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Addendum

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Chapter IV
Reservations to treaties

Addendum

1. Definitions

1.1 Definition of reservations

1. "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.

2. Paragraph 1 is to be interpreted as including reservations that 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 in their application to the State or to the international organization which formulates the reservation.

Commentary

(1) Paragraph 1 of guideline 1.1 gives the definition of reservations adopted by the Commission. It is none other than the composite text of the definitions contained in the Vienna Conventions of 1969, 1978 and 1986, to which no changes have been made. Paragraph 2 indicates the extensive manner in which this definition has been interpreted in practice.

(2) Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties of 23 May 1969 gives the following definition of reservations:

> "'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 effect of certain provisions of the treaty in their application to that State."

(3) This definition reproduces the text proposed by the Commission in 1996 in its final draft articles on the law of treaties,[1] and did not give rise to lengthy discussion either within the Commission[2] or during the Vienna Conference. The text of the definition was reproduced in the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1986 Vienna Convention on Treaties between States and International Organizations or between International Organizations[3] and gave rise to hardly any discussion.

(4) It should be noted, however, that article 2, paragraph 1 (j), of the 1978 Convention and article 2, paragraph (1) (d), of the 1986 Convention do not purely and simply reproduce the text of article 2, paragraph (1) (d), of the 1969 definition. Each of them includes a clarification made necessary by the respective purposes of the two instruments:

(a) The 1978 Convention specifies that a reservation can be made by a State "when making a notification of succession to a treaty";

(b) The 1986 Convention adds that an international organization can make a reservation when it expresses its consent to be bound by a treaty by an act of formal confirmation.

(5) It is these differences that made it necessary to establish for the purposes of the Guide to Practice a composite text, including the additions made in 1978 and 1986, rather than purely and simply to reproduce the 1969 text.

(6) This definition, embodied in judicial decisions[4] and used in practice by States when making reservations themselves or reacting to reservations made by other contracting States, has met with general approval in the writings of legal scholars, even though some authors have criticized it on specific points and have suggested certain additions or amendments.[5]

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[1] *Yearbook ... 1966*, vol. II, p. 187.

[2] See the definitions proposed by Brierly (*Yearbook ... 1950*, vol. II, doc. A/CN.4/23, para. 84), Fitzmaurice (*Yearbook ... 1956*, vol. II, p. 112) and Waldock (*Yearbook ... 1962*, vol. II, p. 36) and the proposals of the Drafting Committee of 1962 (*Yearbook ... 1962*, vol. I, p. 264) and 1965 (*Yearbook ... 1965*, vol. I, p. 335).

[3] During the Commission's elaboration of the draft articles on this topic, a simplification of the definition was proposed in order to avoid a lengthy enumeration of the moments when a reservation may be made in accordance with the 1969 definition (see *Yearbook ... 1974*, vol. II, part I, p. 306). In 1981, however, the Commission reverted to a text based on the 1969 text (see *Yearbook ... 1981*, vol. II, part II, pp. 122 and 124).

[4] See, for example, the arbitral decision of 30 June 1977, *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII, paras. 54–55, pp. 39–40 (the Court of Arbitration had taken note of the parties' agreement to consider that article 2, paragraph (1) (d), of the 1969 Convention, to which they were not parties, correctly defined the reservations, and had drawn the necessary conclusions) or the decision of 5 May 1982 of the European Commission of Human Rights, Case concerning Temeltasch (Decisions and Reports), April 1983, paras. 69–82, pp. 130–131. See also the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Arechaga and Sir Humphrey Waldock attached to the judgment in the *Nuclear Tests (Australia v. France)* case (*I.C.J. Reports 1974*, pp. 349–350, para. 83).

[5] See in particular the definitions proposed by Pierre-Henri Imbert, *Les réserves aux traités*

(7) It has been said that this definition combined elements that were purely definitional with others that were more closely identified with the legal regime of reservations, particularly with regard to the moment when a reservation may be formulated. Illogical though it may appear in the abstract, the idea of including time limits on the possibility of making reservations in the definition of reservations itself has progressively gained ground,[6] given the magnitude of the drawbacks in terms of stability of legal relations of a system that 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.

(8) The fact nonetheless remains that criticisms have been levelled at the restrictive listing in the Vienna Conventions of the moments at which formulation of a reservation can take place. On the one hand, it has been felt that it was incomplete, *inter alia*, in that it did not initially take into account the possibility of formulating a reservation on the occasion of a succession of States;[7] but the 1978 Vienna Convention on Succession of States in respect of Treaties remedied this omission. Moreover, many authors have pointed out that, in some cases, reservations could validly be formulated at moments other than those provided for in the Vienna definition,[8] and in particular that a treaty may make express provision for the possibility of formulating a reservation at a moment other than the time of signature or of expression of consent to be bound by the treaty.[9]

(9) Express consideration of this possibility in the Guide to Practice does not, however, appear to be useful: it is indeed true that a treaty may provide for such an eventuality, but this is then a treaty rule, a *lex specialis* that constitutes a derogation from the general principles established by the Vienna Conventions, which are only intended to substitute for an absence of will, and present no impediment to derogations of this kind. The Guide to Practice with respect to reservations is of the same nature, and it does not seem appropriate to recall under each of its headings that States and international organizations may depart from it by including in the treaties that they conclude reservations clauses which institutes special rules in that respect.

(10) On the other hand, even if one confines oneself to general international law it appears that the list of cases in which the formulation of a reservation can take place, as laid down in article 2, paragraph 1, of the Vienna Conventions, does not cover all the means of

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multilatéraux (Paris, Pedone, 1979), p. 18, and Marjorie Whiteman, *Digest of International Law*, vol. 14, 1970, p. 137. See also Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, vol. 5, 1998, p. 83.

[6] The oldest definitions of reservations did not generally include this element *ratione temporis* (see, for example, those proposed by David Hunter Miller (*Reservations to Treaties: The Effect and Procedure in Regard Thereto*, Washington D. C., 1919, p. 76), Dionisio Anzilotti (*Cours de droit international*, French translation by G. Gidel, Paris, Sirey, vol. I, 1929, p. 399) and R. Genet ("*Les réserves dans les traités*", *Revue de droit international et des sciences diplomatiques et politiques*, 1932, p. 103)).

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

[8] Cf. *ibid*. and 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, pp. 310–313; D.W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law*, 1995, pp. 28–29; 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. 41–43; and Paul Reuter, *Introduction au droit des traités*, 3rd ed., revised and expanded by Philippe Cahier (Paris, P.U.F., 1995), p. 71.

[9] See in particular Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 12.

expressing consent to be bound by a treaty. Yet the spirit of this provision is indeed that a State may formulate (or confirm) a reservation when it expresses its consent, and that it can do so only at that moment. Too much importance must not therefore be attached to the letter of this enumeration, which is incomplete and, moreover, does not correspond to that appearing in article 11 of the 1969 and 1986 Conventions.[10]

(11) The Commission had moreover clearly perceived the problem when it discussed the draft articles on the law of treaties between States and international organizations or between international organizations, in that initially, on the proposal of its Special Rapporteur, Paul Reuter, it had simplified the definition of reservations and intended to say only that they could be made by "a State or by an international organization when signing or consenting ... to be bound by a treaty",[11] which was an implicit reference to article 11 of the future Convention. However, out of a concern to depart as little as possible from the 1969 text, the Commission finally modelled its draft on it, thus abandoning the idea of a useful simplification.[12]

(12) The differences in wording between article 2, paragraph 1 (d), and article 11 of the 1969 and 1986 Conventions lie in the omission from the former of these provisions of two possibilities contemplated in the latter: "exchange of instruments constituting a treaty" and "any other means if so agreed". As one member of the Commission pointed out, it is rather improbable that a general multilateral treaty could consist of an exchange of letters. Nevertheless, the possibility cannot be entirely ruled out; nor can the development of means of expressing consent to be bound by a treaty other than those expressly listed in articles 2, paragraph 1 (d), and 11 of the Vienna Conventions.

(13) It was also suggested that the definition of reservations should be supplemented by a mention of the requirement that reservations must be made in writing and that it should be made clear that a reservation could — in fact could only — seek to limit the legal effect of the provisions in respect of which it is made.

(14) These gaps and ambiguities do not constitute sufficient grounds to call into question the Vienna definition as derived from a combination of the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions. To the extent necessary, this definition is supplemented and clarified in the Guide to Practice, since that is the very purpose and *raison d'être* of the Guide.[13]

(15) Taken literally, the Vienna definition which the Commission has included in paragraph 1 appears to exclude from the general category of reservations unilateral statements that concern not one specific provision or a number of provisions of a treaty, but the entire text. Such an interpretation would have the effect of excluding from the definition

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[10] Article 11 of the Vienna Conventions reads as follows:

> "1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.
>
> 2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed."

See also P. Gautier, *Commentaire de l'Article 2 (1969)* in Olivier Corten and Pierre Klein, *Les conventions de Vienne sur le droit des traités: Commentaires article par article* (Brussels, Bruylant, 2006), vol. I, p. 65, para. 33.

[11] *Yearbook ... 1974*, vol. II, Part I, p. 145; see also the commentary on the draft in question, *ibid*., p. 307.

[12] See footnote ... above.

[13] See in particular guidelines 1.1.1, 2.1.1 and 2.3.

of reservations the well-established practice of across-the-board reservations, which guideline 1.1, paragraph 2, seeks to take into account. A simpler reading of the definition of reservations would lead to an interpretation that was unduly restrictive and contrary to reality.

(16) The wording used by the authors of the Vienna Conventions takes care to make it clear that the objective of the author of the reservation is to exclude or to modify the *legal effect* of certain provisions of the treaty to which the reservation applies and not the provisions themselves.[14] A criticism of the wording relates to the use of the expression "certain provisions". It has been noted that this expression was justified "out of the very commendable desire to exclude reservations that are too general and imprecise[15] and that end up annulling the binding character of the treaty", a consideration regarding which it might be queried whether it "should be placed in article 2. In fact, it relates to the validity of reservations. However, it is not because a statement entails impermissible consequences that it should not be considered a reservation. Moreover, practice provides numerous examples of perfectly valid reservations that do not focus on specific provisions: they exclude the application of the treaty as a whole under certain well-defined circumstances".[16]

(17) Care should be taken not to confuse, on the one hand, a general reservation characterized by the lack of specificity and general nature of its content and, on the other, an across-the-board reservation concerning the way in which the State or the international organization formulating it intends to apply the treaty as a whole, but which cannot necessarily be criticized for lack of precision, since it relates to a specific aspect of the treaty.

(18) Across-the-board reservations are a standard practice and, as such, have not raised particular objections. The same is true of reservations that exclude or limit the application of a treaty:

- to certain categories of persons;[17]
- or of objects, especially vehicles;[18]
- or to certain situations;[19]

[14] The wording of article 21, paragraph 1, of the 1969 and 1986 Conventions is more open to question, in that it defines the legal effects of reservations as amendments *to the provisions* to which they refer.

[15] Cf. the observations of the Government of Israel on the first draft of the International Law Commission (*Yearbook ... 1965*, vol. II, p. 14) or the statement by the representative of Chile at the first session of the Vienna Conference, in 1968 (A/CONF.39/11/SR.4, para. 5). See also K. Zemanek, "Alain Pellet's Definition of a Reservation", *Austrian Review of International and European Law*, vol. 3, 1998, pp. 295–299.

[16] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), pp. 14–15. Similarly, see, for example, Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Y.B.I.L.*, 1970, p. 296.

[17] See, for example, the United Kingdom's reservation concerning the application of the International Covenant on Civil and Political Rights to members of the armed forces and prisoners (*Multilateral treaties deposited with the Secretary-General*, available from http://treaties.un.org/, chap. IV.4) or that of Guatemala concerning the application of the Customs Convention on the Temporary Importation of Private Road Vehicles of 4 June 1954 to natural persons only (*ibid*., chap. XI.A.8).

[18] See, for example, Yugoslavia's reservation to the effect that the provisions of the Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation shall not apply to vessels exclusively employed by the public authorities (*ibid*., chap. XII.3) or that of Germany to the effect that the Convention on the Registration of Inland Navigation Vessels of 25 January 1965 would not apply to vessels navigating on lakes and belonging to the German Federal Railways (*ibid*., chap. XII.4).

- or to certain territories;[20]
- or in certain specific circumstances;[21]
- or for special reasons relating to the international status of their author;[22]
- or to the author's national laws;[23] etc.

(19) Some of these reservations have given rise to objections on grounds of their general nature and lack of precision,[24] and it may be that some of them are tainted by impermissibility for one of the reasons specified in article 19 of the 1969 and 1986 Vienna Conventions. But this impermissibility stems from the legal regime of the reservations and is a separate problem from that of their definition.[25] Furthermore, the inclusion of across-

[19] See, for example, the Argentine reservations to the 1982 Convention of the International Telecommunication Union with regard to the possible increase in its contribution and the possibility that the other parties would not observe their obligations under the Convention (reply by Argentina to the Commission's questionnaire on reservations); or the reservation of France on signature of the final proceedings of the Regional Administrative Conference for the Planning of Maritime Radiobeacons in the European Maritime Area in 1985, concerning the requirements for the adequate operation of the French maritime radio-navigation service using the multifrequency phase metering system (reply by France to the questionnaire on reservations).

[20] See also guideline 1.1.3 below.

[21] See France's reservation to the General Act of Arbitration of 26 September 1928 to the effect that "in future [the said accession to the Act] shall not extend to disputes relating to any events that may occur in the course of a war in which the French Government is involved" (*Multilateral Treaties* ... Part II, No. 29). (Similar reservations were made by the United Kingdom and New Zealand.) See also the reservations of the majority of States parties to the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, whereby that instrument would cease to be binding for the Government of the State making a reservation with regard to any enemy State whose armed forces or whose allies did not respect the prohibitions which were the object of the Protocol. *Status of Multilateral Arms Regulation and Disarmament Agreements*, 4th ed., 1992, vol. I, pp. 11–21.

[22] See, for example, Austria's and Switzerland's reservations to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 10 April 1972, with regard to preserving their status of neutrality (Swiss reply to the questionnaire on reservations) (United Nations, *Treaty Series*, vol. 1015, p. 236) or Austria's similar reservation to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 10 December 1976 (*Multilateral Treaties* ..., chap. XXVI.1).

[23] See, for example, the reservations of the United States of America, Italy and Japan to the effect that those countries would apply the International Wheat Agreement of 14 March 1986 provisionally within the limitations of internal legislation (*ibid.*, chap. XIX.28) or the reservation of Canada to the Convention on the Political Rights of Women of 31 March 1953 "in respect of rights within the legislative jurisdiction of the provinces" (*ibid*., chap. XVI.1).

[24] See, for example, the objections of numerous countries to the reservations made by the Maldives to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 concerning the Islamic Shariah (*ibid.*, chap. IV.8) and also the reservations made by Egypt to the same Convention. See, in this respect, the articles by Anna Jenefsky, "Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", *Maryland Journal of International Law and Trade*, vol. 15, 1991, pp. 199–233, and by R. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", *Virginia Journal of International Law*, vol. 30, 1990, pp. 643–716. See also the objections of certain countries to the reservation of the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, relating to the Constitution of the United States (*Multilateral Treaties* ..., chap. IV.1).

[25] See also guideline 1.8 and the commentary thereto, below.

the-board reservations in the category of reservations constitutes an indispensable prerequisite to assessing their validity under the rules relating to the legal regime governing reservations; an impermissible reservation (1) is still a reservation and (2) cannot be declared impermissible unless it is a reservation.

(20) Another element that supports a non-literal interpretation of the Vienna definition relates to the fact that some treaties prohibit across-the-board reservations or certain categories of such reservations, in particular general reservations.[26] Such a clause would be superfluous (and inexplicable) if unilateral statements designed to modify the legal effect of a treaty as a whole, at least with respect to certain specific aspects, did not constitute reservations.

