

2000



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 10/03/00

DI-E-RIT (99) 5 rev 2

**AD HOC COMMITTEE OF LEGAL ADVISERS
ON PUBLIC INTERNATIONAL LAW
(CAHDI)**

**GROUP OF EXPERTS ON RESERVATIONS TO INTERNATIONAL TREATIES
(DI-E-RIT)**

**3rd meeting
Berlin, 10 March 2000**

PRACTICAL ISSUES REGARDING RESERVATIONS TO INTERNATIONAL TREATIES

**Document submitted by
the delegation of the Netherlands
as approved by the DI-E-RIT at its 3rd meeting, Berlin, 10 March 2000**

Secretariat memorandum
Prepared by the Directorate General of Legal Affairs

Foreword

1. During the first meeting of the Group of Specialists on Reservations to International Treaties (DI-S-RIT) held in Paris, 16-17 February 1998, the delegate of the Netherlands drew the attention of the Group to the fact that the activity was focussing mainly on objections, a phenomenon occurring at the final stage of the treaty making process (see report of the meeting, document DI-S-RIT (98) 5, paragraph 91).
2. She called upon the Group to anticipate possible conflicts and to cover the whole range of developments leading to the problem of reservations and objections. To this extent, she distinguished three stages in relation to treaties: negotiation, ratification and objection and noted that reservations are normally formulated at the negotiation stage.
3. At the negotiation stage, she observed, the key issue is to ensure the reservation in question falls within Art. 19. (a) or (b) of the Vienna Convention on the Law of the Treaties (see relevant provisions in Appendix 1 to this document) and does not come under the scope of Art. 19 (c).
4. At the ratification stage, when a reservation is formulated, she observed that it is necessary to consider preparatory work in order to determine whether the reservation is compatible with the object and purpose of the treaty, if applicable.
5. Thirdly, as regards the objection stage, she supported the proposal to prepare model objection clauses. (A proposal in this sense was submitted by the delegation of Sweden, (document DI-S-RIT (98) 4) which resulted in the adoption by the Committee of Ministers of Recommendation No. R (99) 13 *on responses to inadmissible reservations to international treaties* including in appendix *Model-response clauses to reservations*).
6. She concluded her intervention by stressing the significance of the time limits issue, the usefulness of providing member States with some indication of the elements to include in the internal procedure for dealing with reservations e.g. the consultation procedure, and the over-all need for the exercise to be practice-oriented.
7. As a result of this intervention, the delegation of the Netherlands was invited to prepare a document on the key issues regarding reservations at the various stages of the process of concluding treaties (negotiation, signature and ratification) and the post-ratification stage. Accordingly, the delegation of the Netherlands has submitted the following document including an outline of the various issues regarding reservations and a description thereof.
8. The outline was submitted at the second meeting of the DI-S-RIT in Paris, 14-16 September 1998 as document DI-S-RIT (98) 6 and is also included in the following document. The outline is completed with explanations which are intended as a chronological description of the different considerations with respect to reservations and related issues in the different phases of the existence of a treaty. All article references are to the Vienna Convention on the Law of the Treaties, 1969 (see Appendix 1 to this document).
9. The outline and its explanation have been discussed in the second meeting of the DI-E-RIT in Strasbourg, 6 September 1999.
10. Following these discussions, the explanatory part has been amended to include the views expressed by participants and approved by the DI-E-RIT at its 3rd meeting, Berlin, 10 March 2000.

Action required

Members of the CAHDI are invited to consider and approve the following document and transmit it to the Committee of Minister with a view to publication in the *Official Gazette* of the Council of Europe.

GUIDE TO PRACTICE REGARDING RESERVATIONS TO INTERNATIONAL TREATIES

**(KEY ISSUES REGARDING RESERVATIONS AT THE VARIOUS STAGES OF THE
PROCESS OF CONCLUDING TREATIES (NEGOTIATION, SIGNATURE AND
RATIFICATION) AND POST-RATIFICATION STAGE)**

I. Negotiations Phase

1. Formulate an appropriate reservations clause

A reservations-clause, although it is normally put in the “Final Clauses” section of a Convention, deals with substantive issues. Parties need to consider formulating an appropriate reservations-clause during negotiations. This implies choosing between the options offered by Article 19.a or 19.b VCLT, and formulating a reservations provision accordingly. Article 19.c is basically a residual rule, applicable when no specific rule on reservations has been agreed.

In considering what rule on reservations to formulate, States may wish to take into account the substance of the treaty, and in particular, the core elements of an international instrument. States may wish to prohibit general reservations, for example, by requiring clarification of the reason for formulating a reservation (cf. Article 64.1 European Convention of Human Rights). A reservation clause takes into account issues that may, in future, become the subject of the reservations made.

States may need to consider the implications of a reservations clause on the future role of the depositary, and the future role of the other States Parties with respect to reservations.

