

CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

Introductory note

It is a well-known fact that, according to Article 13, para. 1, of the Charter of the United Nations, “the General Assembly shall initiate studies and make recommendations for the purpose of: a [...] encouraging the progressive development of international law and its codification”. On 21 November 1947, the General Assembly adopted resolution 174 (II), establishing the International Law Commission and approving its Statute. Article 1, para. 1, of the Statute of the ILC provides, that the “Commission shall have for its object the promotion of the progressive development of international law and its codification”. Therefore the ILC has become the most important UN body for the codification and the progressive development of international law. The Commission submits every year to the General Assembly a report on the work done at each of its sessions. The well-established practice of annually considering the reports of the ILC in the Sixth Committee of the UN GA has facilitated the development of the existing relationship between the General Assembly and the Commission. Member States have an opportunity to comment on the report of the ILC and thus to influence drafts articles and other texts prepared by the ILC on various subjects that are on its agenda.

The Czech Republic takes actively part in the debate at the Sixth Committee. The Department of International Law of the Ministry of Foreign Affairs of the Czech Republic, in a close cooperation with legal experts working in the Academia, in particular at the Faculty of Law of Charles University in Prague, prepares annually both an analysis of the Report of the ILC and statements on selected topics presented on behalf of the Czech Republic. In October 2010, the Czech delegation made the in-depth comments on the draft articles on Reservations to treaties.

(ed. Pavel Šturma)

Report of the International Law Commission on the work of its sixty-second session (Agenda Item 79) – 65th Session of the General Assembly

Reservations to Treaties Statement by Mr. Pavel Šturma

Madam Chair,

In this part of the debate on the Report of the International Law Commission, the delegation of the Czech Republic would like to comment on the topic “Reservations to Treaties”.

First of all, the delegation of the Czech Republic wishes to express its appreciation to the Commission and in particular to the Special Rapporteur, Mr. Alain Pellet, for the effort enabling the Commission to complete the first reading and provisionally adopt the entire Guide to Practice on Reservations to Treaties. The Czech Republic believes that the Commission will be able to adopt the final version of the Guide to Practice during its sixty-third session in 2011, so that the Guide can be introduced into practice to provide States and international organizations with guidance in this area of international law.

In view of the fact that the Czech Republic provided observations on the issues covered in the reports of the Commission in the past years, the Czech delegation would like to make several remarks only on the major points of the guidelines discussed and adopted at this year’s session of the Commission. We reserve the right, however, to send further observations to the Secretariat of the Commission before the end of January 2011.

The Czech delegation welcomes as a major achievement the fourth part of the Guide to Practice which covers the legal effects of reservations and interpretative declarations, including the effects of acceptances and objections. The Czech delegation supports the distinction made by the Special Rapporteur between the purported effects and the actual effects. Indeed, they are not necessarily identical and depend on the validity and permissibility of the reservations, but also on the reactions of other interested States or international organizations. Since the effects of a reservation or of an acceptance thereof or objection to a reservation remain one of the most controversial issues of treaty law, the main merit of the Guide to Practice may be in their clarification. Although Articles 20 and 21 of the Vienna Convention on the Law of Treaties have some unclear elements and gaps, the practice of States makes it possible for the Commission to formulate its guidelines.

One of the points where the Vienna Convention brought a novel provision is Article 20, para. 2, adopted as a compromise between the traditional system of unanimity and the Waldock’s flexible system. As regards draft guideline 4.1.2 concerning the establishment of a reservation to a treaty, which has to be applied in its entirety, the Czech delegation shares the view that the concept of plurilateral

treaty has shifted towards that of a treaty whose integrity must be ensured. The draft guideline and commentary thereto seem to reflect adequately the importance of the object and purpose of the treaty.

As regards draft guideline 4.2.2 concerning the effect of the establishment of a reservation on the entry into force of a treaty, the Czech delegation considers the phrase in the second paragraph - that the author of the reservation may be included "at an earlier date" in the number of contracting States and contracting organizations - as an element of the progressive development of the law of treaties. However, the predominant practice of depositaries justifies this inclusion balanced by the safeguard clause "if no contracting State or contracting organization is opposed in a particular case".

The Czech delegation also welcomes the clearly drafted guideline 4.2.5, dealing with exceptions to the general principle of reciprocal application of a reservation. Those exceptions operate mainly in view of the nature of the obligations or the object and purpose of the treaty. The human rights treaties are the most typical, but not the only examples of such treaties.

By far the most controversial issue concerns the effect of an objection. The Czech delegation supports the distinction between the effects of an objection and those of an acceptance. It also maintains the view expressed already by then Czechoslovakia at the Vienna Conference which gave rise to the current Article 20, para. 4(b) and Article 21, para. 3. In other words, the practice subsequent to the Vienna Convention has confirmed that simple objections with "minimum-effect" are used as a rule and objections with "maximum-effect" rather as an exception. The wording of the guidelines rightly reflects this fact.

The Czech delegation also supports the approach adopted in the part 4.5 of the Guide to Practice. This part deals with consequences of an invalid reservation and fills thus one of the most serious gaps in the Vienna Conventions. Draft guideline 4.5.1 clearly spells out the basic principle that an invalid reservation (i.e. a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3) has no legal effect. Not only the modern treaty practice of objections formulated by States, especially European States, but also some decisions of international human rights bodies and regional courts support the so-called "super-maximum" effect. According to this approach reflected in draft guideline 4.5.2, the reserving State or the reserving international organization is considered a contracting State or a contracting organization without the benefit of the reservation. The advantage of this approach is that it fully respects the framework of the Vienna Conventions and does not seek to set up an exception for certain categories of treaties (e.g., human rights treaties). The "super-maximum" effect is reserved for invalid reservations only. An objection to a valid reservation cannot produce such an effect. The Commission pointed out that "the requirement that the treaty must be implemented in its

entirety would derive not from a subjective assessment by another contracting party, but solely from the nullity of the reservation and the intention of its author”.

Consequently, draft guideline 4.5.3 provides that the nullity of an invalid reservation does not depend on the objection or acceptance by a contracting State or a contracting organization. It is only recommended to States or international organizations, which consider that the reservation is invalid, that they should formulate a reasoned objection as soon as possible. The Czech delegation finds this recommendation more than helpful in view of the fact that only a few international bodies are competent to assess the validity of a contested reservation. However, it seems to us that the first paragraph of guideline 4.5.3 may not fully cover all situations. Although it reflects the logical consequence of the distinction between the objective test of validity of a reservation and its subjective assessment by other contracting parties, it does not meet the situation where the incompatibility of a reservation depends on a reaction of parties. E.g., Article 20, para. 2 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that “[a] reservation incompatible with the object and purpose of this Convention shall not be permitted... A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.” In order to cover such situations, the Czech delegation suggests an amendment “unless the treaty so provides” in the end of the first paragraph of guideline 4.5.3.

Thank you, Madam Chair.