(21) The abundance and coherence of the practice of across-the-board reservations (which are not always imprecise and general reservations) and the absence of objections in principle to this type of reservations indicate a practical need that it would be absurd to challenge in the name of abstract legal logic. Moreover, the interpretation of rules of law should not be static; article 31, paragraph 3, of the Vienna Convention invites the interpreter of treaty rules to take into account, "together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", and, as the International Court of Justice has stressed, a legal principle must be interpreted in the light of "the subsequent development of international law".[27]

(22) In order to remove any ambiguity and avoid any controversy, it consequently appears reasonable and useful to establish, in the Guide to Practice, the broad interpretation that States actually give to the apparently restrictive formula of the Vienna definition with regard to the expected effect of reservations.

(23) Furthermore, in order to avoid any confusion with declarations relating to the implementation of a treaty at the internal level, which is the subject of guideline 1.5.2, or even with other unilateral declarations,[28] the Commission decided not to include any reference to "the way in which the State or international organization intends to implement the treaty as a whole". It confined itself to using the actual text of the Vienna definition, according to which, when it formulates a reservation, a State or international 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 organization", specifying, however, that the same may also apply if the reservation relates to "the treaty as a whole with respect to certain specific aspects". The addition of the words "with respect to certain specific aspects" after the words "or of the treaty as a whole" is designed to avoid an interpretation that implies that a reservation might relate to the treaty as a whole, which could go so far as to void it of any substance.

(24) The wording that was retained has the advantage of highlighting the objective pursued by the author of the treaty, which lies at the heart of the definition of reservations adopted in the 1969 and 1986 Vienna Conventions[29] and on which the draft guidelines

[26] This is so in the case of article 57, paragraph 1 (formerly article 64, paragraph 1), of the European Convention on Human Rights or article XIX of the Inter-American Convention on Forced Disappearance of Persons.

[27] Advisory Opinion of 21 June 1971, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), *I.C.J. Reports 1971*, p. 16, para. 53.

[28] See in particular the case of general statements of policy (paras. (12) to (17) of the commentary to guideline 1.5).

[29] See also Daniel Müller, Commentary on article 20 (1969) in Olivier Corten and Pierre Klein (eds.),

relating to the definition of interpretative declarations and other unilateral declarations formulated with regard to a treaty[30] are also based.

(25) Some members of the Commission pointed out, not without justification, that reservations could relate only to certain particular aspects of specific provisions, and that, in their view, constitutes a third hypothesis to be added to reservations that purport "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", a hypothesis directly covered by paragraph 1, and those that purport "to exclude or modify the legal effect of specific aspects of the treaty as a whole", *i.e.* the across-the-board reservations which are the subject of paragraph 2. It cannot be denied that the authors of reservations frequently purport to exclude or modify the legal effect of certain provisions of a treaty only with respect to certain specific aspects,[31] but this possibility is covered by the general definition of paragraph 1 and, more specifically, by the word "modify", which necessarily implies that the reservation relates only to certain aspects of the provisions in question.

(26) Given that the definition used in the Guide to Practice is, from the outset, the one that stems from the Vienna Conventions, the commentary to article 2, paragraph (1) (d), of the Commission's draft article, which was reproduced in the Vienna Convention, retains all its relevance:

> "The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted."[32]

(27) This explanation brings out clearly the function of the definitions contained in this first part of the Guide to Practice: the aim is to distinguish between reservations and other unilateral statements made with respect to a treaty (the largest group of which is that of interpretative declarations), since the two are subject to different legal regimes.

(28) One should also be aware of the limitations of an endeavour of this kind: however much care is taken to define reservations and to distinguish them from other unilateral statements which have certain elements in common with them, some degree of uncertainty inevitably remains. This is inherent in the application of any definition, which is an exercise in interpretation that depends in part upon the circumstances and context and inevitably brings into play the subjectivity of the interpreter.

1.1.1 Statements purporting to limit the obligations of their author

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

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Les conventions de Vienne sur le droit des traités ..., vol. I, p. 885, para. 3, and Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Nijhoff, 2009), p. 89, para. 36.

[30] See guidelines 1.2, 1.3.1, 1.4, 1.5 and 1.5.1 to 1.5.3 below.

[31] See, among very numerous examples, the reservations of Canada, the United States of America, Laos, Thailand and Turkey to the Convention on the Privileges and Immunities of the United Nations (*Multilateral Treaties* …, chap. III.I), that of Malta to the 1954 Additional Protocol to the Convention concerning Customs Facilities for Touring (*ibid.*, chap. XI.A.7) and that of the European Community to articles 6 and 7 of the 1994 Convention on Customs Treatment of Pool Containers (*ibid.*, chap. XI.A.18).

[32] *Yearbook ... 1966*, vol. II, para. (11) of the commentary to article 2, pp. 189–190.

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

Commentary

(1) There is no doubt that the expression "to modify the legal effect of certain provisions of the treaty", as contained in the "Vienna definition" used in guideline 1.1, refers to reservations which *limit* or *restrict* this effect and, at the same time, to the reserving State's obligations under the treaty "because 'restricting' is a way of 'modifying'".[33] Moreover, nearly all reservations are intended to limit the obligations which are in principle incumbent on the declarant under the treaty.

(2) This is in all probability why the amendments proposed during the Vienna Conference on the Law of Treaties for the addition of the words "limit" and "restrict" to the list of the legal effects intended by reservations[34] were not adopted: they would not have added anything to the final text.[35]

(3) The Commission nevertheless considers that the preparation of a Guide to Practice does not impose the same constraints as the drafting of a convention: such a guide can contain a statement of the obvious that would not belong in a treaty.

(4) However, guideline 1.1.1 also serves a more substantial purpose. In the Commission's view, its inclusion in the Guide to Practice, together with guideline 1.1.2, helps to shed light on a question that arises constantly in connection with reservations to treaties, *i.e.* whether there is any such thing as "extensive reservations", of which there is no generally accepted definition,[36] as may be noted from the outset.

(5) The Commission does not intend to enter into a purely theoretical debate, which would be out of place in a Guide to Practice, and it has refrained from using that ambiguous term, but it notes that, when a State or an international organization formulates a unilateral statement by which it intends to limit the obligations the treaty would impose on it in the absence of such a statement, its intention at the same time is inevitably to increase its own rights at the expense of those that the other contracting States or organizations would have under the treaty if the treaty was applied in its entirety; in other words, the obligations of

[33] 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, p. 80.

[34] See the amendments proposed by Sweden (add [a comma and] the word "limit" after the word "exclude") and Viet Nam (add a comma and the words "to restrict" after the word "exclude") (Report of the Committee of the Whole on its work at the first session of the Conference, para. 35; A/CONF.39/14, United Nations Conference on the Law of Treaties, first and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, *Official Records*, *Documents of the Conference*, United Nations, New York, 1971, Sales No. E.70.V.5, p. 112).

[35] See Frank Horn, *op. cit.* (footnote ... above), p. 80.

[36] For example, Ruda defines "extensive reservations" as "declarations or statements purporting to enlarge the obligations included in the treaty" and he includes "unilateral declarations whereby the State assumes obligations, without receiving anything in exchange, because the negotiations for the adoption of the treaty have already been closed" ("Reservations to Treaties", *Recueil des cours de l'Académie de droit international de La Haye* 1975-III, vol. 146, p. 107); Horn makes a distinction between "commissive declarations", by which the State making the declaration undertakes more than the treaty requires, and "extensive reservations proper", whereby "a State will strive to impose wider obligations on the other parties, assuming correspondingly wider rights for itself" (*Reservations and Interpretative Declarations to Multilateral Treaties*, *op. cit.* (footnote ... above), p. 90); Mr. Imbert considers that "there are no 'extensive reservations'" (*Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 15); see also the discussion between two members of the Commission, Mr. Bowett and Mr. Tomuschat, in 1995 (A/CN.4/SR.2401, pp. 4 and 7).

the partners of the author of the reservation are increased accordingly. To this extent, "limitative" reservations — *i.e.* the majority of reservations — may appear to be "extensive reservations".

(6) A distinction should, however, be drawn between two types of statement which are related only in appearance:

- statements which, because they are designed to exempt their author from certain obligations under the treaty, restrict, by correlation, the rights of the other contracting States or organizations; and
- statements designed to impose new obligations, not provided for by the treaty, on the other parties to it.

(7) Guideline 1.1.1 relates only to statements in the first of these categories; those in the second are not reservations.[37]

(8) Certain reservations by which a State or an international organization intends to limit its obligations under the treaty have sometimes been presented as "extensive reservations". This is, for example, the case of the statement by which the German Democratic Republic indicated its intention to bear its share of the expenses of the Committee against Torture only insofar as they arose from activities within its competence as recognized by the German Democratic Republic.[38] It was questioned whether such a reservation was permissible,[39] but it is not because it would have the consequence of increasing the financial burden on the other parties that it should not be described as a reservation or that it would, by its nature, differ from the usual "modifying" reservations.

(9) This seems to apply too in the case of another example of reservations described as "extensive" on the ground that "the reserving State simply widens its rights (and not its obligations), increasing by the same token the obligations of its partners":[40] the reservations formulated by Poland and several socialist countries to article 9 of the Geneva Convention on the High Seas, under which "the rule expressed in article 9 [relating to the immunity of State vessels] applies to all ships owned or operated by a State"[41] would constitute "extensive reservations" because the reserving State simply widens its rights (and not its obligations), increasing by the same token the obligations of its partners. Once again, there is in fact nothing special about this: such a reservation "operates" like any limitative reservation; the State which formulates it modulates the rule laid down in the treaty so as to limit its treaty obligations.[42]

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[37] See guideline 1.5 and in particular paras. (9) and (10) of the commentary thereto.

[38] See *Multilateral Treaties* ..., chap. IV.9.

[39] *Cf.* Richard W. Edwards, Jr., "Reservations to Treaties", *Michigan Journal of International Law*, 1989, pp. 392–393.

[40] Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Y.B.I.L.*, 1970, pp. 295–296.

[41] *Multilateral Treaties* ..., chap. XXI.2.

[42] The examples of "limitative reservations" of this kind are extremely numerous, since, in this case, the modulation of the effect of the treaty may be the result of (i) the substitution by the reserving State of provisions of its internal law for provisions contained in the treaty: "The Argentine Government states that the application of article 15, paragraph 2, of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in article 18 of the Argentine Constitution" ("interpretative declaration" by Argentina concerning the International Covenant on Civil and Political Rights, *Multilateral Treaties* ..., chap. IV.4); (ii) the substitution of obligations stemming from other international instruments for provisions of the treaty to which the reservation is attached: "Articles 19, 21 and 22 in conjunction with article 2, paragraph 1, of the Covenant shall be applied within the scope of article 16 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms" (reservation No. 1 by Germany to the same Covenant, *ibid.*); or

(10) The fact is that the reserving State must not take the opportunity offered by the treaty to try, by means of a reservation, to acquire more rights than those to which it could claim to be entitled under general international law. In such a case, a unilateral statement formulated by a State or an international organization comes not within the category of reservations, as provided for in the draft guideline under consideration, but under that of unilateral statements purporting to add further elements to a treaty.[43]

(11) According to the definition of reservations itself, reservations cannot be described as such unless they are made "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".[44] To the extent that unilateral statements purporting to limit the obligations of the State or the international organization formulating them are reservations, this temporal element comes into play and they are obviously subject to this temporal limitation.

(12) Taking this reasoning to its logical conclusion would probably also mean reproducing the entire list of cases in which a reservation may be formulated, as contained in draft guideline 1.1. However, not only is such a list incomplete,[45] but its inclusion in guideline 1.1.1 would render its wording unduly cumbersome. The Commission considered that a general reminder would be enough; this is the purpose of the expression "when that State expresses its consent to be bound".

1.1.2 Statements purporting to discharge an obligation by equivalent means

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 that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from that imposed by the treaty but which it considers to be equivalent, constitutes a reservation.

Commentary

(1) The rather specific case dealt with in guideline 1.1.2 may be illustrated by the Japanese reservation to the Food Aid Convention, 1971. Under article II of that treaty, the parties agreed to contribute as food aid to the developing countries wheat and other grains in specified annual amounts. In the statement it made when signing, Japan reserved:

> "the right to discharge its obligations under article II by providing assistance in the form of rice, not excluding rice produced in non-member developing countries, or, if requested by recipient countries, in the form of agricultural materials".[46]

(iii) a different formulation, devised for the occasion by the reserving State, regardless of any pre-existing rule: "Article 14 (3) (d) of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing" (reservation No. 2 by Germany, *ibid.*).

[43] It may actually be difficult to tell the difference between the two, since everything depends on whether the State or the international organization intends, by its statement, to grant itself more rights than it has under general international law, and that depends on the interpretation both of the statement itself and of the customary rule to which the declarant is referring. Thus, in the example of the Polish statement given in para. (9) above, it must be regarded as a reservation if it is considered that there is a customary rule by virtue of which all State vessels, *lato sensu*, benefit from immunity. See also guideline 1.5 and in particular paras. (11) and (12) of the commentary thereto.

[44] See guideline 1.1.

[45] See para. (10) of the commentary to guideline 1.1 above.

[46] United Nations, *Treaty Series*, vol. 800, p. 197.

(2) Such a statement does purport to modify the legal effect of some provisions of the treaty in their application to its author[47] and thus falls within the framework of the definition of reservations.

(3) It is probably quite unlikely that it would take effect without the acceptance of the other parties (at least the recipients of the assistance, in the case of the Japanese reservation), but this is the case of reservations resulting from article 20 of the 1969 and 1986 Vienna Conventions.

(4) The specificity of the reservations referred to in this guideline derives from the expression "in a manner *different from but equivalent to*". In accordance with the general principles of public international law, this equivalence can be assessed only by each contracting State or organization insofar as it is concerned. If the obligation assumed is less than that provided for by the treaty, the case is covered by guideline 1.1.2, and the unilateral declaration constitutes a reservation; if it is heavier, it is a statement purporting to undertake unilateral commitments, which is not a reservation.[48] Where assessments differ, the contracting States or organizations must resort to a means of peaceful settlement.

(5) The temporal element is, of course, essential in this case: if the "substitution" takes place after the entry into force of the treaty for its author, it will at best be a collateral agreement (if the other contracting States and organizations accept it) and, at worst, a violation of the treaty. However, this is true for all unilateral statements formulated "late".[49]

1.1.3 Reservations relating to the territorial application of a treaty

A unilateral statement by which a State purports to exclude the application of some provisions of a treaty or of the treaty as a whole with respect to certain specific aspects, to a territory to which they would be applicable in the absence of such a statement constitutes a reservation.

Commentary

(1) As its title indicates, this guideline concerns unilateral statements by which a State[50] purports to exclude the application of a treaty *ratione loci*: the State consents to the application of the treaty as a whole *ratione materiae* except in respect of one or more territories to which the provisions of the treaty would otherwise apply under article 29 of the Vienna Conventions,[51] without any need to draw a distinction between reservations *ratione materiae* and reservations *ratione loci*. Such a distinction follows neither explicitly nor implicitly from the Vienna definition.

(2) In State practice it is quite common, for various reasons, to exclude or modify the application of certain provisions of a treaty in respect of a part of the territory of the State to which, in the absence of such a declaration, the provisions in question would otherwise

[47] On the understanding that, in the above-mentioned example, things are slightly less clear, since article II does not strictly limit the grains to be supplied to wheat, although for the sake of argument it may be assumed that it does.

[48] See paras. (9) and (10) of the commentary to guideline 1.5.

[49] See also section 2.3 (Late formulation of a reservation).

[50] For obvious reasons, this situation generally does not apply to international organizations, although cases could arise in which an organization with territorial competence might formulate a reservation of this type.

[51] Article 29 of the 1986 Vienna Convention stipulates: "Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory."

apply.[52] The reservation formulated by the Netherlands to the International Covenant on Economic, Social and Cultural Rights is of particular interest in this regard:

> "The Kingdom of the Netherlands does not accept this provision in the case of the Netherlands Antilles with regard to the latter's central and local government bodies. [The Kingdom of the Netherlands] clarify that although it is not certain whether the reservation […] is necessary, [it] has preferred the form of a reservation to that of a declaration. In this way the Kingdom of the Netherlands wishes to ensure that the relevant obligation under the Covenant does not apply to the Kingdom as far as the Netherlands Antilles is concerned."[53]

(3) Such unilateral statements constitute reservations within the meaning of the Vienna definition: when formulated on one of the occasions specified, they purport to exclude or to modify the legal effect of certain provisions of the treaty as a whole with respect to certain specific aspects in their application to the author of the statement. In the absence of such a statement, the treaty would apply to the State's entire territory, pursuant to the provisions of article 29 of the 1969 and 1986 Vienna Conventions. Such statements are genuine reservations because they purport the partial exclusion or modification of the treaty's application, which constitutes the very essence of a reservation.

