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## ADDENDA TO THE FIFTH REPORT ON RESERVATIONS TO TREATIES

**by Mr Alain Pellet, Special Rapporteur**

Secretariat Memorandum
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# Fifth report on reservations to treaties

**By Mr. Alain Pellet, Special Rapporteur**

**Addendum**

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# II. Alternatives to reservations and interpretative declarations

66. In his first report, the Special Rapporteur mentioned a number of problems resulting from several specific treaty approaches which appeared to be rival institutions of reservations. Like the latter, these approaches are "aimed at modifying participation in treaties, but, like them, [put] at risk the universality of the conventions in question (additional protocols; bilateralization; selective acceptance of certain provisions, etc.)."[160]

67. As indicated in the second report, it seems useful to link the consideration of the definition of reservations to that of other procedures, which, while not constituting reservations, are, like them, "designed to and do enable States to modify obligations under treaties to which they are parties; this is a question of alternatives to reservations, and recourse to such procedures may likely make it possible, in specific cases, to overcome some problems linked to reservations."[161]

68. Such consideration, to which this chapter is devoted, has two aims.[162] In the first place, such procedures can be a source of inspiration for the progressive development of the law applicable to reservations. Second — and it is for this reason that their description should be linked to the definition of reservations — some of these procedures are so close to reservations that the question arises whether they should not simply be treated as equivalent. Draft guidelines intended to facilitate distinctions between such procedures and reservations in the strict sense round out the discussion; it is proposed to include them in chapter I of the Guide to Practice, on "Definitions", which should thus be complete.

69. The same problem arises, *mutatis mutandis*, with regard to interpretative declarations.

70. For the sake of convenience, it is probably simplest, first, to present a brief overview of the many approaches designed to modify obligations resulting from a treaty or enabling its interpretation to be clarified (part A) and, second, to compare reservations, as they are defined in the draft guidelines already adopted in the Guide to Practice, more specifically with these alternative procedures (part B).

## A. Different procedures for modifying or interpreting treaty obligations

71. Neither reservations nor interpretative declarations, as defined in sections 1.1 and 1.2, respectively, of the Guide to Practice, are the only approaches available to the parties for modifying the effects of the provisions of a treaty (in the first case) and clarifying its meaning (in the second case).

### 1. Different procedures for modifying the effects of a treaty

72. In the first judgement which it rendered, the Permanent Court of International Justice declined, not without reason, to "see in the conclusion of any Treaty by

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[160] A/CN.4/470, para. 149; see also paras. 145-147.

[161] A/CN.4/477, para. 39.

[162] See, in this connection, the approach taken with regard to treaties concluded within the Council of Europe by Sia Spiliopoulo Akermark, "Reservation Clauses in Treaties Concluded Within the Council of Europe", *International and Comparative Law Quarterly*, 1999, pp. 479-514, note, p. 506.

which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."[163]

73. The fact remains that, once concluded through the expression of the free consent of the parties, treaties prove to be "voluntary traps" from which States (or international organizations) can "escape" only under very stringent, rarely fulfilled conditions, as codified and listed exhaustively[164] in the Vienna Convention on the Law of Treaties of 1969.

74. In order to avoid this trap or, at least, mitigate its severity, States and international organizations strive to preserve their freedom of action by limiting treaty obligations. At the risk of undermining legal safeguards, "the ideal, for the diplomat and the politician, is, without any doubt, the non-binding obligation".[165]

75. This "concern of each government with preserving its capacity to reject or adopt [and adapt] the law (a minimal, defensive concern)"[166] is particularly present in two situations: where the treaty in question deals with especially sensitive matters or contains exceptionally onerous obligations,[167] or where it binds States whose situations are very different and whose needs are not necessarily met by a uniform set of rules. It is this type of consideration which led the authors of the Constitution of the International Labour Organization (ILO) to state:

> "In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries."[168]

76. According to ILO, which bases its refusal to permit reservations to the international labour conventions on this article:

> "This would suggest that the object of the framers of the Treaty of Peace, in imposing on the Conference this obligation to give preliminary consideration to the special circumstances of each country, was to prevent States from pleading, after the adoption of a convention, a special situation which had not been submitted to the Conference's judgment."[169]

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[163] Judgment of 17 August 1923, *Case concerning the S.S. Wimbledon, P.C.I.J. series A*, No. 1, p. 25.

[164] Cf. article 42, paragraph 1, of the Vienna Convention on the Law of Treaties of 1969.

[165] Michel Virally, "Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", in Université catholique de Louvain, quatrième colloque du Département des Droits de l'homme, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruylant, Brussels, 1982, p. 7.

[166] Guy de Lacharrière, *La politique juridique extérieure*, Économica, Paris, 1983, p. 31.

[167] Such is the case, for example, of the charters of "integrating" international organizations (cf. the Treaties establishing the European Communities; see also the Rome Statute of the International Criminal Court).

[168] Article 19, paragraph 3. This article reproduces the provisions of article 405 of the Treaty of Versailles.

[169] "Admissibility of reservations to general conventions," memorandum by the Director of the International Labour Office submitted to the Council on 15 June 1927, League of Nations, *Official Journal*, July 1927, p. 883. See also "Written Statement of the International Labour Organization" in International Court of Justice, *Pleadings, Oral Arguments, Documents — Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pp. 224 and 236.

As in the case of reservations, but by a different procedure, the aim is:

> "to protect the integrity of the essential object and purpose of the treaty while simultaneously allowing the maximum number of States to become parties, though they are unable to assume full obligations".[170]

The quest to reconcile these two goals is the aim both of reservations in the strict sense and of the alternative procedures dealt with in this chapter.

77. Reservations are one of the means intended to bring about this reconciliation.[171] But they are far from "the only procedure which makes it possible to vary the content of a treaty in its application to the parties"[172] without undermining its purpose and object. Many other procedures are used.

78. Some authors have endeavoured to reduce all these procedures to one. Thus, Georges Droz, former Deputy Secretary General of the Hague Conference on Private International Law, has proposed to classify these alternatives to reservations under the single heading "options": "Like reservations, they undermine the uniformity created by the treaty. But unlike reservations, in which the reserving State is seen to withdraw to some extent from the treaty on a specific point, options simply allow for a modification, an extension or a clarification of the terms of the treaty within a framework and limits expressly provided for therein. Reservations and options have as their purpose to facilitate accession to the treaty for the largest number of States, despite the deep differences which may exist in their legal systems and despite certain national interests, but they do so differently. Reservations are a "surgical" procedure which amputates certain provisions from the treaty,[173] while options are a more "therapeutic" procedure which adapts the treaty to certain specific needs".[174]

79. While it has been severely criticized,[175] the notion of "options" has the advantage of showing that reservations are not the only means by which the parties to a multilateral treaty can modify the application of its provisions, to which a number of other procedures can lend a flexibility made necessary by the different situations of the States or international organizations seeking to be bound by the treaty.

80. The common feature of these procedures, which makes them alternatives to reservations, is that, like the latter, they purport "to exclude or to modify the legal

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[170] W. Paul Gormley, "The Modification of Multilateral Conventions by means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and Council of Europe", Part I, *Fordham Law Review*, 1970-1971, p. 65. On the strength of these similarities, this author, at the cost of worrisome terminological confusion, encompasses in a single study "all devices the application of which permit a State to become a party to a multilateral convention without immediately assuming all of the maximum obligations set forth in the text", ibid., p. 64.

[171] See the second report on the law of treaties, A/CN.4/477/Add.1, para. 90.

[172] Jean Combacau and Serge Sur, *Droit international public*, Montchrestien, Paris, 1999, p. 133.

[173] This is a somewhat reductionist conception of reservations, as shown by some of the draft guidelines adopted up to now (cf. guidelines 1.1.1, 1.1.3 and 1.1.6).

[174] "Les réservations et les facultés dans les Conventions de La Haye de droit international privé", *Revue critique du droit international privé*, 1969, p. 383.

[175] Particularly by Ferenc Majoros, who believes that "the set of 'options' is merely an amorphous group of provisions *which afford various options*" ("Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", *Journal du droit international*, 1974, p. 88. (Italics in original.)

effect of certain provisions of the treaty"[176] or "of the treaty as a whole with respect to certain specific aspects"[177] in their application to certain parties. But there the similarities end, and drawing up a list of them proves difficult, "for the imagination of legal scholars and diplomats in this area has proved to be unlimited".[178] In addition, on the one hand, some treaties combine several of these procedures with each other and with reservations, and on the other hand, it is not always easy to differentiate them clearly from one another.[179]

81. If, however, an effort is made to do so, there are numerous ways to classify them.

82. Some procedures for modifying the legal effects of the provisions of a treaty are provided for in the treaty itself; others are external to it. This was the distinction adopted by Professor Michel Virally, one of the few authors to undertake a general enquiry into "the means used in practice to limit the binding effect of treaties": "In general, it can be stated that the State has two methods at its disposal. The first consists of introducing limits on [treaty] obligations into the very texts in which they are defined. The second, on the other hand, consists of introducing these limits into the application of the texts by which States have bound themselves".[180]

83. In the first of these two categories, mention can be made of the following:

- Restrictive clauses, "which limit the purpose of the obligation by making exceptions to and placing limits on it"[181] in respect of the area covered by the obligation or its period of validity;
- Escape clauses, "which have as their purpose to suspend the application of general obligations in specific cases",[182] and among which mention can be made of saving clauses and derogations;[183]
- Opting- [or contracting-] in clauses, which have been defined as "those to which the parties accede only through a special acceptance procedure, separate from accession to the treaty as a whole";[184]

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[176] See draft guideline 1.1 of the Guide to Practice.

[177] See draft guideline 1.1.1.

[178] Michel Virally, "Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", in Université catholique de Louvain, quatrième colloque du Département des Droits de l'homme, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruylant, Brussels, 1982, p. 6.

[179] Ibid., p. 17.

[180] Ibid., p. 8.

[181] Ibid., p. 10. This notion corresponds to "clawback clauses" as they have been defined by Rosalyn Higgins: "By a 'clawback' clause is meant one that permits, in normal circumstances, breach of an obligation for a specified number of public reasons" ("Derogations Under Human Rights Treaties", *British Year Book of International Law*, 1976-1977, p. 281; see also Fatsah Ouguergouz, "L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général, *Revue Générale de Droit International Public*, 1994, p. 296). Other authors propose a more restrictive definition; according to R. Gitleman, clawback clauses are provisions "that entitle a State to restrict the granted rights to the extent permitted by domestic law" ("The African Charter on Human and People's Rights", *Virginia Journal of International Law*, 1982, p. 691, cited by Rusen Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles — Etude sur l'article 15 de la Convention européenne des droits de l'homme*, Bruylant, Brussels, 1987, p. 25).

[182] M. Virally, ibid., p. 12.

[183] See paras. 138-139 below.

[184] M. Virally, op. cit., p. 13.

- Opting- [or contracting-] out clauses, "under which a State will be bound by rules adopted by majority vote if it does not express its intent not to be bound within a certain period of time";[185] or

- Those which offer the parties a choice among several provisions; or again,

- Reservation clauses, which enable the contracting parties to formulate reservations, subject to certain conditions and restrictions, as appropriate.

84. In the second category, which includes all procedures enabling the parties to modify the effect of the provisions of the treaty, but which are not expressly envisaged therein, are the following:

- Reservations again, where their formulation is not provided for or regulated by the instrument to which they apply;

- Suspension of the treaty,[186] whose causes are enumerated and codified in part V of the Vienna Conventions of 1969 and 1986, particularly the application of the principles *rebus sic stantibus*[187] and *non adimpleti contractus*;[188]

- Amendments to the treaty, where they do not automatically bind all the parties thereto;[189] and

- Protocols or agreements having as their purpose (or effect) to supplement or modify a multilateral treaty only between certain parties,[190] including in the framework of "bilateralization".[191]

85. Among the latter modification procedures, the first two are unilateral, but derive from the general international law of treaties, while the last two derive from the joint initiative of the parties to the treaty, or some of them, following its adoption.

86. There are, in fact, many other possible classifications of these various approaches to modifying treaty obligations.

87. They can, for example, be classified according to the procedures used. Some are treaty-based; they are provided for either in the treaty whose effects are to be modified (such is the case with regard to restrictive clauses or amendments) or in a different treaty (protocols). Others are unilateral (reservations in cases where a treaty is silent, suspension of treaty provisions). Most are "mixed" in the sense that, being envisaged in the treaty, these procedures are implemented through unilateral declarations of the "receiving" State (reservations provided for in the treaty, including "negotiated reservations",[192] unilateral statements formulated pursuant to

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[185] Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des cours de l'Académie de droit international*, 1994-VI, vol. 250, p. 329; see also Christian Tomuschat, "Obligations Arising for States Without or Against Their Will", *Recueil des cours de l'Académie de droit international*, 1993, vol. 241, pp. 264 et seq.

[186] Termination of the treaty is a different matter; it puts an end to the treaty relations (see para. 133 below).

[187] Cf. article 62 of the Vienna Conventions.

[188] Cf. article 60 of the Vienna Conventions.

[189] Cf. article 40, paragraph 4, and article 30, paragraph 4, of the Vienna Conventions.

[190] Cf. article 41 of the Vienna Conventions.

[191] See section 2, paragraph 2 (c), below.

[192] See paras. 164-165 and 169-170 below.

escape clauses,[193] opting-in or opting-out clauses or clauses offering a choice among the treaty provisions).

88. In most cases, these procedures purport to limit, on behalf of one or more contracting parties, the obligations imposed in principle by the treaty. Such is the purpose not only of reservations[194] but also of restrictive or escape clauses. It may happen, however, that they increase such obligations, as opting-in clauses clearly demonstrate. As to the other procedures listed above, they are "neutral" in this respect, since they may purport either to limit or to increase the obligations, as the case may be (choice among treaty provisions, amendments, protocols).

89. Lastly, among these various procedures, some are "reciprocal" and purport to modify the effects of the treaty provisions in their application not only by the "receiving" State, but also by the other contracting parties in respect of that State. Such is the case, under certain conditions, of the reservations formulated under article 21 of the Vienna Conventions of 1969 and 1986, and, in general, of restrictive clauses, amendments and protocols (unless they expressly provide for discriminatory regimes). On the other hand, statements formulated under escape clauses (derogations or saving clauses) are in essence non-reciprocal (although the treaty may expressly provide the opposite[195]). As to the opting-in or opting-out mechanisms or the provisions offering the parties a choice, they raise interesting questions in this regard (some of which will be considered more extensively in section 2 below), but generally speaking, it can be considered that everything depends on the wording of the relevant provisions or on the nature of the treaty concerned.

90. Thus, the famous article 36, paragraph 2, of the Statute of the International Court of Justice clearly limits the acceptance by States of the compulsory jurisdiction of the Court to disputes between them and States which have made the same declaration:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a. The interpretation of a treaty;
>
> b. Any question of international law;
>
> c. The existence of any fact which, if established, would constitute a breach of an international obligation;
>
> d. The nature or extent of the reparation to be made for the breach of an international obligation."[196]

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[193] The "mixed" nature of this procedure is particularly apparent in the case of derogations (as opposed to saving clauses), as they are not only provided for in the treaty, but must further be authorized by the other contracting parties on the initiative of the receiving party.

[194] See draft guidelines 1.1.5 and 1.1.6.

[195] Cf. article XIX, paragraph 3, of the General Agreement on Tariffs and Trade (GATT) of 1947.

[196] Italics added. The drafting of paragraph 3 ("The declarations referred to above may be made unconditionally or on condition of reciprocity ...") introduces an element of uncertainty. In practice, however, optional declarations under article 36, paragraph 2, are generally made on condition of reciprocity and the Court ensures its strict observance (cf., among numerous examples: Permanent Court

The same is true of article 5, paragraph 2, of the European Convention on Mutual Assistance in Criminal Matters of 1959:

> "Where a Contracting Party makes a declaration in accordance with paragraph 1 of this Article, any other Party may apply reciprocity."

91. On the other hand, the implementation of the escape clauses contained in human rights treaties is in essence non-reciprocal, and it is inconceivable that, for example, if a State party to the European Convention on Human Rights makes use of the option afforded by article 15 of that Convention,[197] the other States parties would be released from their own obligations under the Conventions, even with regard to the nationals of that State.

92. The fairly frequent combination of these various procedures further complicates their necessary[198] classification. To take but three examples:

- The optional declarations under article 36, paragraph 2, of the Statute of the International Court of Justice[199] can be, and frequently are, accompanied by reservations;
- States can formulate reservations to restrictive clauses contained in escape clauses appearing in multilateral conventions; the reservation by France to article 15 of the European Convention on Human Rights (which is an escape clause and, more specifically, a saving clause[200]) constitutes an abundantly commented[201] illustration of this; and
- The entry into force of the derogation regimes provided for in certain conventions can be subordinated to the conclusion of a supplementary agreement; such is the case, for example, of article 23, paragraph 5, of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters, signed at The Hague on 1 February 1971, whereby:

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of International Justice, Judgment of 14 June 1936, *Phosphates in Morocco, P.C.I.J., series A/B*, No. 74, p. 22, and International Court of Justice, Judgment of 6 July 1997, *Certain loans in Norway, I.C.J. Reports 1957*, pp. 23-24, and Judgment of 11 June 1998, *Land and maritime boundary between Cameroon and Nigeria, I.C.J. Reports 1998*, pp. 298-299).

[197] "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law, ... 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. ..."

[198] Necessary again for the same reason (cf. para. 30 above): in the absence of clear distinctions and definitions, it is not possible to determine the legal regime applicable to a specific unilateral provision or declaration.

[199] See para. 90 above and paras. 191-193 below.

[200] See paras. 138-139 below.

[201] See, for example: Alain Pellet, "La ratification par la France de la Convention européenne des droits de l'homme", *Revue du droit public*, 1974, pp. 1358-1363; Vincent Coussirat-Coustère, "La réserve française à l'article 15 de la Convention européenne des droits de l'homme, *Journal du droit international*, 1975, pp. 269-293; Gérard Cohen-Jonathan, *La Convention européenne des droits de l'homme*, Économica, Paris, 1989, pp. 564-566, or Paul Tavernier, commentary on article 15 in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert, eds., *La Convention européenne des droits de l'homme — Commentaire article par article*, Économica, Paris, 1995, pp. 493-494.

"In the Supplementary Agreements referred to in article 21[202] the Contracting States may agree: ...

5. Not to apply this Convention to decisions rendered in the course of criminal proceedings ..."

93. The Special Rapporteur hesitated for a long time before proposing the inclusion in the Guide to Practice of draft guidelines on alternatives to reservations. Upon reflection, however, he found it useful to include them for reasons comparable to those which led the Commission to include in the Guide a section 1.4 on "Unilateral statements other than reservations and interpretative declarations";[203] the Guide to Practice has a strictly "utilitarian" purpose, and it is probably not superfluous to remind negotiators of international conventions that within the law of treaties there are, alongside reservations, various approaches making it possible to modify the effects of treaties through recourse to different procedures.

94. It seems useful, therefore, to include in the Guide to Practice a draft guideline 1.7.1[204] with the following wording:

*1.7.1 Alternatives to reservations*

*In order to modify the effects of the provisions of a treaty in their application to the contracting parties, States and international organizations may have recourse to procedures other than reservations.*

95. The question arises whether these procedures should be enumerated in the Guide to Practice (on the understanding that, in any event, such an enumeration would not be exhaustive) or whether such a list should appear only in the commentary. Ever hoping to better meet the needs of users, the Special Rapporteur leans towards the first solution, on the understanding, however, that procedures not specifically defined in other draft guidelines should be defined in the commentary. Since the Guide to Practice is not intended to become an international treaty, such a non-exhaustive enumeration does not appear to have the same drawbacks as when this type of procedure is used in a codification convention. This could be the subject of the following draft guideline:

*1.7.2 Different procedures permitting modification of the effects of the provisions of a treaty*

*Modification of the effects of the provisions of a treaty by procedures other than reservations may, in particular, result from the inclusion in the treaty of:*

– *Restrictive clauses that limit the purpose of obligations deriving from the treaty by making exceptions to and placing limits on them;*

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[202] Article 21 provides as follows: "Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect."

[203] See, in particular, paras. (1) and (2) of the commentary on draft guideline 1.4 (*Official Records of the General Assembly, Fifty-fourth session, Supplement No. 10* (A/54/10), p. 209).

[204] This numbering is provisional. The Commission may perhaps prefer to place the section provisionally numbered 1.7 on alternatives to reservations and interpretative declarations before draft guideline 1.6 on scope of definitions.

– *Escape clauses that allow the contracting parties to suspend the application of general obligations in specific cases and for a limited period;*

– *Statements made under the treaty by which a contracting party expresses its willingness to be bound by obligations that are not imposed on it solely by virtue of its expression of consent to be bound by the treaty.*

*Modification of the effects of the provisions of a treaty may also result from:*

– *Their suspension in accordance with the provisions of articles 57 to 62 of the Vienna Conventions of 1969 and 1986;*

– *Amendments to the treaty which enter into force only between certain parties; or*

– *Supplementary agreements and protocols having as their purpose to modify the treaty only as it affects the relations between certain contracting parties.*

### 2. Procedures for interpreting a treaty other than interpretative declarations

96. Just as reservations are not the only means at the disposal of contracting parties for modifying the application of the provisions of a treaty, interpretative declarations are not the only procedure by which States and international organizations can specify or clarify their meaning or scope.

97. Leaving aside the third-party interpretation mechanisms provided for in the treaty,[205] the variety of such alternative procedures in the area of interpretation is nonetheless not as great. To the best of the Special Rapporteur's knowledge, hardly more than two procedures of this type can be mentioned.

98. In the first place, it is very often the case that the treaty itself specifies the interpretation to be given to its own provisions. Such is the primary purpose of the clauses containing the definition of the terms used in the treaty.[206] Moreover, it is very common for a treaty to provide instructions on how to interpret the obligations imposed on the parties either in the body of the treaty itself[207] or in a separate instrument.[208]

99. Second, the parties, or some of them,[209] may conclude an agreement for the purposes of interpreting a treaty previously concluded between them. This possibility is expressly envisaged in article 31, paragraph 3 (a), of the Vienna Conventions of 1969 and 1986, which requires the interpreter to take into account, together with the context:

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[205] Cf. Denys Simon, *L'interprétation judiciaire des traités d'organisations internationales*, Pedone, 1981, 936 p.

[206] Cf., among countless examples, article 2 of the Vienna Conventions of 1969 and 1986 or article XXX of the Statutes of the International Monetary Fund.

[207] Cf., here again among countless examples, article 13, paragraph 4, of the International Covenant on Economic, Social and Cultural Rights: "No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, ..."

[208] Cf. "Notes and supplementary provisions" to the GATT of 1947. This corresponds to the possibility envisaged in article 30, paragraph 2, of the Vienna Conventions of 1969 and 1986.

[209] Where all the parties to the interpretative agreement are also parties to the original treaty, the interpretation is authentic (see the final commentary of the International Law Commission on article 27, para. 3 (a), of the draft articles on the law of treaties, which became article 30, para. 3 (a), of the Vienna Convention of 1969: *Yearbook... 1966*, vol. II, p. 241, para. 14; cf., with regard to bilateral treaties, draft guideline 1.5.3.

"(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".

100. Moreover, it may happen that the interpretation is "bilateralized".[210] Such is the case where a multilateral convention relegates to bilateral agreements the task of clarifying the meaning or scope of certain provisions. Thus, article 23 of the Hague Conference Convention of 1971 on the recognition and enforcement of foreign judgements in civil and commercial matters, referred to earlier,[211] provides that contracting States shall have the option of concluding supplementary agreements in order, *inter alia*:

"1. To clarify the meaning of the expression 'civil and commercial matters', to determine the courts whose decisions shall be recognized and enforced under this Convention, to define the expression 'social security' and to define the expression 'habitual residence';

2. To clarify the meaning of the term 'law' in States with more than one legal system; ..."

101. It therefore seems desirable to include in the Guide to Practice a provision on alternatives to interpretative declarations, if only for the sake of symmetry with the proposal made above concerning alternatives to reservations.[212] On the other hand, in view of the small number of these alternatives, it does not appear necessary to devote a separate draft guideline to their enumeration. A single draft guideline can cover the two draft guidelines 1.7.1 and 1.7.2.

102. This draft guideline could be drafted as follows:

*1.7.5 Alternatives to interpretative declarations*

*In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, the contracting parties may have recourse to procedures other than interpretative declarations. They may include in the treaty express provisions whose purpose is to interpret the treaty or may conclude supplementary agreements for this purpose.*

103. No special provision concerning alternatives to conditional interpretative declarations[213] appears to be necessary: the alternative procedures listed above are treaty-based and require only the agreement of the contracting parties. It matters little, therefore, whether or not the agreed interpretation constitutes the *sine qua non* of their consent to be bound.

[210] On the "bilateralization" of reservations, see section 2, paragraph 2 (c), below, and draft guideline 1.7.4.

[211] See para. 92 above.

[212] See paras. 93 and 94.

[213] See draft guideline 1.2.1.

## B. Distinction between reservations and other procedures for modifying the effects of a treaty

104. It is sometimes easy to distinguish between the various options available to States for modifying effects of a treaty with reservations; sometimes, however, it is by no means obvious how to draw such a distinction.

105. The fact that provision may be made in the treaty itself for ways of modifying treaty commitments thus provides no indication as to whether or not the procedures chosen can be described as reservations.[214] The problem is all the trickier in that according to the Vienna definition, which is reflected in draft guideline 1.1 in the Guide to Practice, the manner in which a unilateral act is phrased or named does not constitute an element of its definition as a reservation; a treaty may well not use the term "reservation" in describing a method of modifying treaty commitments, whereas the method in question matches the definition of reservations in all respects and must therefore be regarded as a reservation.[215] As pointed out by Georges Droz, "It is sometimes difficult to distinguish between a reservation and an option, in terms of substance. Some provisions are presented as options but are in fact reservations, while other provisions whereby States 'reserve' certain possibilities are in fact only options".[216]

106. For example, is little doubt that the "declarations" made under article 25 of the European Convention on Nationality[217] constitute reservations even though neither the title nor the relevant provision itself contain the word "reservations". On the other hand, in article 17 of the Energy Charter Treaty of 17 December 1994 "each Contracting Party reserves the right to deny the advantages of this Part ...", even though what is involved here is much more a restrictive clause than a reservation.

