

SETTLEMENT OF DISPUTES AND ASSISTANCE MECHANISM COMMENTS

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Since I am going to be quite critical of the 'assistance mechanism' suggested by the International Law Commission, let me at the outset make it clear that I consider that the Commission, and especially the Special Rapporteur and his assistants (all from Nanterre) have done an excellent job with the Guide to Practice on Reservations to Treaties.

I was not always of that view; progress seemed painfully slow, and the work excessively detailed, covering many points that simply did not arise in practice. The Special Rapporteur never seemed to get to what appeared to be the heart of the matter, the provision now embodied in guideline 4.5.3 (*Status of the author of an invalid reservation in relation to the treaty*).¹ Some of the guidelines as originally adopted by the Commission gave rise to real difficulties, such as the predecessors of what are now guideline 1.1.3 (*Reservations relating to the territorial application of the treaty*) and guidelines 3.2-3.2.5 (*Assessment of the permissibility of reservations*).

But my view changed with the completion of the Guide to Practice in 2011, having regard in particular to the many revisions proposed by the Special Rapporteur, taking full account of all the views submitted by States, which were carefully considered by the Commission's Working Group on Reservations to Treaties, under the excellent chairmanship of Marcelo Vásquez-Bermúdez.² The whole text was improved: there were even deletions and simplifications – though nothing like enough.³ Perhaps even membership of the Commission had something to do with my change of view.

¹ As can be seen from the commentary, the practice on this matter to date has been sharply divided, though all sides seem ultimately to accept the principle that the intention of the reserving State is determinative. States could make an important contribution to achieving more legal certainty in this area by rallying round the Commission's suggestion for 'cautious' progressive development (Commentary, para. 49) in guideline 4.5.3, or at least its paragraphs (1) and (2).

² First report of the Chairman of the Working Group, A/CN.4/SR.3090, pp. 3-7 (for verbatim oral report, see A/CN.4/L.779).

³ See Professor Pellet's contribution to the present volume; A. Pellet, "The ILC's Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur", 24 (2013) *EJIL*, pp. 1061-1097.