(4) It seems self-evident that a territorial reservation must be made, at the latest, by the time the State expresses its consent to be bound by the treaty, if it purports to totally exclude the application of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects to a given territory, and on this point there is no ground on which to differentiate the definition of territorial reservations from the general definition of reservations.

(5) While at first glance it might seem that a declaration by which a State purports to exclude the application of the treaty *as a whole* to all[54] or part of its territory could also be considered as purporting to exclude or modify the application of the legal effect of the treaty, such declarations are not necessarily[55] reservations within the meaning of guideline

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[52] See, for example, the reservations of the United Kingdom formulated on signing the International Covenant on Economic, Social and Cultural Rights: "The Government of the United Kingdom declare that, in relation to article 8 of the Covenant, they must reserve the right not to apply sub-paragraph (b) of paragraph 1 in Hong Kong in so far as it may involve the right of trade unions not engaged in the same trade or industry to establish federations or confederations" (*Multilateral Treaties* …, chap. IV.3). See also the reservations formulated upon ratification by which the United Kingdom "reserve[s] the right to postpone the application" of various provisions of the Covenant to various territories (*ibid*.) or those formulated by the Netherlands (concerning the non-application of article 20, paragraph 1, to the Netherlands Antilles) and by the United Kingdom with regard to the International Covenant on Civil and Political Rights (*ibid*., chap. IV.4).

[53] *Ibid*., chap. IV.3.

[54] For an example of total exclusion in respect of the entire territory of a State, see the reservation of the United States of America to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP) of 1 September 1970 (and the objections elicited by this reservation) (*Multilateral Treaties* …, chap. XI.B.22).

[55] For example, in the case of the Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies, adopted on 21 November 1947, the position of principle of the Secretary-General in the exercise of his functions as depositary consists of considering any declaration that seeks to exclude the application of those instruments to certain territories as a "territorial reservation" and drawing them as such to the attention of the contracting States and, where appropriate, the specialized agency. This way of looking at things is justified by the fact that "in view of their nature the Conventions should be regarded as automatically applying to the Territories for the international relations of which the acceding States were responsible" (*Summary of Practice of the Secretary-*

1.1 but rather the expression of a "different intention" in the sense of article 29 of the Vienna Conventions. The State is not excluding the legal effect of the treaty in respect of a particular territory but is identifying "its territory", in the sense of article 29, where the treaty is applied. The legal effect of the provisions of the treaty remain intact within its territorial scope.

(6) Although in 1964 Sir Humphrey Waldock did not rule out the possibility that the intention of a State not to apply a treaty to part of its territory could be "contained in a reservation",[56] draft article 25 (which became article 29) as adopted by the Commission in 1966 refrained from qualifying such declarations of territorial application. In the commentary the Commission explained:

> "One Government proposed that a second paragraph should be added to the article providing specifically that a State, which is comprised of distinct autonomous parts, should have the right to declare to which of the constituent parts of the State a treaty is to apply. Under this proposal the declaration was not to be considered a reservation but a limitation of the consent to certain parts only of the State. The Commission was of the opinion that such a provision, however formulated, might raise as many problems as it would solve. It further considered that the words 'unless a different intention appears from the treaty or is otherwise established' in the text now proposed give the necessary flexibility to the rule to cover all legitimate requirements in regard to the application of treaties to territory."[57]

(7) The practice of the Secretary-General likewise sheds little light on the subject of the qualification of such a declaration that purports to exclude the application of the treaty as a whole in respect of a particular territory:

> "When neither the nature of the treaty nor other special circumstances (*e.g.*, the fact that the treaty is the constitutive act of an international organization) mandate the non-acceptance of the instrument containing a declaration as to the limited application or non-application of a treaty to Territories, the Secretary-General has been guided by the general principles of resolution 598 (VI), which he has deemed to apply, *mutatis mutandis*, to 'reservations' as to the applicability to Territories. Accordingly, he has accepted instruments containing reservations as to the limited application or non-application to Territories, leaving it to the other parties to draw the legal consequences of such declaration that they may see fit."[58]

(8) It was maintained that it would be difficult to place such territorial declarations under the general legal regime of reservations and, in particular, to formulate objections to them. However, the impossibility of objecting to such a declaration would appear to derive not from its territorial nature but from its status as a reservation "authorized" by the treaty.

General as Depositary of Multilateral Treaties, ST/LEG/8, United Nations publication, Sales No. E.94.V.15), p. 82, para. 274). The Secretary-General goes on to say: "When one State made a declaration concerning the non-application to certain of its non-metropolitan Territories of the Convention on the Privileges and Immunities of the Specialized Agencies, the Secretary-General advised States parties to the Convention and the specialized agencies that the instrument had been transmitted for deposit accompanied by a territorial reservation. Since the Administrative Committee on Coordination of the specialized agencies and several States parties expressed objections, the Secretary-General did not treat the instrument as having been deposited and he invited the State that had transmitted the instrument to reconsider its reservation" (*ibid*., para. 275).

[56] *Yearbook … 1964*, vol. II, p. 12 (draft article 58).

[57] *Yearbook … 1966*, vol. II, p. 213, para. (4) of the commentary.

[58] *Summary of Practice* …, p. 83, para. 277.

(9) On reflection, it would hardly seem possible to consider such declarations purporting to exclude the application of a treaty as a whole to a particular territory as actual reservations.[59] In fact, it was noted that such an assimilation would deprive a State representing a Non-Self-Governing Territory at the international level from becoming a party to a treaty prohibiting reservations for as long as the Territory was unable, for one reason or another, to undertake the same commitments.

(10) It was for this reason that the Commission decided not to include in guideline 1.1.3 cases of declarations that purport to exclude the application of a treaty as a whole to a particular territory. In principle, these are not reservations in the sense of the Vienna Convention.

1.1.4 Reservations formulated when extending the territorial application of a treaty

A unilateral statement by which a State, when extending the application of a treaty to a territory, purports to exclude or to modify the legal effect of certain provisions of the treaty in relation to that territory constitutes a reservation.

Commentary

(1) Whereas guideline 1.1.3 deals with the scope *ratione loci* of certain reservations, guideline 1.1.4 deals with the time factor of the definition: the moment at which certain reservations concerning the territorial application of a treaty can be made.

(2) Generally speaking, a State makes a reservation upon signing the treaty or when it expresses its definitive consent to be bound by it. This is in fact the only time at which a reservation can be made if that reservation purports to modify the legal effect of a provision of the treaty or of the treaty as a whole with respect to certain specific aspects.[60] That may not, however, be the case for reservations that seek to exclude or modify the legal effect of some provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to a territory not previously covered by the treaty.

(3) The territorial application of a treaty may indeed vary across time, either because a State decides to extend the application of a treaty to a territory under its jurisdiction that was not previously covered by the treaty, or because the territory came under its jurisdiction after the entry into force of the treaty, or for any other reason not covered by the provisions concerning reservations to the treaty. In such cases, the State responsible for the territory's international relations may purely and simply extend the treaty to that territory, but it may also choose to do so only partially; in the latter case, upon notifying the depositary of the extension of the territorial application of the treaty, the State also includes in the notification any new reservations specific to that territory. There is no reason to attempt to prevent it from doing so: such a restriction would make it more difficult to extend the territorial application of the treaty and is quite unnecessary provided that the unilateral statement is made in accordance with the legal regime of reservations and is therefore permissible only if it meets the conditions for validity of reservations[61] and, in particular, is compatible with the object and purpose of the treaty.

(4) Some examples of reservations made under such conditions are the reservations made by the United Kingdom on 19 March 1962 upon extending application of the

[59] In this regard, see also Syméon Karagiannis, *Commentaire de l'article 29 (1969)* in Olivier Corten and Pierre Klein, *Les Conventions de Vienne sur le droit des traités* …, vol. II, pp. 1199–1204, paras. 19–24.

[60] See paras. (9) to (14) of guideline 1.1.

[61] See Part 3 of the Guide to Practice, below.

Convention Relating to the Status of Stateless Persons of 28 September 1954 to Fiji, and the State of Singapore and the West Indies[62] and the reservations made by the Netherlands in extending the Convention relating to the Status of Refugees of 28 July 1951 to Suriname on 29 July 1971.[63]

(5) There are recent examples of reservations made upon notification of territorial application: on 27 April 1993, Portugal notified the Secretary-General of the United Nations of its intention to extend to Macau application of the two 1966 International Covenants on human rights; that notification included reservations concerning the territory.[64] On 14 October 1996, the United Kingdom notified the Secretary-General of its decision to apply the Convention on the Elimination of All forms of Discrimination against Women of 18 December 1979 to Hong Kong, with a certain number of reservations.[65] Those reservations caused no reaction or objection on the part of the other contracting States.

(6) It would therefore seem wise to make clear, as has in fact been suggested in the writings of legal scholars,[66] that a unilateral statement made by a State in the context of notification of territorial application constitutes a reservation if it meets the relevant conditions set out by the Vienna definition thus supplemented. To so specify would not of course in any way prejudice issues related to the permissibility of such reservations.[67]

1.1.5 Reservations formulated jointly

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

Commentary

(1) One of the fundamental characteristics of reservations is that they are unilateral statements,[68] and the majority of the Commission is convinced that this element of the Vienna definition is not subject to exceptions even if from a formal standpoint nothing prevents a number of States or international organizations from formulating a reservation jointly, that is to say in a single instrument addressed to the depositary of a multilateral treaty in the name of a number of parties.

(2) The practice of concerted reservations is well established: it is accepted current practice for States sharing common or similar traditions, interests or ideologies to act in concert with a view to formulating identical or similar reservations to a treaty. That was often done by the Eastern European States which pledged allegiance to socialism,[69] the

[62] *Multilateral Treaties* ..., chap. V.3.
[63] *Ibid.*, chap. V.2.
[64] *See Multilateral Treaties* ..., chap. IV.3.
[65] *Ibid.*, chap. IV.8.
[66] Cf. Renata Szafarz, *op. cit.* (see footnote …), p. 295.
[67] See also guideline 1.8, below.
[68] Although in the past some authors have had a "contractual" conception of reservations (cf. Charles Rousseau, *Principes généraux de droit international public* (Paris, Pedone, 1944), vol. 1, p. 290; see also the definition proposed by James L. Brierly in 1950, *ILC Yearbook ... 1950*, vol. II, pp. 238–239, para. 84). The adoption of the 1969 Vienna Convention silenced the controversies over this point. See also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Nijhoff, 2009), p. 88, para. 34.
[69] See, for example, the reservations by the Byelorussian SSR, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Romania and the Union of Soviet Socialist Republics to section 30 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946; some of these reservations have been withdrawn since 1989 (cf. *Multilateral Treaties* ..., chap.

Nordic countries[70] and the States members of the Council of Europe or the European communities (subsequently the European Union).[71] However, each of these reservations was still formulated individually by each of the States or international organizations concerned, and this thus poses no problem in relation to the Vienna definition.

(3) Nevertheless, during the discussion of the draft which was to become article 2, paragraph 1 (d), of the Vienna Convention, one member of the Commission pointed out that a reservation could be not only concerted, but also joint.[72] At the time, this remark elicited no response, and in practice, it does not appear that States have to date had recourse to joint reservations.[73] The possibility of such reservations cannot, however, be excluded. It is all the more probable in that, though there are no joint reservations, there are nowadays fairly frequent cases of:

(a) Joint objections to reservations entered by other parties;[74]

(b) Joint interpretative declarations (which, moreover, are not always easy to distinguish from reservations *stricto sensu*).[75]

(4) That the problem may arise in the future cannot then be ruled out, and the Commission felt that it would be wise to anticipate that possibility in the Guide to Practice.

(5) The Commission felt that there could be nothing against the joint formulation of a reservation by a number of States or international organizations: it is hard to see what could prevent them from doing together what they can without any doubt do separately and in the same terms. This flexibility is all the more necessary in that, with the proliferation of common markets and of customs and economic unions, the precedents constituted by the joint objections and interpretative declarations referred to above will in all probability recur with respect to reservations, given that such institutions often share competence with their member States, and it would be highly artificial to require the latter to act separately from the institution to which they belong. Moreover, in theoretical terms such a practice would

III.1).

[70] See, for example, the reservations of Finland and Sweden to articles 35 and 58 of the Vienna Convention on Consular Relations of 24 April 1963 (cf. *ibid.*, chap. III.6) and those of Denmark, Finland, Iceland and Sweden to article 10 of the International Covenant on Civil and Political Rights of 16 December 1966 (*ibid.*, chap. IV.4).

[71] See, for example, the reservations by Austria (No. 5), Belgium (No. 1), France (No. 6) and Germany (No. 1) to the same 1966 Covenant (*ibid*.) and the "declarations" by all the States members of the European Community made *in that capacity* to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (*ibid.*, chap. XXVI.3).

[72] Statement by Mr. Paredes at the 651st meeting, 25 May 1962 (*Yearbook ... 1962*, vol. 1, p. 163, para. 87).

[73] The reservations formulated by an international organization are attributable to the organization and not to its member States; thus they cannot be termed "joint reservations".

[74] Thus, the European Community and its (then) nine member States objected, by means of a single instrument, to the "declarations" made by Bulgaria and the German Democratic Republic with respect to article 52, paragraph 3, of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets of 4 November 1975, which contemplated the possibility of customs or economic unions becoming contracting parties (see *Multilateral Treaties ...*, chap. XI.A-16). See also guideline 2.6.4 (Objections formulated jointly) below.

[75] See the declarations made by the European Community and its member States, or by the latter alone, with respect, for example, to the United Nations Framework Convention on Climate Change of 9 May 1992 (*ibid.*, chap. XXVII.7), the Convention on Biological Diversity of 5 June 1992 (*ibid.*, chap. XXVII.8) and the Agreement of 4 August 1995 on straddling fish stocks (*ibid.*, chap. XXI.7). See also guideline 1.2.1 (Interpretative declarations formulated jointly).

certainly not be contrary to the practice of the Vienna definition: a single act on the part of a number of States can be regarded as unilateral if its addressee or addressees are not parties to it.[76]

(6) In practical terms, such joint reservations will also possess the great advantage of simplifying the task of the depositary — which would be able to address the text of the jointly formulated reservation to the other parties without having to increase the number of notifications — and of those other parties, which could if they wished react to it by means of a single instrument.

(7) The Commission considered the advisability of going further and envisaging the possibility of collective reservations, by which a group of States or international organizations would undertake not only to formulate the reservation jointly, but also to withdraw or modify it exclusively as a group. This would also imply that the other parties would have to accept it or object to it uniformly. However, this course seemed to present more drawbacks than advantages:

- In practical terms, it would constitute an obstacle to the withdrawal of reservations, which is often considered a "necessary evil",[77] by making the withdrawal of a joint reservation contingent upon the agreement of all the States or international organizations which formulated it;
- In theoretical terms, it would imply that a group of parties could impose upon the others the rules on reservations agreed upon by them, which is hardly compatible with the principle of privity to treaties; in other words, it was possible that a number of States or international organizations might agree to consider that the reservation formulated collectively by them could only be withdrawn or modified collectively, but such an agreement would be *res inter alios acta* with regard to the other contracting States or organizations to the treaty to which the reservation related.

(8) These are the reasons for which the Commission, while envisaging the possibility of jointly formulated reservations, decided to specify that such reservations were nonetheless subject to the general regime of reservations, governed largely by their "unilateral" nature, which cannot be affected by such joint formulation.

(9) Moreover, it should be specified that the coordinating conjunction "or" used in guideline 1.1.5[78] in no way excludes the possibility of reservations formulated jointly by one or more States *and* by one or more international organizations, and should be understood to mean "and/or". Nevertheless, the Commission considered that this formulation would make the text too cumbersome.

1.1.6 Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of the treaty

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty with regard to the party that has made the statement, constitutes a reservation expressly authorized by the treaty.