107. The fact remains that in some cases the distinction between "options" or "alternatives to reservations" and reservations themselves does not pose any particular problem. This is basically so in the case of two hypotheses: on the one hand, when modification of the effects of a treaty does not result from a unilateral statement but from a treaty procedure, despite the doctrinal confusion that has arisen with respect to the notions of "treaty reservations" or "bilateralization", and, on the other hand, when a unilateral statement by a State has the effect of suspending the application of certain provisions of a treaty or of the treaty as a whole or of terminating it. Much trickier problems arise in the case of hypotheses whereby a treaty provides that the parties may choose between treaty provisions, by means of unilateral statements.

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[214] See paras. 110-111 below.

[215] In this connection, see, for example: Ferenc Majoros, "Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", *Journal du droit international* 1974, p. 88.

[216] "Les réserves et les facultés dans les Conventions de La Haye de droit international prive", *Revue critique de droit international privé* 1969, p. 383.

[217] "Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, that it will exclude Chapter VII from the application of the Convention" (on the subject of this provision, see para. 153 below). See also, for example, article 10 of the agreement of 18 December 1997 on humane trapping rules, and article 19 of the Framework Convention of 1 February 1995 for the Protection of National Minorities.

108. For the sake of simplicity, it is preferable to consider each of the procedures in question individually and then to compare them with the definition of reservations.

### 1. Treaty methods of modifying the effects of a treaty

109. One might imagine that there is little likelihood of confusing reservations and some of the procedures for modifying the effects of a treaty listed in draft guideline 1.7.2 above, which do not take the form of unilateral statements but of one or more agreements between the party to a treaty or between certain parties to the treaty. However, whether it is a question of restrictive clauses set out in the treaty, amendments that take effect only as between certain parties to the treaty, or "bilateralization" procedures, problems can arise.

#### (a) Restrictive clauses

110. The fact that a unilateral statement purporting to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author,[218] is specifically provided for by a treaty is not sufficient to characterize such a statement as either being or not being a reservation. This is precisely the object of "reservation clauses" that can be defined as "treaty provisions [... setting] limits within which States should [[219]] formulate reservations and even the content of such reservations";[220] however, other exclusion any clauses with the same or similar effects are nevertheless not reservations within the precise meaning of the word, as defined by the Vienna Conventions and the Guide to Practice.

111. Prof. Pierre-Henri Imbert gives two examples that highlight this fundamental difference, by comparing article 39 of the revised General Act of Arbitration of 28 April 1949[221] with article 27 of the European Convention of 29 April 1957 for the peaceful settlement of disputes.[222] Under article 30, paragraph 2, of the General Act reservations that are exhaustively enumerated and "must be indicated at the time of accession":[223]

> "May be such as to exclude from the procedure described in the present act:
>
> (a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute;
>
> (b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States."

Article 27 of the 1957 Convention reads:

> "The provisions of this Convention shall not apply to:

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[218] Cf. draft guidelines 1.1 and 1.1.1.

[219] It would be more accurate to use the word "may".

[220] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 12. If the Commission decides to devote part of the Guide to Practice to definitions (other than the part on reservations and interpretive declarations), it would be desirable to include a definition of reservation clauses. "Negotiated reservations" (see para. 164 et seq. below) fall within this category.

[221] Article 39 of the General Act of Arbitration of 26 September 1928 was similarly worded.

[222] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 10.

[223] Article 39, para. 1.

(a) Disputes relating to facts or situations prior to the entry into force of this Convention as between the Parties to the dispute;

(b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States."

112. There are striking similarities here: in both cases the aim is to exclude identical types of disputes from methods of settlement provided for by the treaty in question. However, the two approaches work differently: in the 1957 Convention the exclusion is comprehensive and based on the treaty itself; in the General Act the exclusion is just one of a number of possibilities available to States parties, and this exclusion is permitted by the treaty but takes effect only if a unilateral statement is made at the time of accession.[224] Article 39 of the 1949 General Act of Arbitration is a reservation clause; article 27 of the 1957 Convention is a restrictive clause that limits the object of the obligations imposed by the treaty by making exceptions and setting limits thereto, as stated in the definition proposed above, in draft guideline 1.7.2.

113. There are many such restrictive clauses, in treaties on a wide range of subjects, such as the settlement of disputes,[225] the safeguarding of human rights,[226] protection of the environment,[227] trade,[228] and the law of armed conflicts.[229]

114. At first glance, there would appear to be no likelihood of confusion between such restrictive clauses and reservations. However, not only is language usage deceptive and are "such terms as 'public order reservations', 'military imperatives

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[224] It is therefore not entirely accurate to assert, as P. H. Imbert does, that "in practice, article 27 of the European Convention produces the same result as a reservation in respect of the General Act" (ibid., p. 10). This is true only of the reserving State's relations with other parties to the General Act, and not of such other parties' relations among themselves, to which the treaty applies in its entirety.

[225] In addition to article 27 of the above-mentioned 1957 European Convention, see, for example, article I of the Franco-British Arbitration Agreement of 14 October 1903, which has served as a model for a great number of subsequent treaties: "differences which may arise of a legal nature, or relating to the interpretation of Treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties".

[226] Cf. the "clawback clauses" referred to above in note 181. For example (again, there are innumerable examples), article 4 of the 1966 Covenant on Economic, Social and Cultural Rights: "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society".

[227] Cf. article VII ("Exemptions and other special provisions relating to trade") of the Convention of 3 March 1973 on international trade in endangered species of wild fauna and flora, or article 4 (Exceptions) of the Lugano Convention of 21 June 1993 on Civil Liability for damage resulting from activities dangerous to the environment.

[228] Cf. article XII ("Restrictions to safeguard the balance of payments"), article XIV ("Exceptions to the rule of non-discrimination"), article XX ("General exceptions") or article XXI ("Security exceptions") of the 1947 General Agreement on Tariffs and Trade.

[229] Cf. article 5 of the Geneva Conventions of 12 August 1949 ("Derogations").

reservations', or 'sole competence reservations' frequently encountered",[230] but authors, including the most distinguished among them, have caused an unwarranted degree of confusion. For example, in an oft-quoted passage [231] from the dissenting opinion that he appended to the Judgment of the International Court of Justice rendered on 1 July 1952 in the *Ambatielos (Preliminary objection)* case, Judge Zoričić stated the following:

> "A reservation is a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning."[232]

115. More ambiguously, but nevertheless in an unfortunate manner, Georges Scelle also causes confusion in defining a reservation as "a *treaty clause* emanating from one or *more* governments that have signed or acceded to a treaty and setting up a legal regime derogating from the normal treaty regime".[233]

116. Although the confusion appears to be only doctrinal, the Commission could help to clear up the misunderstandings in question if it were to include in the Guide to Practice, an appropriate draft guideline, which could be inserted in section 1.7 on alternatives to reservations[234] and would read:

> *1.7.3 Restrictive clauses*
>
> *A provision in a treaty that purports to limit or restrict the scope or application of more general rules contained in the treaty does not constitute a reservation within the meaning of the present Guide to Practice.*

**(b) Amendments that enter into effect only as between certain parties to a treaty**

117. It would not appear to be necessary to dwell on another treaty procedure that would facilitate flexible application of a treaty: amendments (and additional protocols) that enter into effect only as between certain parties to a treaty.

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[230] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 10, for an instance of a "public order reservation", see the first paragraph of article 6 of the Havana Convention of 20 February 1928 regarding the Status of Aliens in the respective Territories of the Contracting Parties: "for reasons of public order or safety, States may expel foreigners domiciled, resident, or merely in transit through their territory". For an example of a "sole competence reservation", see article 3, paragraph 11, of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: "nothing contained in this article [on "Offences and sanctions] shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law".

[231] Cf. Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" in *The British Year Book of International Law* 1957, pp. 272-273; however, although he quotes this definition with apparent approval, this distinguished author departs from it considerably in his commentary.

[232] *I.C.J. Reports, 1952*, p. 76.

[233] *Précis de droit des gens (Principes et systématiques)*, Sirey, Paris, vol. 2, 1934, p. 472; emphasis added.

[234] Another option would be to include it in section 1.1 on the definition of reservations.

118. This procedure, which is provided for in article 40, paragraphs 4 and 5,[235] (and article 30, paragraph 4)[236] and article 41[237] of the 1969 and 1986 Vienna Conventions,[238] is applied as a matter of routine. Even if, in terms of its general approach and as regards some aspects of its legal regime (respect for the fundamental characteristics of the treaty, though it does not contain a reference to its "object and purpose"), it is similar to procedures that characterize reservations, it is nonetheless very different in many respects:

The flexibility it achieves is not the product of a unilateral statement by a State, but of agreement between two or more parties to the initial treaty;

Such agreement may be reached at any stage, generally following the treaty's entry into effect for its parties,[239] which is not so in the case of reservations that must be formulated at the time of the expression of consent to be bound, at the latest; and

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[235] Article 40 — Amendment of multilateral treaties:
"4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such States.
"5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
(a) Be considered as a party to the treaty as amended;
(b) Be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

[236] Article 30 — Application of successive treaties relating to the same subject-matter:
"3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59 [on termination or suspension of the operation of a treaty implied by conclusion of a later treaty], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
"4. When the parties to the later treaty do no include all the parties to the earlier one:
(a) As between parties to both treaties the same rule applies as in paragraph 3;
(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

[237] Article 41 — Agreements to modify multilateral treaties between certain of the parties only:
"1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
(a) The possibility of such a modification is provided for by the treaty; or
(b) The modification in question is not prohibited by the treaty and:
(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

[238] In its commentary to the corresponding draft articles (article 36, paras. 4-5 (and article 26, para. 4) and article 37), the Commission takes great care to distinguish between "formal amendments" and agreements making "modifications" (cf. *Yearbook* ... 1966, vol. II, p. 232, para. 3, and p. 235, para. 1). Such a distinction does not seem relevant for the purposes of a comparison with reservations.

[239] This is not always the case, however; cf. the well-known New York Agreement of 29 July 1994 relating to the implementation of Part XI of the United Nations Convention of 10 December 1982 on the Law of the Sea.

It is not a question here of excluding or modifying *the legal effect* of certain provisions of the treaty *in their application*", but in fact of modifying *the provisions in question themselves*;[240]

Moreover, whereas reservations can only limit their author's treaty obligations or make provision for equivalent ways of implementing a treaty,[241] amendments and articles can have the effect of both extending and limiting the obligations of States and international organizations party to a treaty.

119. Since there is no fear of confusion in the case of reservations, no clarification is called for and it would appear unnecessary to devote a specific guideline in the Guide to Practice to drawing a distinction which is already quite clear. It will suffice to mention that in this case there is a possible alternative to reservations, in draft guideline 1.7.2, as suggested above. However, some specific agreements concluded between two or more States Parties to basic treaties purporting to produce the same effects as those produced by reservations pose special problems, and it would be possible (and desirable) to combine the two in a single draft guideline.[242]

### (c) "Bilateralization" of "reservations"

120. These specific agreements, which are sometimes equated with reservations, fall within the category of the "bilateralization" method, the doctrine of which was examined at The Hague Conference on Private International Law on the occasion of the elaboration of the Convention of 1 February 1971 on the recognition and enforcement of foreign judgements in civil and commercial matters.

121. The bilateralization regime has been described as permitting "contracting States, while being parties to a multilateral convention, to choose the partners with which they will proceed to implement the regime provided for".[243] This is not an innovation of the 1971 Convention, since it can be traced back to article XXXV, paragraph 1, of the 1947 General Agreement on Tariffs and Trade.[244] Moreover, a number of conventions on private international law adopted earlier in the context of the Hague Conference had already at least partially achieved the goal of free choice of partners, by allowing the parties to refuse to be bound vis-à-vis States that had

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[240] In this connection: J. M. Ruda "Reservations to Treaties", *Recueil des cours de l'Académie de droit international* 1975-III, vol. 146, pp. 107-108.

[241] Cf., draft guidelines 1.1.5-1.1.6 and, on the other hand, 1.4.1, 1.4.2 and 1.5.1.

[242] See draft guideline 1.7.4 and para. 130 below.

[243] M. H. Van Hoogstraten, "*L'état présent de la Conférence de La Haye de Droit International Privé*", in *Virginia Journal of International Law, The Present State of International Law*, Kluwer, Deventer, 1973, p. 287.

[244] "This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting Party and any other contracting party if (a) the two contracting parties have not entered into tariff negotiations with each other, and (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application." See Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 199. The practice of "lateral agreements" (cf. Dominique Carreau and Patrick Juillard, *Droit international économique*, Libraire général de droit et de jurisprudence, Paris, 1998, pp. 54-56 and 127) has accentuated this bilateralization. See also article XIII of the Agreement Establishing the World Trade Organization.

not participated in the conventions' adoption[245] or making the effect of the accession of such States subject to the specific consent of contracting States.[246] The same applies to article 37 of the European Convention of 16 May 1972 on State Immunity, adopted in the context of the Council of Europe.[247]

122. The general approach involved in this procedure is not comparable with the approach on which the reservations method is based; it allows a State to exclude by means of its silence or by means of a specific declaration, the application of a treaty as a whole in its relations with one or more other States and not to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain aspects. It is more comparable with statements of non-recognition, where such statements purport to exclude the application of a treaty between a declaring State and the non-recognized entity.[248]

123. However, in response to a Belgian proposal, the 1971 Enforcement Convention goes further than these traditional bilateralization methods. It not only makes the Convention's entry into effect with respect to relations between two States subject to the conclusion of a supplementary agreement,[249] but it also permits the two States to modify their commitment *inter se* within the precise limits set in article 23;[250]

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[245] Cf., for example, article 13, paragraph 4, of the Companies Convention of 1 June 1956: Accession shall have an effect only on relations between the acceding State and States which raise no objection in the six months following this communication (quoted by P. H. Imbert, op. cit., p. 200, who also refers to article 12 of the Legalization Convention of 5 October 1961, article 31 of the Maintenance-enforcement Convention of 2 October 1973, and article 42 of the Administration of Estates Convention of 2 October 1973). For more recent examples, see article 44, paragraph 3, of The Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption, article 58, paragraph 3, of The Hague Convention of 19 October 1996 concerning competence, applicable law, recognition, execution and cooperation in matters relating to parental responsibility and measures for the protection of children, or article 54, paragraph 3, of the Convention of 2 October 1999 on the international protection of adults.

[246] Cf., for example, article 17, paras. 2-3, of the Children's maintenance-enforcement Convention of 15 April 1958:

> The Convention shall take effect, as between the acceding State and the State which has declared that it accepts such accession on the sixtieth day following the day on which the instrument of accession is deposited.
>
> Accession shall have an effect on only relations between the acceding State and contracting States which have declared that they accept such accession ... (quoted by P. H. Imbert, op. cit., who also refers to article 13 of the contractual forum-sales convention of 15 April 1958, article 21 of the Protection of Infants Convention of 5 October 1961, article 39 of the Taking of Evidence Convention of 18 March 1970, article 28 of the Divorce Convention of 1 June 1970, and article 18 of the Traffic Accidents Convention of 4 May 1971; also see P. Jenard, "Une technique originale: La bilatéralisation de conventions multilatérales", *Belgian Review of International Law* 1966, p. 389).

[247] "3. ... if a State having already acceded to the Convention notifies the Secretary General of the Council of Europe of its objection to the accession of another non-member State, before the entry into force of this accession, the Convention shall not apply to the relations between these two States."

[248] Cf. draft guideline 1.4.3 and paras. (5)-(9) of the commentary (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 277-279).

[249] See note 202 above for the text of article 21 of the Convention.

[250] Mentioned above in paras. 92 and 100. The initial Belgian proposal did not envisage this modification possibility, which was established subsequently as the discussions progressed (Cf. P. Jenard, "Une technique originale: La bilatéralisation de conventions multilatérales", *Belgian Review of International Law* 1966, pp. 392-393).

"In the Supplementary Agreements referred to in article 21 the Contracting States may agree: ..."

Below is a list of 23 possible ways of modifying the Convention, whose purposes, as summarized in the explanatory report of C. N. Fragistas, are as follows:

"1. *To clarify a number of technical expressions used by the Convention* whose meaning may vary from one country to another (article 23 of the Convention, items No. 1, 2, 6 and 12);

2. *To include within the scope of the Convention matters that do not fall within its scope* (article 23 of the Convention, items No. 3, 4 and 22);

3. *To apply the Convention in cases where its normal requirements have not been met* (article 23 of the Convention, items No. 7, 8, 9, 10, 11, 12 and 13);

4. *To exclude the application of the Convention in respect of matters normally covered by it* (article 23 of the Convention, item No. 5);

5. *To declare a number of provisions inapplicable* (article 23 of the Convention, item No. 20);

6. *To make a number of optional provisions of the Convention mandatory* (article 23 of the Convention, items No. 8*bis* and 20);

7. *To regulate issues not settled by the Convention or adapt a number of formalities required by it to domestic legislation* (article 23 of the Convention, items No. 14, 15, 16, 17, 18 and 19)".[251]

124. According to Prof. P. H. Imbert, many of these alternatives "simply permit States to define words or to make provision for procedures; however, a number of them restrict the effect of the Convention and are genuine reservations (particularly those set out in paragraph 5, 8, 13, 19 and 20)".[252] The Special Rapporteur does not agree.

125. These options, which permit States concluding a supplementary agreement to exclude from the application of the Convention certain categories of jurisdictional decisions or not to apply certain provisions thereof, either as a general rule or in particular circumstances, do indeed purport to exclude or modify the legal effect of certain provisions of the Convention or of the Convention as a whole with respect to certain specific aspects, in their application to the two States. However, and this is a fundamental difference, such exclusions or modifications are not the product of a unilateral statement, which constitutes an essential element of the definition of reservations,[253] but, rather, an agreement between two of the States parties to the basic convention that does not affect the other Contracting Parties to the Convention.

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[251] Conférence de la Haye, *Actes et documents de la session extraordinaire*, 1966, p. 364 — emphasis in the original text. Also see Georges A. L. Droz, "Le récent projet de Convention de La Haye sur la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale", *Netherlands International Law Review* 1966, p. 240.

[252] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 200.

[253] Cf. draft guideline 1.1.

126. As Georges Droz states, "if such provisions had been set out in the body of the Treaty itself, they would have constituted genuine reservations [254], but as a result of bilateralization they are confined to relations between two partners. The wish to eliminate the classic reservation system is obvious".[255]

"The system leads to the elaboration of two instruments: a multilateral convention, on the one hand, and a supplementary agreement, on the other, which, although based on the multilateral convention, nevertheless has an independent existence".[256] The supplementary agreement is, so to speak, an instrument that is not a prerequisite for the entry into effect of the Convention but for ensuring that the Convention has effects on relations between the two States concluding the agreement, since its effects will otherwise be diminished (and it is in this respect that its similarity to the reservations procedure is particularly obvious) or increased; however, its treaty nature precludes any equation with reservations.

127. The 1971 Enforcement Convention is not the only treaty that makes use of this procedure of pairing a basic convention and a supplementary agreement, thus permitting the introduction to the convention of alternative contents, even though the convention is a typical example and probably a more refined product. Reference may also be made, *inter alia*, to:[257]

Article 20 of The Hague Convention of 15 November 1965 on the service of judicial documents, which permits contracting States to "agree to dispense with" a number of provisions; "but its application is not [based] on the free choice of a partner";[258]

Article 34 of the Convention of 14 June 1974 on the Limitation Period in the International Sale of Goods, which prompts the same comment;

Articles 26, 56 and 58 of the European Convention of 14 December 1972 on social security, which with similar wording states:

> "The application [of certain provisions] as between two or more Contracting Parties shall be subject to the conclusion between those Parties of bilateral or multilateral agreements which may also contain appropriate special arrangements";

or, for more recent examples:

Article 39, paragraph 2, of The Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption:

> "Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have

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254 *Sic.* see (a) above and draft guideline 1.7.3.

255 Georges A. L. Droz, "Les réserves et les facultés dans les Conventions de La Haye de droit international privé", *Revue critique de droit international privé* 1969, p. 391.

256 P. Jenard, Rapport du Comité restreint sur la bilatéralisation, Conférence de La Haye, *Actes et documents de la session extraordinaire*, 1966, p. 145. Also see the explanatory report by C. N. Fragistas, ibid., pp. 363-364.

257 These examples are taken from Pierre-Henri Imbert, op. cit., note 244 above, p. 201.

258 Ibid.; also see Georges A. L. Droz, op. cit., note 255 above, pp. 390-391. In fact, this procedure bears a resemblance to amendments between certain parties to the basic convention alone.

concluded such an agreement shall transmit a copy to the depositary of the Convention".[259]

or article 5 (Voluntary extension) of the Helsinki Convention of 17 March 1992 on the Transboundary Effects of Industrial Accidents:

"Parties concerned should, at the initiative of any of them, enter into discussions on whether to treat an activity not covered by Annex I as a hazardous activity ... Where the parties concerned so agree, this Convention, or any part thereof, shall apply to the activity in question as if it were a hazardous activity."

128. It seems inappropriate to devote a draft guideline to bilateralization as such since this treaty procedure does not have a *ratione materiae* effect but, rather, a *ratione personae* effect. On the other hand, there are quite powerful reasons in favour of a draft guideline on "bilateralized reservations" purporting to produce, in the relations of parties to a supplementary agreement, the same effect as that produced by reservations proper with which they are sometimes wrongly equated.

129. Such a draft guideline might read:

*1.7.4. ["Bilateralized reservations"] [Agreements between States having the same object as reservations]*

*An agreement [, concluded under a specific provision of a treaty,] by which two or more States purport to exclude or to modify the legal effect of certain provisions [of the] [of a] treaty or of the treaty as a whole in their application to their relations inter se does not constitute a reservation within the meaning of the present Guide to Practice.*

130. The alternative titles proposed for this draft guideline are intended to indicate that two approaches are conceivable: the Commission may wish to limit the guideline strictly to supplementary "bilateralization" agreements and, in that event, the logical title is the first one (even though using inverted commas does not work well)[260] and it would be desirable to include in the text the wording inside square brackets: or the Commission may wish to opt for a more general formulation to cover comprehensively all agreements containing derogations, in other words, both "bilateralized reservations" and amendments and protocols between certain parties to treaties only and the second solution (without the words inside square brackets) would seem to be preferable. The Special Rapporteur himself has a preference for the second alternative, in the interest of achieving the greatest completeness possible, even though, as indicated above,[261] amendments and protocols do not give rise to serious problems of definition vis-à-vis reservations. In either case, the nuances of the various possible formulations should be discussed in the commentary to this draft guideline.

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[259] Once again, one cannot truly speak of bilateralization in a strict sense since this provision does not call for the choice of a partner. Also see article 52 of the draft Hague convention of 19 October 1996 concerning competence, applicable law, recognition, execution and cooperation in matters relating to parental responsibility and measures relating to protection of children, or article 49 of The Hague convention of 2 October 1999 on international protection of adults.

[260] Inverted commas were used in the title of draft guideline 1.5.1. on "'Reservations' to bilateral treaties", but that approach was criticized by the representative of Spain in the Sixth Committee (see note 135 above).

[261] In section (b).

### 2. Unilateral declarations purporting to suspend a treaty or certain provisions thereof

131. Unlike in the case of the procedures considered above, which reflect agreement between the parties to the treaty or between certain parties to it, the notifications in question in this paragraph are unilateral statements just as reservations are. And as in the case of reservations, they can purport to exclude the legal effect of certain provisions of a treaty in their application to the author of the notification, but only on a temporary basis. They can also suspend application of the treaty as a whole; in such cases, they are subject to the same legal regime as in the case of notifications of withdrawal or termination. Even though they are generally considered from a different angle, notifications made under a waiver or escape clause differ from the preceding clauses only with respect to their legal basis (since provision is made for them by means of a treaty provision, and not in the form of the general international law of treaties).

#### (a) Notifications of suspension, denunciation or termination of a treaty

132. Under article 65, paragraph 1, of the 1969 and 1986 Vienna Conventions:

> "A party which, under the provisions of the present Convention[262] invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it, or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor."

133. Unquestionably, unilateral statements are what is being dealt with here. However, that is where all possible comparisons with reservations end. These notifications do not purport "to exclude or modify the legal effect of *certain provisions* of a treaty", "or of the Treaty as a whole *with respect to certain specific aspects*",[263] but to put an end to the instrument that the treaty constitutes (in the case of notification of termination",[264] to treaty relations (in the case of notification of withdrawal or denunciation of a multilateral treaty)[265] or to release the parties "between which the operation of the treaty is suspended from the obligation to perform the treaty [*as a whole*] in their mutual relations during the period of the suspension".[266]

134. The problem of a possibly increasing similarity to reservations could, however, arise if the suspension did not affect the treaty as a whole but only certain provisions thereof: in such a case,[267] it is indeed a question of temporarily excluding the legal

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[262] See para. 73 above.

[263] Cf. draft guidelines 1.1 and 1.1.1.

[264] Cf. article 70, paragraph 1, of the Vienna Conventions.

[265] Cf. article 70, paragraph 2, of the Vienna Conventions.

[266] Article 72 of the Vienna Conventions.

[267] This possibility is not excluded by the Vienna Conventions (despite their obvious caution): cf. article 57 (a) (Suspension of a treaty under its provisions) and article 44 of the two Conventions on "separability of treaty provisions"). See Paul Reuter, "Solidarité et divisibilité des engagements conventionnels" *in* Y. Dinstein, ed., *International Law at a Time of Perplexity — Essays in Honour of Shabtai Rosenne*, Nijhoff, Dordrecht, 1989, pp. 623-634, also reproduced *in* Paul Reuter, *Le développement de l'ordre juridique international-Écrits de droit international*, Économica, Paris, 1995, pp. 361-374.

effect of certain provisions of a treaty in their application to the State or international organization that made the notification of partial suspension. And the temporary nature of such exclusion is not a decisive element in the differentiation from reservations, since reservations may be formulated for just a fixed period.[268] Moreover, reservation clauses can impose such a provisional nature.[269]

135. However, even in the case of a notification of partial suspension, a fundamental element of the definition of reservations is still lacking, since it can be assumed that such a notification is not made by a State "when signing, ratifying, formally confirming, accepting or approving a treaty or by a State when making a notification of succession to a treaty"[270] or, more generally, by its author when expressing consent to be bound,[271] but, on the contrary, after the treaty has taken effect for the author, which suffices in order to distinguish clearly between such unilateral statements and reservations.