A State’s position on reservation will obviously be inspired by its domestic (constitutional) rules on making reservations.

Depending on the substance of a treaty, States may wish to consider whether a “sunset” reservations-clause would be appropriate. Such a provision contains a time-limit for the validity of a reservation. This means that, unless a reserving State takes a particular step (such as renewing its reservation), the reservation will “disappear” after a certain period of time. From the point of view of limiting the impact of reservations, a “sunset” provision may have important advantages.

2. Establish a position on a future reservations regime before starting negotiations

It is wise for delegations to establish their position on a reservations-clause prior to starting negotiations, on the basis of their views on the core obligations of an international instrument. However, the development of the negotiations may necessitate further choices with respect to reservations-clauses.

II. Signature Phase

3. Consider whether to make reservations on signature

Once negotiations are concluded, States need to decide on an individual basis whether a reservation on signature needs to be made. Reservations made at signature have to be repeated on expressing consent to be bound if one wants them to enter into force (Article 23.2 VCLT).

4. Consider whether to react to reservations made on signature

If reservations have been made on signature, other Parties may need to consider, individually or in a co-ordinated manner, whether there is a need to object to such a reservation (Article 23.3 VCLT).

5. Functions of the depositary

The role of the depositary in the signature phase is to receive reservations and declarations, and to execute the administrative functions related thereto.

The depositary will notify the reservations made on signature to other potential Parties, and to States that have already expressed consent to be bound.

The depositary will receive and notify the objections made by other signatory States to reservations made on signature to the other States expressing consent to be bound.

III. **Ratification Phase**

6. Internal considerations with respect to reservations

Prior to expressing consent to be bound, States may wish to consider the need to adapt national legislation in order to prevent the formulation of reservations.

States may consider the possibility of making a “proper” interpretative declaration (for the distinction see Article 2.1.d VCLT), instead of making a reservation.

Prior to submitting a reservation, a State needs to establish that the intended reservation will comply with the convention’s rules or with the general law of treaties (Art. 19).

7. Raising an objection to a reservation

When considering raising an objection to a reservation, States may wish to establish, individually or in a co-ordinated manner, a dialogue with a State that has made a reservation, in order to suggest its reconsideration of that reservation with a view to withdrawing it, within the time-limit set by Article 20.5 VCLT.

On expressing consent to be bound, a State needs to consider whether there is a need to object to a reservation previously made by other Parties (art. 20.5 VCLT). They may also consider whether it is desirable to raise an objection in co-ordination with other States (through COJUR or CAHDI, for example).

States that are parties need to consider whether there is a need to object to a reservation being made by a new State Party (Article 20.5 VCLT).

States may consider co-ordinating the formulation of model-objections to particular (types of) reservations. Possibilities to do so will clearly depend on a shared opinion on a particular (type of) reservation.

8. Denunciation of a treaty and re-ratification with reservations

Recently, there have been instances where States have denounced a treaty to which they had not made reservations with a view to re-accessing to the treaty with reservations. The VCLT has no specific rules covering this situation. The validity of this action is controversial.

The view has been expressed that this procedure is circumventing the rule that reservations

may only be made when expressing consent to be bound. The view has also been expressed that, although highly undesirable, there are no formal rules against such a procedure

9. Role of the depositary in the ratification phase

The depositary is to receive reservations and declarations made by the State Parties on the occasion of expressing consent to be bound.

The depositary has to establish whether a reservation complies with the treaty's rules on reservations (see Articles 19.a and 19.b VCLT). If a reservation is questionable in the light of the treaty's rules on reservations the depositary will have to take action in accordance with the VCLT.

The depositary will notify reservations and declarations made to the State Parties and to States entitled to sign the treaty.

The depositary will receive the objections made to reservations and notify all States Parties of such objections.

IV. Post-Ratification Phase

10. Modification of reservations

Modification of a reservation is acceptable when it restricts the scope of the original reservation. A modification that expands the scope of the original reservation is contrary to the rule that reservations may only be made when expressing consent to be bound (Art. 2.1.d VCLT).

By analogy with Article 20 para. 5 VCLT, a 12 months time-limit should be applicable to the (non)acceptance of such modified reservations.

11. Withdrawal of reservations

States may wish to consider the withdrawal of their reservations and interpretative declarations at regular intervals (Article 22.1 VCLT).

12. Withdrawal of objection

In case a reservation (or interpretative declaration) has been withdrawn, States having made an objection to that reservation may withdraw their objection. This may not be required by law, but should be understood as a gesture of courtesy (article 22.2 VCLT).

13. No new reservations may be made after ratification

As reservations may only be made at the time of expressing consent to be bound (Article 2.1.d VCLT states, "When signing, ratifying, accepting, approving or acceding to a treaty.."), consequently, reservations may not be made at a later stage. Presumably, the depositary has a role with respect to alerting other State Parties to such out-of-time reservations.