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[76] This is a case of what may be termed "multi-partite unilateral acts"; on this point, see the first report by Mr. V. Rodriquez-Cedeño on unilateral acts of States (A/CN.4/486, paras. 79 and 133), *Yearbook … 1998*, vol. II, Part One, pp. 329 and 335.

[77] See the statement made by Roberto Ago at the 797th meeting of the Commission, 8 June 1965, *Yearbook ... 1965*, vol. I, p. 166.

[78] "... by several States *or* international organizations ...".

Commentary

(1) According to a widely accepted definition, an exclusionary or opting-out [or contracting-out] clause is a treaty provision by which a State will be bound by rules contained in the treaty unless it expresses its intent not to be bound, within a certain period of time, by some of those provisions.[79]

(2) 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,[80] the Council of Europe,[81] the ILO[82] and in various other conventions. 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."[83]

(3) The question whether or not statements made in application of such exclusionary clauses are reservations is controversial. The strongest argument that they are not clearly derives from the consistent strong opposition of the ILO to such an assimilation, even

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[79] Cf. Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des cours* …, 1994-VI, vol. 250, p. 329; see also Christian Tomuschat, "Obligations Arising for States Without or Against Their Will", *Recueil des cours* …, 1993, vol. 241, pp. 264 ff.

[80] Cf. article 8, first subparagraph, of the Convention of 15 June 1955 relating to the settlement of 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"; see also article 9 of The Hague Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and foundations.

[81] Cf. article 34, paragraph 1, of the European Convention for the peaceful settlement of disputes of 29 April 1957: "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"; see also 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"); and 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"), etc. For other examples, see Sia Spiliopoulo Åkermark, "Reservation clauses in treaties concluded within the Council of Europe", *ICLQ*, 1999, pp. 504–505.

[82] Cf. article 2 of International Labour Convention No. 63 of 1938, concerning statistics 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."

[83] 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* (Paris, Pedone, 1979), pp. 171–172.

though that organization regularly resorts to the opting-out procedure.[84] In its reply to the Commission's questionnaire, the ILO wrote:

> "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]).
>
> "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 *I.C.J. Pleadings, 1951*, at pp. 217, 227–228).

[84] See also G. Raimondi, "*Réserves et conventions internationales du travail*" in J.-C. Javillier and B. Gernigon, *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*, International Labour Office, Geneva, 2004, pp. 527–539.

"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*, *I.C.J. 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, even 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 *I.C.J. 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)."[85]

(4) In the Commission's view, while this reasoning reflects a respectable tradition, it 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 or in the present Guide to Practice.

(5) In fact, the Vienna Conventions do not preclude the making of reservations, not on the basis 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 treaty provisions. 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 …".

(6) 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[86] 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 [[87]] formulate reservations and even the content of such reservations".[88]

(7) 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.[89] They are indeed

[85] Reply to the questionnaire, pp. 3–5.

[86] Cf. guideline 1.1.

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

[88] Pierre-Henri Imbert, *op. cit.*, p. 12.

[89] At the same time, there is little doubt that a practice accepted as law has developed in the 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*

unilateral statements made at the time consent to be bound[90] 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, it would seem that they are not and need not be subject to a separate legal regime.

(8) Except for the absence of the word "reservations", there appears to be little difference between the aforementioned exclusionary clauses[91] and what are indisputably reservation clauses, such as article 16 of The Hague Convention of 14 March 1970, on celebration and recognition of the validity of marriages;[92] 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;[93] and 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.[94] It is thus apparent that, in both their form and their effects,[95] 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.[96]

(9) The fact that a State party cannot formulate an objection to a statement made under such an exclusionary clause does not rule out the classification of such a statement as a reservation. However, this is no doubt true of every reservation formulated under a reservation clause: once a reservation is expressly authorized by a treaty, the contracting States and organizations know what to expect; they have accepted in advance the reservation or reservations concerned in the treaty itself. This is not in fact a problem of definition, but one of legal regime.[97]

(10) 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 context of the Council of Europe.[98] "Strictly speaking, this means that it is the *reservation* — and not only the right to make

international privé", *RCDIP 1969*, pp. 388–392). However, this is an altogether different question from that of defining reservations.

90 With regard to statements made in application of an exclusionary clause but subsequent to its author's expression of consent to be bound, see para. (17) of the commentary below.

91 See para. (2) of the commentary.

92 "A Contracting State may reserve the right to exclude the application of Chapter I" (article 28 provides for the possibility of "reservations").

93 "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."

94 "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'."

95 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.

96 See Pierre-Henri Imbert, *op. cit.*, p. 169, and Sia Spiliopoulo Åkermark, *op. cit.*, pp. 505–506.

97 See also guideline 4.1.1 (Establishment of a reservation expressly authorized by a treaty).

98 See Georges A.L. Droz, "*Les réserves et les facultés dans les Conventions de La Haye de droit international privé*", *RCDIP 1969*, 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, and Sia Spiliopoulo Åkermark, *op. cit.*, pp. 489–490.

one — that is the subject of the negotiations."[99] 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.

(11) It is true that, in some conventions (at least those of the Council of Europe), exclusionary *and* reservation clauses are present at the same time.[100] This is probably more a reflection of terminological vagueness than of a deliberate distinction.[101] Moreover, it is striking that, in its reply to the Commission's questionnaire, the 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.[102]

(12) The case covered in guideline 1.1.6 is the same as that dealt with in article 17, paragraph 1, of the 1969 and 1978 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 …".

(13) This provision, which was adopted without change by the 1968–1969 Vienna Conference,[103] is contained in part II, section 1, of the Convention (Conclusion of treaties) and creates a link with articles 19 to 23 dealing specifically with reservations. It is explained by the 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 State to be bound by part of a treaty is

[99] Pierre-Henri Imbert, *op. cit.*, p. 196. 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" (Héribert Golsong, *op. cit.*, p. 228 (emphasis added); see also Sia Spiliopoulo Åkermark, *op. cit.*, p. 498; see also pp. 489–490).

[100] See articles 7 (footnote … above) and 8 of the Council of Europe Convention of 1968 on reduction of cases of multiple nationality and the examples given by Sia Spiliopoulo Åkermark, *op. cit.*, p. 506, note 121.

[101] Likewise, the fact that certain multilateral conventions prohibit any reservations while allowing some statements that may be equated with exclusionary clauses (see article 124 of the Statute of the International Criminal Court of 17 July 1998) is not in itself decisive; it, too, is doubtless more the result of terminological vagueness than of an intentional choice aimed at achieving specific legal effects.

[102] See footnote … above.

[103] 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* (A/CONF.39/II/Add.2) (United Nations publication, Sales No. E.70.V.5), Reports of the Committee of the Whole, paras. 156–157, pp. 129–130.

effective only if the treaty or the other contracting States authorize such a partial consent."[104]

(14) The expression "without prejudice to articles 19 to 23" in article 17 of the 1969 and 1986 Vienna Conventions implies that, in some cases, options amount to reservations.[105] Conversely, it would appear that this provision is drafted so as not to imply that all clauses that offer parties a choice between various provisions of a treaty *are* reservations.

(15) This is certainly true of statements made under an optional clause, as indicated in guideline 1.5.3. However, one might ask whether it is not also true of certain statements made under certain exclusionary clauses, which, while having the same or similar effects as reservations, are not reservations in the strict sense of the term, as defined in the Vienna Conventions and the Guide to Practice.

(16) 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";[106]
- 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.

(17) Unilateral statements made under provisions of this type are certainly not reservations.[107] 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 insofar as nothing prevents negotiators from departing from the provisions of the Vienna Conventions, which are merely residual in nature. 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

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[104] *Yearbook ... 1966*, vol. II, pp. 219–220.

[105] See Sia Spiliopoulo Åkermark, *op. cit.*, p. 506.

[106] 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 in para. (11) of the commentary.

[107] 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.

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 of those instruments, entitled "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.

(18) Such statements are expressly excluded from the scope of guideline 1.1.6 by the words "when that State or organization expresses its consent to be bound".

1.2 Definition of interpretative declarations

"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 of a treaty or of certain of its provisions.

Commentary

(1) Notwithstanding the apparent silence of the 1969 and 1986 Vienna Conventions on this phenomenon, States have always felt that they could attach to their expression of consent to be bound by a multilateral treaty declarations whereby they indicate the spirit in which they agree to be bound; such declarations do not, however, seek to modify or exclude the legal effect of certain provisions of the treaty (or of the treaty as a whole with respect to certain specific aspects) and thus do not constitute reservations, but interpretative declarations.[108]

(2) It is often difficult to distinguish between such unilateral declarations and, on the one hand, reservations as defined in guideline 1.1 and, on the other hand, other types of unilateral declarations which are made in respect of a treaty, often on the occasion of the expression of consent by its authors to be bound, but which are neither reservations nor interpretative declarations and examples of which are provided in section 1.5 of the present Guide to Practice. This distinction is of great practical importance, however, because it affects the legal regime applicable to each of these declarations.

(3) For a long time, reservations and interpretative declarations were not clearly distinguished in State practice or in doctrine. In the latter case, the dominant view simply

[108] The long-standing practice of such declarations had been in existence since multilateral treaties themselves first appeared. Generally speaking, it dates back to the Final Act of the Congress of Vienna in 1815, which brought together "in a general instrument" all treaties concluded in the wake of Napoleon's defeat. With this initial appearance of the multilateral format came both a reservation and an interpretative declaration. The latter came from Great Britain, which, when the instruments of ratification were exchanged, declared that article VIII of the Treaty of Alliance concluded with Austria, Prussia and Russia, which invited France to join the Alliance, must be "understood as binding the Contracting Parties ... to a common effort against the power of Napoleon Bonaparte ..., but is not to be understood as binding His Britannic Majesty to prosecute the War, with a view of imposing upon France any particular Government". Today, interpretative declarations are very frequent, as shown by the replies of States and, to a lesser extent, of international organizations to the Commission's questionnaire on reservations.

grouped them together, and authors who made a distinction generally found themselves embarrassed by it.[109]

(4) A number of elements help to blur the necessary distinction between reservations and interpretative declarations:

- the terminology is hesitant;
- the practice of States and international organizations is uncertain; and
- the declarants' objectives are not always unambiguous.

(5) The terminological uncertainty is underscored by the definition of reservations itself, since, according to the 1969, 1978 and 1986 Vienna Conventions, a reservation is "a unilateral statement, *however phrased or named* ...".[110] This "negative precision" eschews any nominalism to focus instead on the actual content of declarations and on the effect they seek to produce, but — and here is the reverse side of the coin — this decision to give precedence to substance over form runs the risk, in the best of cases, of encouraging States not to pay attention to the name they give to their declarations, thereby sowing confusion or unfortunate ambiguity; in the worst cases, it allows them to play with names in order to create uncertainty as to the real nature of their intentions.[111] By giving the name of "declarations" to instruments that are obviously and unquestionably genuine reservations, they hope not to arouse the vigilance of the other States parties while attaining the same objectives; conversely, to give greater weight to declarations that clearly have no legal effect on the provisions of a treaty, they label them "reservations", even though under the terms of the Vienna definition they are not.

(6) Instruments having the same objective can be called "reservations" by one State party and "interpretative declarations" by another.[112] Sometimes, instruments having the same objective can be called "reservations" by some States, "interpretations" by others and nothing at all by still others.[113] In some cases, a State will employ various expressions that make it difficult to tell whether they are being used to formulate reservations or

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[109] See the survey of doctrine prior to 1969 made by F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, *op. cit.* (footnote … above), p. 229; see also D.M. McRae, "The Legal Effect of Interpretative Declarations", *B.Y.B.I.L.* 1978, p. 156; Rosario Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali* (Milan, Giuffrè, 1996), pp. 69–82 (prior to the Second World War) and pp. 117–122 (post-1945); or Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), pp. 52–53.

[110] Article 2, para. 1 (d), of the 1969 Convention and article 2, para. 1 (j), of the 1986 Convention.

[111] As Denmark points out in its reply to the Commission's questionnaire on reservations: "There even seems to be a tendency among States to cast their reservations in terms of interpretative statements either because the treaty does not allow for reservations proper or because it looks 'nicer' with an interpretative declaration than a real reservation."

[112] For example, France and Monaco have used identical terms to spell out the way in which they interpret article 4 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination, yet Monaco submitted this interpretation as a reservation, while France formally announced that its intention was merely to "place on record its interpretation" of that provision (*Multilateral Treaties* ..., chap. IV.2). Poland and the Syrian Arab Republic have also declared in the same terms that they do not consider themselves bound by the provisions of article 1, paragraph 1, of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, but the former expressly called this statement a "reservation", while the latter labelled it a "declaration" (*ibid.*, chap. XVIII.7).

[113] See in this connection the comments by F. Horn, *op. cit.* (footnote … above), p. 294, on the subject of declarations made in respect of the 1966 International Covenant on Civil and Political Rights.

interpretative declarations and whether they have different meanings or scope.[114] Thus, the same words can, in the view of the very State employing them, cover a range of legal realities.[115] It sometimes happens that, faced with an instrument entitled "declaration", the other contracting States and organizations view it in different ways and treat it either as such or as a "reservation" or that, conversely, objections to a "reservation" refer to it as a "declaration";[116] and, at the limit of this terminological confusion, there are even occasions when States make interpretative declarations by means of a specific reference to the provisions of a convention on reservations.[117]

(7) The confusion is worsened by the fact that, while in French one encounters few terms other than "*réserves*" and "*déclarations*",[118] English terminology is much more varied, since certain English-speaking States, particularly the United States of America, use not only "reservation" and "(interpretative) declaration", but also "statement", "understanding", "proviso", "interpretation", "explanation" and so forth. The advantage of this variety of terms, although not based on strict distinctions,[119] is that it shows that all

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[114] That was the case of France, for example, when it acceded to the International Covenant on Civil and Political Rights:

> "The Government of the Republic considers that ...";
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> "The Government of the Republic enters a reservation concerning ...";
>
> "The Government of the Republic declares that ...";
>
> "The Government of the Republic interprets ...";

with all of these formulas appearing under the heading "Declarations and reservations" (example given by Rosario Sapienza, *op. cit.* (footnote … above), pp. 154–155; complete text in *Multilateral Treaties* …, chap. IV.4).

[115] In accepting the IMCO Statute, Cambodia twice used the word "declares" to explain the scope of its acceptance. In response to a request for clarification from the United Kingdom, Norway and Greece, Cambodia explained that the first part of its declaration was "a political declaration" but that the second part was a reservation (*ibid.*, chap. XII.1).

[116] For example, while several of the "Eastern bloc" countries identified their statements of opposition to article 11 of the Vienna Convention on Diplomatic Relations (which deals with size of missions) as "reservations", the countries that objected to those statements sometimes called them "reservations" (Germany and the United Republic of Tanzania) and sometimes "declarations" or "statements" (Australia, Belgium, Canada, Denmark, France, the Netherlands, New Zealand, Thailand and the United Kingdom) (*ibid.*, chap. III.3).

[117] Such was the case of a "declaration" made by Malta with regard to article 10 of the European Convention on Human Rights which referred to former article 64 (now article 57) of that instrument (example cited by William Schabas, commentary on article 64 in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (dirs.), *La Convention européenne des droits de l'homme – Commentaire article par article* (Paris, Économica, 1995), p. 926).

[118] This would seem to hold true in general for all the romance languages: in Spanish, the distinction is made between "*reserva*" and "*declaración* (*interpretativa*)", in Italian between "*riserva*" and "*dichiarazione* (*interpretativa*)", in Portuguese between "*reserva*" and "*declaração* (*interpretativa*)" and in Romanian between "*rezervă*" and "*declarație* (*interpretativ*)". The same holds true for Arabic, German and Greek.

[119] Marjorie M. Whiteman describes United States practice this way: "The term 'understanding' is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than a substantive reservation ... The terms 'declaration' and 'statement' are used most often when it is considered essential or desirable to give matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty." (*Digest of International Law* (Washington, D.C., 1970), vol. 14, pp. 137–138); see also the letter dated 27 May 1980 from Mr. Arthur W. Rovine, Assistant Legal Adviser for Treaties in the United States Department of State, to Mr. Ronald F. Stowe, Chairman of

unilateral declarations formulated in respect of or on the occasion of a treaty are not necessarily either reservations or interpretative declarations; draft guidelines at 1.5 to 1.5.3 describe some of these other types of unilateral declarations, which, in the view of the Commission, are neither reservations nor interpretative declarations as understood in the Guide to Practice.