136. Furthermore, the Vienna Conventions make such statements subject to a legal regime that differs clearly from the reservations regime.[272]

**(b) Notifications made under a waiver or an escape clause**

137. It can happen that the suspension of the effect of the provisions of a treaty is the result of a notification not made, as in the hypothesis considered above, under the rules of general international treaty law, but on the basis of specific provisions set out in the treaty itself.

138. As indicated above,[273] such escape clauses fall into two categories:[274] waivers and escape clauses. Although some authors do not draw a clear distinction between the two,[275] it can be assumed that escape clauses permit a contracting party

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[268] Frank Horn offers the example of ratification by the United States of the 1933 Montevideo Convention on Extradition, with the reservation that certain provisions thereof should not be applicable to the United States "... until subsequently ratified in accordance with the Constitution of the United States" (*Reservations and Interpretative Declarations to Multilateral Treaties*, Swedish Institute of International Law, Studies in International Law, No. 5, Tobias Michael Carel Asser Instituut, The Hague, 1988, p. 100).

[269] Cf. article 25, paragraph 1, of the 1967 European Convention on the adoption of children, and article 14, paragraph 2, of the 1975 European Convention on the legal status of children born out of wedlock, whose wording is identical: "A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period"; or article 20 of the Hague Divorce Convention of 1 June 1970, which authorizes Contracting States which do not provide for divorce to reserve the right not to recognize a divorce, but whose paragraph 2 states: "This reservation shall have effect only so long as the law of the State utilizing it does not provide for divorce".

[270] Draft guideline 1.1.

[271] Cf. draft guideline 1.1.2.

[272] Cf., in particular, articles 65, 67, 68 and 72.

[273] Para. 83.

[274] Cf. Patrick Daillier and Alain Pellet, *Droit international public (Nguyen Quoc Dinh)*, Libraire générale de droit et de jurisprudence, Paris, 6th ed., 1999, pp. 218 or 302.

[275] Aleth Manin provides a broad definition of "escape clauses", which covers both escape clauses *stricto sensu* and waivers: "The term 'escape clauses' is used to refer to the provisions set out in certain international agreements which offer contracting parties which invoke them the option of temporarily derogating, either fully or partially, from the provisions contained in such agreements as and when certain circumstances justify their application, upon completion of a

temporarily not to meet certain treaty requirements owing to the difficulties it is encountering in fulfilling them as a result of special circumstances, whereas waivers, which produce the same effect, must be authorized by the other contracting parties or by an organ responsible for monitoring treaty implementation. That is to say, notifications made on the basis of an escape clause produce effects *ipso facto*, owing solely to the fact that they are notified to the other parties or to the depositary by the beneficiary State, whereas only authorization by the other contracting States or, more often, by an organ of an international organization, gives effect to notifications under a waiver.

139. A comparison of article XIX, paragraph 1, and article XXV, paragraph 5, of the 1947 General Agreement on Tariffs and Trade shows the difference clearly.[276] The first article reads:

> "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to threaten serious injury to domestic producers in that territory of like products, the contracting party shall be free, in respect of such products, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."[277]

This is an escape clause. On the other hand, the general provision laid down in article XXV, paragraph 5 (entitled "Joint Action by the Contracting Parties"), is a waiver:

> "In exceptional circumstance not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a Contracting Party by this Agreement; provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the Contracting Parties."[278]

140. The shared characteristic of these two types of clauses is that they authorize States parties to the treaty containing them to suspend their treaty obligations temporarily. In that respect they bear a similarity to reservations, without there being any reason to focus on the distinction between escape clauses and waivers, since a

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procedure determined by each agreement considered" ("À propos des clauses de sauvegarde", *Revue trimestrielle de droit européen*, 1970, p. 1). Also see Michel Virally, op. cit., note 165 above, pp. 14-15, or Fatsah Ouguergouz, "L'absence de clauses de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général", *Revue général de droit international public*, 1994, p. 290.

[276] Cf. Dominique Carreau and Patrick Juillard, *Droit international économique*, Libraire générale de droit et de jurisprudence, Paris, 4th edition, 1998, p. 104. Article 15 of the European Convention on Human Rights (see note 197 above) provides another well-known example of an escape clause, in a very different field.

[277] This option has been regulated but not abolished by the 1994 GATT Agreement on Safeguards (Marrakesh, 15 April 1994).

[278] The same applies, for example, to article VIII, section 2 (a), of the IMF Agreement: "... no member shall, *without the approval of the Fund*, impose restrictions on the making of payments and transfers for current international transactions".

treaty may make the formulation of a reservation subject to the reactions of the other parties,[279] which means that it is closer to a waiver than to an escape clause.

141. As stated by Prof. Aleth Manin, "the identical approach taken in the case of the two methods is noteworthy. Both approaches appear to show little concern for the integrity of an international agreement, since they prefer a more universal application thereof. The option of formulating reservations is an element that is likely to promote more widespread acceptance of international treaties. Similarly, the fact that it is possible to release oneself or be released for a given period of time from one's international obligations is such as to encourage a hesitant State to enter finally into a commitment that offers it a number of advantages".[280]

142. "There, however, the similarity between the two procedures ends."[281] In fact, in the case of a reservation, the partners of the reserving State or international organization are informed at the outset of the limits on the commitment of that State or organization, whereas in the case of a declaration under an escape clause, the aim is to remedy unforeseeable difficulties arising from the application of the treaty. The time element of the definition of reservations is thus absent, as it is in the case of all unilateral statements purporting to suspend the provisions of a treaty.[282]

143. For the sake of completeness, a guideline with the following wording could be included in section 1.4 of the Guide to Practice, on "Unilateral statements other than reservations and interpretative declarations":

*A unilateral declaration by which a State or an international organization purports to notify its intention to suspend the application of [all or] certain provisions of a treaty [whether in application of an escape clause or a waiver or under general rules on the suspension of treaties] is outside the scope of the present Guide to Practice.*

144. However, since there is no likelihood of serious confusion between such notifications and reservations it is not essential to include such a guideline in the Guide to Practice.

### 3. Procedures providing for a choice between provisions of a treaty by means of a unilateral statement

145. The distinction between reservations on the one hand and unilateral statements made on the basis of a treaty clause which allows States to choose between the treaty's provisions on the other hand, however, proves to be far more problematic.

146. In an effort to clarify this matter, it would be useful to look at in succession:

- Statements by which a State, exercising an option provided for in a treaty, excludes the application of certain provisions of the treaty;
- Statements by which, conversely, a State accepts obligations which the treaty specifically presents as being optional;

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279 Cf. the examples given by P. H. Imbert, op.cit., note 244 above , pp. 174-176.

280 Aleth Manin, "À propos des clauses de sauvegarde", *Revue trimestrielle de droit européen*, 1970, p. 3.

281 Ibid.

282 See para. 135 above. See also, in that connection, Sia Spiliopoulo Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", *International and Comparative Law Quarterly*, 1999, pp. 501-502.

– Lastly, statements by which a State chooses between obligations deriving from a treaty, again in exercise of an option provided for in the treaty itself.

147. Three preliminary comments must be made here:

1. First, the specific purpose of these unilateral statements is, once again, to modify the application of the treaty to which they relate in order to facilitate accession thereto; in this way such statements come close to being reservations as defined in the Vienna Conventions and the Guide to Practice;

2. Secondly, as has already been noted[283] the fact that such options are provided for in the treaty whose application they seek to modify clearly does not of itself afford sufficient grounds for distinguishing between such unilateral statements and reservations: the purpose of reservation clauses is also to allow States to suspend the application of certain provisions of the treaty even though this may entail certain conditions;

3. Thirdly, and lastly, the distinction between the three formulas above is not always obvious,[284] particularly as they can occasionally be combined. Nevertheless, from an intellectual standpoint, they can and must be considered separately when comparing them to reservations as defined in draft guideline 1.1 and those that follow.

**(a) Unilateral statements excluding the application of certain provisions of a treaty under an exclusionary clause**

148. This case is contemplated by article 17, paragraph 1, of the 1969 and 1986 Vienna Conventions:

> "Without prejudice to articles 19 to 23, the consent of a State [or of an international organization] to be bound by part of a treaty is effective only if the treaty so permits ...".

149. This provision, which was adopted without modification by the 1968-1969 Vienna Conference,[285] is explained by the International Law Commission as follows in its final report of 1966 on the draft articles on the law of treaties:

> "Some treaties expressly authorize States to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, acceptance, approval or accession is admissible. But in the absence of such a provision, the established rule is that the ratification, accession etc. must relate to the treaty as a whole. Although it may be admissible to formulate reservations to selected provisions of the treaty under the rule stated in article 16 [19 in the text of the Convention], it is inadmissible to subscribe only to selected parts of the treaty. Accordingly, paragraph 1 of the article lays down that without prejudice to the provisions of articles 16 to 20 [19 to 23] regarding reservations to multilateral treaties, an expression of consent by a

[283] See para. 110 above.

[284] For examples, see paras. 180 or 203 and 204 below.

[285] See *United Nations Conference on the Law of Treaties, First and second sessions (Vienna, 26 March-24 May 1968 and 9 April-2 May 1969)*, Documents of the Conference (United Nations publication, Sales No. E.70.V.5), Reports of the Committee of the Whole, paras. 156-157, pp. 129-130.

State to be bound by part of a treaty is effective only if the treaty or the other contracting States authorize such a partial consent."[286]

150. One thing that is immediately obvious about this provision is the fact that while it appears in section 1 of part II ("Conclusion of treaties"), it creates a link with articles 19 to 23, which are specifically devoted to reservations. Thus it becomes even more important to determine whether statements by which a State or an international organization expresses its consent to be bound only to part of a treaty when a treaty so permits are reservations or not.

151. Such exclusionary clauses (opting or contracting out) are quite common. Samples can be found in the conventions adopted under the auspices of The Hague Conference on Private International Law, the Council of Europe and ILO and in various other conventions.[287] Among the latter, one may cite by way of example article 14, paragraph 1, of the London Convention of 2 November 1973 for the Prevention of Pollution from Ships:

"A State may, at the time of signing, ratifying, accepting, approving or acceding to the present Convention declare that it does not accept any one or all of Annexes III, IV and V (hereinafter referred to as "Optional Annexes") of the present Convention. Subject to the above, Parties to the Convention shall be bound by any Annex in its entirety".

152. The Hague Conference, which is surely the most inventive body when it comes to modifying the provisions of treaties drafted under its auspices, has used exclusionary clauses on many occasions:

– Article 8, first subparagraph, of the Convention of 15 June 1955 relating to the settlement of the conflicts between the law of nationality and the law of domicile:

"Each Contracting State, when signing or ratifying the present Convention or acceding thereto, may declare that it excludes the application of this Convention to disputes between laws relating to certain matters".

– Article 9 of The Hague Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and foundations:

"Each Contracting State, when signing or ratifying the present Convention or acceding thereto, may reserve the right to limit the scope of its application, as stipulated in article 1".

153. The appearance of exclusionary clauses in conventions concluded by the Council of Europe is also common:[288]

– Article 34, paragraph 1, of the European Convention for the peaceful settlement of disputes of 29 April 1957:

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[286] *Yearbook ... 1966*, vol. II, pp. 219-220.

[287] The provisions which follow are cited by way of example and in no way exhaust the list of exclusionary clauses of conventions adopted in these forums. For other examples, see in general P. H. Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, pp. 171-172.

[288] For other examples, see Sia Spiliopoulo Åkermark, "Reservation clauses in treaties concluded within the Council of Europe", *ICLQ*, 1999, pp. 504-505.

"On depositing its instrument of ratification, any one of the High Contracting Parties may declare that it will not be bound by:

(a) Chapter III relating to arbitration; or

(b) Chapters II and III relating to conciliation and arbitration."

– Article 7, paragraph 1, of the Council of Europe Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality of 6 May 1963:

"Each Contracting Party shall apply the provisions of Chapters I and II.

"It is however understood that each Contracting Party may declare, at the time of ratification, acceptance or accession, that it will apply the provisions of Chapter II only. In this case the provisions of Chapter I shall not be applicable in relation to that Party."

– Article 25, first subparagraph, of the European Convention on Nationality of 6 November 1997:

"Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, that it will exclude Chapter VII from the application of this Convention."

154. International labour conventions also make use of this technique, in keeping with the spirit of article 19 of the ILO Constitution:[289]

– Article 2 of International Labour Convention No. 63 of 1938, concerning statistic of wages and hours of work:

"1. Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude from its acceptance of the Convention:

(a) any one of Parts II, III or IV; or

(b) Parts II and IV; or

(c) Parts III and IV.

2. Any Member which has made such a declaration may at any time cancel that declaration by a subsequent declaration.

3. Every Member for which a declaration made under paragraph 1 of this Article is in force shall indicate each year in its annual report upon the application of this Convention the extent to which any progress has been made with a view to the application of the Part or Parts of the Convention excluded from its acceptance".

– Article 17, paragraph 1,[290] of International Labour Convention No. 119 of 25 June 1963, concerning the guarding of machinery:

"The provisions of this Convention apply to all branches of economic activity unless the Member ratifying the Convention specifies a more limited application by a declaration appended to its ratification".

[289] See para. 75 above.

[290] Paragraph 2 governs statements made in accordance with paragraph 1 and limits the application of the provisions of the Convention.

155. International labour conventions (and other treaties) also contain more complex provisions that cannot be compared to exclusionary clauses, since ultimately they allow States Parties to exclude the application of certain provisions of the convention in respect of themselves while compelling them to accept others which are nevertheless quite different.[291]

156. As far as the Special Rapporteur knows, the great majority of authors who have taken up the question of whether or not statements made in application of such exclusionary clauses are reservations maintain that they are.[292]

157. The strongest argument that they are not clearly derives from ILO's consistent strong opposition to such an assimilation, even though that organization regularly resorts to the opting-out procedure. In its reply to the Commission's questionnaire, ILO wrote, in a long passage which is worth citing in its entirety here:

> "It has been the consistent and long-established practice of the ILO not to accept for registration instruments of ratification of international labour Conventions when accompanied with reservations. As has been written, 'this basic proposition of refusing to recognize any reservations is as old as ILO itself' (see W. P. Gormley, 'The Modification of Multilateral Conventions by Means of Negotiated Reservations and Other Alternatives: A Comparative Study of the ILO and Council of Europe', *Fordham Law Review*, 1970, p. 65). The practice is not based on any explicit legal provision of the Constitution, the Conference Standing Orders, or the international labour Conventions, but finds its logical foundation in the specificity of labour Conventions and the tripartite structure of the Organization. Reference is usually made to two Memoranda as being the primary sources for such firm principle: first, the 1927 Memorandum submitted by the ILO Director to the Council of the League of Nations on the Admissibility of Reservations to General Conventions, and second, the 1951 Written Statement of the International Labour Organization in the context of the ICJ proceedings concerning the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.
>
> "In his Memorandum to the Committee of Experts for the Codification of International Law, the ILO Director General wrote with respect to labour Conventions:
>
> > "'these agreements are not drawn up by the Contracting States in accordance with their own ideas: they are not the work of plenipotentiaries, but of a conference which has a peculiar legal character and includes non-government representatives. Reservations would still be inadmissible, even if all the States interested accepted them; for the rights which the treaties have conferred on non-governmental interests in regard to the adoption of international labour Conventions would be overruled if the consent of the Governments alone could suffice to modify the substance and detract from the effect of the Conventions' (see League of Nations, *Official Journal, 1927*, at p. [882]).

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[291] See section (c) below.

[292] Some authors, however, without specifically taking a position, see distinct differences between contracting out and reservations (see Bruno Simma, "From Bilateralism to Community Interest in International Law", *RCADI*, 1994-VI, vol. 250, pp. 329-331).

"In the same vein, the ILO Memorandum, submitted to the ICJ in 1951, read in part:

> "'international labour conventions are adopted and enter into force by a procedure which differs in important respects from the procedure applicable to other international instruments. The special features of this procedure have always been regarded as making international labour conventions intrinsically incapable of being ratified subject to any reservation. It has been the consistent view of the International Labour Organization, since its establishment, that reservations are not admissible. This view is based upon and supported by the consistent practice of the International Labour Organization and by the practice of the League of Nations during the period from 1920-1946 when the League was responsible for the registration of ratifications of international labour conventions' (see *ICJ Pleadings, 1951*, at pp. 217, 227-228).

"Wilfred Jenks, Legal Adviser of the ILO, addressing in 1968 the United Nations Vienna Conference on the Law of Treaties, stated the following:

> "'reservations to international labour Conventions are incompatible with the object and purpose of these Conventions. The procedural arrangements concerning reservations are entirely inapplicable to the ILO by reason of its tripartite character as an organization in which, in the language of our Constitution, "representatives of employers and workers" enjoy "equal status with those of governments". Great flexibility is of course necessary in the application of certain international labour Conventions to widely varying circumstances, but the provisions regarded by the collective judgement of the International Labour Conference as wise and necessary for this purpose are embodied in the terms of the Conventions and, if they prove inadequate for the purpose, are subject to revision by the Conference at any time in accordance with its regular procedures. Any other approach would destroy the international labour code as a code of common standards'.

"In brief, with relation to international labour Conventions, a member State of the ILO must choose between ratifying without reservations and not ratifying. Consistent with this practice, the Office has on several occasions declined proffered ratifications which would have been subject to reservations (for instance, in the 1920s, the Governments of Poland, India and Cuba were advised that contemplated ratifications subject to reservations were not permissible; see *Official Bulletin*, vol. II, p. 18, and vol. IV, pp. 290-297). Similarly, the Organization refused recognition of reservations proposed by Peru in 1936. In more recent years, the Office refused to register the ratification of Convention No. 151 by Belize as containing two true reservations (1989). In each instance, the reservation was either withdrawn or the State was unable to ratify the Convention.

"It is interesting to note that, in the early years of the Organization, the view was taken that ratification of a labour Convention might well be made subject to the specific condition that it would only become operative if and when certain other States would have also ratified the same Convention (see International Labour Conference, 3rd session, 1921, at p. 220). In the words of

the ILO Director General in his 1927 Memorandum to the Council of the League of Nations,

> "'these ratifications do not really contain any reservation, but merely a condition which suspends their effect; when they do come into force, their effect is quite normal and unrestricted. Such conditional ratifications are valid, and must not be confused with ratifications subject to reservation which modify the actual substance of conventions adopted by the International Labour Conference' (for examples of ratifications subject to suspensive conditions, see Written Statement of the ILO in *Genocide Case*, *ICJ Pleadings, 1951*, at pp. 264-265).

There is no record of recent examples of such a practice. In principle, all instruments of ratification take effect 12 months after they have been registered by the Director General.

"Notwithstanding the prohibition of formulating reservations, ILO member States are entitled, and, at times, ever required, to attach declarations — optional and compulsory accordingly. A compulsory declaration may define the scope of the obligations accepted or give other essential specifications. In some other cases a declaration is needed only where the ratifying State wishes to make use of permitted exclusions, exceptions or modifications. In sum, compulsory and optional declarations relate to limitations *authorized* by the Convention itself, and thus do not amount to reservations in the legal sense. As the Written Statement of the ILO in the *Genocide Case* read, 'they are therefore a part of the terms of the convention as approved by the Conference when adopting the convention and both from a legal and from a practical point of view are in no way comparable to reservations' (see *ICJ Pleadings, 1951*, at p. 234). Yet for some, these flexibility devices have 'for all practical purposes the same operational effect as reservations' (see Gormley, op. cit., *supra*, at p. 75)."[293]

158. This reasoning reflects a respectable tradition but is somewhat less than convincing:

- In the first place, while international labour conventions are obviously adopted under very specific circumstances, they are nevertheless treaties between States, and the participation of non-governmental representatives in their adoption does not modify their legal nature;
- Secondly, the possibility that the International Labour Conference might revise a convention that proved to be inadequate proves nothing about the legal nature of unilateral statements made in application of an exclusionary clause: the revised convention could not be imposed against their will on States that had made such statements when becoming parties to the original convention, and it matters little in such cases whether or not those statements were reservations;
- Lastly, and most importantly, the position traditionally taken by ILO reflects a restrictive view of the concept of reservations which is not reflected in the Vienna Conventions.

[293] Reply to questionnaire, pp. 3-5.

159. In fact, the Vienna Conventions do not preclude the making of reservations, not because of an authorization implicit in the general international law of treaties as codified in articles 19 to 23 of the 1969 and 1986 Conventions, but on the basis of specific conventional provisions: reservation clauses.[294] This is quite clear from article 19 (b) of the Conventions, which concerns treaties that provide "that only *specified* reservations ... may be made", or article 20, paragraph 1, which stipulates that "a reservation *expressly authorized* by a treaty does not require any subsequent acceptance ...".

160. In fact, exclusionary clauses are clearly related to reservation clauses, and the resulting unilateral statements are related to the "specified" reservations "expressly authorized" by a treaty, including international labour conventions.[295] They are indeed unilateral statements made at the time consent to be bound is expressed and purporting to exclude the legal effect of certain provisions of the treaty as they apply to the State or the international organization making the statement, all of which corresponds exactly to the definition of reservations, and, at first glance at least,[296] it would seem that they are not and need not be subject to a separate legal regime.

161. Except for the absence of the word "reservations", there appears to be little difference between the aforementioned exclusionary clauses[297] and:

- Article 16 of The Hague Convention of 14 March 1970 on celebration and recognition of the validity of marriages:

  "A Contracting State may reserve the right to exclude the application of chapter I", article 28 of which provides for the possibility of "reservations";

- Article 33 of the Convention concluded on 18 March 1978 in the context of The Hague Conference on Private International Law, on the taking of evidence abroad in civil or commercial matters:

  "A State may, at the time of signature, ratification or accession, exclude, in whole or in part, the application of the provisions of paragraph 2 of article 4 and of Chapter II. No other reservation shall be permitted";

- Or article 35, entitled "Reservations", of the Lugano Convention of the Council of Europe of 21 June 1993, on civil liability for damages resulting from activities dangerous to the environment:

  "Any signatory may declare, at the time of signature or when depositing its instrument of ratification, acceptance or approval, that it reserves the right:

  ...

  "(c) not to apply Article 18".

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[294] See para. 110 above.

[295] At the same time, there is little doubt that a practice accepted as law has developed in ILO. Under this practice, any unilateral statement seeking to limit the application of the provisions of international labour conventions that is not explicitly stipulated is inadmissible. This is also clearly the case with regard to the conventions adopted by The Hague Conference of Private International Law (see Georges A. L. Droz, "*Les réserves et les facultés dans les Conventions de La Haye de droit international privé*", *RCDIP 1969*, pp. 388-392). However, this is an altogether different question from that of defining reservations.

[296] This needs to be verified, but at least it is no longer a question of definition.

[297] Paras. 151-154.

And there are countless other examples.

162. The only disturbing element is the simultaneous presence in some conventions (at least those of the Council of Europe) of exclusionary *and* reservation clauses.[298] The Special Rapporteur sees no other explanation for this situation than terminological vagueness.[299] And it is striking that, in its reply to the Commission's questionnaire, ILO should mention among the problems encountered in the areas of reservations those relating to article 34 of the European Convention for the peaceful settlement of disputes, since the word "reservation" does not even appear in this standard exclusionary clause.[300]

163. The distinction is not crystal clear,[301] to say the least, and both in their form and their effects[302] the statements made when expressing consent to be bound under exclusionary clauses are in every way comparable to reservations when provision is made for the latter, with restrictions, by reservation clauses.

164. In reality, exclusionary clauses take the form of "negotiated reservations", as the term is currently (and erroneously) accepted in the context of The Hague Conference on Private International Law and further developed in the Conference of the Council of Europe.[303] As Professor Pierre-Henri Imbert notes, "strictly speaking, this means that it is the *reservation* — and not only the right to make one — that is the subject of the negotiations. In other words, unlike traditional clauses, clauses that apply such a procedure should make it possible to know beforehand not only what the reservation is but also what State will actually make it".[304] At the same time, the term is used in the Council of Europe in a broader sense, seeking to cover the "*procedure* intended to enumerate either in the body of the Convention itself or in an annex the limits of the options available to States in formulating a reservation".[305]

165. These, then, are not "reservations" at all in the proper sense of the term, but *reservation clauses* that impose limits and are precisely defined when the treaty is negotiated. And they are truly nothing more,[306] even in the very rare cases where a specific State is mentioned in the clause as being its only beneficiary.[307]

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[298] See arts. 7 (para. 153 above) and 8 of the Council of Europe Convention of 1968 on reduction of cases of multiple nationality and examples given by Sia Spiliopoulo Åkermark, op. cit., p. 506, note 121.

[299] This uncertainty is also stressed by Sia Spiliopoulo Åkermark, op. cit., p. 513.

[300] See para. 153 above.

[301] Similarly, see Pierre-Henri Imbert, p. 169, or Sia Spiliopoulo Åkermark, op. cit., pp. 505-506.

[302] Similarly, see W. Paul Gormley, "The Modification of Multilateral Conventions by Means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and Council of Europe", Part I, *Fordham Law Review*, 1970-1971, pp. 75-76.

[303] See Georges A. L. Droz, op. cit., pp. 385-388; Héribert Golsong, "*Le développement du droit international régional*" in SFDI, Colloque de Bordeaux, *Régionalisme et universalisme dans le droit international contemporain*, 1997, p. 228, or Sia Spiliopoulo Åkermark, op. cit., pp. 489-490.

[304] Op. cit., see note 244 above, p. 196.

[305] Héribert Golsong, op. cit., p. 228 (emphasis added); see also Sia Spiliopoulo Åkermark, op. cit., p. 498 and also pp. 489-490.

[306] On this point, see Sia Spiliopoulo Åkermark, op. cit., pp. 498-499, or Pierre-Henri Imbert, op. cit., pp. 197-199.

