

## **PRACTICAL ISSUES REGARDING RESERVATIONS TO INTERNATIONAL TREATIES**

### **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 depository, 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 they are 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 depository 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 depository to take the necessary steps once that is the case. The depository should not accept such "late" reservations, and should return them to the author State. Alternatively, the depository could notify other State Parties of such a "late" reservation indicating the controversial nature of such a reservation.

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