(8) It goes without saying that the elements listed above are not in themselves likely to facilitate the search for an independent criterion for distinguishing between reservations and interpretative declarations. It should be possible to seek it empirically, however, by starting, as one generally does,[120] with the definition of reservations in order to extract, by means of comparison, the definition of interpretative declarations. At the same time, this also makes it possible to distinguish both interpretative declarations and reservations from other unilateral declarations that fall into neither of these categories.

(9) That was the position of Sir Gerald Fitzmaurice, third Special Rapporteur on the Law of Treaties, who, in his first report in 1956, defined interpretative declarations negatively in contrast with reservations, stating that the term "reservation":

> "does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty".[121]

However, that was a "negative", "hollow" definition, which clearly showed that reservations and interpretative declarations were distinct legal instruments but did not positively define what was meant by "interpretative declaration". Furthermore, the formulation ultimately used, which, it may be assumed, probably related to the "conditional interpretative declarations" defined in guideline 1.4, was lacking in precision, to say the least.

(10) This second shortcoming was corrected in part by Sir Humphrey Waldock, fourth Special Rapporteur on the Law of Treaties, who, in his first report, submitted in 1962, removed some of the ambiguity brought about by the end of the definition proposed by his predecessor, but once again proposed a purely negative definition:

> "an explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation".[122]

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the Air and Space Law Committee of the International Law Section of the American Bar Association, reproduced in Marian Nash Leich, ed., *Digest of United States Practice in International Law* (Washington, D.C., Office of the Legal Adviser, Department of State, 1980), pp. 397–398. These various names can have a legal impact on some domestic legislation; they seem not to in the area of international law, and it is not certain that the distinctions are categorical, even at the internal level. Thus during the debate in the United States Senate on the Convention relating to the Organization for Economic Cooperation and Development (OECD), when the Chairman of the Foreign Affairs Committee asked what the difference between a "declaration" and an "understanding" was, the Under-Secretary of State for Economic Affairs replied: "Actually the difference between a declaration and an understanding, I think, is very subtle, and I am not sure that it amounts to anything" (quoted by Marjorie M. Whiteman, *op. cit.*, p. 192). As the Special Rapporteur understands it, in Chinese, Russian and the Slavic languages in general, it is possible to draw distinctions between several types of "interpretative" declarations.

[120] Cf. Rosario Sapienza, *op. cit.* (footnote … above), p. 142 or Frank Horn, *op. cit.* (footnote … above), p. 236.

[121] Document A/CN.4/101; *Yearbook ... 1956*, vol. II, p. 112.

[122] Document A/CN.4/144; *Yearbook ... 1962*, vol. II, p. 36.

(11) In the view of the Commission, this procedure makes it possible to know what an interpretative declaration is not; it is of little use in defining what it is, a question in which the International Law Commission lost interest during the drafting of the Vienna Convention.[123] Yet it is important to determine "positively" whether or not a unilateral declaration made in respect of a treaty constitutes an interpretative declaration because it gives rise to specific legal consequences which the Commission will set out to describe in Part 4 of the Guide to Practice.

(12) An empirical observation of practice helps to determine in a reasonably precise manner how interpretative declarations are similar to reservations and how they differ, and to arrive at a positive definition of the former.

(13) There seems to be little point in dwelling on the fact that an interpretative declaration is most certainly a unilateral declaration[124] in the same way as a reservation.[125] It is in fact this shared feature which is at the origin of the entire difficulty of drawing a distinction: they look the same; in form, virtually nothing[126] distinguishes them.

(14) The second point in common between reservations and interpretative declarations has to do with the irrelevance of the phrasing or name chosen by their author.[127] This element, which automatically stems, *a fortiori*, from the very definition of reservations,[128] is confirmed by the practice of States and international organizations, which, when faced with unilateral declarations submitted as interpretative declarations by their authors, do not hesitate to object to them by expressly considering them to be reservations.[129] Similarly,

[123] However, the commentary to draft article 2, paragraph 1 (d), points out that the declaration which is a mere "clarification of the State's position" ... does not "amount to a reservation" (*Yearbook ... 1966*, vol. II, p. 206). Moreover, in its comments on the draft articles on the law of treaties adopted on first reading, Japan attempted to bridge that gap by noting "that not infrequently a difficulty arises in practice of determining whether a statement is in the nature of a reservation or of an interpretative declaration" and by suggesting that "a new provision should be inserted [...] in order to overcome this difficulty" (Sir Humphrey Waldock, fourth report on the law of treaties, *Yearbook ... 1964*, vol. II, pp. 46–47). However, the Japanese position confined itself to making provision for the insertion of a paragraph to draft article 18 (which became article 19): "2. A reservation, in order to qualify as such under the provisions of the present articles, must be formulated in writing, and expressly stated as a reservation" (comments transmitted by a note verbale dated 4 February 1964, A/CN.4/175, p. 78; see also pp. 70–71); here again, this was not a "positive" definition of interpretative declarations, and the insertion proposed was more a matter for the legal regime of reservations than their definition. Moreover, this proposal is incompatible with the definition of reservations eventually retained, which consists in eliminating all nominalism.

[124] On the possibility of jointly formulating interpretative declarations, see guideline 1.2.1 and the commentary thereto.

[125] Cf. Frank Horn, *op. cit.* (footnote … above), p. 236.

[126] Unlike reservations, interpretative declarations can be formulated orally, although this is not desirable (see guideline 2.4.1 (Form of interpretative declarations)).

[127] See Monika Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* (Berlin, Duncker & Humblot, 2005), pp. 34–37.

[128] See guideline 1.1.

[129] There are countless examples of this phenomenon. To mention only a few that relate to recent conventions, there are:

The objection of the Netherlands to Algeria's interpretative declaration concerning paragraphs 3 and 4 of article 13 of the International Covenant on Economic, Social and Cultural Rights (*Multilateral Treaties* ..., chap. IV.3). The reactions of many States to the declaration by the Philippines in respect of the 1982 Montego Bay Convention (*ibid.*, chap. XXI.6). The objection of Mexico, which considered that the third declaration, formally called interpretative, of the United States of America to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 constituted "a modification of the Convention contrary to the objective of the

nearly all the writers who have recently looked into this fine distinction between reservations and interpretative declarations give numerous examples of unilateral declarations which are presented as interpretative declarations by the States formulating them, but which they themselves regard as reservations, and vice versa.[130]

(15) It follows that, like reservations, interpretative declarations are unilateral statements formulated by a State or an international organization, it being unnecessary to be concerned about how they are phrased or named by the declarant.[131] The two instruments are, however, very different in terms of the objective pursued by the declarant.

(16) As their definition makes clear, reservations aim "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to their author[132] or to certain specific aspects of the treaty as a whole.[133] As their name indicates, interpretative declarations have a different objective: they are aimed at *interpreting* the treaty as a whole or certain of its provisions.

(17) This can — and must — constitute the central element of their definition, yet it poses difficult problems[134] nonetheless, the first of which is determining what is meant by "interpretation", a highly complex concept, the elucidation of which would far exceed the scope of the present Guide.[135]

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latter" (*ibid.*, chap. VI.19). The reaction of Germany to a declaration by which the Tunisian Government indicated that it would not adopt, in implementation of the Convention on the Rights of the Child of 20 November 1989, "any legislative or statutory decision that conflicts with the Tunisian Constitution" (*ibid.*, chap. IV.11). It also happens that "reacting" States contemplate both solutions and express their reactions in accordance with whether the text is a reservation or an interpretative declaration, again regardless of the term used by the author to designate it. Germany, the United Kingdom and the United States of America reacted to an interpretative declaration by Yugoslavia concerning the 1971 Seabed Treaty by considering it first as an actual interpretative declaration (which they rejected) and then as a reservation (which they considered to be late and inconsistent with the object and purpose of the Treaty) (example cited by Luigi Migliorino, "Declarations and Reservations to the 1971 Seabed Treaty", *I.Y.B.I.L.* 1985, p. 110. In the same spirit, Germany and the Netherlands objected to declarations made by the countries of Eastern Europe with regard to "the definition of piracy as given in the Convention insofar as the said declarations are to be qualified as reservations" (*Multilateral Treaties* ..., chap. XXI.2). Likewise, several States questioned the real nature of the (late) "declarations" by Egypt concerning the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (see in particular the reaction of Finland: "Without taking any stand on the content of the declarations, which appear to be reservations in nature ...", *ibid.*, chap. XXVII.3); see also para. (6) above. Judges and arbitrators also do not hesitate to question the true nature of unilateral declarations formulated by a State in respect of a treaty and, as appropriate, to call it something else; see the examples given below in the commentary to draft guideline 1.3.2 (Phrasing and name).

130 See, for example, Derek Bowett, "Reservations to Non-Restricted Multilateral Treaties", *B.Y.B.I.L.* 1976–1977, p. 68; Frank Horn, *op. cit.* (footnote … above), pp. 278–324; D.M. McRae, "The Legal Effect of Interpretative Declarations", *B.Y.B.I.L.* 1978, p. 162, footnote 1; Luigi Migliorino, "Declarations and Reservations to the 1971 Seabed Treaty", *I.Y.B.I.L.* 1985, pp. 106–123; Rosario Sapienza, *op. cit.* (footnote … above), pp. 154–176; or Rosa Riquelme Cortado, *Las reservas a los tratados, Lagunas y Ambigüedades del Regimen de Viena* (Universidad de Murcia, 2004), pp. 380–381.

131 This does not mean that the phrasing or name chosen has no impact whatsoever on the distinction. As may be seen from guideline 1.3.1, they may give an indication as to the purported legal effect.

132 See guideline 1.1, para. 1.

133 See guideline 1.1, para. 2.

134 See also Monika Heymann, *Einseitige Interpretationserklärungen* ..., *op. cit.* (footnote ...), pp. 37–38.

135 Regarding the concept of interpretation, see in particular the reports by Hersch Lauterpacht at the Institute of International Law, "De l'interprétation des traités", *IIL Yearbook*, 1950, pp. 366–423, and

(18) Suffice it to say, in a phrase often recalled by the International Court of Justice, that the expression "to construe" ("*interprétation*" in French) must be understood as meaning to give a precise definition of the meaning and scope of a binding legal instrument,[136] in this case a treaty. What is essential is that interpreting is not revising.[137] While the aim of reservations is to modify, if not the text of the treaty, at least the legal effect of its provisions, interpretative declarations are in principle limited to clarifying the meaning and the scope that their author attributes to the treaty or to certain of its provisions. Since the phrase "purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions" paraphrases the commonly accepted definition of the "interpretation", the Commission considered that it would be tautological to include the term "to interpret" in the body of guideline 1.2.

(19) The expression "the meaning or scope attributed by the declarant to the treaty" introduces a subjective element into the definition of interpretative declarations, although any unilateral interpretation is imbued with subjectivity.[138] Moreover, in accordance with the very spirit of the definition of reservations, they may be distinguished from other unilateral declarations made with regard to a treaty by the legal effect *aimed at* by the declarant, *i.e.* by its *intention* (inevitably subjective). There is no reason to depart from the spirit of this definition as far as interpretative declarations are concerned.[139]

(20) In accordance with an extremely widespread practice, the interpretation that is the subject of such declarations may relate either to certain provisions of a treaty or to the treaty as a whole.[140] The gap in the 1969, 1978 and 1986 Vienna Conventions on that point,

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1952, vol. I, pp. 197–223, and vol. II, pp. 359–406; V.D. Degan, *L'interprétation des accords en droit international* (The Hague, Nijhoff, 1963), p. 176; Myres S. McDougall, H.D. Laswell and J.C. Miller, *The Interpretation of Agreements and World Public Order* (Yale University Press, 1967), 410 pp., and Dordrecht, Nijhoff, 1993, 536 pp.; Serge Sur, *L'interprétation en droit international public* (Paris, LGDJ, 1974), 449 pp.; Mustapha Kamil Yasseen, "*L'interprétation des traités d'après la Convention de Vienne*", *Recueil des cours ...*, 1976-III, vol. 151, pp. 1–114; or Marteen Bos, "Theory and practice of treaty interpretation", *Netherlands International Law Review* 1980, pp. 3–38 and 135–170; or Anthony Aust, *Modern Treaty Law and Practice* (New York, Cambridge University Press, second edition, 2007), pp. 230–233; Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht, Springer, 2007), pp. 10–13; Richard K. Gardiner, *Treaty Interpretation* (Oxford, Oxford University Press, 2008), pp. 26–33; Alexander Orakhelashvili, "The Recent Practice on the Principles of Treaty Interpretation", in Alexander Orakhelashvili and Sarah Williams, *40 Years of the Vienna Convention on the Law of Treaties* (London, British Institute of International and Comparative Law, 2010), p. 117; Panos Merkouris, "Introduction: Interpretation is a Science, is an Art, is a Science", in Malgosia Fizmaurice, Olufemi Elias and Panos Merkouris, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden, Martinus Nijhoff Publishers, 2010), pp. 1–13.

136 See the Judgment of 16 December 1927, *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Permanent Court of International Justice Series A*, No. 13, p. 10; see also the Judgment of 27 November 1950, *Request for interpretation of the Judgment of November 20th, 1950, in the asylum case, I.C.J. Reports 1950*, p. 402.

137 Advisory Opinion of 18 July 1950, *Interpretation of peace treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 229, or the Judgment of 27 August 1952, *Rights of nationals of the United States of America in Morocco, I.C.J. Reports 1952*, p. 196.

138 An *agreement* on interpretation constitutes an authentic (supposedly "objective") interpretation of the treaty (see guideline 1.6.3).

139 Monika Heymann, *Einseitige Interpretationserklärungen …*, *op. cit.* (footnote …), p. 87.

140 Among a great many examples, see the interpretative declaration of Thailand concerning the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties ...*, chap. IV.8) or that of New Zealand to the 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (*ibid.*, chap. XXVI.1); see also above,

which led the Commission to insert paragraph 2 into guideline 1.1 on "across-the-board" reservations in order to take account of the practice actually followed by States and international organizations, was thus remedied by the wording adopted for guideline 1.2.

(21) The Commission questioned whether the temporal element which is present in the definition of reservations[141] ought to be included in the definition of interpretative declarations but determined that the practical considerations which were based on the concern to avoid abuses and which led the framers of the 1969, 1978 and 1986 Vienna Conventions to adopt that solution[142] do not arise with the same force in respect of interpretative declarations,[143] at least those which the declarant formulates without making the proposed interpretation a condition for its participation.[144]

(22) In any event, such temporal limitations are not justified with respect to interpretative declarations.[145] And it is not without relevance that the rules relating to reservations and those devoted to the interpretation of treaties appear in separate parts of the 1969 and 1986 Vienna Conventions: the former in Part II, relating to the conclusion and entry into force of treaties, and the latter in Part III, where they are found side by side with the provisions relating to the observance and application of treaties.[146]

(23) This is to say that interpretative declarations formulated unilaterally by States or international organizations concerning the meaning or scope of the provisions of a treaty are and can be only some of the elements of the interpretation of such provisions. They coexist with other simultaneous, prior or subsequent interpretations which may be made by other contracting States or contracting organizations or third bodies entitled to give an interpretation that is authentic and binding on the parties.

(24) Thus, even if an instrument made by a party "in connection with the conclusion of a treaty" can, under certain conditions, be considered for the purposes of interpreting the treaty to be part of the "context", as expressly provided in article 31, paragraph 2 (b), of the 1969 and 1986 Vienna Conventions, this does not imply any exclusivity *ratione temporis*. Moreover, paragraph 3 of article 31 expressly invites the interpreter to take "into account, together with the context", any subsequent agreement between the parties and any subsequent practice followed. Such subsequent agreements or practices may be supported by interpretative declarations that may be formulated at any time in the life of the treaty: at

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the declaration by the United Kingdom cited in footnote ...

141 "'Reservation' means a unilateral statement ... made by a State or an international organization *when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty* ..." (guideline 1.1, para. 1, emphasis added).