[307] See the annex to the European Convention on Civil Liability for Damage Caused by Motor Vehicles, which allowed Belgium to make a specific reservation for a three-year period, or

166. In the Special Rapporteur's view, these terminological nuances belong in the chapter of the Guide to Practice devoted to definitions, on the understanding that the point cannot be pressed too far, since they say nothing about which legal regime, if any, should govern a particular category of reservations, and since ultimately there is nothing to prevent the parties to a treaty from agreeing on a specific regime or waiver.

167. With regard to unilateral statements made when expressing the author's consent to be bound by a treaty in accordance with an exclusionary clause, a draft guideline should be added to section 1.1 of the Guide to Practice in order to make it clear that what is involved is indeed a reservation, however phrased or named. The draft text might read:

*1.1.8*[308] *Reservations formulated under exclusionary clauses.*

*A unilateral statement made by a State or an international organization when expressing its consent to be bound by a treaty or by a State when making a notification of succession, in accordance with a clause in the treaty expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties constitutes a reservation.*

168. On the other hand, and not without some hesitation, the Special Rapporteur does not propose to include in the Guide to Practice a draft guideline defining "negotiated reservations". This term is surely misleading,[309] yet there does not seem to be any particular reason for dealing with it any differently than by means of the draft guideline proposed above for reservation clauses.[310]

169. If, however, the Commission should take the opposite view, the following definition could be considered (and probably included in section 1.7 of the Guide to Practice):

*"Negotiated reservations"*

*A "negotiated reservation" is [the provision of a treaty] [a reservation clause] indicating precisely and within certain limits what reservations can be made to [this] [a] treaty.*

The choice of bracketed phrases will depend on whether or not the term "reservation clause" is defined elsewhere.

170. Draft guideline 1.1.8 proposed above is fully compatible with the provisions of article 17, paragraph 1, of the 1969 and 1978 Vienna Conventions.[311] The question has already been raised: "What is the legal meaning of the reference in article 17

article 32, para. 1 (b), of the European Convention on Transfrontier Television of 1989, which allowed the United Kingdom alone to formulate a specific reservation; example cited by Sia Spiliopoulo Åkermark, op. cit., p. 499.

[308] This numbering is provisional; the Commission may wish to insert the draft text after draft guideline 1.1.2.

[309] See para. 165 above.

[310] See note 220.

[311] Quoted in para. 148 above.

('without prejudice to ...') to articles 19 to 23 of the Vienna Convention on the Law of Treaties, if not to imply that in some cases options amount to reservations?"[312]

171. Yet, conversely, it would appear that this provision is drafted so as to imply that all clauses that offer parties a choice between various provisions of a treaty *are not* reservations.

172. As indicated below,[313] this is certainly true of statements made under opting-in clauses. But one might also ask whether it is not true of certain statements made under opting-out clauses as well.

173. It so happens that some treaties allow the parties to exclude, by means of a unilateral statement, the legal effect of certain of the treaty's provisions in their application to the author of the statement, not (or not only) at the time of expression of consent to be bound, but after the treaty enters into force for them. For example,

- Article 82 of the International Labour Convention on minimum standards authorizes a member State that has ratified the Convention to denounce, 10 years after the entry into force of the Convention, either the entire Convention or one or more of Parts II to X;
- Article 22 of The Hague Convention of 1 June 1970 on the recognition of divorces and legal separations authorizes contracting States, "*from time to time*, [to] declare that certain categories of persons having their nationality need not be considered their nationals for the purposes of this Convention";[314]
- Article 30 of The Hague Convention of 1 August 1989 on successions stipulates that:

  "A State Party to this Convention may denounce it, *or only Chapter III of the Convention*, by a notification in writing addressed to the depositary";

- Article X of the ASEAN Framework Agreement on Services of 4 July 1996 authorizes a member State to modify or withdraw any commitment in its schedule of specific commitments, subject to certain conditions, at any time after three years from the date on which that commitment entered into force.

174. Unilateral statements made under provisions of this type are clearly not reservations.[315]

175. In this respect, the fact that they are formulated (or may be formulated) at a time other than the time of consent to be bound is perhaps not in itself absolutely decisive in so far as nothing prevents negotiators from departing from the provisions of the Vienna Conventions, which are merely auxiliary in character; this aspect will be studied in more detail in the next chapter of this report.

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[312] Sia Spiliopoulo Åkermark, op. cit., p. 506.

[313] See section (b) below.

[314] Concerning the circumstances under which this provision was adopted, see Georges A. L. Droz, op. cit., pp. 414-415. This, typically, is a "negotiated reservation" in the sense referred to earlier (para. 169) whose sole beneficiary is the United Kingdom and which in reality has the same effects as an optional clause (see para. 180 below).

[315] Significantly, article 22, already cited, of the Convention on the recognition of divorces and legal separations, of the 1970 Hague Conference, is omitted from the list of reservation clauses given in article 25.

176. Nevertheless, statements made under these exclusionary clauses after the entry into force of the treaty are very different from reservations in that they do not place conditions on the accession of the State or the international organization which makes them. Reservations are an element of the conclusion and entry into force of a treaty, as is demonstrated by the inclusion of articles 19 to 23 of the Vienna Conventions in part II, relating to the conclusion and entry into force of treaties. They are partial acceptances of the provisions of the treaty to which they relate; and that is why it seems logical to consider statements made at the time of expressing consent to be bound as being reservations. On the other hand, statements made after the treaty has been in force for a certain period of time in respect of their author are partial denunciations which, in their spirit, are much more closely related to part V of the Vienna Conventions concerning invalidity, termination and suspension of the operation of treaties. They may also be linked to article 44, paragraph 1, which does not exclude the right of a party to withdraw partially from a treaty if the treaty so provides.

177. It would be possible to include in section 1.7 of the Guide to Practice a draft guideline specifying the following:

> *Unilateral statements formulated under an exclusionary clause after the entry into force of the treaty*
>
> *A unilateral statement made by a State or an international organization in accordance with a clause in the treaty expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to these parties after the entry into force of the treaty in their respect does not constitute a reservation.*

178. The Special Rapporteur considers, however, that this clarification is not essential. It merely repeats, *a contrario*, indications included in draft guideline 1.1.8 proposed above, and it is probably sufficient to include these explanations in the commentary to that guideline.

### (b) Unilateral statements accepting the application of certain provisions of a treaty under an optional clause

179. In contrast to the exclusionary clauses under which the unilateral statements analysed above are made, "optional clauses" (or "opting" or "contracting in" clauses) should be the terms used to designate clauses which envisage that the parties to a treaty may accept provisions which, in the absence of express acceptance, would not be applicable to them.[316]

180. Paradoxically, the distinction between optional clauses and exclusionary clauses is not always obvious. In addition to the particular problems posed by clauses which offer a choice among the provisions of a treaty, some of which resemble both types of clauses,[317] there are clauses which appear to be exclusionary clauses but are really optional clauses in that statements made under these provisions actually result in granting additional rights to the other parties to the

[316] Here again, this expression should, undoubtedly, be defined in the Guide to Practice if the Commission decides to include in it the definition of the terms used (other than reservations and interpretative declarations).

[317] Which will be considered below, *sub litt.* (c).

treaty, and therefore increase the *obligations* of the State or international organization which made the statement.

181. This is the case, for example, of article 22, already cited (para. 173) of the 1970 Hague Convention on the recognition of divorces and legal separations, the complex scope of which has been explained by Mr. Georges Droz as follows:

> "This power seems very mysterious. It must be remembered that the Convention takes the competence of the national authorities of the spouses as the basis for the recognition of foreign divorces. The purpose of this power is to enable the United Kingdom to specify that certain persons who are British subjects, but are not nationals of the United Kingdom itself (England, Scotland, Wales, Northern Ireland), for example nationals of Hong Kong, will not be regarded as 'nationals' for the purposes of the application of the Convention. This means that a State which is bound by the Treaty to the United Kingdom will, of course, recognize the judgments issued in the United Kingdom concerning English or Scottish people, but, *merely on the basis of the nationality of the spouses*, will not be obliged to recognize judgments issued in London for the benefit of two nationals of Hong Kong. This is actually a power to make a certain specification, not a reservation. Indeed, the United Kingdom is not in any way seeking to lessen the effect on it of the Convention, but instead wishes to spare its partners from a considerable extension of the obligations of the Convention which would result solely from the concept of British nationality".[318]

182. Beyond these, often delicate, problems of the "dividing line" between different categories of treaty provisions allowing States to choose among the provisions of a treaty, it remains true that the optional clauses referred to here have the objective not of lessening but of increasing the obligations deriving from the treaty for the author of the unilateral statement.

183. The most famous of these clauses is Article 36, paragraph 2, of the Statute of the International Court of Justice,[319] but there are many others; such clauses are either drawn up on the same model and result in the acceptance of the competence of a certain mode of settlement of disputes or of monitoring by an organ created by the treaty as envisaged in article 41, paragraph 1, of the 1966 International Covenant on Civil and Political Rights:

> "A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant ..."[320]

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[318] Georges A. L. Droz, "*Les resérves et les facultés dans les Conventions de La Haye de droit international privé*", R.C.D.I.P. 1969, pp. 414-415; italicized in the text.

[319] See above, para. 90.

[320] Compare with article 1 of the Optional Protocol. See also the former articles 25 (acceptance of the right to address individual petitions to the Commission) and 46 (acceptance of inter-State declarations) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (these articles have been modified, to provide for automatic compulsory jurisdiction, by articles 33 and 34 of Protocol No. 11 of 11 May 1994) or article 45, paragraph 1, of the American Convention on Human Rights: "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in

or are exclusively prescriptive in nature, as in the case of, among many other examples, article 25 of the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations:

> "Any Contracting State may, at any time, declare that the provisions of this Convention will be extended, in relation to other States making a declaration under this article, to an official deed ("*acte authentique*") drawn up by or before an authority or public official and directly enforceable in the State of origin insofar as these provisions can be applied to such deeds".[321]

184. Although, curiously, one author has found it possible to affirm that unilateral statements made under such optional clauses "functioned as reservations",[322] in reality, at the technical level, they have very little in common with reservations, apart from the (important) fact that they both purport to modify the application of the effects of the treaty.

185. It is quite clear that "opt-out clauses seem to be much closer to reservations than opt-in clauses".[323] Indeed, not only can

1. Statements made under optional clauses be formulated, generally speaking, at any time, but also,

2. Optional clauses "start from a presumption that parties are not bound by anything other than they have explicitly chosen",[324] while exclusionary clauses, like the mechanism for reservations, start from the opposite assumption; and

3. Statements made under optional clauses purport not to "exclude or to modify the legal effect of certain provisions of [a] treaty in their application" to their author[325] or to limit the obligations imposed on [the author] by the treaty,[326] but, instead, to increase them, while the mere entry into force of the treaty for the author does not have this effect.

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which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention".

321 See also articles 16 and 17, paragraph 2, of the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters, or article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, or article 4, paragraphs 2 and 4, of ILO Convention No. 118 of 1962 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (see also the examples given in the memorandum from ILO to I.C.J. in 1951, in I.C.J., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Pleadings, oral arguments, documents*, p. 232, or again article 4, paragraph 2 (g), of the United Nations Framework Convention on Climate Change of 9 May 1992.

322 "[I]t is valid to conclude that they *function* as reservations" (W. Paul Gormley, "The Modification of Multilateral Conventions by Means of Negotiated Reservations and Other Alternatives: A Comparative Study of the ILO and Council of Europe", Part II, *Fordham Law Review*, 1970-1971, p. 450 — italicized in text). The author makes this comment with regard to former article 25 of the European Convention on Human Rights; see also pp. 68 and 75 regarding comparable clauses appearing in the international labour conventions.

323 Sia Spiliopoulo Åkermark, "Reservation Clauses in Treaties Concluded Within the Council of Europe", I.C.L.Q. 1999, pp. 479-514, not p. 505.

324 Ibid.

325 Draft guideline 1.1 of the Guide to Practice.

326 Draft guideline 1.1.5.

186. Here again, to a certain degree, the complex problems of "extensive reservations"[327] arise. However, draft guideline 1.4.1 adopted by the Commission in 1999 states that:

> "A unilateral statement formulated by a State or an international organization in relation to a treaty whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice".

187. The only difference between the statements envisaged in this draft guideline and those under consideration here is that the former are formulated on the sole initiative of the author, while the latter are made under a treaty.

188. Given the great differences between them, a confusion between reservations, on the one hand, and statements made under an optional clause, on the other, need hardly be feared, so that it might be asked whether it is necessary to include a guideline in the Guide to Practice in order to distinguish between them. The Special Rapporteur believes, however, that this question should be answered in the affirmative: even if statements based on optional clauses are clearly, at the technical level, very different from reservations, with which statements made under exclusionary clauses may be (and must be) equated, such statements are nevertheless the counterpart of statements made under exclusionary clauses and their general objective is too similar for them to be ignored, particularly since they are often presented jointly.[328]

189. It is therefore proposed that the following draft guideline should be included in section 1.4 of the Guide to Practice:

> *1.4.6*[329] *Unilateral statements adopted under an optional clause*
>
> *A unilateral statement made by a State or an international organization in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not imposed on them solely by the entry into force of the treaty is outside the scope of the present Guide to Practice.*

190. It goes without saying that, if the treaty so provides or, given the silence of the treaty, if it is not contrary to the goal and purpose of the provision in question,[330] there is nothing to prevent such a statement, in turn, from being accompanied by restrictions aimed at limiting the legal effect of the obligation thereby accepted.

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[327] See the third report on reservations to treaties, A/CN.4/491/Add.3, paras. 208-227.

[328] See, for example, Michel Virally, who includes them in the same term "optional clauses". ("*Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités*"in Catholic University of Louvain, fourth symposium of the Department of Human Rights, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruylant, Brussels, 1982, pp. 13-14).

[329] This numbering is provisional; the Commission may wish to place this guideline after draft guideline 1.4.1.

[330] In the *Loizidou v. Turkey* case, the European Court of Human Rights held that "having regard to the object and purpose of the [European] Convention [of Human Rights], the consequences" of restrictions on its competence "for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for. However no such provision exists in either Article 25 or Article 46" (on these provisions, see above, note 320) (judgment of 23 March 1995, para. 75, R.U.D.H. 1995, p. 139).

191. This is the case with the reservations frequently made by States when they accept the optional clause recognizing the optional jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute.[331]

192. There can be no question, in the context of the present report, of entering into a detailed analysis of the legal nature of these reservations and conditions.[332] It is sufficient to express support for the views expressed by Ambassador Shabtai Rosenne in his masterpiece on the law and practice of the International Court:[333]

> "There is a characteristic difference between these reservations, and the type of reservation to multilateral treaties encountered in the law of treaties. ... Since the whole transaction of accepting the compulsory jurisdiction is *ex definitione* unilateral and individualized and devoid of any multilateral element or element of negotiation, the function of reservations in a declaration cannot be to exclude or vary the legal effect of some existing provision in relation to the State making the declaration. Their function, together with that of the declaration itself, is to define the terms on which that State unilaterally accepts the compulsory jurisdiction — to indicate the disputes which are included within that acceptance, in the language of the *Right of Passage* (Merits) case".[334]

193. These observations are consistent with the jurisprudence of the Court, and, in particular, its recent judgment of 4 December 1998 in the *Fisheries Jurisdiction* case between Spain and Canada:

> "Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. (...) All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout".[335]

194. The same goes for the reservations which States attach to statements made under other optional clauses such as, for example, those resulting from the

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331 Although the Statute is silent on the possibility of optional declarations under Article 36, paragraph 2, being accompanied by reservations other than the condition of reciprocity, this power, which is well established in practice and was confirmed by committee IV/I of the San Francisco Conference (cf. UNCIO, vol. 13, p. 39) is quite clear. Cf. Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996, vol. II, Jurisdiction*, pp. 767-769; see also the dissenting view of Judge Bedjaoui attached to the judgment of the I.C.J. of 4 December 1998 in the *Fisheries Jurisdiction* case (Spain v. Canada), para. 42); and, for a recent discussion of this question, see the pleadings in the *Aerial Incident of 10 August 1999* (Pakistan v. India) case, 3 April 2000, CR 2000/1, pp. 19-24 (M. Munshi) and 4 April 2000, CR 2000/2, pp. 20-21 (M. Brownlie).

332 Shabtai Rosenne makes a distinction between these two concepts (ibid., pp. 768-769) which is not convincing to the Special Rapporteur, but this is irrelevant for the purposes of the present report.

333 However, the second reason mentioned by Ambassador Rosenne does not seem conclusive: it is based on the control exercised by the Court on the validity of reservations included in optional declarations (ibid., pp. 769-770); but if it is not inherent to the institution of reservations to treaties, this control may also be exercised, if necessary, on reservations to multilateral treaties (cf. the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 177-251).

334 Ibid., p. 769. The passage in question of the judgment relating to the *Right of Passage over Indian Territory* case of 12 April 1960 appears on page 34 of the *I.C.J. Reports* (1960).

335 Para. 44. See also para. 47: "Therefore, declarations and reservations are to be read as a whole".

acceptance of the competence of the International Court of Justice under article 17 of the General Act for Conciliation, Judicial Settlement and Arbitration[336] in respect of which the Court has stressed "... the close and necessary link that always exists between a jurisdictional clause and reservations to it".[337]

195. It is therefore impossible simply to equate reservations appearing in the unilateral statements by which a State or an international organization accepts a provision of a treaty under an optional clause with reservations to a multilateral treaty. It is undoubtedly true that their ultimate objective is to limit the legal effect of the provision which the author of the statement thereby recognizes as being applicable to him. But the reservation in question cannot be separated from the statement and does not, in itself, constitute a unilateral statement.

196. In view of the great theoretical and practical importance[338] of the distinction, it seems necessary that this should be reflected in a guideline of the Guide to Practice, which is the necessary complement to draft guideline 1.4.6 proposed above. It could be drafted as follows:

*1.4.7 Restrictions contained in unilateral statements adopted under an optional clause*

*A restriction or condition contained in a unilateral statement adopted under an optional clause does not constitute a reservation within the meaning of the present Guide to Practice.*

**(c) Unilateral statements providing for a choice between the provisions of a treaty**

197. While paragraph 1, mentioned above,[339] of article 17 of the 1969 and 1986 Vienna Conventions concerns the partial exclusion of the provisions of a treaty under an exclusionary clause, paragraph 2 of the same provision envisages the intellectually different hypothesis in which the treaty contains a clause allowing a choice between several of its provisions:

> "The consent of a State [or an international organization] to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates".

198. The commentary on this provision, reproduced without change by the Vienna Conference,[340] is concise but is sufficiently clear about the hypothesis envisaged:

> "Paragraph 2 takes account of a practice which is not very common but which is sometimes found, for example, in the General Act for the Pacific Settlement of International Disputes and in some international labour

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336 Without prejudice to the exact legal nature of article 38 of this Act; see below, para. 200.

337 Judgment of 19 December 1978 in the *Aegean Sea Continental Shelf* case, *I.C.J. Reports, 1978*, p. 32, para. 79. For a recent discussion of this question, see again the pleadings in the *Aerial Incident of 10 August 1999* (Pakistan v. India) case, 4 April 2000, CR 2000/2, pp. 44-45 and 6 April 2000, CR 2000/4, pp. 20-22 (M. Pellet).

338 Particularly as regards interpretation; cf. the afore-mentioned judgment of I. C. J. of 4 December 1998 in *Fisheries Jurisdiction* case, paras. 42-56.

339 See para. 179.

340 See above, note 285.

conventions. The treaty offers to each State a choice between differing provisions of the treaty".[341]

199. As has been noted,[342] it is not accurate (or, at all events, not very accurate) to say that such a practice is, today, not very common. It is actually fairly widespread, at least in the apparently rather vague sense given to it by the Commission in 1966. This includes two different hypotheses, however, which do not fully overlap.

200. The first is illustrated, for example, by the statements made under the 1928 General Act for Conciliation, Judicial Settlement and Arbitration,[343] article 38, paragraph 1, of which provides:

"Accessions to the present General Act may extend:

A. Either to all the provisions of the Act (chapters I, II, III and IV);

B. Or to those provisions only which relate to conciliation and judicial settlement (chapters I and II), together with the general provisions dealing with these procedures (chapter IV)".

201. The same goes for several ILO conventions, in which this technique, often used subsequently,[344] was introduced by Convention No. 102 of 1952 concerning Minimum Standards of Social Security, article 2 of which provides:

"Each Member for which this Convention is in force —

(a) shall comply with —

(i) Part I;

(ii) at least three of Parts II, III, IV, V, VI, VII, VIII, IX and X;

(iii) the relevant provisions of Parts XI, XII and XIII; and

(iv) Part XIV".

202. In the same connection, two conventions of great scope which were adopted in the context of the Council of Europe may be cited:

– The European Social Charter, of 18 October 1961, article 20, paragraph 1, of which provides for a partially optional system of acceptance:[345]

"Each of the Contracting Parties undertakes:

(a) To consider part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part;

(b) To consider itself bound by at least five of the following articles of part II of this Charter: articles 1, 5, 6, 12, 13, 16 and 19;

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[341] *Yearbook ... 1966*, vol. II, p. 202, para. 3 of the commentary on article 14 (became article 17 in 1969).

[342] Sia Spiliopoulo Åkermark, "Reservation Clauses in Treaties Concluded Within the Council of Europe", *I.C.L.Q.* 1999, p. 504.

[343] The revised general act of 1949 adds a third possibility: "C. Or to those provisions only which relate to conciliation (chapter I), together with the general provisions concerning that procedure (chapter IV)".

[344] See P. H. Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 172.

[345] Hans Wiebringhaus, "*La Charte sociale européenne: vingt ans après la conclusion du Traité*", *A.F.D.I.* 1982, p. 936.

(c) [...] to consider itself bound by such a number of articles or numbered paragraphs of part II of the Charter as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs";

this complex system was used again in article A, paragraph 1, of the revised Social Charter on 3 May 1996;[346]

- Article 2 of the European Charter for Regional or Minority Languages of 5 November 1992 is similar:

"1. Each Party undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definition in article 1.

2. In respect of each language specified at the time of ratification, acceptance or approval, in accordance with article 3, each Party undertakes to apply a minimum of thirty-five paragraphs or subparagraphs chosen from among the provisions of part III of the Charter, including at least three chosen from each of the articles 8 and 12 and one from each of the articles 9, 10, 11 and 13."

203. A superficial reading of these provisions could perhaps give rise to the impression that they are optional clauses within the meaning proposed above.[347] In reality, however, they are very different: the statements which they invite the Parties to make are not optional but binding and condition the entry into force of the treaty for them,[348] and they have to be made at the time of giving consent to be bound by the treaty.

204. Similarly, these statements cannot be completely equated with those made in application of an exclusionary clause.[349] Clearly, they end up by excluding the application of provisions which do not appear in them. But they do so indirectly, through partial acceptance,[350] and not by excluding the legal effect of those provisions but because of the silence of the author of the statement in their regard.

205. The same goes for statements made under the second category of treaty clauses which, even more clearly, offer a choice between the provisions of a treaty because they oblige the parties to choose a given provision (or a given set of provisions) *or, alternatively,* another provision (or another set of provisions). This is no longer a question of choosing *among* the provisions of a treaty but of choosing *between them*, on the understanding that, in contrast to the previous case, there can be no accumulation,[351] and the acceptance of the treaty is not partial (even if the obligations deriving from it may be more or less binding depending on the option selected).

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346 See also articles 2 and 3 of the European Code of Social Security of 1964.

347 Para. 179.

348 This may be seen from the rest of the wording of article 17, para. 2, cited above (para. 148) of the Vienna Conventions.

349 See above, (a).

350 P. H. Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 170.

351 Article 287 of the United Nations Convention on the Law of the Sea of 1982 is midway between the two approaches: States must choose one or more binding procedures for the settlement of disputes leading to binding decisions, failing which the arbitral procedure envisaged in annex VII applies. But there may be an accumulation of different procedures.

206. These "alternative clauses" are less common than those analysed above. They do exist, however, as demonstrated by, for example:

- Article 2 of ILO Convention No. 96 (revised) of 1949 concerning Fee-Charging Employment Agencies:[352]

> "1. Each Member ratifying this Convention shall indicate in its instrument of ratification whether it accepts the provisions of part II of the Convention, providing for the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies, or the provisions of part III, providing for the regulation of fee-charging employment agencies including agencies conducted with a view to profit.
>
> 2. Any Member accepting the provisions of part III of the Convention may subsequently notify the Director General that it accepts the provisions of part II; as from the date of the registration of such notification by the Director General, the provisions of part III of the Convention shall cease to be applicable to the Member in question and the provisions of part II shall apply to it";

- Or section 1 of article XIV of the Statutes of IMF (modified in 1976) whereby:

> "Each member shall notify the Fund whether it intends to avail itself of the transitional arrangements in section 2 of this article [Exchange restrictions], or whether it is prepared to accept the obligations of article VIII, sections 2, 3 and 4 [General obligations of member States]. A member availing itself of the transitional arrangements shall notify the Fund as soon thereafter as it is prepared to accept these obligations".

207. As has been observed, "[o]ptional commitments ought to be distinguished from authorized reservations although they in many respects resemble such reservations".[353] Moreover, the silence of article 17, paragraph 2, of the Vienna Conventions, which contrasts with the reference in paragraph 1 to articles 19 to 23 on reservations[354] constitutes, in contrast with unilateral statements made under an exclusionary clause, an indication of the clear dividing line between reservations and these alternative commitments.

208. In the two forms which they may take, these statements are clearly alternatives to reservations in that they constitute procedures which modify the application of a treaty on the basis of the preferences of the parties (even if these preferences are strongly indicated in the treaty). In addition, like reservations, they take the form of unilateral statements made at the time of signature or of the expression of consent to be bound (even if they may subsequently be modified — but, under certain conditions, reservations may be modified too). And the fact that they have to be envisaged in the treaty to which they apply does not constitute a factor differentiating them from reservations, since reservations may also be envisaged in a restrictive way by a reservation clause.

