, for instance, the case under Article 20(2) where a reservation, in order to be established in the sense of Article 21(1), needs to be accepted unanimously. A 'late-coming' state, i.e., a state which enters the privileged circle of contracting states once the unanimous acceptance of a reservation had been established, has no choice other than to accept the reservation in order not again to put into question the status of the author of the reservation.[108] Sir Humphrey Waldock included this hypothesis in his draft Article 18(3)(*c*)(i).[109] In his first report, he explained that despite the fact that, under the general flexible reservation regime, nothing prevents a state from formulating an objection when it expresses its consent to be bound, '[t]his qualification of the rule is not possible in the case of plurilateral treaties because there the delay in taking a decision does place in suspense the status of the reserving State *vis-à-vis* all the States participating in the treaty'.[110]

In the same sense, and in accordance with Article 20(3) of the Vienna Conventions, a state or an international organization is not called to express its individual consent to reservations formulated to a treaty which is the constituent instrument of an international organization.[111] Only the acceptance of the competent organ of the organization concerned is required, at least once that organ is established.[112]

Considering these instances, there is nothing stunning in the conclusion that a state or an international organization may (no longer) be entitled to object to a reservation, in particular, when it has accepted that reservation in not seizing the opportunity to make an objection in good time. But such a conclusion is mandatory only in the event that objections are limited to expressing refusal of the necessary consent to reservations. While this is certainly the only purpose, and indeed the only legal effect, envisaged by the Vienna Conventions,[113] state practice has given a much wider meaning and function to objections.

Objections are indeed used, and quite often so, by states in order to express their conviction that a given reservation does not satisfy the validity criteria of Article 19 of the

[108] See also guideline 2.8.7 (Unanimous acceptance of reservations), *supra* note 3.

[109] 1st report on the law of treaties, *supra* note 61, at 61 ('[a] State which acquires the right to become a party to a treaty after a reservation has already been formulated [or better, established] shall be presumed to consent to the reservation … [i]n the case of a plurilateral treaty, if it executes the act or acts necessary to enable it to become a party to the treaty').

[110] *Ibid.*, at 67, para. 16 of the commentary on draft Art. 18.

[111] In this sense see guideline 2.8.10(2), *supra* note 3 ('For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required').

[112] See also guideline 2.8.11 (Acceptance of a reservation to a constituent instrument that has not yet entered into force), *supra* note 3, which confirms the solution and the conclusions drawn with regard to plurilateral treaties (see *supra* note 110 and accompanying text).

[113] See *supra* note 73 and 17th report on reservations to treaties, *supra* note 35, at para. 507. The Vienna Conventions are in this regard quite different from the regime proposed by the Court in its 1951 Advisory Opinion: see Müller, *supra* note 60, at 513, para. 62, with further references.

Vienna Conventions,[114] even if the fact and the legal effects of non-validity are, under the Vienna Conventions,[115] not conditioned upon such objections.[116] It might be inappropriate to suggest that such objections do not produce any effects; they are indeed quite valuable for a judicial or quasi-judicial determination of the objective question of validity. But if their main aim is not to produce the legal effects contemplated by the Vienna Conventions, there is no reason why they could not be formulated at any time, including once the application of Article 20(5) considered the author of such an objection as having accepted the reservation. Indeed, if the assessment concerning the non-validity of a reservation and expressed through an objection is correct, a reservation would in any event not produce the effects contemplated in Article 21, and this independently of the individual assessment contained in the objection. Only a valid reservation can produce the effects provided under the Vienna regime.

Certainly, an objection formulated late cannot unmake consent expressed or assumed in the sense of the Vienna Convention; but it is still an objection. Some members of the Commission expressed concerns about this point,[117] confusing objections under the Conventions and producing the effects contemplated by the Conventions, on the one hand, and a larger notion of objections corresponding to state practice, on the other hand. Despite some uncertainties,[118] the Commission finally endorsed the possibility of formulating an 'objection' late, i.e., after the time-period established under Article 20(5). Guideline 2.6.13 (Objections formulated late) simply states that such an objection formulated late 'does not produce all the legal effects of an objection formulated within that time period'.[119] In other words, it is not an objection the legal effects of which are determined by the Vienna Conventions. But it is clearly an objection as long as its author 'purports to preclude the reservation from having its intended effects or otherwise opposes the reservation'.[120] This intended effect can be reached differently: first, a state can refuse its consent to the reservation. This possibility is clearly envisaged, and regulated, by the Vienna Conventions. Falling outside the legal requirements of the Vienna Conventions, a 'late' objection can no longer produce this result. Secondly, a state can express its doubts concerning the validity of the reservation. If finally and objectively non-valid, the reservation would also not

[114] Prof. Gaja proposed distinguishing between 'major' objections relating to the validity of a reservation and 'minor' objections, with the understanding that both kinds of objections do not necessarily have the same legal effects and that only the latter are addresses and regulated by the Vienna Conventions: see Provisional Summary Record, 2915th meeting, 8 May 2007, A/CN.4/SR.2915, at 9–10.