142 See paras. (7) to (12) of the commentary to guideline 1.1.

143 See guideline 2.4.4 and the commentary thereto.

144 See guideline 1.4 and the commentary thereto.

145 See guideline 2.4.4 (Time at which an interpretative declaration may be formulated) below.

146 In fact, there is no gap between the formation and the application of international law or between interpretation and application: "*La mise en œuvre de règles supposent leur interprétation préalable. Elle peut être explicite ou implicite, et dans ce cas se confond avec les mesures d'application*" ("The implementation of rules implies that they have already been interpreted. Implementation may be explicit or implicit, in which case it may become confused with measures of application"), (Serge Sur in Jean Combacu and Serge Sur, *Droit international public* (Paris, Montchrestien, ninth edition, 2010), p. 169). Some have even gone so far as to affirm that "*La règle de droit, dès l'instant de sa création jusqu'au moment de son application aux cas singuliers est une affaire d'interprétation*" ("the rule of law, from the moment of its creation to the moments of its application to individual cases, is a matter of interpretation") (A.J. Arnaud, "*Le médium et le savant – signification politique de l'interprétation juridique*", *Archives de philosophie du droit*, 1972, p. 165) (quoted by Denys Simon in *L'interprétation judiciaire des traités d'organisations internationales* (Paris, Pedone), p. 7).

its conclusion, at the time a State or international organization expresses its final consent to be bound, or at the time of application of the treaty.[147]

(25) This was the position taken by Sir Humphrey Waldock in his fourth report on the law of treaties, in which he pointed out that a declaration could have been made

> "during the negotiations, or at the time of signature, ratification, etc., or later, in the course of the 'subsequent practice'".[148]

(26) Independently of these general considerations, to confine the formulation of interpretative declarations to a limited period of time, as the definition of reservations does, would have the serious drawback of being inconsistent with practice. Even if it is quite often at the moment they express their consent to be bound that States and international organizations formulate such declarations, that is not always the case.

(27) It is indeed striking to note that States tend to get around the *ratione temporis* limitation of the right to formulate reservations by submitting them, occasionally out of time, as interpretative declarations. This was the case, for example, of the "declaration" made by Yugoslavia in respect of the 1971 Treaty on the Denuclearization of the Seabed[149] or of the declaration made by Egypt regarding the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.[150] In these two cases, the "declarations" elicited protests on the part of the other contracting States, who were motivated by the fact that the declarations were actually reservations and, in the second case, the fact that article 26 of the Basel Convention (which prohibits reservations) authorizes States to formulate declarations, within certain limits, only "when signing, ratifying, accepting, approving, ... confirming or acceding to this Convention". One can conclude *a contrario* that, if true interpretative declarations had been involved (and if the Basel Convention had not set any time limits), the declarations could have been formulated at a time other than the moment of signature or consent to be bound.

(28) This is in fact quite normal in practice. It should be pointed out, as Professor Greig does, that when they formulate objections to reservations or react to interpretative declarations formulated by other contracting States or contracting organizations, States and international organizations often go on to propose their own interpretation of the treaty's provisions.[151] There is no *prima facie* reason not to consider such "counter-proposals" as veritable interpretative declarations, at least when they seek to clarify the meaning and

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[147] This last possibility was recognized by the International Court of Justice in its Advisory Opinion of 11 July 1950 concerning the International Status of South-West Africa: "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument" (*I.C.J. Reports 1950*, pp. 135–136); in fact, the Court based itself on declarations made by South Africa in 1946 and 1947 on the interpretation of its mandate over South-West Africa, an agreement that had been concluded in 1920.

[148] *Yearbook ... 1964*, vol. II, p. 52.

[149] See footnote ... above.

[150] See *Multilateral Treaties* ..., chap. XXVII.3, note 8.

[151] In this connection, see D.W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Y.B.I.L.* 1995, pp. 24 and 42–45. See the example cited by this author (p. 43) of the reactions of the Netherlands to the reservations of Bahrain and Qatar to article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations or the "counter-interpretation" of articles I and II of the Non-Proliferation Treaty made by the United States of America in reaction to point 8 of the Italian declaration concerning that treaty (United Nations, *Treaty Series*, vol. 1078, pp. 417–418).

scope of the treaty in the eyes of the declarant;[152] however, they are by definition formulated after the time at which the formulation of a reservation is possible.

(29) Under these circumstances, it would hardly seem possible to include in a general definition of interpretative declarations a specification of the time at which such a declaration is to be made.

(30) The Commission wishes to make it clear, however, that the fact that guideline 1.2 is silent about the moment at which an interpretative declaration may be made, out of concern not to limit unduly the freedom of action of States and international organizations and not to go against a well-established practice, should not be seen as encouragement to formulate such declarations at inappropriate times. Even though "simple" interpretative declarations[153] are not binding on the other contracting States or contracting organizations, such an attitude could lead to abuse and create difficulties. By way of a remedy, it might be expedient for the parties to a treaty to try to avoid anarchical interpretative declarations by specifying in a limitative manner when such declarations may be made, as is done in the 1982 Montego Bay Convention on the Law of the Sea[154] and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.[155]

(31) The silence of guideline 1.2 on the moment when an interpretative declaration may be formulated should not lead one to conclude, however, that an interpretative declaration may in all cases be formulated at any time:

- for one thing, this might be formally prohibited by the treaty itself;[156]
- furthermore, it would seem to be out of the question that a State or international organization could formulate a *conditional* interpretative declaration[157] at any time in the life of the treaty: such laxity would cast an unacceptable doubt on the reality and scope of the treaty obligations;
- and, lastly, even simple interpretative declarations can be invoked and modified at any time only to the extent that they have not been expressly accepted by the other contracting States or contracting organizations to the treaty or that an estoppel has not been raised against them.

[152] See also guideline 2.9.2 and the commentary thereto.

[153] As opposed to conditional interpretative declarations, which are the subject of guideline 1.4.

[154] Article 310: "Article 309 [which excludes reservations] 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 regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State" (emphasis added).

[155] Article 26: "1. No reservation or exception may be made to this Convention. Paragraph 1 of this Article does not preclude a State or political and/or economic integration organization, *when signing, ratifying, accepting, approving, formally confirming 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 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 the Convention in their application to that State" (emphasis added).

[156] See the examples given in footnotes ... and ... above. See also guideline 3.5 and the commentary thereto.

[157] See guideline 1.4 and the commentary thereto.

(32) These are questions that are clarified in chapter II of the Guide to Practice, on the formulation of reservations and interpretative declarations.[158]

(33) It goes without saying that this definition in no way prejudges the validity or the effect of such declarations and that the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them.

(34) In the light of this comment, the definition in guideline 1.2 has, in the Commission's view, the dual advantage of making it possible to distinguish clearly between interpretative declarations and reservations, on the one hand, and, on the other, between interpretative declarations and other unilateral statements made in respect of a treaty, while being sufficiently general to encompass different categories of interpretative declarations.[159]

1.2.1 Interpretative declarations formulated jointly

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

Commentary

(1) Like reservations, interpretative declarations may be formulated jointly by two or more States or international organizations. Guideline 1.1.5, which acknowledges this possibility in respect of reservations, nonetheless appears to be an element of progressive development of international law, since there is no clear precedent in this regard.[160] The same is not true with regard to interpretative declarations, the joint formulation of which comes under the heading of *lex lata*.

(2) Indeed, as in the case of reservations, it is not uncommon for several States to consult one another before formulating identical or quite similar declarations. This was the case, for example, with several interpretative declarations formulated by the "Eastern bloc" countries prior to 1990,[161] with those made by the Nordic countries in respect of several conventions,[162] or with the declarations made by 13 States members of the European Community when signing the 1993 Convention on the Prohibition of Chemical Weapons and confirmed upon ratification, which stated:

> "As a Member State of the European Community, [each State] will implement the provisions of the Convention on the Prohibition of Chemical Weapons, in

[158] See in particular guideline 2.4.4 (Time at which an interpretative declaration may be formulated) and the commentary thereto.

[159] On ways of applying this distinction, see guidelines 1.3 to 1.3.3.

[160] See the commentary to guideline 1.1.5, para. 3.

[161] See, for example, the declarations by Belarus, Bulgaria, Hungary, Mongolia, Romania, the Russian Federation and Ukraine concerning articles 48 and 50 of the Vienna Convention on Diplomatic Relations (Cuba formulated an express reservation; the wording of Viet Nam's declaration is ambiguous) (*Multilateral Treaties* ..., chap. III.3) or those of Albania, Belarus, Bulgaria, Poland, Romania, the Russian Federation and Ukraine concerning article VII of the Convention on the Political Rights of Women (*ibid.*, chap. XVI.1).

[162] See, for example, the declarations by Denmark, Finland, Iceland, Norway and Sweden concerning article 22 of the Vienna Convention on Consular Relations (*ibid.*, chap. III.6).

accordance with its obligations arising from the rules of the Treaties establishing the European Communities to the extent that such rules are applicable."[163]

(3) At the same time, and contrary to what has occurred thus far in reservations, there have also been truly joint declarations, formulated in a single instrument, by "the European Community [now the European Union] and its Member States" or by the latter alone. This occurred in the case of:

- examination of the possibility of accepting annex C.1 of the 1976 Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials;[164]
- implementation of the United Nations Framework Convention on Climate Change of 9 May 1992;[165]
- implementation of the Convention on Biological Diversity of 5 June 1992;[166]
- implementation of the Agreement of 4 August 1995 on Straddling Fish Stocks.[167]

(4) These are real precedents which justify *a fortiori* the adoption of a guideline on interpretative declarations similar to guideline 1.1.5 on reservations.

(5) As is the case with reservations, it must be understood, first, that this possibility of joint formulation of interpretative declarations cannot undermine the legal regime applicable to such declarations, governed largely by "unilateralism"[168] and, second, that the conjunction "or" used in guideline 1.2.1[169] does not exclude the possibility that interpretative declarations may be formulated jointly by one or more States or by one or more international organizations, and should be understood to mean "and/or". Nevertheless, the Commission considered that this formulation would make the text too cumbersome.[170]

(6) The similarity between the wording of guidelines 1.1.5 and 1.2.1 does not mean that the same legal regime is applicable to interpretative declarations formulated jointly, on the one hand, and to reservations formulated jointly, on the other. In particular, the fact that the former may be formulated orally while the latter may not could have an effect on that regime. This problem relates to the substance of the applicable law, however, and not to the definition of interpretative declarations.

(7) The Commission also considered whether there might be reason to envisage the possibility of all of the contracting States or contracting organizations formulating an interpretative declaration jointly, and whether in such a situation the proposed interpretation would not lose the character of a unilateral act and become a genuinely collective act. The Commission concluded that this is not the case: the word "several" in guideline 1.2.1 precludes such a possibility, which in any case is covered by article 31, paragraphs 2 (a) and 3 (a), of the 1969 and 1986 Vienna Conventions concerning collateral agreements relating to the interpretation or application of the treaty.

[163] *Ibid.*, chap. XXVI.3, pp. 890–892.
[164] *Ibid.*, chap. XIV.5.
[165] *Ibid.*, chap. XXVII.7.
[166] *Ibid.*, chap. XXVII.8.
[167] *Ibid.*, chap. XXI.7.
[168] See para. (8) of the commentary to guideline 1.1.5.
[169] "... by several States or international organizations ...".
[170] See para. (9) of the commentary to guideline 1.1.5.

1.3 Distinction between reservations and interpretative declarations

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

Commentary

(1) A comparison of guidelines 1.1 and 1.2 shows that interpretative declarations are distinguished from reservations principally by the objective pursued by the author State or international organization: in formulating a reservation, the State or organization purports to exclude or modify the legal effect upon itself of certain provisions of a treaty (or of the treaty as a whole with respect to certain specific aspects); in making an interpretative declaration, it intends to specify or clarify the meaning or scope that it attributes to a treaty or to certain of its provisions.

(2) In other words,

- the character of a unilateral statement as a reservation depends on the question whether its object is to exclude or modify the legal effect of the provisions of the treaty in their application to the author State or international organization; and
- the character of a unilateral statement as an interpretative declaration depends on the question whether its object is to specify or clarify the meaning or scope attributed by its author to a treaty or to certain of its provisions.

(3) This is confirmed in the jurisprudence. For example, in the *Belilos* case, "[l]ike the Commission and the Government, the [European] Court [of Human Rights] recognizes that it is necessary to ascertain the *original intention* of those who drafted the declaration".[171] Likewise, in the *Mer d'Iroise* case, the Franco-British Arbitral Tribunal held that, in order to determine the nature of the reservations and declarations made by France regarding the 1958 Convention on the Continental Shelf, "[t]he question [was] one of *the respective intentions* of the French Republic and the United Kingdom in regard to their legal relations under the Convention ...".[172]

(4) This distinction is fairly clear as to its principle, yet it is not easily put into practice, particularly since States and international organizations seldom explain their intentions, even taking pains at times to disguise them, and since the terminology used does not constitute an adequate criterion for distinguishing them. The objective of this section of the Guide to Practice is to provide some information regarding the substantive rules that should be applied in order to distinguish between reservations and interpretative declarations.

(5) These guidelines may be transposed, *mutatis mutandis*, to the equally important distinction between simple interpretative declarations and conditional interpretative declarations which, as guideline 1.4 shows, is also based on the intention of the declarant. In both cases, the declarant seeks to interpret the treaty, but in the first case it does not make its interpretation a condition for participation in the treaty, whereas in the second case its interpretation cannot be dissociated from the expression of its consent to be bound.

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[171] European Court of Human Rights, 29 April 1988, *Publications of the European Court of Human Rights, Series A*, vol. 132, para. 48, p. 23; emphasis added.

[172] Decision of 30 June 1977, *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, United Nations – *Reports of International Arbitral Awards*, vol. XVIII, para. 30, p. 28; emphasis added.

1.3.1 Method of determining the distinction between reservations and interpretative declarations

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, with a view to ascertaining the intention of its author, in the light of the treaty to which it refers.

Commentary

(1) The object of this guideline is to indicate the *method* that should be adopted to determine whether a unilateral statement is a reservation or an interpretative declaration. This question is of considerable importance when, in keeping with the definition of such instruments,[173] all "nominalism" is excluded.

(2) As guideline 1.3 makes clear, the decisive criterion for drawing the distinction is the legal effect that the State or international organization making the unilateral statement purports to produce. Hence, there can be no doubt that the author's intention when formulating it should be established: did the declarant purport to exclude or modify the legal effect upon it of certain provisions of the treaty (or of the treaty as a whole in respect of certain aspects), or did it intend to specify or clarify the meaning or scope it attributes to the treaty or certain of its provisions? In the first case it is a reservation; in the second, it is an interpretative declaration.[174]

(3) It was asked whether, in the doctrine, in order to answer these questions, it was appropriate to apply a "subjective test" (what did the declarant *want* to say?) or "objective" or "material" test (what did the declarant *do*?). In the Commission's view, this is a spurious alternative. The expression "purports to", which appears in the definition both of reservations and of interpretative declarations, simply means that the legal effect sought by the author cannot be achieved for various reasons (impermissibility, objections by other contracting States and organizations); but this does not in any way mean that the subjective test alone is applicable: only an analysis of the potential — and objective — effects of the statement can determine the purpose sought. In determining the legal nature of a statement formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement has (or would have). If it results (or would result) in modifying or excluding the legal effect of the treaty or certain of its provisions, it is a reservation "however phrased or named"; if the statement simply clarifies the meaning or scope that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration.

(4) The point of departure should be the principle that the intended purpose is reflected in the text of the statement. The problem is therefore a conventional one of interpretation that can be solved by relying on the normal rules of interpretation in international law. "Discerning the real substance of the often complex statements made by States upon ratification of, or accession to, a multilateral treaty is a matter of construction and must be solved through the ordinary rules of interpretation."[175]

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[173] See guidelines 1.1 and 1.2, which expressly define them independently of their phrasing or name. The fact remains, however, that the latter are of no utility in drawing the distinction (see guideline 1.3.2).

[174] See also Monika Heymann, *Einseitige Interpretationserklärungen …, op. cit.* (footnote …), pp. 88–92; Rosa Riquelme Cortado, *Las reservas a los tradados, Lagunas y Ambigüedades del Régimen de Viena* (Universidad de Murcia, 2004), pp. 37–39.

[175] Massimo Coccia, "Reservations to Multilateral Treaties on Human Rights", *California Western International Law Journal*, 1985, p. 10.