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352 Pierre-Henri Imbert stresses that this is the best example of the type of clause allowing States to make a choice in the restrictive sense (*Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 172); see also Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, Swedish Institute of International Law, Studies in International Law, No. 5, T. M. C. Asser Instituut, The Hague, 1988, p. 134.

353 F. Horn, ibid., p. 133.

354 See above, paras. 150 and 170.

209. There are striking differences from reservations, however, because unlike reservations, these statements are the condition *sine qua non*, by virtue of the treaty, of the participation of the author of the statement in the treaty. Moreover, although they exclude the application of certain provisions of the treaty in respect of the State or international organization making the statement, this exclusion relates to the treaty itself and is inseparable from the entry into force of other provisions of the treaty in respect of the author of the same statement.

210. It seems necessary to specify, in the Guide to Practice, that unilateral statements meeting this definition do not constitute reservations within the meaning of the Guide. This could be done in the form of the following draft guideline:

*1.4.8 Unilateral statements providing for a choice between the provisions of a treaty*

*A unilateral statement made by a State or an international organization in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty is outside the scope of the present Guide to Practice.*

**Conclusion of the first part**

211. In the opinion of the Special Rapporteur, this draft guideline should come at the end of chapter 1 of the Guide to Practice concerning the definition of reservations and interpretative declarations.

212. It goes without saying that the 34 draft guidelines of which chapter 1 is composed cannot attempt to cover all the hypotheses which could occur or resolve in advance all the problems which could arise, so great is the "imagination of legal scholars and diplomats".[355] However, they probably do cover all the *categories* of doubtful cases in which it can legitimately be questioned whether a procedure purporting to modify the application of the treaty is or is not a reservation or an interpretative declaration.

213. The next parts of the Guide to Practice will be strictly confined to unilateral statements corresponding to the various definitions contained in sections 1.1 and 1.2. It is to these definitions alone that the legal regime of reservations and interpretative declarations, as specified in these other parts, applies, which does not mean either that it will necessarily be a uniform regime for each of these categories[356] or that certain elements of these regimes are not applicable to other unilateral statements which do not fall within the scope of the present Guide to Practice.

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[355] See above, para. 80.

[356] Thus, for example, the Commission seems to be inclined towards the definition of a set of rules applicable to conditional interpretative declarations which is markedly closer to the legal regime of reservations than to that of "simple" declarative statements (cf. paras. 13 to 18 of the commentary on draft guideline 1.2.1, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 247-248.

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# Fifth report on reservations to treaties

**By Mr. Alain Pellet, Special Rapporteur**

**Addendum**

## Annex

## Definitions

### Consolidated text of all draft guidelines dealing with definitions adopted on first reading or proposed in the fifth report[1]

**1.1 Definition of reservations[2]**

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

**1.1.1 Object of reservations[3]**

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation.

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[1] The text of the draft guidelines proposed in the fifth report appears in italics.

[2] For the commentary on this draft guideline, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

[3] For the commentary on this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

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**1.1.2 Cases in which a reservation may be formulated[4]**

The cases in which a reservation may be formulated contained in guideline 1.1 include all the means of expressing consent to be bound by a treaty referred to in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

**1.1.3 Reservations having territorial scope[5]**

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement, constitutes a reservation.

**1.1.4 Reservations formulated when notifying territorial application[6]**

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of the treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

**1.1.5 Statements purporting to limit the obligations of their author[7]**

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 by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

**1.1.6 Statements purporting to discharge an obligation by equivalent means[8]**

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

**1.1.7 Reservations formulated jointly[9]**

The joint formulation of a reservation by a number of States or international organizations does not affect the unilateral nature of that reservation.

***1.1.8 Reservations formulated under exclusionary clauses[10]***

*A unilateral statement made by a State or an international organization when expressing its consent to be bound by a treaty or by a State when making a notification of succession, in accordance with a clause in the treaty expressly*

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[4] For the commentary on this draft guideline, see ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 204-206.

[5] For the commentary on this draft guideline, see ibid., pp. 206-209.

[6] For the commentary on this draft guideline, see ibid., pp. 209-210.

[7] For the commentary on this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221.

[8] For the commentary on this draft guideline, see ibid., pp. 222-223.

[9] For the commentary on this draft guideline, see ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210-213.

[10] Concerning this draft guideline, see the present report, paras. 148-178.

*authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties constitutes a reservation.*

**1.2 Definition of interpretative declarations[11]**

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

**1.2.1 Conditional interpretative declarations[12]**

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

**1.2.2 Interpretative declarations formulated jointly[13]**

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

**1.3 Distinction between reservations and interpretative declarations[14]**

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

**1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[15]**

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in the light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

**1.3.2 Phrasing and name[16]**

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a

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[11] For the commentary on this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223-240.

[12] For the commentary on this draft guideline, see ibid., pp. 240-249.

[13] For the commentary on this draft guideline, see ibid., pp. 249-252.

[14] For the commentary on this draft guideline, see ibid., pp. 252-253.

[15] For the commentary on this draft guideline, see ibid., pp. 254-260.

[16] For the commentary on this draft guideline, see ibid., pp. 260-266.

single treaty and designates some of them as reservations and others as interpretative declarations.

**1.3.3 Formulation of a unilateral statement when a reservation is prohibited[17]**

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

**1.4 Unilateral statements other than reservations and interpretative declarations[18]**

Unilateral statements formulated in relation to a treaty which are not reservations or interpretative declarations are outside the scope of the present Guide to Practice.

**1.4.1 Statements purporting to undertake unilateral commitments[19]**

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

**1.4.2 Unilateral statements purporting to add further elements to a treaty[20]**

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

**1.4.3 Statements of non-recognition[21]**

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

**1.4.4 General statements of policy[22]**

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

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[17] For the commentary on this draft guideline, see ibid., pp. 266-268.
[18] For the commentary on this draft guideline, see ibid., pp. 268-270.
[19] For the commentary on this draft guideline, see ibid., pp. 270-273.
[20] For the commentary on this draft guideline, see ibid., pp. 273-274.
[21] For the commentary on this draft guideline, see ibid., pp. 275-280.
[22] For the commentary on this draft guideline, see ibid., pp. 280-284.

**1.4.5 Statements concerning modalities of implementation of a treaty at the internal level[23]**

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting to affect its rights and obligations towards the other contracting parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

***1.4.6 Unilateral statements adopted under an optional clause[24]***

*A unilateral statement made by a State or an international organization in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not imposed on them solely by the entry into force of the treaty is outside the scope of the present Guide to Practice.*

***1.4.7 Restrictions contained in unilateral statements adopted under an optional clause[25]***

*A restriction or condition contained in a unilateral statement adopted under an optional clause does not constitute a reservation within the meaning of the present Guide to Practice.*

***1.4.8 Unilateral statements providing for a choice between the provisions of a treaty[26]***

*A unilateral statement made by a State or an international organization in accordance with a clause contained in a treaty that expressly requires the parties to choose between two or more provisions of the treaty is outside the scope of the present Guide to Practice.*

**1.5 Unilateral statements in respect of bilateral treaties**

**1.5.1 "Reservations" to bilateral treaties[27]**

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

**1.5.2 Interpretative declarations in respect of bilateral treaties[28]**

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

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[23] For the commentary on this draft guideline, see ibid., pp. 284-289.

[24] Concerning this draft guideline, see the present report, paras. 179-189.

[25] Concerning this draft guideline, see ibid., paras. 190-196.

[26] Concerning this draft guideline, see ibid., paras. 197-210.

[27] For the commentary on this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 290-302.

[28] For the commentary on this draft guideline, see ibid., pp. 302-306.

**1.5.3 Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party[29]**

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to a treaty and accepted by the other party constitutes the authentic interpretation of the treaty.

**1.6 Scope of definitions[30]**

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

***1.7 Alternatives to reservations and interpretative declarations***

***1.7.1 Alternatives to reservations[31]***

*In order to modify the effects of provisions of a treaty in their application to the contracting parties, States and international organizations may make use of procedures other than reservations.*

***1.7.2 Different procedures permitting modification of the effects of the provisions of a treaty[32]***

*Modification of the effects of the provisions of a treaty by procedures other than reservations may result in the inclusion in the treaty of:*

- *Restrictive clauses that limit the object of the obligations imposed by the treaty by making exceptions and setting limits thereto;*
- *Escape clauses that allow the contracting parties not to apply general obligations in specific instances and for a specific period of time;*
- *Statements made under the treaty by which a contracting party expresses its willingness to be bound by obligations that are not imposed on it solely by its expression of its consent to be bound by the treaty.*

*Modification of the effects of the provisions of a treaty may also result in:*

- *Their suspension, in accordance with the provisions of articles 57 to 62 of the 1969 and 1986 Vienna Conventions;*
- *Amendments to the treaty entering into force only for certain parties; or*
- *Supplementary agreements and protocols purporting to modify the treaty only as it affects the relations between certain parties.*

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[29] For the commentary on this draft guideline, see ibid., pp. 306 and 307.
[30] For the commentary on this draft guideline, see ibid., pp. 308-310.
[31] Concerning this draft guideline, see the present report, paras. 72-94.
[32] Concerning this draft guideline, see ibid., paras. 72-95.

*1.7.3 Restrictive clauses*[33]

*A provision in a treaty that purports to limit or restrict the scope or application of more general rules contained in the treaty does not constitute a reservation within the meaning of the present Guide to Practice.*

*1.7.4 ["Bilateralized reservations"] [Agreements between States having the same object as reservations]*[34]

*An agreement[, concluded under a specific provision of a treaty,] by which two or more States purport to exclude or to modify the legal effect of certain provisions [of the] [of a] treaty or of the treaty as a whole in their application to their relations* inter se *does not constitute a reservation within the meaning of the present Guide to Practice.*

*1.7.5 Alternatives to interpretative declarations*[35]

*In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, the contracting parties may have recourse to procedures other than interpretative declarations. They may include in the treaty express provisions whose purpose is to interpret the treaty or may conclude supplementary agreements to that end.*

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[33] Concerning this draft guideline, see ibid., paras. 110-116.

[34] Ibid., paras. 117-130.

[35] Concerning this draft guideline, see ibid., paras. 96-103.

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# Fifth report on reservations to treaties

**By Mr. Alain Pellet, Special Rapporteur**

**Addendum**

## Part Two
## Procedure regarding reservations and interpretative declarations

Contents



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# Part Two
# Procedure regarding reservations and interpretative declarations

## Introduction

214. In his second report, the Special Rapporteur proposed a "provisional general outline of the study" on reservations,[357] which the Commission endorsed.[358] According to this outline, the first two parts of the study on reservations to treaties would deal with, respectively, the unity or diversity of the legal regime for reservations to multilateral treaties (reservations to human rights treaties) and the definition of reservations. The first of these topics was addressed in chapter II of the second report[359] and the second was addressed in the third report,[360] a small part of the fourth report[361] and chapter II of the fifth report.[362]

215. Also according to the general outline, the third part of the study was to deal with the formulation and withdrawal of reservations, acceptances of reservations and objections to reservations. The overall format of this part was presented as follows in the second report:

"III. FORMULATION AND WITHDRAWAL OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS

A. Formulation and withdrawal of reservations

(a) Acceptable times for the formulation of a reservation (1969 and 1986, art. 19, *chapeau*);

(b) Procedure regarding formulation of a reservation (1969 and 1986, art. 23.1 and 4);

(c) Withdrawal (1969 and 1986, art. 22.1 and 3 (a) and 23.4).

B. Formulation of acceptances of reservations

(a) Procedure regarding formulation of an acceptance (1969 and 1986, art. 23.1 and 3);

(b) Implicit acceptance (1969 and 1986, art. 20.1 and 5);

(c) Obligations and express acceptance (1969 and 1986, art. 20.1, 2, and 3) (124 (ii), 148 (xii)).

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[357] A/CN.4/477, para. 37.

[358] See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 114, and ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), paras. 116 et seq.

[359] A/CN.4/477 and Corr.1 and Add.1 and Corr.1 to 4.

[360] A/CN.4/491/Add.1 to 6 and A/CN.4/491/Add.2/Corr.1, Add.3/Corr.1, Add.4/Corr.1 and Add.6/Corr.1.

[361] A/CN.4/499, paras. 44 to 54.

[362] A/CN.4/508/Add.1. All the draft guidelines dealing with the definition of reservations are contained in an annex to this document.

C. Formulation and withdrawal of objections to reservations

(a) Procedure regarding formulation of an objection (1969 and 1986, art. 23.1 and 3);

(b) Withdrawal of an objection (1969 and 1986, art. 22.2 and 3 (b) and 23.4)."[363]

216. Overall, this format still seems valid and the Special Rapporteur proposes to follow it in the present part of the fifth report.

217. Nevertheless, he has seen fit to make some adjustments in the light, essentially, of the inclusion in part I of the Guide to Practice of a number of definitions dealing with interpretative declarations.[364]

218. Although he had hoped to be able to begin dealing comprehensively with the "legal regime of interpretative declarations" in his third report,[365] the Special Rapporteur found, when he came to write that report, that this was neither feasible nor desirable:[366] the legal regime of interpretative declarations cannot be studied independently of the related element of reservations.[367] This is particularly true of conditional interpretative declarations, the legal regime of which undoubtedly is (or should be) very close to that of reservations.[368]

219. Like the other parts of the study, this part will therefore deal both with the procedure regarding reservations (and acceptances and objections related thereto) and with the formulation and withdrawal of interpretative declarations (straightforward or conditional) and reactions to such declarations.

220. Once again, the Special Rapporteur wishes to explain that he intends to adhere strictly to the approach proposed in the 1996 provisional general outline and to deal in this part of the study only with the *procedural* issue of the *formulation* of the various kinds of interpretative declaration, and not with the issue of whether or not they are lawful, which he will take up in his next report. However, this does not mean that there is no link whatsoever between the two issues: the respect for form

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[363] A/CN.4/477, para. 37. The references in parentheses are to the relevant articles of the Vienna Conventions of 1969 and 1986. Moreover, a footnote stated that: "To the extent that the role of depositories seems, in the predominant system, to have been exclusively 'mechanical', this chapter will probably be the logical — although probably not exclusive — place to discuss that topic".

[364] Cf. draft guidelines 1.2, 1.2.1 and 1.2.2.

[365] Cf. "Provisional general outline of the study", A/CN.4/477, para. 37.

[366] See, for instance, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 15, or ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), paras. 534 and 539. See also the following summary records of the International Law Commission: 3 June 1997, A/CN.4/SR.2987, paras. 15 (Mr. Pellet) and 28 (Mr. Pambou-Tchivounda); 26 June 1997, A/CN.4/SR.2500, para. 35 (Mr. Addo); 30 July 1998, A/CN.4/SR.2552, p. 5 (Mr. Lukashuk and Mr. Pambou-Tchivounda), pp. 7 and 16 (Mr. Pellet), pp. 9 to 10 (Mr. Hafner), p. 10 (Mr. Brownlie) and p. 11 (Mr. Simma).

[367] In a recent study, Rosario Sapienza accepts that the legal regime of reservations must be a starting point for studying the legal regime of interpretative declarations, but argues that the latter regime is a separate issue. *Dichiarazioni interpretativi unilaterali e trattati internazionali*, Milan, Giuffrè, 1996, p. 222. See likewise Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, pp. 243 to 244.

[368] Cf. Third report on reservations to treaties, A/CN.4/491/Add.4, para. 334.

considered in this part is an element of the lawfulness of reservations and determines their legal effects, as the wording of the opening phrase of paragraph 1 of article 21 of the Vienna Conventions of 1969 and 1986 clearly shows:[369] "A reservation established with regard to another party *in accordance with articles 19, 20 and 23* ..." produces the effects indicated in the subparagraphs of paragraph 1 that follow.

221. Moreover, as in the case of definitions and in accordance with the decision taken by the Commission in 1996,[370] one should start systematically with the relevant provisions of the Vienna Conventions of 1969 and 1986 whenever those Conventions, no matter how incomplete, contain rules on some of the procedural problems dealt with in this part. This is obviously true of article 23 of the Conventions, entitled "Procedure regarding reservations", but other provisions of the Vienna Conventions contain rules on the formulation of reservations, their acceptance or objections thereto. These provisions are listed in the excerpt from the provisional general outline reproduced above;[371] they are the *chapeau* to article 19, part of article 20 and article 22. As a result, as was done for the definition of reservations,[372] the Special Rapporteur will propose reproducing these provisions in the Guide to Practice, adapting them where necessary to the Guide's form and layout.

222. By virtue of the above, the present part will be organized as follows:

- Chapter III: Formulation, modification and withdrawal of reservations and interpretative declarations;
- Chapter IV: Formulation and withdrawal of acceptances of and objections to reservations and of reactions to interpretative declarations ("reservations dialogue").

## III. Formulation, modification and withdrawal of reservations and interpretative declarations

223. According to José María Ruda, "[t]he procedure regarding reservations should necessarily be analogous to the procedure for the conclusion of treaties, because a reservation modifies the application of the provisions of a treaty, i.e., it modifies the substance of a contractual stipulation".[373] This is true in part, but disregards the fact that reservations are, by definition, *unilateral* declarations, an essential characteristic that makes them very different from the treaty to which they relate and which explains the procedural particularities of their formulation.

224. As one writer has said, "[l]'apposizione di riserve ad un trattato è regolata da *norme diplomatici-processuali*, che concernono il *momento* in cui la riserva può essere posta; la *forma* che essa deve assumere; la *pubblicità*, onde fa d'uopo che sia

[369] See likewise Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law, Ninth Edition*, vol. I, *Peace*, parts 2 to 4, London, Longman, 1992, p. 1247.

[370] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491 (d).

[371] Para. 215.

[372] Cf. draft guideline 1.1.

[373] "Reservations to Treaties", *R.C.A.D.I.* 1975-III, vol. 146, p. 193.

circondata; e, infine, la *revocabilità*, che è propria della riserva stessa"[374] (the formulation of reservations to a treaty is regulated by *diplomatic-procedural* norms, which concern the *moment* at which the reservation can be made; the *form* which it must take; the *publicity* which must be given to it; and, lastly, the *revocability* which is its defining feature). However, this ignores the fact that the withdrawal of reservations, a consequence of their "revocability", is subject to special rules which are not entirely symmetrical with those applicable to their formulation, since the modification of reservations can be a means of partially withdrawing them, something which remains highly problematic and should therefore be studied at the same time as withdrawal *stricto sensu*.

225. While the procedure for the formulation and withdrawal of reservations is fairly precisely regulated in the Vienna Conventions, the Conventions make no mention of the rules applicable to interpretative declarations, which one can but try to "develop progressively" by comparison with those on the formulation and withdrawal of reservations, in the light of a somewhat vague practice, since it does not seem possible to develop them entirely separately.

226. This chapter will therefore be divided into two sections on, respectively: (a) the formulation of reservations and interpretative declarations and (b) their withdrawal and modification.

## A. Formulation of reservations and interpretative declarations

227. While the three Vienna Conventions of 1969, 1978 and 1986 define reservations as being "made" at specific moments,[375] it is the verb "formulate" that is used in the substantive provisions on reservations:

- "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, *formulate* a reservation unless ..." (article 19 of the Vienna Convention of 1969,[376] "Formulation of reservations");
- "The reservation [must] be *formulated* ... in writing ..." (article 23, paragraph 1, of the 1969 and 1986 Conventions, "Procedure regarding reservations");
- "If *formulated* when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed ..." (article 23, paragraph 2, of the 1969 Convention[377]);
- "When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty ... it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States ... unless, when making the notification of succession, it expresses a contrary intention or *formulates* a reservation which relates to

[374] Adolfo Maresca, *Il diritto dei trattati — La Convenzione codificatrice di Vienna del 23 Maggio 1969*, Milan, Giuffrè, 1971, p. 299; the italics are his.

[375] Cf. articles 2 (d) of the 1969 and 1986 Conventions and 2 (j) of the 1978 Convention.

[376] Article 19 of the 1986 Convention is identical, except that it also gives international organizations the power to formulate reservations.

[377] Article 23, paragraph 2, of the 1986 Convention is identical, except that it adds act of formal confirmation to the list of ways of expressing consent to be bound by a treaty.

the same subject-matter as that reservation" (article 20, paragraph 1, of the Vienna Convention of 1978 on Succession of States in respect of Treaties);

- "When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty ... a newly independent State may *formulate* a reservation unless the reservation is one the *formulation* of which would be excluded ..." (article 20, paragraph 2, of the 1978 Convention);
- "When a newly independent State *formulates* a reservation ..." (article 20, paragraph 3, of the 1978 Convention).

228. The use of the verb *formulate* rather than *make* in the above provisions is the result of a deliberate choice:[378] the authors of the Conventions wanted to make it clear that a reservation is not sufficient in itself and produces effects (hence is "made") only if it is either accepted[379] or expressly authorized by the treaty.[380] This choice does not, of course, solve every problem,[381] and the Commission will have to come back to it when it takes up the question of the legal effects of reservations; it nevertheless shows, quite rightly, that the formulation of a reservation is part of a *process* of which it is the starting point and which continues (in theory) with its acceptance (or rejection — by means of an objection), which are dealt with in the next chapter of this report.

229. For now, all that matters is this starting point, namely, the moment at which a reservation (or an interpretative declaration) is formulated, the form it takes and the publicity which must be given to it. The hidden part of the iceberg, i.e. the internal procedure leading to the formulation of the reservation or interpretative declaration, must also be examined, as must its international implications.

### 1. Moment of formulation of reservations and interpretative declarations

230. Although the moment at which a reservation or a conditional interpretative declaration may be formulated is mentioned in their definitions,[382] it is necessary to come back to it: first of all, simply listing the "cases in which a reservation may be formulated", to use the title chosen by the Commission for draft guideline 1.1.2, does not solve all the problems raised in this regard; secondly, the Vienna Conventions themselves address the issue in several places.

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[378] Cf. with regard to future article 19 of the 1969 Convention, the first and fourth reports of Sir Gerald Fitzmaurice on the law of treaties (*Yearbook ... 1962*, vol. II, p. 62, para. 1, and p. 65, para. 9, and *Yearbook ... 1965*, vol. II, p. 53, para. 6) and the rejection of the proposal by China at the Vienna Conference that the words "formulate a reservation" should be replaced by "make reservations" (*Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Documents of the Conference* (United Nations publication, Sales No. E.70/V.5), paras. 176 and 183).

[379] Cf. article 20 of the Vienna Conventions of 1969 and 1986.

[380] Which is why article 19, paragraph 2 (b), refers to "specified reservations" which "may be made".

[381] See the developments recorded by P. H. Imbert in "L'ambiguité de l'expression 'formulation des réserves'" (*Les réserves aux traités multilatéraux*, Paris, Pédone, 1979, pp. 83 to 86; see also pp. 89 to 90 and J. M. Ruda, "Reservations to Treaties", *R.C.A.D.I.*, 1975-III, vol. 146, p. 179). Moreover, it is hard to see why article 2, paragraph 1 (d), uses the word "made" in the definition of reservations.

[382] Cf. draft guidelines 1.1, 1.1.2, 1.1.4 and 1.2.1.

231. The limit on the time within which a unilateral declaration may be formulated in order to constitute a reservation under article 2, paragraph 1 (d), is in fact confirmed by articles 19 and 23, paragraph 2, of the 1969 Convention and the corresponding provisions of the 1986 Convention:[383]

*Article 19. Formulation of reservations*

"A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless ...".

*Article 23. Procedure regarding reservations*

"2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, 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".

232. Moreover, article 20 of the Vienna Convention of 1978 accepts that a reservation may be maintained or formulated at the moment when "a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession".

233. There is no point in returning to the issues already addressed and resolved by the Commission in connection with the definition of reservations. It can be taken as settled that:

- The list in article 19 of the 1969 and 1986 Conventions includes "all the means of expressing consent to be bound by a treaty referred to" in the two Conventions;[384]
- A reservation may be formulated in relation to a territory in respect of which it makes a notification of territorial application;[385]
- The omission from the list in article 19 of the possibility of formulating a reservation on the occasion of a succession of States was remedied, at least in part, by article 20 of the Vienna Convention of 1978;[386] and
- It is not useful to state expressly that a treaty may provide for the possibility of formulating a reservation at any other moment, since all the guidelines in the

[383] It is the latter provisions which are reproduced here, since they include act of formal confirmation among the means of expressing consent to be bound, which the Vienna Convention of 1969, dealing exclusively with treaties among States, omits.

[384] See draft guideline 1.1.2 and its commentary (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 203 to 206); see also the third report on reservations to treaties, A/CN.4/491/Add.3, paras. 138 to 143.

[385] See draft guideline 1.1.4 and its commentary (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 209 to 210); see also the third report on reservations to treaties, A/CN.4/491/Add.3, paras. 144 to 146.

[386] See draft guideline 1.1 and paragraphs 5 and 8 of its commentary (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196 to 198); see also the third report on reservations to treaties, A/CN.4/491/Add.1, paras. 70 to 72, and Add.3, para. 138. The specific problems with regard to succession of States will be dealt with in a separate study and in a specific part of the Guide to Practice.

Guide to Practice are intended to substitute for an absence of will and the contracting parties to a treaty can always derogate therefrom if they see fit.[387]

234. On this latter point, it could nevertheless be asked whether it would be advisable to indicate in the Guide to Practice that such a possibility must be expressly provided for in the treaty or unanimously accepted by the parties. This goes back to the more general problem of reservations which are formulated late (see paras. 279 to 306). Moreover, a number of points should be made regarding the formulation *ratione temporis* of reservations and interpretative declarations (see paras. 235 to 278).

[387] See, for instance, the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 133 and 163, and the third report, A/CN.4/491/Add.2, paras. 102 to 103, and Add.3, paras. 138 to 140; see also *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 122, and para. 5 of the commentary on draft guideline 1.1.2 (ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), p. 205).

### (a) Reservations and interpretative declarations formulated *ratione temporis*

*The travaux préparatoires of article 19 and article 23, paragraph 2, of the Vienna Conventions of 1969 and 1986*

235. The text of article 23, paragraph 2, of the Vienna Convention of 1986,[388] which requires the confirmation of reservations made when signing if they have been formulated "subject to ratification, act of formal confirmation, acceptance or approval", is reprinted above (para. 231).