[115] Concerning the link between reactions to reservations and the validity criteria of Art. 19 see also Müller, *supra* note 60, at 511–515, paras 58–65.

[116] See guideline 4.5.2(1) (Reactions to a reservation considered invalid), *supra* note 3.

[117] See, in particular, Provisional Summary Record, 2917th meeting, 10 May 2007, A/CN.4/SR.2917, at 8 (Kolodkin); *ibid.*, at 11 (McRae); *ibid.*, at 11 (Caflisch); *ibid.*, 2918th meeting, 11 May 2007, A/CN.4/SR.2918, at 4 (Escarameia); *ibid.*, at 6 (Jacobsson); *ibid.*, at 6–7 (Wisnumurti); *ibid.*, at 7 (Nolte); *ibid.*, at 10 (Hmoud).

[118] See the Special Rapporteur's conclusions, *ibid.*, 2919th meeting, 15 May 2007, A/CN.4/SR.2919, at 8–9 (Pellet).

[119] *Supra* note 3.

[120] See guideline 2.6.1 (Definition of objections), *supra* note 3.

produce its intended effects. Simply, the objection alone cannot produce this result, either under the Vienna Conventions, or otherwise.[121]

Even if the legal effect contemplated by the Vienna Conventions for objections is limited to the particular rules and conditions, including timing, laid down in these instruments, the notion of objection is not restrained by these limitations. Beyond the Vienna regime, an objection, just like a reservation, is determined only by its purported effects. As the Special Rapporteur on reservations to treaties rightly pointed out:

> [T]he questions of definition and validity should not be confused. An objection which was not valid for temporal reasons would nevertheless constitute an objection, just as a late reservation, or a reservation incompatible with the object and purpose of a treaty, while not being valid, would still be a reservation, since definition and validity were separate issues. Objections, like reservations, could be valid or invalid. It could not be averred that a reservation was not a reservation because it was invalid, or that a late objection, being invalid, was not an objection. On the contrary, it was first necessary to determine whether a declaration could be described as a reservation or an objection, before going on to ascertain whether the reservation or objection was or was not valid.[122]

The question of time is an issue of only 'formal' validity. Indeed, it would be incongruous to conclude that a declaration which had been made outside the temporal frame fixed by Article 20(5) of the Vienna Conventions was not an objection. One has first to determine whether such a declaration is an objection in order to be able to apply Article 20(5). The qualification is a necessary prerequisite for the establishment and the application of a time-limit. If the objection does not meet this time-limit, it may not be valid and be unable to produce the legal effects attached to a valid objection. But it nevertheless is still an objection.

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This *tour d'horizon* of the question and role of time shows that the law and practice of reservations to treaties is made of much more than reservations, acceptances, and objections contemplated by the Vienna Conventions. Reservations are not just this 'necessary evil'[123] which needs to be strictly regulated because it potentially harms the integrity of the treaty. This does not imply that such phenomena as premature or late formulations of reservations and objections are unregulated or left to chaos. It simply shows that the Vienna Conventions, in their definition of 'reservations' and their five Articles dealing with reservations, address only rather limited aspects of reservations, i.e., those aspects which are strictly necessary in order

[121] There are some particular reservations regimes which do indeed attach much more weight to objections for the determination of the validity of a given reservation. This is, e.g., the case of the *lex specialis* regime established under Art. 20(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 1966), 660 UNTS 195, according to which '[a] reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it'. On this provision see also the contribution by Ineta Ziemele and Lāsma Liede to this Symposium.

[122] Provisional Summary Record, 2919th meeting, 15 May 2007, A/CN.4/SR.2919, at 8–9 (Pellet).

[123] *Yrbk ILC* (1965), I, 797th meeting, 8 June 1965, at 151, para. 38 (Ago).

readily to assess the legal effects a reservation and its reactions can produce on the treaty relations.

The Guide to Practice is not so limited and sheds some light on that part of the reservations regime which has developed beside and beyond the Vienna Conventions. The number of guidelines and the extent of the commentaries prove that the Vienna Conventions touch only on a rather limited part of the subject, whereas the Guide tries also to address the immersed part of the iceberg. Despite some inconsistencies and lacunae, the Guide describes reservations, acceptances, and objections not simply as instruments able to modify or to exclude the treaty relationships between their authors, but as a comprehensive and not necessarily linear process.

This reservations dialogue is aimed at ensuring the integrity of the treaty and not merely organizing a multitude of separate and possibly different bilateral treaty relationships within a multilateral treaty. This purpose is achieved not only through the legally well determined instruments enshrined in the Conventions, but also by reservations, acceptances, and objections which do not as such fall under the Vienna regime, especially because of the moment at which they were made. A comprehensive analysis of reservations cannot simply ignore these valuable instruments just because they are not producing legal effects. Indeed, reservations, acceptances, and objections do not exist because the Vienna Conventions have proposed a definition of them and have attached some legal effects to them. They are a reality that needs to be assessed in its entirety, within and beyond the Vienna Conventions.