(5) Some international courts have not hesitated to apply the general rules of interpretation of treaties to reservations,[176] and this seems all the more reasonable in that, unlike other unilateral statements formulated in connection with a treaty,[177] they are indissociable from the treaty to which they apply. However, in the Commission's view, while these rules provide useful indications, they cannot be purely and simply transposed to reservations and interpretative declarations because of their special nature. The rules applicable to *treaty* instruments cannot be applied to *unilateral* instruments without some care.[178]

(6) This was pointed out recently by the International Court of Justice in connection with optional declarations of acceptance of its compulsory jurisdiction:

> "The regime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties (...) The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction."[179]

(7) The Commission is aware that the statements in question are of a different nature from those of reservations and unilateral declarations. Formulated unilaterally in connection with a treaty text, they nonetheless have important common features, and it would seem necessary to take account of the Court's warning in interpreting unilateral statements made by a State or an international organization in connection with a treaty with a view to determining its legal nature. Bearing these considerations in mind, the Commission did not purely and simply refer to the "General rule of interpretation" and the "Supplementary means of interpretation" set out in articles 31 and 32 of the 1969 and 1986 Vienna Conventions.[180]

(8) This remark notwithstanding, the fact remains that these provisions constitute useful guidelines and, in particular, like a treaty, a unilateral statement relating to the provisions of a treaty:

> "... must be interpreted by examining its text in accordance with the ordinary meaning which must be attributed to the terms in which it has been formulated within the general context of the treaty (...). This approach must be followed except when the resultant interpretation would leave the meaning ambiguous or obscure or would lead to a result which is manifestly absurd or unreasonable. (...)
>
> "Thus without excluding the possibility that supplementary means of interpretation might, in exceptional circumstances, be resorted to, the interpretation of reservations must be guided by the primacy of the text."[181]

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[176] See Inter-American Court of Human Rights, Advisory Opinion of 8 September 1983, OC-3/83, *Restrictions to the death penalty (articles 4 (2) and 4 (4) of the Inter-American Convention on Human Rights)*, para. 62, p. 84.

[177] See section 1.4 below.

[178] On the interpretation of reservations in general, see guideline 4.2.6.

[179] I.C.J., Judgment of 4 December 1998, case concerning *Fisheries jurisdiction (Spain v. Canada), Jurisdiction of the Court*, para. 46; see also the judgment of 11 June 1998 in *Land and maritime boundary between Cameroon and Nigeria (Preliminary Objections)*, para. 30.

[180] See guideline 4.2.6 (Interpretation of reservations) and the commentary thereto; see also Monika Heymann, *Einseitige Interpretationserklärungen …, op. cit.* (footnote …), p. 89.

[181] Inter-American Court of Human Rights, Advisory Opinion of 8 September 1983, OC-3/83 *Restrictions to the death penalty (articles 4 (2) and (4) of the Inter-American Convention on Human*

(9) Even though doctrine has barely contemplated the problem from this standpoint,[182] jurisprudence is unanimous in considering that priority must be given to the actual text of the declaration:

> "This condition [imposed by the third French reservation to article 6 of the Geneva Convention on the Continental Shelf], *according to its terms*, appears to go beyond a mere interpretation ... the Court, ... accordingly, concludes that this 'reservation' is to be considered a 'reservation' rather than an 'interpretative declaration'";[183]
>
> "In the instant case, the Commission will interpret the intention of the respondent Government by taking account both of *the actual terms of the above-mentioned interpretative declaration* and the *travaux préparatoires* which preceded Switzerland's ratification of the [European] Convention [on Human Rights].
>
> "The Commission considers that *the terms used, taken by themselves*, already show an intention by the Government to prevent ...
>
> [...]
>
> "*In the light of the terms used* in Switzerland's interpretative declaration ... and the above-mentioned *travaux préparatoires* taken as a whole, the Commission accepts the respondent Government's submission that it intended to give this interpretative declaration the effect of a formal reservation";[184]
>
> "In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine *the substantive content*";[185]
>
> "If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration. In the present case, the statement entered by the French Government upon accession to the [1966 International] Covenant [on Civil and Political Rights] is clear: it seeks to exclude the application of article 27 to France and emphasizes this exclusion semantically with the words: 'is not applicable'."[186]

(10) More rarely, international courts which have had to rule on problems of this type, to supplement their reasoning, have based themselves on the preparatory work of the

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Rights), paras. 63–64, pp. 84–85.

[182] See, however, Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, *op. cit.* (footnote ... above), pp. 33 and 263–272 and, for a clearer and more concise account, D.W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Y.B.I.L.* 1995, p. 26.

[183] Arbitral decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII, para. 55, pp. 169–170; emphasis added.

[184] European Commission of Human Rights, decision of 5 May 1982, *Temeltasch* case, *Decisions and Reports*, April 1983, paras. 74, 75 and 82, pp. 131–132.

[185] European Court of Human Rights, Judgment of 29 April 1988, *Belilos* case, *Publications of the European Court of Human Rights*, Series A, vol. 132, para. 42, p. 24. In the same case, the Commission reached a different conclusion, also basing itself "both on the wording of the declaration and on the preparatory work (*ibid.*, para. 41, p. 21); the Commission, more clearly than the Court, gave priority to the terms used in the Swiss declaration (para. 93 of the Commission's report; see the commentary by Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: The Belilos Case", *G.Y.B.I.L.* 1990, pp. 71–74).

[186] Human Rights Committee, *Communication No. 220/1987*, decision of 8 November 1989, *T.K. v. France*, report of the Human Rights Committee, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40* (A/45/40), annex X, para. 8.6, p. 140.

unilateral declarations under consideration. In the *Belilos* case, for example, the European Court of Human Rights, after admitting that "the wording of the original French text" of the Swiss declaration, "though not altogether clear, can be understood as constituting a reservation,"[187] "[l]ike the Commission and the Government, ... recognizes that it is necessary to ascertain the original intention of those who drafted the declaration" and, in order to do so, takes into account the preparatory work on the declaration,[188] as the Commission had done in the same case and in the *Temeltasch* case.[189]

(11) In the Commission's view, some caution is required in this regard. As has been noted, "[s]ince a reservation is a unilateral act by the party making it, evidence from that party's internal sources regarding the preparation of the reservation is admissible to show its intention in making the reservation".[190] Still, in the everyday life of the law it would appear difficult to recommend that the preparatory work be consulted regularly in order to determine the nature of a unilateral declaration relating to a treaty: it is not always made public,[191] and in any case it would be difficult to require foreign Governments to consult it.

(12) This is the reason why guideline 1.3.1 does not reproduce the text of article 32 of the 1969 and 1986 Vienna Conventions and, without alluding directly to the preparatory work, merely calls for account to be taken of the intention of the author of the statement. This wording draws directly on that used by the International Court of Justice in the case concerning *Fisheries jurisdiction (Spain v. Canada), Jurisdiction of the Court*:

> "The Court will ... interpret the relevant words of a declaration, including a reservation contained therein, in a natural and responsible way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court."[192]

(13) Guideline 1.3.1 also specifies that, for the purpose of determining the legal nature of a statement formulated in respect of a treaty, it shall be interpreted "in the light of the treaty to which it refers". This constitutes, in these circumstances, the principal element of the "context" mentioned in the general rule of interpretation set out in article 31 of the 1969 and 1986 Vienna Conventions:[193] whereas a reservation or an interpretive declaration constitutes a unilateral instrument, separate from the treaty to which it relates, it is still closely tied to it and cannot be interpreted in isolation.

(14) The method indicated in guideline 1.3.1 can be transposed to the distinction between simple interpretative declarations and conditional interpretative declarations.[194] In this case, too, it is the intention of the State or international organization making the declaration that

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[187] European Court of Human Rights, Judgment of 29 April 1988, *Belilos* case, *Publications of the European Court of Human Rights,* Series A, vol. 132, para. 44, para. 49, p. 22.

[188] *Ibid*., para. 48, p. 23.

[189] European Commission of Human Rights, decision of 5 May 1982, *Temeltasch* case, *Decisions and Reports*, April 1983, paras. 76–80, pp. 131–132.

[190] Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th ed., vol. I, Peace, Longman, London, p. 1242. The authors cite as proof the Judgment of the International Court of Justice of 19 December 1978 in the *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1979*, p. 32.

[191] In the *Belilos* case, the representative of the Swiss Government referred to the internal debates within the Government, but took cover behind their confidential nature (see Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: The Belilos Case", *G.Y.B.I.L.*, 1990, p. 84).

[192] Judgment of 4 December 1998, para. 49.

[193] In this regard, see the aforementioned advisory opinion of the Inter-American Court of Human Rights, para. 8, note 124.

[194] See guideline 1.4 and the commentary thereto below.

has to be determined, and this should be done above all by interpreting it in good faith in accordance with the ordinary meaning to be given to its terms.

1.3.2 Phrasing and name

The phrasing or name of a unilateral statement provides an indication of the purported legal effect.

Commentary

(1) The general rule making it possible 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 is set out in guideline 1.3.1. Guidelines 1.3.2 and 1.3.3 supplement this general rule by taking into consideration certain specific, frequently encountered situations which may facilitate the determination. They are therefore subsidiary to the general rule set out in guideline 1.3.1, not as a rule of interpretation but as a method for determining whether a unilateral statement constitutes a reservation or an interpretative declaration.

(2) As guidelines 1.3 and 1.3.2 make clear, it is not the phrasing or name of a unilateral statement formulated in respect of a treaty that determines its legal nature, but the legal effect it purports to produce. In fact, the result of the definition of reservations, given by the Vienna Conventions of 1969, 1978 and 1986 and reproduced in guideline 1.1, and of the definition of interpretative declarations found in guideline 1.2 is that:

- on the one hand, the character of both is imparted by the objective pursued by the author: excluding or modifying the legal effect of certain provisions of the treaty in their application to its author in the first instance, and specifying or clarifying the meaning attributed by the declarant to the treaty or to certain of its provisions, in the second instance;
- and, on the other, the second point that reservations and interpretative declarations have in common has to do with the non-relevance of the phrasing or name given them by the author.[195]

(3) This indifference to the terminology chosen by the State or international organization formulating the statement has been criticized by some authors who believe that it would be appropriate to "take States at their word" and to consider as reservations those unilateral declarations which have been so titled or worded by their authors, and as interpretative declarations those which they have proclaimed to be such.[196] This position has the dual merit of simplicity (an interpretative declaration is whatever States declare is one) and of conferring "morality" on the practice followed in the matter by preventing States from "playing around" with the names they give to the declarations they make with a view to side-stepping the rules governing reservations or misleading their partners.[197]

(4) In the opinion of the Commission, however, this position runs up against two nullifying objections:

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[195] In both cases, this results from the formulation "however phrased or named".

[196] See, for example, the analysis of the declaration made by France when signing the Treaty of Tlatelolco in 1973 and the analysis thereof by Hector Gros Espiell ("*La signature du Traité de Tlatelolco par la Chine et la France*", *A.F.D.I.* 1973, p. 141. However, the author also bases himself on other parameters). This was also the position taken by Japan in 1964 in its observations on the draft articles on the law of treaties adopted by the Commission on first reading (see the commentary to guideline 1.2, footnote ...).

[197] See para. (5) of the commentary to guideline 1.2.

- first, it is incompatible with the Vienna definition itself: if a unilateral declaration can be a reservation "however phrased or named", this of necessity means that simple "declarations" (even those expressly qualified as interpretative by their author) may constitute true reservations, but it also and necessarily implies that terminology is not an absolute criterion that can be used in defining interpretative declarations; and
- secondly, it runs counter to the practice of States, jurisprudence and the position of most doctrine.[198]

(5) It should be noted in particular that judges, international arbitrators and bodies monitoring the implementation of human rights treaties refrain from any nominalism and do not dwell on the appellation of the unilateral statements accompanying States' consent to be bound but endeavour to discover the true intention as it emerges from the substance of the declaration, or even the context in which it has been made.

(6) For example, the arbitral tribunal responsible for deciding the Franco-British dispute in the case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (Mer d'Iroise case)* carefully examined the argument of the United Kingdom that the third French reservation to article 6 of the 1958 Convention on the Continental Shelf was, in reality, a simple interpretative declaration.[199] Similarly, in the *Temeltasch* case, the European Commission of Human Rights, relying on article 2, paragraph 1 (d) of the Vienna Convention on the Law of Treaties, agreed

> "on this point with the majority of legal writers and considers that where a State makes a declaration, presenting it as a condition of its consent to be bound by the Convention and intending it to exclude or alter the legal effect of some of its provisions, such a declaration, *whatever it is called*, must be assimilated to a reservation ..."[200]

This position was also taken by the European Court of Human Rights in the *Belilos* case: Switzerland accompanied its instrument ratifying the European Convention on Human Rights by a unilateral statement which it entitled "interpretative declaration"; the Court nevertheless considered it to be a true reservation.

> "Like the Commission and the Government, the Court recognizes that it is necessary to ascertain the original intention of those who drafted the declaration [...].
>
> "In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content."[201]

The Human Rights Committee took the same line in its decision of 8 November 1989 in the case of *T.K. v. France*: on the basis of article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties, it decided that a communication concerning France's failure to respect article 27 of the International Covenant on Civil and Political Rights was inadmissible because the French Government, on acceding to the Covenant, had declared

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198 See *ibid.*, paras. (4) to (8).

199 Decision of 30 June 1977, United Nations, *Reports of International Arbitral Awards*, vol. XVIII, paras. 54–55, pp. 169–170. See footnote … above.

200 Decision of 5 May 1982, European Commission of Human Rights, *Decisions and Reports*, February 1983, paras. 69–82, pp. 146–148; emphasis added.

201 Judgment of 29 April 1988, *Publications of the European Court of Human Rights*, Series A, vol. 132, paras. 48–49, pp. 23–24.

that "in the light of article 2 of the Constitution of the French Republic, [...] article 27 is not applicable so far as the Republic is concerned". The Committee observed:

> "in this respect that it is not the formal designation but the effect the statement purports to have that determines its nature".[202]

(7) Nevertheless, this indifference to nominalism is not as radical as it might appear at first sight, since, in the *Belilos* case, the European Commission of Human Rights had maintained that

> "if a State made both reservations and interpretative declarations at the same time, the latter could only exceptionally be equated with the former".[203]

(8) From these observations the following conclusion may be drawn: while the phrasing and name of a unilateral declaration do not constitute part of the definition of an interpretative declaration any more than they do of the definition of a reservation, they nonetheless form an element of appraisal which must be taken into consideration and which can be viewed as being of particular (although not necessarily vital) significance when a State formulates both reservations and interpretative declarations in respect of a single treaty at the same time.

(9) This observation is consistent with the more general doctrinal position that "there is a potential for inequity in this aspect ['however phrased or named'] of the definition":

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[202] Communication No. 220/1987, decision adopted on 8 November 1989; Report of the Human Rights Committee to the General Assembly, *Official Records, Forty-fifth Session, Supplement No. 40* (A/45/40), United Nations, New York, annex X, para. 8.6, p. 123. See also, to the same effect, the decisions *M.K. v. France* of the same date, communication No. 222/187 (pp. 127–133), and *S.G. v. France* of 1 November 1991 (No. 347/1988), *G.B. v. France* of 1 November 1991 (No. 348/1989) and *R.L.M. v. France* of 6 April 1992 (No. 363/1989). Report of the Human Rights Committee to the General Assembly, *Official Records, Forty-seventh Session, Supplement No. 40* (A/47/40), United Nations, New York, annex X, pp. 346–371. In an individual opinion which she attached to the decision on *T.K. v. France*, Mrs. Higgins criticized the Committee's position, pointing out that, in her view:

"the matter [was not] disposed of by invocation of article 2 (1) (d) of the Vienna Convention on the Law of Treaties, which emphasizes that intent, rather than nomenclature, is the key".