236. This provision originated in the proposal, made by Sir Humphrey Waldock in his first report, to include a provision (draft article 17, paragraph 3 (b)) based on the principle that "the reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained".[389] The Special Rapporteur did not conceal that "[c]learly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all",[390] mentioning, in particular, article 14 (d)[391] of the Harvard draft, which posited the contrary assumption.[392]

237. The members of the Commission, absorbed in the discussion of the provisions concerning the lawfulness of reservations, attached hardly any importance to this part of the draft of what was then article 17 during the discussion in plenary meeting.[393] After considering it on two successive occasions, the Drafting Committee adopted the principle proposed by the Special Rapporteur, while making several changes (not all of them felicitous[394]) to the initial draft.[395]

238. The commentary on this provision (which became article 18, paragraph 2) is interesting in that it explains in a concise way the *raison d'être* of the rule adopted by the Commission:

> "A statement of reservation is sometimes made during the negotiation and duly recorded in the *procès-verbaux*. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. It seems essential, however, that the State concerned should formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear."[396]

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388 The text of the same provision in the 1969 Convention is identical, the only difference being that it does not mention the procedure to be followed by an international organization.

389 *Yearbook ... 1962*, vol. II, p. 66.

390 Ibid.

391 Waldock was citing article 15 (d) by error.

392 "If a State has made a reservation when signing a treaty its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty"; the Harvard draft is reprinted in *Yearbook ... 1950*, vol. II, pp. 243-244.

393 Cf. the summary records of the 651st to 656th meetings (25 May-4 June 1962), *Yearbook ... 1962*, vol. I, pp. 139-179. See, however, the comments by Mr. Castrén (652nd meeting, 28 May 1962, p. 148) and Sir Humphrey Waldock (656th meeting, 4 June 1962, pp. 174-175).

394 The Drafting Committee referred, in particular, to confirmation of the reservation by the State which formulates it "when carrying out the act establishing its own consent to be bound by the treaty" (*Yearbook ... 1962*, vol. I, p. 221).

395 See the summary records of the 663rd and 668th meetings (18 and 25 June 1962), *Yearbook ... 1962*, vol. I, pp. 221-223 and p. 257.

396 *Yearbook ... 1962*, vol. II, p. 180.

239. Governments made hardly any comments on the substance of draft article 18. Nevertheless (leaving aside the observations of Denmark and Finland, which concerned minor drafting questions[397]), note can be taken of Sweden's comment that articles 18 and 19, which dealt with acceptance of and objections to reservations, contained much that "simply exemplifies what the parties may prescribe or that merely amounts to procedural rules which would fit better into a code of recommended practices".[398] Further to these observations, the Special Rapporteur, Sir Humphrey Waldock, proposed in his fourth report a new article 20 dealing with the question of reservations from a procedural standpoint.[399] The first two paragraphs of this article, entitled "Procedure regarding reservations", corresponded to article 18, paragraphs 2 and 3, and article 19 of the former draft, and read as follows:

> "1. A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.[400]
>
> "2. A reservation put forward upon the occasion of the adoption of the text or upon signing a treaty subject to ratification, acceptance or approval, shall be effective only if the reserving State formally confirms the reservation when ratifying, accepting or approving the treaty."[401]

240. During the discussions in the Commission on second reading, few observations were made on the formulation of reservations.[402] Nevertheless, interesting comments were made on the "status" of a reservation formulated at the time of signing, pending its confirmation at the time of ratification.[403] In this connection, the Special Rapporteur believed that the rules on acceptance of reservations should be applicable only after the reservation was confirmed; "otherwise, it might be difficult to frame a rule governing the case of tacit consent".[404] After certain changes had been made to it by the Drafting Committee, new article 20 was adopted by the Commission.[405]

241. Draft article 20, paragraph 2, as finally adopted, differed from the current text of article 23, paragraph 2, only by the inclusion of a reference to reservations formulated "on the occasion of the adoption of the text",[406] a reference that was

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[397] *Yearbook ... 1965*, vol. II, pp. 46-47. Japan also submitted draft articles which roughly recapitulated the Commission's wording concerning the moment of formulation of reservations (*Yearbook ... 1966*, vol. II, p. 306).

[398] Ibid., vol. II, p. 47. This allusion to a "code of recommended practices" testifies to an interesting intuition of the needs which the elaboration of the Guide to Practice is designed to meet.

[399] Ibid., pp. 53-54.

[400] This paragraph recapitulates the preliminary clause of former art. 18, para. 2 (a), and in a simplified form, para. 3 of that article.

[401] This paragraph was a slightly simplified version of former art. 18, para. 2 (b). For their part, paras. 3 and 4 dealt with express and tacit acceptance of a reservation and paras. 5 and 6 with objections to reservations.

[402] See, however, the observations by Mr. Ruda (*Yearbook ... 1965*, vol. I, p. 154, para. 71) and Mr. Rosenne (ibid., p. 264).

[403] See, in particular, the comments by Mr. Bartos and Mr. Lachs (ibid., p. 269).

[404] Ibid.

[405] Ibid., p. 284.

[406] "If formulated on the occasion of the adoption of the text or upon signing the treaty ..." (*Yearbook ... 1960*, vol. II, p. 208).

deleted at the Vienna Conference under circumstances that have been described as "mysterious".[407] The commentary on this provision reproduces the 1962 text[408] almost verbatim and adds:

> "Paragraph 2 concerns reservations made at a later stage [after negotiation]: on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval. Here again the Commission considered it essential that, when definitely committing itself to be bound, the State should leave no doubt as to its final standpoint in regard to the reservation. The paragraph accordingly requires the State formally to confirm the reservation if it desires to maintain it. At the same time, it provides that in these cases the reservation shall be considered as having been made on the date of its confirmation, a point which is of importance for the operation of paragraph 5 of article 17 [20 in the text of the Convention].[409]

242. The rule in article 23, paragraph 2, of the 1969 Convention was reproduced in its essence by Paul Reuter in his fourth and fifth reports on the law of treaties between States and international organizations or between two or more international organizations, with only the drafting changes made necessary by the inclusion of international organizations[410] and the introduction of the concept of "formal confirmation" (with the risks of confusion which this implies between that concept and the notion of "simple" confirmation of the reservation in article 23[411]). This provision was adopted on first reading with the new drafting changes made necessary by the introduction into the draft of the concept of "formal confirmation" — equivalent to ratification for international organizations — in the form of two separate articles, owing to the distinction that was adopted for a while between, on the one hand, treaties between several international organizations and, on the other hand, treaties between States and one or more international organizations or between international organizations and one or more States.[412] The two articles 23 and 23 *bis*, which received no comments from Governments,[413] were again combined in a single provision on second reading. This provision differs from article 23 of the 1969 Convention only by the mention of international organizations and the mechanism of formal confirmation (of the treaty itself).[414] The Vienna

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[407] "In paragraph 2, the phrase 'on occasion of the adoption of the text' mysteriously disappeared from the ILC text, when it was finally approved by the Conference" (J. M. Ruda, "Reservations to Treaties", *RCADI* 1975-III, vol. 146, p. 195). The Special Rapporteur found no trace of any amendment to this effect in the official records of the Conference.

[408] See para. 238 above.

[409] *Yearbook ... 1966*, vol. II, p. 208.

[410] *Yearbook ... 1975*, vol. II, p. 38, and *Yearbook ... 1976*, vol. II, Part One, p. 146.

[411] See the discussions on this subject at the 1434th meeting on 6 June 1977, *Yearbook ... 1977*, vol. I, pp. 101-103. At the same meeting, a discussion began on the notion of international organizations having the capacity to become parties to a treaty (ibid.).

[412] See the text and its commentary in *Yearbook ... 1976*, vol. II, Part One, p. 146 (fifth report of Paul Reuter) and *Yearbook ... 1977*, vol. II, Part Two, pp. 115-116 (report of the Commission — two separate articles; this distinction was abandoned in 1981 — see the tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II, Part One, p. 63). See also the discussions at the 1434th and 1451st meetings (6 June and 1 July 1977), *Yearbook ... 1977*, vol. I, pp. 101-103 and 195-196).

[413] The Council of Europe stated, however, that the rule contained in paragraph 2 of the article was consistent with its practice.

[414] Tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II, Part One, p. 63, and report of the Commission, *Yearbook ... 1982*, vol. II, Part Two, p. 37.

Conference of 1986 adopted the text prepared by the International Law Commission without making any changes to the French text.[415]

*The obligation to confirm reservations made when signing*

243. While there can be hardly any doubt that at the time of its adoption, article 23, paragraph 2, of the 1969 Convention pertained more to progressive development than to codification in the strict sense,[416] one can probably consider the obligation to formally confirm reservations formulated when treaties in formal form are signed as having become part of positive law. Crystallized by the 1969 Convention and confirmed in 1986, the rule is followed in practice and seems to satisfy an *opinio necessitatis juris* which permits a customary value to be assigned to it.

244. Thus, in an aide-mémoire dated 1 July 1976, the United Nations Legal Counsel, describing the "practice of the Secretary-General in his capacity as depositary of multilateral treaties regarding ... reservations and objections to reservations relating to treaties not containing provisions in that respect", relied on article 23, paragraph 2, of the Vienna Convention of 1969 in concluding that: "If formulated at the time of signature subject to ratification, the reservation has only a declaratory effect, having the same legal value as the signature itself. It must be confirmed at the time of ratification; otherwise, it is deemed to have been withdrawn".[417] The Council of Europe changed its practice in this regard in 1980;[418] and in their answers to the Commission's questionnaire on reservations to treaties, the States which replied to question 1.10.2[419] indicated that, in general, they confirmed reservations formulated when the treaty was signed at the time of ratification or accession.[420]

245. Curiously, however, the practice of the Secretary-General of the United Nations is inconsistent with the conviction expressed by the Legal Counsel in

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[415] The Chairman of the Drafting Committee, Mr. Al-Khasawneh, stated that a correction had been made to the English text (replacing "by a treaty" with "by the treaty" — 5th plenary meeting, 18 March 1986, records of the Conference, p. 15, para. 63.

[416] See the first report of Sir Humphrey Waldock, op. cit., para. 236. See also: D. W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law*, 1995, p. 28, or Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T. M. C. Asser Institute, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 41.

[417] *Yearbook ... 1976*, p. 211. See also Marjorie M. Whiteman, *Digest of International Law*, vol. 14, 1970, pp. 158-159.

[418] Cf. Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, loc. cit., and Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Publications du Conseil de l'Europe, 1999, p. 96.

[419] "If reservations were formulated at the time when the treaty was signed, were they formally confirmed when the State expressed its definitive consent to be bound?"

[420] Cf. the replies by Japan, Switzerland (with the exception, it would appear, however, of the International Telecommunications Convention of 22 December 1982 and the additional protocols thereto, but no explanation is given concerning this exception), France and Mexico. Bolivia indicates that on one occasion it formulated reservations when signing but did not confirm them, since they were the subject of a protocol annexed to the treaty. In its reply to question 1.10.1 ("Was the timing of the formulation of the reservations based on any particular considerations? If so, what considerations?"), Denmark, which states that it formulates all its reservations when expressing definitive consent to be bound, expressly bases its answer on art. 23, para. 2, of the Convention.

1976,[421] since the former includes in the valuable publication entitled *Multilateral treaties deposited with the Secretary-General* reservations formulated when the treaty was signed, whether or not they were confirmed subsequently,[422] even on the assumption that the State formulated other reservations when expressing its definitive consent to be bound.

246. In legal writing, the rule laid down in article 23, paragraph 2, of the Vienna Conventions of 1969 and 1986 is the object of what now appears to be general approval,[423] even if that was not always true in the past.[424] In any event, whatever arguments might be advanced against it, they would not be of such a nature as to challenge a clear rule appearing in the Vienna Conventions that the Commission has decided to follow in principle, except in case of an overwhelming objection.

247. Accordingly, it seems both necessary and desirable to recapitulate in the Guide to Practice, in the form of a draft guideline, the rule laid down in article 23, paragraph 2, of the Vienna Convention of 1986.[425] Two problems arise, however, with regard to the specific formulation of this draft.

248. First, is it appropriate simply to reproduce the wording of article 23, paragraph 2, or should it be supplemented to take into account the possibility afforded to a successor State to formulate a reservation when it makes a notification of succession in accordance with draft guideline 1.1, which thus rounds out the definition of reservations contained in article 2, paragraph 1 (d) of the 1986 Convention? The answer is not very simple. At first glance, the successor State can either confirm or invalidate an existing reservation made by the predecessor State,[426] or formulate a new reservation when it makes a notification of succession,[427] in neither of these two cases, therefore, is the successor State led to confirm a reservation when signing. Nevertheless, under article 18, paragraphs 1 and 2, of the 1986 Convention, a newly independent State may, under certain conditions, establish through a notification of succession its capacity as a contracting State or party to a multilateral treaty which was not in force on the date of the State succession and to which the predecessor State was itself a contracting State. Under

[421] See para. 244 above.

[422] Examples of reservations formulated when signing and not confirmed subsequently: the reservations made by the Islamic Republic of Iran and Peru to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 (United Nations, *Multilateral treaties deposited with the Secretary-General: Status as at 31 December 1999*, vol. I, pp. 334-346) and those made by Turkey to the Customs Convention on Containers of 2 December 1972 (ibid., p. 487). Examples of reservations made when signing and confirmed when expressing consent to be bound: the reservation made by the United Kingdom of Great Britain and Northern Ireland to the Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials of 22 November 1950 (ibid., vol. II, p. 66), the reservations made by Argentina and Venezuela to the Agreement establishing the Common Fund for Commodities of 27 June 1980 (ibid., vol. II, pp. 139-140), and the reservation made by Slovakia to the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (ibid., p. 121).

[423] See, in particular, D. W. Grieg, "Reservations: Equity as a Balancing Factor?", *AYIL*, 1995, p. 28, and P. H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, p. 285.

[424] Cf. Imbert, op. cit., pp. 253-254.

[425] Rather than the 1969 formulation, which is less comprehensive because international organizations are omitted.

[426] Cf. article 20, para. 1, of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

[427] Cf. article 20, para. 2.

article 2 (f) of the Vienna Convention of 1969 and article 2 (k) of the 1986 Convention, however, "'contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force" — a State, not a mere signature. It follows, conversely, that there can be no "succession to the signing" of a treaty (in formal form[428])[429] and that the concept of notification of succession should not be introduced into draft guideline **2.2.1**.[430]

249. Second, it might be asked whether the Commission should take account, in the preparation of this draft, of draft guideline 1.1.2 ("Cases in which a reservation may be formulated"), which provides that:

> "The cases in which a reservation may be formulated contained in guideline 1.1 include all the means of expressing consent to be bound by a treaty referred to in article 11 of the Vienna Convention of 1969 and 1986 on the law of treaties."

The problem does not arise with regard to the designation of the moment when the confirmation should take place, since the formula contained in article 23, paragraph 2, of the Vienna Conventions of 1969 and 1986 is equivalent to the one adopted by the Commission in draft guideline 1.1.2 ("when expressing its consent to be bound"). It might be thought, however, that the number of cases to which article 23, paragraph 2, seems to limit the possibility of subordinating definitive consent to be bound (ratification, act of formal confirmation, acceptance or approval) is too small and does not correspond to the one in article 11.

250. In the view of the Special Rapporteur, however, such a concern is excessive; the differences in wording between article 11 and article 23, paragraph 2, of the Vienna Conventions of 1969 and 1986 lie in the omission from the latter of these provisions of two possibilities contemplated in the former: "exchange of instruments constituting a treaty" and "any other means if so agreed".[431] The probability that a State or an international organization would subordinate the expression of its

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[428] See paras. 259-260 below.

[429] The publication *Multilateral treaties deposited with the Secretary-General — Status as at 31 December 1999* mentions, however — in the footnotes and without special comment — reservations formulated when signing by a predecessor State and apparently not formally confirmed by the successor State or States; see, for example, Czechoslovakia's reservations to the 1982 United Nations Convention on the Law of the Sea, noted in connection with the Czech Republic and Slovakia (United Nations publication, Sales No. E.00.V.2, vol. II, pp. 239-240, note 4). Moreover, irrespective of the question of reservations, some States expressly indicated that they intended to succeed to the signature of a predecessor State (see, for example, the notifications made by the Czech Republic and Slovakia concerning the United Nations Convention on the Law of the Sea (ibid., p. 239) and the Vienna Convention on Succession of States in Respect of Treaties (ibid., p. 277).

[430] According to Claude Pilloud, "it seems that it should be recognized that in applying the rule provided for in article 23, paragraph 2, by analogy to reservations expressed when signing, States which have made a declaration of continuation" to the Geneva Conventions of 1949 "should, if they had meant to endorse the reservations expressed [by the predecessor State], so state expressly in their declaration of continuation" ("Les réserves aux Conventions de Genève de 1949", *Revue internationale de la Croix-Rouge*, March-April 1976, p. 135. It is doubtful whether such an analogy could be made; the matter will be considered in a future report on succession to reservations.

[431] For a similar comment concerning the comparison of article 2, para. 1 (d), and article 11, see the commentary on draft guideline 1.1.2, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 205-206, para. (8).

definitive consent to be bound by a multilateral treaty subject to reservations to one of these modalities is sufficiently low that it does not seem useful to overburden the wording of draft guideline **2.2.1** or to include, in chapter 2 of the Guide to Practice, a draft guideline equivalent to draft guideline 1.1.2. No doubt it will be sufficient to mention this point in the commentary.

251. Under these circumstances, the wording of draft guideline **2.2.1** can be modelled on that of article 23, paragraph 2, of the Vienna Convention of 1986:

> **2.2.1** *Reservations formulated when signing and formal confirmation*
>
> *If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, 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.*

252. It may be asked, furthermore, whether a reservation can be formulated when initialling[432] or signing a treaty *ad referendum*, which are mentioned along with signing in article 10 of the Vienna Conventions of 1969 and 1986 as methods of authenticating the text of a treaty. The answer to this question is certainly affirmative: nothing prevents a State or an international organization from indicating formally to its partners the "reservations" which it has regarding the adopted text at the authentication stage,[433] or, for that matter, at any previous stage of negotiation.

253. This had, moreover, been contemplated by the International Law Commission in draft article 19 (which became article 23 of the 1969 Convention), of which paragraph 2, as it appeared in the final text of the draft articles adopted in 1966, provided that: "If formulated on the occasion of the adoption of the text ... a reservation must be formally confirmed by the reserving State 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".[434] Commenting on this provision, the Commission stated:

> "(3) Statements of reservations are made in practice at various stages in the conclusion of a treaty. Thus, 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."[435]

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[432] Cf. Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, 1970, p. 295.

[433] On authentication "as a distinct part of the treaty-making process", see the commentary on article 9 of the International Law Commission's draft articles on the law of treaties (which became article 10 at the Vienna Conference), *Yearbook ... 1966*, vol. II, p. 212.

[434] See *Yearbook ... 1966*, vol. II, p. 208.

[435] Ibid., p. 208, para. (3) of the commentary.

254. As indicated above,[436] the reference to the adoption of the text disappeared from the text of article 23, paragraph 2, of the Vienna Convention of 1969 under "mysterious" circumstances during the Vienna Conference of 1968-1969, probably out of concern for consistency with the wording of the *chapeau* of article 19 (the summary records of the Conference give no indication about this, however). The question arises whether it might not be appropriate to reinstate the reference in the Guide to Practice.

255. In the view of the Special Rapporteur, the Commission would be making a useful clarification by reinstating it, given that:

- On the one hand, any reservation formulated prior to the expression of definitive consent to be bound[437] by the treaty must be confirmed by its author; that is the very purpose of this clarification, and
- On the other hand, there does not seem to be any reason to limit the clarification to "embryonic" reservations formulated when adopting or authenticating the text; the obligation to confirm formally is, of course, required, especially when the "intention to formulate a reservation" is expressed at a prior stage of negotiation.

256. This clarification could be the subject of a draft guideline **2.2.2**, worded as follows:

> **2.2.2** *Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation*
>
> 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.

257. This wording is taken from that of draft guideline **2.2.1**,[438] itself modelled on article 23, paragraph 2, of the Vienna Convention of 1986, and the question arises whether it might not be advantageous to combine the two drafts. This would "economize" on provisions, but would have the drawback of altering the text of the Vienna Convention. It may, of course, be asserted that the Commission did the same thing with regard to draft guideline 1.1; however, the question was not posed in exactly the same terms; the definition of reservations adopted in the draft "is none other than the composite text of the definitions contained in the Vienna Conventions of 1969, 1979 and 1986, to which no changes have been made".[439] The combining in a single draft of the texts proposed for draft guidelines **2.2.1** and **2.2.2** would not be of the same nature and would be tantamount to adding to the text of the Vienna Conventions a possibility that they did not contemplate. For this reason, the Special Rapporteur is inclined to favour two separate drafts.

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[436] Para. 241.

[437] "Negotiated reservations", that is to say, reservation clauses inserted in a treaty during negotiation (see paras. 164-171 above), are often adopted following the expression by one or more States of their disagreement with some of the proposed provisions; such expressions of disagreement may be regarded as "embryonic reservations".

[438] See para. 251 above.

[439] Para. (1) of the commentary on draft guideline 1.1, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 196.

258. If a majority of members of the Commission were of a different view, the text of the draft might read as follows:

> *Reservations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation*
>
> *If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, an act of formal confirmation, acceptance or approval, 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.*

259. Whatever solution is adopted in this respect,[440] the proposed wording (which is, in any event, faithful to the Vienna text) clearly implies that the rule thus codified applies only to treaties in formal form, those that do not enter into force solely by being signed.[441] On the other hand, with regard to treaties not requiring any post-signing formalities in order to enter into force, which are referred to in French legal writing as "agreements in simplified form",[442] it is self-evident that, if formulated when the treaty is signed, a reservation becomes effective immediately, without any formal confirmation being necessary or even conceivable.[443]

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[440] What is involved is not a fundamental issue. The solution to be adopted by the Commission in this regard will constitute a precedent, however, for the question cannot fail to arise again with respect to other provisions of the Vienna Conventions. Taking into account the advantage of deviating as little as possible from the Conventions, it seems to the Special Rapporteur that the Commission should take another look at the matter before combining draft guidelines **2.2.1** and **2.2.2**, as envisaged in para. 258 above.

[441] On the distinction between treaties in formal form and agreements in simplified form, see, in particular: C. Chayet, "Les accords en forme simplifiée", *AFDI* 1957, pp. 1-13; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, Paris, *LGDJ*, 6th ed., 1999, pp. 136-144; P. F. Smets, *La conclusions des accords en forme simplifiée*, Brussels, Bruylant, 1969, 284 pp. This distinction is more common among authors writing in the Roman-Germanic tradition than among those schooled in common law, which is more concerned with executive agreements, a concept that does not fully coincide with the notion of agreements in simplified form (see G. J. Horvath, "The Validity of Executive Agreements", *OZORV*, 1979, pp. 105-131). Sir Ian Sinclair (*The Vienna Convention on the Law of Treaties*), Manchester University Press, 1984, p. 41) and Ian Brownlie (*Principles of Public International Law*, Oxford University Press, 5th ed., 1998, p. 611), however, mentioned the concept of "agreements" or "treaties in simplified form" in connection with discussions on the law of treaties in the International Law Commission.

[442] While the procedure involving agreements in simplified form is more commonly used for concluding bilateral rather than multilateral treaties, it is not at all unknown in the second case, and major multilateral agreements may be cited which have entered into force solely by being signed. This is true, for example, of the General Agreement on Tariffs and Trade of 1947 (at least in terms of the entry into force of the bulk of its provisions following the signing of the Protocol of Provisional Application), the Geneva Declaration on the Neutrality of Laos of 23 July 1962 or the Agreement establishing a food and fertilizer technology centre for the Asian and Pacific region, *United Nations Treaty Series*, vol. 704, No. 10100, p. 18. There are also "mixed" treaties that can, if the Contracting Parties so choose, enter into force solely by being signed or subject to ratification (cf. article XIX of the Agreement of 20 August 1971 concerning the International Telecommunications Satellite Organization (Intelsat); see also the following footnote).

[443] The Special Rapporteur is not aware, however, of any clear example of a reservation made at the time when a multilateral agreement in simplified form was signed. This eventuality certainly cannot be ruled out, however; as the preceding footnote indicates, there are also "mixed treaties"

260. In truth, however, this rule derives from the text of article 23, paragraph 2, of the Vienna Conventions of 1969 and 1986; it is reproduced in draft guideline **2.2.1** and supplemented by draft guideline **2.2.2**. Nevertheless, given the practical nature of the Guide to Practice, it would probably not be superfluous to clarify this explicitly in a draft guideline **2.2.3**:

> **2.2.3** *Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]*[444]
>
> *A reservation formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.*

261. It is self-evident, however, that if an "embryonic reservation" to an agreement in simplified form is formulated when negotiating, adopting or authenticating the text of a treaty, it must be confirmed when signing. Nevertheless, just as, in this case, signing constitutes the expression of definitive consent to be bound, the possibility is covered expressly by draft guidelines **2.2.1** and **2.2.2** ("when expressing consent to be bound"), and it seems completely unnecessary to repeat it in a separate draft guideline.

262. There is, moreover, another hypothetical case in which the confirmation of a reservation formulated when signing appears to be superfluous, namely, where the treaty itself provides expressly for such a possibility without requiring confirmation. Thus, for example, article 8, paragraph 1, of the Council of Europe Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality of 1963 provides that:

> "Any Contracting Party may, *when signing this Convention or* depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the Annex to the present Convention" (italics added).[445]

263. In a case of this kind, it seems that practice consists of not requiring a party which formulates a reservation when signing to confirm it when expressing definitive consent to be bound; thus, to return to the previous example, France made a reservation when it signed the 1963 Convention and did not confirm it subsequently.[446] Likewise, Hungary and Poland did not confirm their reservation to

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which can, if the parties so choose, enter into force solely upon signature or following ratification, and which are subject to reservations or contain reservation clauses (cf. the 1971 Convention on Psychotropic Substances (art. 32), the Code of Conduct for Liner Conferences of 6 April 1974 or the International Convention relating to the arrest of seagoing ships of 1999 (art. 12, para. 2)).