14. Establish a domestic mechanism for monitoring subsequent reservations (formulated by other States)

States may wish to establish a domestic "early-warning" mechanism with respect to reservations or declarations made by other States, in order to be able to react in time (Article 20.5 VCLT: "period of twelve months") to such reservations or declarations by formulating objections, or by starting consultations with the State concerned.

On the basis of consultations with other sections of the Ministry of Foreign Affairs, or with other government departments, a general policy on acceptable and unacceptable reservations and declarations may be established for guidance.

15. (Co-ordinated) action with respect to objections made by other States

States may wish to establish, either individually or in a co-ordinated manner, dialogue with a State that has made a reservation, in order to suggest its reconsideration of a reservation with a view to withdrawing it. Such consultation needs to be undertaken at an early stage in order to remain within the time-limit set by the Vienna Convention if objections need to be made (Article 20.5 VCLT).

16. After ratification of an instrument by a Party, no new reservations may be made by that Party

The rule that reservations may not be made at a later stage (see Article 2.1.d VCLT) puts an obligation on the depositary to take the necessary steps once that is the case. The depositary should not accept such “late” reservations, and should return them to the author State. Alternatively, the depositary could notify other State Parties of such a “late” reservation indicating the controversial nature of such a reservation.

Recently a number of States has started to explore ways around this prohibition, by denouncing a treaty and re-ratifying the same treaty while formulating reservations.

KEY ISSUES REGARDING RESERVATIONS AT THE VARIOUS STAGES OF THE PROCESS OF CONCLUDING TREATIES (NEGOTIATION, SIGNATURE AND RATIFICATION) AND POST-RATIFICATION STAGE

	NEGOTIATION	SIGNATURE	RATIFICATION	POST-RATIFICATION
LEGAL EFFECT	<p>1. Individually/Co-ordinated Formulate appropriate reservation clauses (Art. 19.a or 19.b; or 19.c)</p> <p>Issues:</p> <ul style="list-style-type: none"> - Substance of the convention - Anticipated motives for making reservations - Future role of depositaries - Future role of the Parties - "Sunset" provision on reservations (?) - Constitutional rules on treaty-making 	<p>3. Individually Decide whether making a reservation on signature is necessary (Art. 23.2)</p> <p>4. Individually/Co-ordinated Consider the need to object to a reservation made on signature (Art. 23.2)</p>	<p>6. Individually</p> <p>A. Decide whether there is a (domestic) need for making a reservation</p> <p>B. Consider the possibility of making a "proper" interpretative declaration instead (Art. 2.1.d)</p> <p>C. Establish that the intended reservation will comply with the convention's rules or with the general law of the treaties (Art. 19)</p> <p>7. Individually/Co-ordinated Consider the need to object to a reservation previously made by other Parties (Art. 20.5)</p> <p>8. Individually Denunciation of a treaty and re-ratification with reservations</p>	<p>10. Individually Modification of reservations</p> <p>11. Individually Withdrawal of reservation (Art. 22.1)</p> <p>12. Individually Withdrawal of objection (Art. 22.2)</p> <p>13. No new reservations may be made after ratification (Art. 2.1.d)</p>
POLITICAL ACTION	<p>2. Individually/Co-ordinated Establish a position on a future reservation's regime before negotiations</p>			<p>14. Individually Establish a domestic mechanism for monitoring subsequent reservations</p> <p>Issues:</p> <ul style="list-style-type: none"> - Early warning, time limit in Art. 20.5 - Consultations with other sections or ministries - Political reactions with the reserving State <p>15. Individually/Co-ordinated Establish dialogue with a reserving Party in order to suggest reconsideration or withdrawal of the reservations (Art. 20.5)</p>
ROLE OF THE DEPOSITORIES		<p>5. Functions</p> <p>A. Receive reservations and declaration</p> <p>B. Publish reservations</p> <p>C. Receive and publish objections to reservations</p>	<p>9. Functions</p> <p>A. Receive reservations and declarations</p> <p>B. Establish whether the reservation complies with the treaty's reservation clause (Art. 19.a or b)</p> <p>C. Publish the reservations</p> <p>D. Receive and publish the objections made to reservations</p>	<p>16. No new reservations may be made after ratification (Art. 2.1.d)</p>

APPENDIX 1**Convention on the Law of Treaties[†]****Article 2*****Use of terms***

For the purposes of the present Convention:

(d) “reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty; whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that State.

Article 19***Formulation of reservations***

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, 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; or (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20***Acceptance of and objection to reservations***

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

[†] Signed in Vienna on 23 May 1969 UN Doc. A/Conf.39/27. UN Conference on the Law of the Treaties. Official Records. Documents of the Conference (A/Conf.39/11 Add.2) United Nations, New York 1971, pp. 289-301.

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State 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.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State; (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23***Procedure regarding reservations***

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
2. If formulated when signing the treaty subject to ratification, acceptance or approval, 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.
3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.