[444] The alternative draftings that have been proposed relate to the fact that, as indicated in the preceding footnote, the term "agreements in simplified form", familiar to jurists schooled in the Roman law tradition, might bewilder those with training in common law.

[445] See also, among numerous examples: article 17 of the New York Convention on the Reduction of Statelessness, article 30 of the Council of Europe Convention on Mutual Administrative Assistance on Tax Matters of 1988, article 29 of the European Convention on Nationality of 1997 or article 24 of the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons of 1989.

[446] Council of Europe, European Committee on Legal Cooperation (CCJ), *CCJ Conventions and reservations to those Conventions*, Note by the Secretariat, CCJ (99) 36, Strasbourg, 30 March

article 20 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides, in its article 28, paragraph 1, that such a reservation can be made when signing. Nor did Luxembourg confirm its reservation to the Convention relating to the Status of Refugees of 28 July 1951, or Ecuador its reservation to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 17 December 1973.[447] It is true that other States[448] nonetheless confirmed their reservations, to the same provision of the Convention against Torture at the time of ratification. In the view of the Special Rapporteur, reservations made when signing the Convention against Torture were sufficient in and of themselves. While nothing prevented the reserving States from confirming them,[449] nothing compelled them to do so. The rule set out in article 23, paragraph 2, of the Vienna Conventions should be applicable only where the treaty is silent; otherwise, the provisions providing for the possibility of reservations when signing would have no useful effect.

264. Despite the uncertainties in practice — which may be explained by the fact that if a formal confirmation in a case of this kind is not essential, it is also not ruled out — it does not seem futile to endorse the "minimum" practice (this seems logical, since the treaty expressly provides for the formulation of reservations when signing[450]) by embodying it in a draft guideline that might read as follows:

1999, p. 11. The same applied to Belgium's reservations to the 1988 Convention on Mutual Administrative Assistance on Tax Matters (ibid., p. 55).

[447] *Multilateral treaties deposited with the Secretary-General* ..., vol. I, p. 224 and p. 214; ibid., vol. I, p. 265, and vol. II, p. 115. The Hungarian reservation was subsequently withdrawn.

[448] Belarus, Bulgaria (reservation subsequently withdrawn), Czechoslovakia (reservation subsequently withdrawn by the Czech Republic and Slovakia), Morocco, Tunisia and Ukraine (reservation subsequently withdrawn); see ibid., vol. I, pp. 212-214.

[449] And such "precautionary confirmations" are quite common (see, for example, the reservations by Belarus, Brazil (which, however, confirmed only two of its three initial reservations), Hungary, Poland, Turkey or Ukraine to the 1971 Convention on Psychotropic Substances, ibid., vol. I, pp. 327-329).

[450] If this principle was not recognized, many unconfirmed reservations would have to be deemed illegal (or without effect), even where the States which formulated them did so on the basis of the text of the treaty itself.

**2.2.4** *Reservations formulated when signing for which the treaty makes express provision*

*A reservation formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate a reservation at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.*

*Time of formulation of interpretative declarations (recapitulation)*

265. The third report on reservations to treaties discusses in some detail the time at which an interpretative declaration may be formulated.[451] The report indicates in particular that a "simple" interpretative declaration may be formulated at any time, unless otherwise stipulated by the treaty that it concerns, whereas a conditional interpretative declaration may be formulated only when signing or when expressing consent to be bound, since by definition it makes participation in the treaty by the declarant State or international organization subject to certain conditions.

266. These views were accepted by the Commission and are reflected in draft guideline 1.2, which defines interpretative declarations independently of any time factor,[452] and draft guideline 1.2.1, which on the contrary specifies that a conditional interpretative declaration, like a reservation, is "a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty ...".[453]

267. However, in the case of this second hypothesis, the Commission noted that if the conditional interpretative declaration was formulated when signing the treaty, it would "probably" be "confirmed at the time of the expression of definitive consent to be bound".[454] There is no logical reason for advocating one solution for reservations and another for conditional interpretative declarations.

268. It will be noted that in practice States wishing to make their participation in a treaty subject to a specified interpretation of the treaty generally confirm their interpretation when stating it at the time of signature or at any earlier point in the negotiations. The following are examples:

- Germany and the United Kingdom, upon ratifying the Basel Convention of 1989 on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, confirmed "declarations"[455] that could be regarded as being conditional;[456]

[451] A/CN.4/491/Add.4, paras. 336-346.

[452] See paras. 21-32 of the commentary to draft guideline 1.2, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 234-239.

[453] See paras. 15-18 of the commentary to draft guideline 1.2.1 (ibid., pp. 248-249).

[454] Ibid., note 346, p. 249.

[455] See *Multilateral Treaties deposited with the Secretary-General*, ..., vol. II, pp. 356-357.

[456] Moreover, the question may be asked whether confirmation of an interpretative declaration made when signing constitutes an indication (among others) of its conditional nature.

- Monaco proceeded in the same manner when it signed and then ratified the 1966 Covenant on Civil and Political Rights;[457]

- Austria set out in its instrument of ratification of the European Convention of 6 May 1959 on the Protection of the Archaeological Heritage a declaration made when signing;[458]

- The European Community, when approving the 1991 Espoo Convention, also confirmed a declaration that it had made when signing.[459]

269. It is thus appropriate to transpose to conditional interpretative declarations the rules governing the formal confirmation of reservations formulated when signing (draft guideline 2.2.1) or when negotiating, adopting or authenticating the text of the treaty (draft guideline 2.2.2). Two problems arise, however.

270. Firstly, there is a methodological problem as to whether to include one or more draft guidelines reproducing the substance of the corresponding draft text on the confirmation of reservations formulated when signing, or whether it would suffice to follow the procedure adopted by the Commission in draft guideline 1.5.2 on "interpretative declarations in respect of bilateral treaties",[460] and to refer to draft guidelines 2.2.1 and 2.2.2. The chief reason for adopting that procedure in draft guideline 1.5.2 was that the Commission had decided not to deal with "reservations" to bilateral treaties in the remainder of the Guide to Practice.[461] This reason no longer applies: even if the Guide to Practice is to focus essentially on reservations, it has been agreed that wherever appropriate the Guide should also contain guidelines on the legal regime of interpretative declarations (simple or conditional).[462] It would therefore be desirable to include in the Guide substantive provisions on the obligation to confirm formally conditional interpretative declarations formulated prior to expressing definitive consent to be bound, unless the corresponding rules on reservations are simply transposed to conditional interpretative declarations.[463]

271. If the Commission agrees to this initial suggestion, it will still have to take a position on a second problem concerning form: whether one or two draft guidelines should be devoted to the question of formal confirmation of conditional interpretative declarations, as in the case of reservations. In the Special Rapporteur's view, this problem should be approached from a different angle. It was in order to avoid "touching up" the provisions of the Vienna Conventions on the law of treaties that he expressed a clear preference for adopting two separate draft guidelines: one linked to the time of the confirmation of the reservations formulated when signing, and the other to negotiations.[464] This consideration does not apply in the case of

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[457] *Multilateral Treaties deposited with the Secretary-General, ...*, vol. II, p. 139.

[458] Web site: http://conventions.coe.in/treaty/FR/cadreprincipal/htm.

[459] *Multilateral treaties deposited with the Secretary-General, ...*, vol. II, p. 363. See also the declarations by Italy and the United Kingdom on the 1992 Rio Convention on Biological Diversity, (ibid., pp. 379-380).

[460] This draft guideline reads: "Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties".

[461] See draft guideline 1.5.1 and paragraphs 19 and 20 of the commentary thereto (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10), p. 301*).

[462] See para. 218 above.

[463] Here again (see note 440 above), this is not a crucial problem, but the decision taken by the Commission on this matter will constitute a precedent, which should probably be followed in the subsequent parts and chapters of the Guide to Practice.

[464] See para. 257 above.

interpretative declarations, in respect of which the 1969 and 1986 Conventions have nothing at all to say.

272. It would therefore be reasonable to transpose draft guidelines 2.2.1 and 2.2.2 to interpretative declarations and to combine them, as in the case of the alternative proposed in paragraph 258 above for reservations:

> **2.4.4** *Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation*
>
> *If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, an act of formal confirmation, acceptance or approval, a conditional interpretative declaration 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 declaration shall be considered as having been made on the date of its confirmation.*

273. For the same reasons, it would seem legitimate to transpose to interpretative declarations[465] draft guidelines 2.2.3 and 2.2.4 concerning non-confirmation of reservations formulated when signing an agreement in simplified form or of a treaty making express provision for them. The draft guidelines in question might read as follows:

> **2.4.5** *Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]*
>
> *An interpretative declaration formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.*
>
> **2.4.6** *Interpretative declarations formulated when signing for which the treaty makes express provision*
>
> *An interpretative declaration formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate such a declaration at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.*

274. However, precisely because they may in principle be formulated at any time,[466] simple interpretative declarations pose a particular problem not encountered in the case of reservations and which does not arise in the case of conditional interpretative declarations either: what happens in cases where the treaty to which they apply expressly provides that they may be formulated only at specified times,

[465] It is unnecessary to distinguish between conditional interpretative declarations and simple interpretative declarations, because there is in any event no obligation to confirm simple interpretative declarations, which unless otherwise provided may be formulated at any time (see paras. 265-266 above).

[466] See also paras. 265-266 above.

as in the case of article 310 of the United Nations Convention on the Law of the Sea?[467]

275. Clearly, in such cases, the contracting parties may make interpretative declarations such as those envisaged in the relevant provision only at the time or times specified in the treaty. This is so obvious as to prompt the question as to whether this needs to be spelled out in a guideline in the Guide to Practice.

276. However, there are two reasons for including such a provision. Firstly, this could be an opportunity to recall that a simple interpretative declaration may in principle be formulated at any time — which none of the draft guidelines adopted so far currently do, other than draft guideline 1.2, which does so by omission, since it does not introduce any time element into the definition of interpretative declarations.[468] Secondly, such a clarification is in fact neither any more nor any less superfluous than those set out, for example, in article 19 (a) and (b) of the 1969 and 1986 Vienna Conventions, which deal with the option of entering reservations.[469]

277. The existence of an express treaty provision limiting the option of formulating interpretative declarations is not the only instance in which a State or an international organization is prevented, *ratione temporis,* from formulating an interpretative declaration. The same applies in cases where the State or organization has already formulated an interpretation which its partners have taken as a basis or were entitled to take as a basis (estoppel). In such a case, the author of the initial declaration is prevented from modifying it. This hypothesis will be considered below in section 2, together with questions relating to the modification of reservations and interpretative declarations. However, it should be reflected in draft guideline 2.4.3.

278. Moreover, this draft guideline must exclude special rules relating to conditional interpretative declarations. It might read as follows:

> **2.4.3.** *Times at which an interpretative declaration may be formulated.*
>
> *Without prejudice to the provisions of guidelines 1.2.1,* ***2.4.4, 2.4.7 and 2.4.8,*** *an interpretative declaration may be formulated at any time, [unless otherwise provided by an express provision of the treaty] [the treaty states that it may be made only at specified times].*

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[467] "Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and its regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of this Convention in their application to that State." Also see, for example, article 26, paragraph 2, of the Basel Convention of 22 March 1989 on the Control of Transboundary Movements of Hazardous Wastes, and article 43 of the New York Agreement of 4 August 1995 on straddling fish stocks.

[468] See paras. 265-266 .

[469] Article 19 of the 1969 Convention reads: "a State may ... formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations which do not include the reservation in question may be made".

### (b) Late reservations and interpretative declarations

*Late reservations*

279. Unless otherwise provided by a treaty, which is always possible, the expression of definitive consent be bound constitutes for the contracting parties the last time (and in view of the requirement concerning formal confirmation of reservations formulated during negotiations and when signing, the only time) when a reservation may be formulated.[470] This rule, which is unanimously recognized in the relevant doctrine,[471] and which arose from the very definition of reservations and is also implied by the "chapeau" of article 19 of the 1969 and 1986 Vienna Conventions, is widely observed in practice.[472] It was regarded as forming part of positive law by the International Court of Justice in its Judgment of 20 December 1988 in the case concerning *Border and Transborder Armed Actions:*

> "... Article LV of the Pact of Bogotá enables the parties to make reservations to that instrument which 'shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity'. In the absence of special procedural provisions, those reservations may, in accordance with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties, be made only at the time of signature or ratification of the pact or at the time of adhesion to that instrument."[473]

280. Moreover, it has interesting specific consequences — which the Special Rapporteur will expand on and clarify in the report that he will in principle prepare next year on the permissibility of reservations (since the fundamental problem is clearly how to determine whether a belated reservation is impermissible solely owing to that fact). However, two of the consequences in question should be considered at the current stage since they help to clarify the scope of the rule implied by the "chapeau" of article 19 of the 1969 and 1986 Vienna Conventions.[474]

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[470] However, some reservation clauses specify that "reservations to one or more of the provisions of this Convention may be made at any time prior to ratification of or accession to this Convention ..." (Convention of 29 July 1960 on third party liability in the field of nuclear energy) or "at the latest at the moment of ratification or at adhesion, each State may make the reserves contemplated in articles ..." (Hague Convention of 5 October 1961 concerning the protection of infants — these examples are quoted by P. H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, pp. 163-164).

[471] It has been stated particularly forcefully by Giorgio Gaja: "the latest moment in which a State may make a reservation is when it expresses its consent to be bound by a treaty" ("Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago,* Milan, Giuffrè, 1987, vol. I, p. 310).

[472] Moreover, this explains why States sometimes try to get around the prohibition on formulating reservations after the entry into effect of a treaty by calling unilateral statements "interpretative declarations", which actually match the definition of reservations (see para. 27 of the commentary to draft guideline 1.2 ("Definition of interpretative declarations"), *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), p. 236; see also the third report on reservations to treaties, A/CN. 4/491/Add.4, para. 340.

[473] *I.C.J. Reports 1988*, p. 85.

[474] It would seem unnecessary to reproduce formally in the Guide to Practice the rule enunciated in the provision in question: That would overlap with the definition set out in draft guidelines 1.1 and 1.1.2. However, it is included in order to introduce the exceptions that may be made with respect to it by draft guideline 2.3.1 (see para. 286 below).

281. On the one hand, the principle that a reservation may not be formulated after the expression of definitive consent to be bound appeared to be sufficiently established at the Inter-American Court of Human Rights for the Court to consider, in its advisory opinion of 8 September 1983 concerning *Restrictions to the death penalty*, that once made,[475] a reservation "escapes" from its author and may not be interpreted outside the context of the treaty itself. The Court adds the following:

> "A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation related, including even all such matters which the State might subsequently declare that it intended the reservation to cover.
>
> "The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting, or acceding to a treaty (Vienna Convention, art. 19)".[476]

282. On the other hand, following the *Belilos* case,[477] the Swiss Government initially revised its 1974 "interpretative declaration", which the Strasbourg Court regarded as an impermissible reservation, by adding a number of clarifications to its new "declaration".[478] The permissibility of this new declaration, which was criticized by the relevant doctrine,[479] was challenged before the Federal Court, which in its decision *Elisabeth B. v. Council of State of Thurgau Canton* of 17 December 1992 declared the declaration invalid on the ground that it was a new reservation[480] that was incompatible with paragraph (1) of article 64 of the European Convention on Human Rights.[481] *Mutatis mutandis*, the limit on the formulation of reservations imposed by article 64 of the Rome Convention is similar to the limit resulting from article 19 of the Vienna Conventions, and the judgement

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[475] The word "made" is probably more appropriate here than "formulated", since the Inter-American Court of Human Rights considers (perhaps questionably) that "a reservation becomes an integral part of the treaty", which is conceivable only if it is "in effect".

[476] Advisory opinion OC-3/83, paras. 63-64. Giorgio Gaja interprets this advisory opinion the same way ("Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987 vol. I, p. 310).

[477] Judgement of 29 April 1988, Series A, No. 132.

[478] See Council of Europe, European Court of Human Rights, *Reservations and declarations*, European Treaty Series (ETS), No. 5.

[479] See in particular G. Cohen-Jonathan, "Les réserves à la Convention européene des droits de l'homme", Revue générale de droit international public 1989, p. 314. Also see the other references made by J.-F. Flauss, "Le contentieux de la validité des réserves à la CEDH [Cour européenne des droits de l'homme] devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6, paragraphe, 1, Revue universelle des droits de l'homme 1993, note 28, p. 300.

[480] The European Court of Human Rights would have declared the 1974 "declaration" as a whole invalid: "the interpretative declaration concerning article 6, paragraph 1, European Court of Human Rights, formulated by the Federal Council at the time of ratification could therefore not have a full effect in either the field of criminal law or in that of civil law. As a result, the 1988 interpretative declaration cannot be regarded as a restriction, a new formulation or a clarification of the reservation that existed previously. Rather, it represents a reservation formulated subsequently" (*Journal des Tribunaux*, 1995, p. 536; German text in *EuGRZ* 1993, p. 72).

[481] "Any State may, when signing this Convention or when depositing an instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article."

of the Swiss Federal Court should certainly be regarded as a reaffirmation of the prohibition in principle on reservations formulated following the definitive expression of consent to be bound and also, perhaps, of the impossibility of formulating a new reservation in the guise of an interpretation of an existing reservation.[482]

283. The decision of the European Commission on Human Rights in the *Chrysostomos et al.* case leads to the same conclusion but provides an additional lesson. In the case in question, the Commission believed that it followed from the clear wording of article 64, paragraph 1, of the European Convention on Human Rights that a High Contracting Party may not, in subsequent recognition of the individual right of appeal, make a major change in its obligations arising from the Convention for the purposes of procedures under article 25.[483] Here again, the decision of the European Commission may be interpreted as a confirmation of the rule resulting from the introductory wording of the provision in question, with the important clarification that a State may not circumvent the prohibition on reservations following ratification by adding to a declaration made under an opting-in clause (which, does not in itself, constitute a reservation)[484] conditions or limitations with effects identical to those of a reservation, at least in cases where the optional clause in question does not make any corresponding provision.

284. Although in the *Loizidou* judgement of 23 March 1995 rendered in the same case the Court was not as precise, the following passage can be regarded as a reaffirmation of the position in question:

> "The Court further notes that article 64 of the Convention enables States to enter reservations when signing the Convention or when depositing their instruments of ratification. The power to make reservations under article 64 is, however, a limited one, being confined to particular provisions of the Convention ..."[485]

285. The decisions of the Inter-American Court of Human Rights, the European Court of Human Rights and the Swiss Federal Court reaffirm the stringency of the rule set out at the beginning of article 19 of the Vienna Conventions on the law of treaties and draws very direct and specific consequences therefrom, which certainly should be made explicit in the Guide to Practice.

286. This draft guideline could be worded as follows:

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[482] For a discussion of the other problems posed by this judgement, see section B, para. 2, below.
[483] Decision of 4 March 1991, Revue universelle des droits de l'homme, 1991, p. 200, para. 15.
[484] See paras. 179-196 above and draft guidelines 1.4.6 and 1.4.7.
[485] Publications of the European Court of Human Rights, Series A, vol. 310, p. 28, para. 76.

2.3.4 *Late exclusion or modification of the legal effects of a treaty by procedures other than reservations*

*Unless otherwise provided in the treaty, a contracting party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:*

*(a) Interpretation of a reservation made earlier; or*

*(b) A unilateral statement made under an optional clause.*

287. The Special Rapporteur is aware that, in the draft guideline proposed above, he has reverted to certain "alternatives" to reservations, which, he proposed, in the previous chapter, should be excluded from the scope of the Guide to Practice. He believes, however, that such a guideline is essential once it is a matter not of regulating these procedures as such, but of emphasizing that they may not be used to circumvent the rules relating to reservations themselves. By contrast, since draft guideline 1.4.6[486] defines unilateral statements made under an optional clause and is to be the subject of a commentary, it does not appear necessary to expand further here on the meaning of the rule reflected in subparagraph (a); it will be quite sufficient to refer back to draft guideline 1.4.6 and the related commentary.

288. Despite its far-reaching implications, the principle that a reservation may not be formulated after expression of consent to be bound "is not absolute. It applies only if the contracting States do not authorize by agreement the formulation, in one form or another, of new reservations".[487]

289. Although this hypothesis "has never been contemplated, either in the context of the International Law Commission or during the Vienna Conference",[488] it is relatively frequent.[489] Thus, for example:

– Article 29 of the Convention of 23 July 1912 on the unification of the law relating to bills of exchange provided that:

"The State which desires to avail itself of the reservations in Article 1, paragraph 2, or in Article 22, paragraph 1, must specify the reservation in its instrument of ratification or adhesion ...

"The contracting State which *hereafter* desires to avail itself of the reservations[490] above mentioned, must notify its intention in writing to the Government of the Netherlands ...";[491]

[486] See para. 189 above.

[487] Jean-François 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, paragraphe 1", *Revue universelle des droits de l'homme*, vol. 5, 1993, p. 302.

[488] P. H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, p. 12, note 14.

[489] In addition to the examples cited below, see those given by P. H. Imbert in *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, pp. 164-165.

[490] In fact, what is meant here is not *reservations*, but *reservation clauses*.

[491] See also article 1, paragraphs 3 and 4, of the Convention of 7 June 1930 providing a uniform law for bills of exchange and promissory notes and article 1, paragraphs 3 and 4, of the Convention of 19 March 1931 providing a uniform law for cheques: "... the reservations referred to in Articles ... may, however, be made after ratification or accession, provided that they are notified to the Secretary-General of the League of Nations ...".

– Likewise, under article XXVI of the Warsaw Convention of 12 October 1929 as amended by the 1944 Chicago Protocol and the 1955 Hague Protocol:

"No reservation may be made to this Protocol except that a State may *at any time* declare by a notification addressed to the Government of the People's Republic of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities";

– Article 38 of the Hague Convention of 2 October 1973 concerning the international administration of the estates of deceased persons provides that:

"A Contracting State desiring to exercise one or more of the options envisaged in Article 4, the second paragraph of Article 6, the second and third paragraphs of Article 30 and Article 31, shall notify this to the Ministry of Foreign Affairs of the Netherlands, either at the time of the deposit of its instrument of ratification, acceptance, approval or accession *or subsequently*";[492]

– Under article 30, paragraph 3, of the Convention of 25 January 1988 on Mutual Administrative Assistance on Tax Matters (Council of Europe):

"*After the entry into force of the Convention in respect of a Party*, that Party may make one or more of the reservations listed in paragraph 1 *which it did not make at the time of ratification, acceptance or approval*. Such reservations shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the reservation by one of the Depositaries";[493]

– Similarly also, article 10, paragraph 1, of the International Convention on arrest of ships of 12 March 1999 provides that:

"Any State may, at the time of signature, ratification, acceptance, or accession, *or at any time thereafter*, reserve the right to exclude the application of this Convention to any or all of the following: ...".

290. This is not especially problematic in itself and is in conformity with the idea that the Vienna rules are only of a supplementary nature (as will be the guidelines of the Guide to Practice, and with all the more reason).[494] However, since what is

"Each of the High Contracting Parties may, in urgent cases, make use of the reservations contained in Articles ... even after ratification or accession ...".

[492] See also article 26 of the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes: "A Contracting State having at the date of the entry into force of the Convention for that State a complex system of national allegiance may specify *from time to time* by declaration how a reference to its national law shall be construed for the purposes of the Convention". This hypothesis may refer to an interpretative statement rather than a reservation.

[493] This Convention entered into force on 1 April 1995; it seems that no State party has exercised the option envisaged in this provision. See also article 5 of the 1978 Additional Protocol to the European Convention on information on foreign law, "[a]ny Contracting Party which is bound by the provisions of both Chapters I and II may at any time declare by means of a notification addressed to the Secretary General of the Council of Europe that it will only be bound by one or the other of Chapters I and II. Such notification shall take effect six months after the date of the receipt of such notification".

[494] See para. 233 and note 287 above.

involved is a derogation from a rule now accepted as customary and enshrined in the Vienna Conventions, it seems necessary that such a derogation should be expressly provided for in the treaty.

291. It is true that the European Commission on Human Rights, curiously,[495] is more flexible in this respect, having appeared to rule that a State party to the Rome Convention could invoke the amendment of national legislation covered by an earlier reservation to modify, at the same time, the scope of that reservation without violating the time limit placed on the option of formulating reservations by article 64 of the Convention.[496] The import of this jurisprudence[497] is not clear, however, and it may be that the Commission took this position because, in reality, the amendment of its legislation did not in fact result in an additional limitation on the obligations of the State concerned.[498]

292. Whatever the case, the requirement that there should be a clause expressly authorizing the formulation of a reservation after expression of consent to be bound seems all the more crucial given that it was necessary, for particularly pressing practical reasons, which the Commission set out in its commentary to draft guideline 1.1.2, to include a time limit in the definition of reservations itself:

> "The idea of including time limits on the possibility of making reservations in the definition of reservations itself has progressively gained ground, given the magnitude of the drawbacks in terms of stability of legal relations of a system which would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta sunt servanda* itself which would be called into question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question; in addition, this would excessively complicate the task of the depositary."[499]

293. Thus, there is undoubtedly a need to specify this requirement in a draft guideline. However, since this is not the only exception to the rule that a reservation must, in principle, be made not later than the moment at which consent to be bound is expressed, it is doubtless preferable to include the two exceptions in a single draft guideline. It is not clear, moreover, that they are as different from one another as they appear.

294. It emerges from current practice that the other Contracting Parties may unanimously accept a late reservation, and this consent (which may be tacit) can be seen as a collateral agreement extending *ratione temporis* the option of formulating

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[495] Curiously, because the organs of the European Convention on Human Rights are certainly inclined to have little sympathy for the institution of reservations itself.

[496] See note 472.

[497] See for instance *Association X v. Austria*, application 473/59, Yearbook of the European Convention on Human Rights No. 2, p. 405; *X v. Austria*, application 1731/62, Yearbook of the European Convention on Human Rights No. 7, p. 192; or *X v. Austria*, application 8180/78, DR 20, p. 26.

[498] In case 1731/62, the Commission took the view that "the reservation made by Austria on 3 September 1958 ... covers the law of 5 July 1962, *the result of which was not to enlarge* a posteriori *the field removed from the control of the Commission*", Yearbook of the European Convention on Human Rights No. 7, p. 202 — italics added.

[499] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. (3), pp. 206-207; see also the third report on reservations to treaties, A/CN.4/491/Add.3, para. 136.

reservations — if not reservations to the treaty concerned in general, then at least the reservation or reservations in question.

295. This possibility has been seen as translating the principle that "the parties are the ultimate guardians of a treaty and may be prepared to countenance unusual procedures to deal with particular problems".[500] In any event, according to another author, "[t]he solution must be understood as dictated by pragmatic considerations. A party remains always[501] at liberty to accede anew to the same treaty, this time proposing certain reservations. As the result will remain the same whichever of these two alternative actions one might choose, it seemed simply more expedient to settle for the more rapid procedure ...".[502]

296. Initially, the Secretary-General of the United Nations, in keeping with his great caution in this area, had held to the position that: "[i]n accordance with established international practice to which the Secretary-General conforms in his capacity as depositary, a reservation may be formulated only at the time of signature, ratification or accession", and, as a result, he had taken the view that a party to the Convention on the Elimination of All Forms of Racial Discrimination which did not make any reservations at the time of ratification was not entitled to make any later.[503] Two years later, however, he softened his position considerably in a letter to the permanent mission to the United Nations of a Member State[504] that was contemplating denouncing the Convention of 31 March 1931 providing a uniform law for cheques with a view to reacceding to it with new reservations. Taking as a basis "the general principle that the parties to an international agreement may, by unanimous decision, amend the provisions of an agreement or take such measures as they deem appropriate with respect to the application or interpretation of that agreement", the Legal Counsel states:

> "Consequently, it would appear that your Government could address to the Secretary-General, over the signature of the Minister for Foreign Affairs, a letter communicating the proposed reservation together with an indication of the date, if any, on which it is decided that it should take effect. The proposed reservation would be communicated to the States concerned (States parties, Contracting States and signatory States) by the Secretary-General and, in the absence of any objection by States parties within 90 days from the date of that communication (the period traditionally set, according to the practice of the Secretary-General, for the purpose of tacit acceptance and corresponding, in the present case, to the period specified in the third paragraph of article I of the Convention for acceptance of the reservations referred to in articles 9, 22, 27

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[500] D. W. Greig, "Reservations: Equity as a balancing factor?", *Australian Yearbook of International Law*, 1995, pp. 28-29.

[501] The author is referring to a specific treaty: the Convention of 19 March 1931 providing a uniform law for cheques (see para. 296 below), in which article VIII expressly provides for the option of denunciation; but the practice also applies in the case of treaties that do not include a withdrawal clause (see para. 298 below).

[502] Frank Horn, *Reservations and interpretative declarations to multilateral treaties*, T. M. C. Asser Institute, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 43.

[503] Memorandum to the Director of the Division of Human Rights, 5 April 1976, *United Nations Juridical Yearbook* 1976, p. 221.

[504] The Member State in question was France (cf. Frank Horn, *Reservations and interpretative declarations to multilateral treaties*, T. M. C. Asser Institute, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 42).

and 30 of annex II), the reservation would be considered to take effect on the date indicated".[505]

297. This is indeed what happened: the French Government addressed to the Secretary-General, on 7 February 1979, a letter drafted in accordance with this information; the Secretary-General circulated this letter on 10 February and "[s]ince no objections by the Contracting States were received within 90 days from the date of circulation of this communication ... the reservation was deemed accepted and took effect on 11 May 1979"; curiously, the Government of the Federal Republic of Germany expressly stated, on 20 February 1980, that it "raise[d] no objections thereto".[506]

298. Since then, the Secretary-General of the United Nations appears to have adhered continuously to this practice in the performance of his functions as depositary.[507] It was formalized in a legal opinion of the Secretariat of 19 June 1984 to the effect that "the parties to a treaty may always decide, *unanimously*, at any time, to accept a reservation in the absence of, or even contrary to, specific provisions in the treaty", and irrespective of whether the treaty contains express provisions as to when reservations may be formulated.[508]

299. This practice is not limited to the treaties of which the Secretary-General is the depositary. In the above-mentioned 1978 legal opinion, the Legal Counsel of the United Nations had referred to a precedent involving a late reservation to the Customs Convention of 6 October 1960 on the Temporary Importation of Packings deposited with the Secretary-General of the Customs Cooperation Council, article 20 of which "provides that any Contracting Party may, at the time of signing and ratifying the Convention, declare that it does not consider itself bound by article 2 of the Convention. Switzerland, which had ratified the Convention on 30 April 1963, made a reservation on 21 December 1965, which was submitted by the depositary to the States concerned and, in the absence of any objection, was considered accepted with retroactive effect to 31 July 1963".[509]

300. Several States parties to the 1978 Protocol to the International Convention of 1973 for the Prevention of Pollution from Ships (MARPOL), which entered into

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[505] Letter dated 14 September 1978, *United Nations Juridical Yearbook* 1978, pp. 199-200.

[506] *Multilateral treaties deposited with the Secretary-General ...*, vol. II, p. 422, note 4.

[507] In addition to the examples given by Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 311, see for instance Belgium's reservation (which in fact amounts to a general objection to the reservations formulated by other parties) to the 1969 Convention on the Law of Treaties: while this country had acceded to the Convention on 1 September 1992, "[o]n 18 February 1993, the Government of Belgium notified the Secretary-General that its instrument of accession should have specified that the said accession was made subject to the said reservation. None of the Contracting Parties to the Agreement having notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its circulation (23 March 1993), the reservation is deemed to have been accepted" (*Multilateral treaties deposited with the Secretary-General ...*, vol. II, p. 275, note 9).

[508] Letter to a governmental official in a Member State, *United Nations Juridical Yearbook* 1984, p. 183; the italics are contained in the original text.

[509] Letter to the Permanent Mission of a Member State to the United Nations, 14 September 1978, *United Nations Juridical Yearbook* 1978, pp. 199-200.

force on 2 October 1983, have widened the scope of their earlier reservations[510] or added new ones after expressing their consent to be bound.[511]

301. Likewise, late reservations to certain conventions of the Council of Europe have been formulated without any objection being raised. This was true, for example, of:

- Greece's reservation to the European Convention on the Suppression of Terrorism of 27 January 1977;[512]
- Portugal's reservations to the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters;[513] and
- The "declaration" by the Netherlands of 14 October 1987 restricting the scope of its ratification (on 14 February 1969) of the European Convention on Extradition of 13 December 1957.[514] [515]

302. This brief (and incomplete) picture proves one point: it is not out of the question that late reservations should be deemed to have been legitimately made, in the absence of any objection by the other contracting Parties consulted by the depositary.[516] But it also shows that the cases involved have almost always been fairly borderline ones, either the delay in communicating the reservation was minimal, or the notification occurred after ratification but before the entry into force of the treaty for the reserving State,[517] or else the planned reservation was duly

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[510] France (ratification — 25 September 1981; amendment — 11 August 1982 — IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999*, p. 77).

[511] Liberia (ratification — 28 October 1980, new reservations — 27 July 1983, subject of a procès-verbal of rectification of 31 August 1983), ibid., p. 81; Romania (accession — 8 March 1993, rectified subsequently, in the absence of any objection, to include reservations adopted by Parliament), ibid., p. 83; United States of America (ratification — 12 August 1980, reservations communicated — 27 July 1983, subject of a procès-verbal of rectification of 31 August 1983), ibid., p. 86; in the case of Liberia and the United States, the French Government stated that, in view of their nature, it had no objection to those rectifications, but such a decision could not constitute a precedent.

[512] Ratification — 4 August 1988; rectification communicated to the Secretary-General — 5 September 1988. Greece invoked an error: the reservation expressly formulated in the act authorizing ratification had not been transmitted at the time of the deposit of the instrument of ratification; Internet site: http://conventions.coe.int/treaty/EN/cadreprincipal.htm.

[513] Deposit of the instrument of ratification — 27 September 1994; entry into force of the Convention for Portugal — 26 December 1994; notification of reservations and declarations — 19 December 1996; in this case too, Portugal invoked an error due to the non-transmission of the reservations contained in the Assembly resolution and the Decree of the President of the Republic published in the Official Gazette of the Portuguese Republic (Internet site: http://conventions.coe.int/treaty/EN/cadreprincipal.htm).

[514] Internet site: http://conventions.coe.int/treaty/EN/cadreprincipal.htm.

[515] See also the example of the late reservations of Belgium and Denmark to the European Agreement on the Protection of Television Broadcasts cited by Giorgio Gaja ("Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 311).

[516] Regarding the exact modalities for such consultation and the parties consulted, see sect. 2 below.

[517] In this connection Giorgio Gaja cites two reservations added on 26 October 1976 by the Federal Republic of Germany to its instrument of ratification (dated 2 August 1976) of the Convention of 1954 relating to the Status of Stateless Persons (cf. *Multilateral treaties deposited with the Secretary-General ...*, vol. I, p. 279, note 4) and observes that the Secretary-General's position

published in the official publications, but was "forgotten" at the time of the deposit of the instrument of notification, which can, at a pinch, be considered "rectification of a material error".

303. In a pamphlet published by the Council of Europe, Mr. Jörg Polakiewicz, Deputy Head of the organization's Legal Advice Department and Head of the Treaty Office, emphasizes the exceptional nature of the derogations permitted within that organization from the agreed rules on formulating reservations and adds: "Accepting the belated formulation of reservations may create a dangerous precedent which could be invoked by other States in order to formulate new reservations or to widen the scope of existing ones. Such practice would jeopardize legal certainty and impair the uniform implementation of European treaties".[518] For the same reasons, some authors are reluctant to acknowledge the existence of such a derogation from the principle of the limitation *ratione temporis* of the possibility of formulating reservations.[519]

304. Yet, it is a fact that "[a]ll the instances of practice here recalled point to the existence of a rule that allows States to make reservations even after they have expressed their consent to be bound by a treaty, provided that [the] other Contracting States acquiesce to the making of reservations at that stage".[520] In fact, it is difficult to imagine what might prevent all the contracting States from agreeing to such a derogation, whether this agreement is seen as an amendment to the treaty or as the mark of the "collectivization" of control over the permissibility of reservations.[521]

305. It is this requirement for unanimity, be it passive or tacit, that makes the exception to the principle acceptable and limits the risk of abuse. It is an indissociable element of this derogation, observable in current practice and consistent with the role of "guardian" of the treaty that States parties may collectively assume.[522] But this requirement is not meaningful, nor does it fulfil its objectives, unless a single objection renders the reservation impossible. Failing this, the very principle established in the first phrase of article 19 of the Vienna Conventions of 1969 and 1986 would be reduced to nothing: any State could add a new reservation to its acceptance of a treaty at any time because there would always be one other contracting State that would not object to such a reservation, and the situation would revert to that in which States or international organizations find

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that, in the absence of any objection, the reservations could be deemed to have been made on the date of ratification was "questionable, as the instrument of ratification could not be withdrawn" (Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 311). Obviously, this is correct, but the "departure" from the rule contained in the chapeau of article 19 of the Vienna Conventions is limited for all that.

518 *Treaty making in the Council of Europe*, Strasbourg, 1999, p. 94.

519 Cf. R. W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law* 1989, p. 383, or R. Baratta, *Gli effecti delle riserve ai trattati*, Milan, Giuffrè, 1999, p. 27, note 65.

520 Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 312.

521 This "control" must, of course, be exercised in conjunction with the "organs of control", where they exist. In the *Chrysostomos* and *Loizidou* cases, control by States over the permissibility *ratione temporis* of reservations (introduced by Turkey by means of an optional statement accepting individual petitions) was superseded by the organs of the European Convention on Human Rights (see paras. 283-284 above).

522 See para. 295 above.

themselves at the time of becoming parties, when they enjoy very broad scope for formulating reservations, subject only to the limits set in articles 19 and 20.

306. It does not then seem compatible with the spirit of either the "Vienna definition" or the principle set forth in article 19 to consider that "an objection on the part of a Contracting State would arguably concern only the effects of the late reservations in the relations between the reserving and the objecting States".[523] The caution demonstrated in practice and the clarifications provided on several occasions by the Secretary-General, together with doctrinal considerations and concerns relating to the maintenance of legal certainty, justify, in this particular instance, the strict application of the rule of unanimity — it being understood that, contrary to the traditional rules applicable to all reservations (except in Latin America), this unanimity concerns the acceptance of (or at least the absence of any objection to) late reservations. It is without effect, however, on the participation of the reserving State (or international organization) in the treaty itself: in the event of an objection, it remains bound, in accordance with the initial expression of its consent; and it can only opt out (with a view to reacceding subsequently and formulating anew the rejected reservations) in conformity with either the provisions of the treaty itself or the general rules codified in articles 54 to 64 of the Vienna Conventions.

[Continued in document A/CN.4/508/Add.4]

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[523] Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 312.

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# Fifth report on reservations to treaties

**By Mr. Alain Pellet, Special Rapporteur**

**Addendum**

## Part Two

**Procedure regarding reservations and interpretative declarations**

## Contents



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307. The question arises, however, whether a distinction should not be made between, on the one hand, objections in principle to the formulation of late reservations and, on the other hand, "traditional" objections, such as those that can be made to reservations pursuant to article 20, paragraph 4 (b), of the Vienna Conventions of 1969 and 1986. This distinction appears to be necessary, for it is hard to see why co-contracting States or international organizations should not have a choice between all or nothing, that is to say, either accepting both the reservation itself and its lateness or preventing the State or organization which formulated it from doing so, whereas they may have reasons that are acceptable to their partners. Furthermore, in the absence of such a distinction, States and international organizations which are not parties when the late reservation is formulated but which become parties subsequently through accession or other means would be confronted with a fait accompli. Paradoxically, they could not object to a late reservation, whereas they are permitted to do so under article 20, paragraph 5,[524] relating to reservations formulated when the reserving State expresses its consent to be bound.[525]

308. The unanimous consent of the other contracting parties should therefore be regarded as necessary for the *late formulation* of reservations. On the other hand, the normal rules regarding acceptance of and objections to reservations, as codified in articles 20 to 23 of the Vienna Conventions, should be applicable as usual with regard to the actual content of late reservations, to which the other parties should be able to object "as usual".

309. In view of these remarks, the Commission could adopt two draft guidelines. The first one could establish the principle that a late reservation must be accepted unanimously, while the second would explain the consequences of an objection to such a reservation.

310. With regard to the principle, it would no doubt be useful to present it clearly as an exception to the basic principle that late reservations are prohibited. Accordingly, draft guideline 2.3.1 could be drafted as follows:

> *2.3.1* *Reservations formulated late*
>
> *Unless the treaty provides otherwise, 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 other contracting Parties do not object to the late formulation of the reservation.*

311. In view of the interest attached to avoiding late reservations to the extent possible, the phrase "unless the treaty provides otherwise", which introduces the draft guideline proposed above, should be interpreted strictly. Under these circumstances, the Commission might do well to adopt "model clauses" (as it

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[524] "... a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation *or by the date on which it expressed its consent to be bound by the treaty, whichever is later*" (italics added).

[525] It would be equally paradoxical to allow States or international organizations which become parties to the treaty after the reservation is entered to object to it under art. 20, para. 4 (b), whereas the original parties cannot do so.

expressed the intention to do in 1995[526]), indicating to States and international organizations the type of provisions which it might be useful to include in a treaty in order to avoid any ambiguity in this regard.

312. Such model clauses could be based on the provisions cited above,[527] on the understanding that in order to avoid any uncertainty with regard to reservations formulated after the expression of consent to be bound, but before the entry into force of the treaty, it would no doubt be preferable for such clauses to avoid referring to the entry into force. They might read as follows (alternatively, of course):

> ***Model clause 2.3.1*** — *Reservations formulated after the expression of consent to be bound*
>
> *A. A contracting party may formulate a reservation after expressing its consent to be bound by the present treaty.*
>
> *B. A contracting party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] when signing, ratifying, formally ratifying, accepting or approving the treaty or acceding thereto at any time thereafter.*
>
> *C. A contracting party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] at any time by means of a notification addressed to the depositary.*

313. Draft guideline 2.3.3 might read as follows:

> *2.3.3 Objection to reservations formulated late*
>
> *If a contracting Party to a treaty objects to a reservation formulated late, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being made.*

314. The considerations which explain the hesitations seen in practice with regard to late reservations apply also with regard to the length of time in which the other contracting Parties must give their consent and the form that such consent must take.[528] On the one hand, there would be no way to prevent all the contracting parties from accepting a modification in the way that the treaty applies to one of them; on the other hand, that possibility must be confined within narrow and specific limits, or else the very principle laid down in article 19 of the Vienna Conventions would be undermined.

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[526] Cf. the report of the Commission on the work of its forty-seventh session: "The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; *these provisions would, if necessary, be accompanied by model clauses" (Yearbook ... 1995*, vol. II, Part Two, p. 108, para. 487 (b)) (italics added).

[527] Para. 289.

[528] One might consider that what is involved here are questions relating to the formulation of acceptances of or objections to reservations, the subject of chap. IV of the present report. From a purely abstract standpoint, that is correct. In the view of the Special Rapporteur, however, these questions are so closely related to the issue of late reservations that it is useful, as a practical matter, to address them at the same time as the latter.

315. With regard to the form, just as reservations formulated within the set periods may be accepted tacitly,[529] it should likewise be possible for late reservations to be accepted in that manner (whether their late formulation or their content is at issue), and for the same reasons. It seems fairly clear that to require an express unanimous consent would rob the (at least incipient) rule that late reservations are possible under certain conditions of any substance, for, in practice, the express acceptance of reservations at any time is rare indeed.[530]

316. Such is, moreover, the practice followed by the Secretary-General of the United Nations[531] and by the secretaries-general of the Customs Cooperation Council (World Customs Organization (WCO))[532] and the International Maritime Organization (IMO),[533] all of whom considered that a new reservation enters into force in the absence of objections from the other contracting parties.

317. It remains to be determined, however, how much time the other contracting parties have to respond to a late reservation. A similar question arises with regard to amendments to existing reservations and is addressed in greater detail in section B of the present chapter.

318. With regard to late reservations in the strict sense, practice is ambiguous. To the knowledge of the Special Rapporteur, the secretaries-general of IMO, the Council of Europe or WCO proceeded in an empirical manner and did not set any specific periods when they consulted the other contracting parties.[534] That was not true for the Secretary-General of the United Nations.

319. In the first place, when the Secretary-General's current practice was inaugurated in the 1970s, the parties were given a period of 90 days in which to object to a late reservation, where appropriate. Nevertheless, the choice of this period seems to have been somewhat circumstantial; it happens to have coincided with the period provided for in the relevant provisions of the Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques, of 1931, to which France sought to make a new reservation.[535] That notwithstanding, the 90-day period was adopted whenever a State availed itself thereafter of the opportunity to formulate a new reservation, or modify an existing one, after the entry into force with respect to that State of a new treaty of which the Secretary-General was depositary.[536]

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[529] Cf. art. 20, para. 5, of the Vienna Conventions (in the 1986 text): "... unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty ..."

[530] See chap. IV, sect. 1, above.

[531] See paras. 296-298 above.

[532] See para. 299 above.

[533] See para. 300 above.

[534] It would appear, however, that the Secretary-General of IMO considers that, in the absence of a response within one month following notification, the reservation becomes effective (cf. footnote 511 above and IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999*, concerning the reservation of Liberia, p. 81, and that of the United States of America, p. 86).

[535] See paras. 296-297 above.

[536] See para. 298 above.

320. In practice, however, the period proved to be too short; owing to the delays in transmission of the communication by the Office of the Legal Counsel to States, the latter had very little time in which to examine these notifications and respond to them, whereas such communications are likely to raise "complex questions of law" for the parties to a treaty, requiring "consultations among them, in deciding what, if any, action should be taken in respect of such a communication".[537] It is significant, moreover, that in the few situations in which parties took action, such actions were formulated well after the 90-day period that had theoretically been set for them.[538]

321. For this reason, following a note verbale from Portugal reporting, on behalf of the European Union, on difficulties linked to the 90-day period, the Secretary-General announced, in a circular addressed to all Member States, a change in the practice in that area. From then on, if a State which had already expressed its consent to be bound by a treaty formulated a reservation to that treaty, the other parties would have a period of 12 months after the Secretary-General had circulated the reservation to inform him that they wished to object to it.[539]

322. In taking this decision, which will also apply to the amendment of an existing reservation,[540] "the Secretary-General [was] guided by article 20, paragraph 5, of the [Vienna] Convention, which indicates a period of twelve months to be appropriate for Governments to analyse and assess a reservation that has been formulated by another State and to decide upon what action, if any, should be taken in respect of it".[541] The decision meets the concerns of States and falls within the current trend towards establishing a "reservation dialogue" between a State which intends to formulate a reservation and the other contracting parties,[542] facilitating such a dialogue through the length of time it allows.

323. This long period has one drawback, however: during the 12 months following notification by the Secretary-General,[543] total uncertainty prevails as to the fate of the reservation that has been formulated, and if a single State objects to it at the last minute, that is sufficient to consider it as not having been made.[544] The question arises, therefore, whether an intermediate solution (six months, for example), would not have been wiser. Nevertheless, taking into account the provisions of article 20, paragraph 5, of the Vienna Conventions and the recent announcement by the Secretary-General of his intentions, it probably makes more sense to bring the Commission's position — which, in any event, has to do with progressive development and not with codification in the strict sense — into line with theirs.

324. Likewise, in view of the different practices followed by other international organizations acting as depositaries,[545] it would no doubt be wise to reserve the

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[537] Memorandum from the United Nations Legal Counsel addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000.

[538] Cf. the response by Germany to the French reservation to the 1931 Convention on cheques, issued one year following the date of the French communication (para. 297 above).

[539] See footnote 535 above.

[540] See sect. B below.

[541] Memorandum, loc. cit.

[542] On the concept of a "reservation dialogue", see chap. IV below.

[543] In other words, not the communication from the State announcing its intention to formulate a late reservation. This is highly debatable; the question will be considered in chap. IV of the present report.

[544] See paras. 304-305 above.

[545] See para. 316 above.

possibility for an organization acting as depositary to maintain its usual practice, provided that it has not elicited any particular objections.

325. Based on article 20, paragraph 5, of the Vienna Convention of 1986, as adapted to the specific case of late reservations, draft guideline 2.3.2 could therefore be drafted as follows:

*2.3.2 Acceptance of reservations formulated late*

*Unless the treaty provides otherwise or the usual practice followed by the depositary differs, a reservation formulated late shall be deemed to have been accepted by a contracting party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.*

*(ii) Late interpretative declarations*

326. Like reservations, interpretative declarations can be late. This is obviously true for conditional interpretative declarations, which, like reservations themselves, can be formulated (or confirmed) only when expressing consent to be bound, as stipulated in draft guidelines 1.2.1 and 2.4.4. But it may also be true for simple interpretative declarations which may, in principle, be formulated at any time,[546] either because the treaty itself sets the period in which they can be made or because of circumstances surrounding their formulation.[547]

327. The declarations formulated on 31 January 1995 by the Egyptian Government, which had ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, constitute a striking example of late formulation.[548]

328. Under article 26, paragraph 2, of the Convention, a State may, within certain limits, formulate such declarations, but only "when signing, ratifying, accepting, approving, or formally confirming or acceding to this Convention". Several parties contested the admissibility of the Egyptian declarations, either because, in their view, the declarations were really reservations (prohibited by article 26, paragraph 1) or because they were late.[549]

329. Accordingly, the Secretary-General of the United Nations, depositary of the Basel Convention, "in keeping with the depositary practice followed in similar cases, ... proposed to receive the declarations in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of their circulation".[550] Subsequently, in view of the objections received from certain contracting States,[551] the Secretary-General "[took] the view that he [was] not in a

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[546] Cf. draft guideline 2.4.3.

[547] See paras. 274-277 above.

[548] See *Multilateral treaties deposited with the Secretary-General — Status as at 31 December 1999*, vol. II, United Nations, New York, 2000, Sales No. E.00.V.2, pp. 357-358.

[549] See the observations by the United Kingdom, Finland, Italy, the Netherlands or Sweden (*Multilateral treaties deposited with the Secretary-General — Status as at 30 April 1995*, United Nations, New York, 1996, Sales No. E.96.V.5, pp. 897-898 — the 2000 edition of this publication is incomprehensible).

[550] Ibid., p. 897.

[551] See para. 328 above.

position to accept these declarations [formulated by Egypt] for deposit",[552] declined to include them in the section entitled "Declarations and Reservations", and reproduced them only in the section entitled "Notes", accompanied by the objections concerning them.

330. In truth, whether what is at issue are conditional declarations formulated after the expression of consent to be bound or simple interpretative declarations whose formulation is limited to certain periods, there does not seem to be any reason to deviate from the rules applicable to late reservations.

331. These rules should therefore be transposed to late interpretative declarations (whether what is at issue are simple interpretative declarations, where the treaty limits the possibility of making such declarations to specified periods, or conditional declarations) in draft guidelines 2.4.7 and 2.4.8, based on draft guideline 2.3.1:

*2.4.7* *Interpretative declarations formulated late*

*Where a treaty provides that an interpretative declaration can be made only at specified times, a State or an international organization may not formulate an interpretative declaration on that treaty at another time, unless the late formulation of the interpretative declaration does not elicit any objections from the other contracting Parties.*

*2.4.8* *Conditional interpretative declarations formulated late*

*A State or an international organization may not formulate a conditional interpretative declaration on a treaty after expressing its consent to be bound by the treaty unless the late formulation of the declaration does not elicit any objections from the other contracting Parties.*

332. It is self-evident that the approaches laid down in draft guidelines 2.3.2 and 2.3.3 can also be transposed to acceptances of interpretative declarations formulated late and objections to such formulation. Nevertheless, it is probably not useful to overburden the Guide to Practice by including express draft guidelines in this respect, and it probably suffices to state as much in the commentary on the draft guidelines proposed above.

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[552] *Multilateral treaties deposited with the Secretary-General — Status as at 30 April 1995 ...*, p. 897.