"An examination of the notification of 4 January 1982 shows that the Government of the Republic of France was engaged in two tasks: listing certain reservations and entering certain interpretative declarations. Thus in relation to articles 4 (1), 9, 14 and 19, it uses the phrase 'enters a reservation'. In other paragraphs it declares how terms of the Covenant are in its view to be understood in relation to the French Constitution, French legislation or obligations under the European Convention on Human Rights. To note, by reference to article 2 (1) (d) of the Vienna Convention, that it does not matter how a reservation is phrased or named, cannot serve to turn these interpretative declarations into reservations. Their content is clearly that of declarations. Further, the French notification shows that deliberately different language was selected to serve different legal purposes. There is no reason to suppose that the contrasting use, in different paragraphs, of the phrase 'reservation' and 'declaration' was not entirely deliberate, with its legal consequence well understood by the Government of the Republic." (*Official Records, Forty-fifth Session, Supplement No. 40* (A/45/40), United Nations, New York, annex X, appendix II, p. 143.)

[203] Cf. the Decision of the Court in this case, 21 May 1988, *Publications of the European Court of Human Rights*, Series A, vol. 132, para. 41, p. 21. For its part, the Court observed that one of the things that made it difficult to reach a decision in the case was the fact that "the Swiss Government have made both 'reservations' and 'interpretative declarations' in the same instrument of ratification", although the Court did not draw any particular conclusion from that observation (*ibid.*, para. 49, p. 24). See also the individual opinion of Mrs. Higgins in the *T.K. v. France* case before the Human Rights Committee (see footnote … above).

"Under the Vienna Convention, the disadvantages of determining that a statement is a reservation are [...] imposed over the other parties to the treaty. [...] It would be unfortunate in such circumstances if the words 'however phrased or named' were given an overriding effect. In exceptional circumstances it might be possible for a party to rely upon an estoppel against a State which attempts to argue that its statement is a reservation. [...] While this is a matter of interpretation rather than the application of equitable principles, it is in keeping with notions of fairness and good faith which underlie the treaty relations of States."[204]

(10) Without reopening the debate on the principle posed by the Vienna Convention with regard to the definition of reservations, a principle which extends to the definition of interpretative declarations,[205] it would seem legitimate, then, to spell out the extent to which it is possible to remain indifferent to the nominalism implied by the expression "however named or phrased". This is the purpose of guideline 1.3.2, which acknowledges that the name a declaring State gives to its declaration is nevertheless an indication of what it is, although it does not constitute an irrebuttable presumption.

(11) This indication, while still rebuttable, is reinforced when a State simultaneously formulates reservations and interpretative declarations and designates them respectively as such, as the last phrase of guideline 1.3.2 emphasizes.

1.3.3 Formulation of a unilateral statement when a reservation is prohibited

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect of those provisions by a State or an international organization shall be presumed not to constitute a reservation. Such a statement nevertheless constitutes a reservation if 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.

Commentary

(1) Guideline 1.3.3 has been worded in the same spirit as the preceding guideline and its purpose is to make it easier to say whether a unilateral statement formulated in respect of a treaty should be classified as a reservation or as an interpretative declaration when the treaty prohibits reservations of a general nature,[206] or to certain of its provisions.[207]

(2) It seems to the Commission that, in such situations, statements made in respect of provisions to which any reservation is prohibited must be deemed to constitute interpretative declarations. "This would comply with the presumption that a State would intend to perform an act permitted, rather than one prohibited, by a treaty and protect the State from the possibility that the impermissible reservation would have the effect of invalidating the entire act of acceptance of the treaty to which the declaration was attached."[208] In a more general context, this presumption of permissibility is consonant with the "well-established general principle of law that bad faith is not presumed".[209]

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[204] D.W. Greig, "Reservations: Equity as a Balancing Factor?". *Australian Yearbook of International Law*, 1995, pp. 27–28; see also p. 34.

[205] See guideline 1.2.

[206] As, for example, in the case of article 309 of the United Nations Convention on the Law of the Sea.

[207] As, for example, in the case of article 12 of the Geneva Convention on the Continental Shelf which deals with reservations to articles 1 to 3. See the arbitral decision of 30 June 1977, *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII, paras. 38–39, pp. 161; see also the individual opinion of Herbert W. Briggs, *ibid.*, p. 262.

[208] D.W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International*

(3) It goes without saying, however, that the presumption referred to in guideline 1.3.3 is not irrebuttable and that if the statement actually purports to exclude or modify the legal effect of the provisions of the treaty and not simply to interpret them, then it must be considered to be a reservation and the consequence of article 19, subparagraphs (a) and (b), of the 1969 and 1986 Vienna Conventions is that such a reservation is impermissible and must be treated as such. This is consistent with the principle of the irrelevance, in principle, of the phrasing or name of unilateral statements formulated in respect of a treaty, as embodied in the definition of reservations and interpretative declarations.[210]

(4) It is apparent from both the title of the guideline and its wording that the guideline's purpose is not to determine whether unilateral declarations formulated in the circumstances in question constitute interpretative declarations or unilateral statements other than reservations or interpretative declarations as defined in section 1.5 of the present chapter. Its sole aim is to draw attention to the principle that there can be no presumption that a declaration made in respect of treaty provisions to which a reservation is prohibited is a reservation.

(5) If this is not the case, it is for the interpreter of the declaration in question, which may be either an interpretative declaration or a declaration under section 1.5, to classify it positively on the basis of guidelines 1.2 and 1.5.1 to 1.5.3.

1.4 Conditional interpretative declarations

1. A conditional interpretative declaration 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, 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.

2. Conditional interpretative declarations are subject to the rules applicable to reservations.

Commentary

(1) In accordance with the definition given in guideline 1.2, interpretative declarations can be seen as "offers" of interpretation, governed by the fundamental principle of good faith, but lacking any inherent authentic or binding character. However, their authors frequently endeavour to broaden their scope, so that they come closer to being a reservation without actually becoming one. This is what happens when a State or international organization does not merely propose an interpretation but makes its interpretation a condition of its consent to be bound by the treaty.

(2) The members of the Commission have unanimously recognized the existence of such a practice, which was not systematized in the legal doctrine until relatively recently,[211] while continuing to explore the exact legal nature of such unilateral statements.

Law, 1995, p. 25.

[209] Arbitral decision of 16 November 1957, *Lac Lanoux* case (France/Spain), United Nations, *Reports of International Arbitral Awards*, vol. XII, p. 305.

[210] See guidelines 1.1 and 1.2.

[211] The distinction between these two types of interpretative declaration was clearly and authoritatively drawn by Professor D.M. McRae in an important article published in 1978. Exploring the effect of interpretative declarations, he noted that "two situations have to be considered. The first is where a State attaches to its instrument of acceptance a statement that simply purports to offer an

(3) It is not uncommon for a State, when formulating a declaration, to state expressly that its interpretation constitutes the *sine qua non* to which its consent to be bound is subordinate. For example, France attached to its signature[212] of Additional Protocol II of the Treaty of Tlatelolco a four-point interpretative declaration, stipulating:

> "In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States."

The conditional nature of the French declaration here is indisputable.

(4) Although it is drafted less categorically, the same can surely be said of the "understanding" recorded by the Islamic Republic of Iran in connection with the United Nations Convention on the Law of the Sea:

> "The main objective [of the Government of the Islamic Republic of Iran] for submitting these declarations is the avoidance of eventual future interpretation of the following articles in a manner incompatible with the original intention and previous positions or in disharmony with national laws and regulations ..."[213]

(5) In other cases, the conditional nature of the declaration can be deduced from its drafting. For example, its categorical wording leaves little doubt that the interpretative declaration made by Israel upon signing the International Convention Against the Taking of Hostages of 17 December 1979 should be considered a conditional interpretative declaration:

> "It is the understanding of Israel that the Convention implements the principle that hostage taking is prohibited in all circumstances and that any person committing such an act shall be either prosecuted or extradited pursuant to article 8 of this Convention or the relevant provisions of the Geneva Conventions of 1949 or their Additional Protocols, without any exception whatsoever."[214]

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interpretation of the treaty or part of it. This may be called a 'simple interpretative declaration' [They are referred to as 'mere declaratory statements' by Detter, *Essays on the Law of Treaties*, 1967, pp. 51–52]. The second situation is where a State makes its ratification of or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty. This may be called a 'qualified interpretative declaration'. In the first situation the State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. [...] If, on the other hand, the declaring State wishes to assert its interpretation regardless of what a subsequent tribunal might include, that is, the State when making the declaration has ruled out the possibility of a subsequent inconsistent interpretation of the treaty, a different result should follow. This is a 'qualified interpretative declaration'. The State is making its acceptance of the treaty subject to or conditional upon acquiescence in its interpretation". (D.M. McRae, "The Legal Effect of Interpretative Declarations", *B.Y.B.I.L.* 1978, pp. 160–161.) The expression "qualified interpretative declaration" has little meaning in French. This distinction has been used by a number of authors; for example, see Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: The Belilos Case", *G.Y.B.I.L.* 1990, p. 77 or Rosario Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali*, *op. cit.* (footnote ... above), pp. 205–206, or Monika Heymann, *Einseitige Interpretationserklärungen …*, *op. cit.* (footnote …), pp. 70 to 87.

[212] The declaration was confirmed upon ratification on 22 March 1974; see United Nations, *Treaty Series*, vol. 936, p. 419.

[213] *Multilateral Treaties ...*, chap. XXI.6.

[214] *Ibid.*, chap. XVIII.5.

(6) The same holds true for the interpretative declaration made by Turkey in respect of the 1976 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques:

> "In the opinion of the Turkish Government the terms 'widespread', 'long-lasting' and 'severe effects' contained in the Convention need to be clearly defined. So long as this clarification is not made the Government of Turkey will be compelled to interpret itself the terms in question and consequently it reserves the right to do so as and when required."[215]

(7) Conversely, a declaration such as the one made by the United States of America when signing the 1988 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution is clearly a simple interpretative declaration:

> "The Government of the United States of America understands that nations will have the flexibility to meet the overall requirements of the protocol through the most effective means."[216]

(8) It is in fact only rarely that the conditional nature of an interpretative declaration is so clearly apparent from the wording used.[217] In such situations the distinction between "simple" and "conditional" interpretative declarations poses problems similar to those posed by the distinction between reservations and interpretative declarations, and these problems must be solved in accordance with the same principles.[218]

(9) Moreover, it is not uncommon for the true nature of interpretative declarations to become clear when they are contested by other contracting States or contracting organizations. This is demonstrated by some famous examples, such as the declaration that India attached to its instrument of ratification of the constituent instrument of the Inter-

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[215] *Ibid.*, chap. XXVI.1.

[216] *Ibid.*, chap. XXVII.1.

[217] Most often, the declaring State or international organization simply says that it "considers that ..." ("*considère que* ...") (for examples (of which there are a great many), see the declarations made by Brazil when signing the United Nations Convention on the Law of the Sea (*ibid.*, chap. XXI.6), the third declaration made by the European Community when signing the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (*ibid.*, chap. XXVII.4), or those made by Bulgaria to the Vienna Convention on Consular Relations of 1963 (*ibid.*, chap. III.6) or to the 1974 Convention on a Code of Conduct for Liner Conferences (*ibid.*, chap. XII.6)), "*estime que* ..." (see the declaration made by Sweden concerning the Convention establishing the International Maritime Organization (*ibid.*, chap. XII.1)), or "declares that ..." (see the second and third declarations made by France concerning the 1966 International Covenant on Economic, Social and Cultural Rights (*ibid.*, chap. IV.3)) or that made by the United Kingdom when signing the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (*ibid.*, chap. XXVII.3), or that it "interprets" a particular provision in a particular way (see the declarations made by Algeria or Belgium in respect of the International Covenant on Economic, Social and Cultural Rights (*ibid.*, chap. IV.3), the declaration made by Ireland in respect of article 31 of the 1954 Convention relating to the Status of Stateless Persons (*ibid.*, chap. V.3) or the first declaration made by France when signing the 1992 Convention on Biological Diversity (*ibid.*, chap. XXVII.8)), or that, "according to its interpretation", a particular provision has a certain meaning (see the declarations by the Netherlands concerning the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980 (*ibid.*, chap. XXVI.2) or those made by Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu in respect of the 1992 United Nations Framework Convention on Climate Change (*ibid.*, chap. XXVII.7)) or that it "understands that ..." (see the declarations made by Brazil when ratifying the United Nations Convention on the Law of the Sea (*ibid.*, chap. XXI.6)).

[218] See guideline 1.3.1.

Governmental Maritime Consultative Organization (IMCO)[219] or Cambodia's declaration with regard to the same Convention.[220] These precedents confirm that there is a discrepancy between some declarations, in which the State or international organization formulating them does no more than explain its interpretation of the treaty, and others in which the authors seek to impose their interpretation on the other contracting parties.

(10) This discrepancy is of great practical significance. Unlike reservations, simple interpretative declarations place no conditions on the expression by a State or international organization of its consent to be bound; they simply attempt to anticipate any dispute that may arise concerning the interpretation of the treaty. The declarant "sets a date", in a sense; it gives notice that, should a dispute arise, its interpretation will be such, but it does not make that point a condition for its participation in the treaty. Conversely, conditional declarations are closer to reservations in that they seek to produce a legal effect on the provisions of the treaty, which the State or international organization accepts only on condition that the provisions are interpreted in a specific way.

(11) Case law reflects the ambivalent nature of conditional interpretative declarations:

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[219] The text of the declaration appears in *Multilateral Treaties ...*, chap. XII.1.

"When the Secretary-General notified IMCO of the instrument of ratification of India subject to the declaration, it was suggested that in view of the condition which was 'in the nature of a reservation' the matter should be put before the IMCO Assembly. The Assembly resolved to have the declaration circulated to all IMCO members but until the matter had been decided, India was to participate in IMCO without vote. France and the Federal Republic of Germany lodged objections against the declaration made by India, France on the ground that India was asserting a unilateral right to interpret the Convention and Germany on the ground that India might in the future take measures that would be contrary to the Convention.

"In resolution 1452 (XIV) adopted on 7 December 1959, the General Assembly of the United Nations, noting the statement made on behalf of India at the 614th meeting of the Sixth Committee (Legal) explaining that the Indian declaration on IMCO was a declaration of policy and that it did not constitute a reservation, expressed the hope 'that, in the light of the above-mentioned statement of India an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India'.

"In a resolution adopted on 1 March 1960, the Council of the Inter-Governmental Maritime Consultative Organization, taking note of the statement made on behalf of India referred to in the foregoing resolution and noting, therefore, that the declaration of India has no legal effect with regard to the interpretation of the Convention 'considers India to be a member of the Organization'." (India's reply to the International Law Commission questionnaire on reservations to treaties.)

With regard to this episode, see in particular D.M. McRae, "The legal effect of interpretative declarations", *B.Y.B.I.L.* 1978, pp. 163–165; Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, *op. cit.* (footnote … above), pp. 301–302; Rosario Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali*, *op. cit.* (footnote … above), pp. 108–113.

[220] The text appears in *Multilateral Treaties ...*, chap. XII.1. Several Governments stated "that they assumed that it was a declaration of policy and did not constitute a reservation; and that it had no legal effect with regard to the interpretation of the Convention". Accordingly, "[i]n a communication addressed to the Secretary-General on 31 January 1962, the Government of Cambodia stated that '... the Royal Government agrees that the first part of the declaration which it made at the time of the acceptance of the Convention is of a political nature. It therefore has no legal effect regarding the interpretation of the Convention. The statements contained [in the second part of the declaration?], on the other hand, constitute a reservation to the Convention by the Royal Government of Cambodia'" (*ibid.*, note 17). With regard to this episode, see in particular D.M. McRae, "The Legal Effect of Interpretative Declarations, *B.Y.B.I.L.* 1978, pp. 165–166; Rosario Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali*, *op. cit.* (footnote … above), pp. 177–178.

- in the *Belilos* case, the European Court of Human Rights considered the validity of Switzerland's interpretative declaration from the standpoint of the rules applicable to reservations, without assimilating one to the other;[221]

- likewise, in a text that is admittedly rather obscure, the Arbitral Tribunal that settled the dispute between France and the United Kingdom concerning the continental shelf analysed the third reservation by France concerning article 6 of the 1958 Geneva Convention "as a particular condition posed by the French Republic for its acceptance of the delimitation system provided for in article 6", adding: "To judge by its terms, this condition would seem to go beyond a simple interpretation."[222] This would seem to establish *a contrario* that it could have been a conditional interpretative declaration and not a reservation in the strict sense of the term.

(12) The fact remains that, even if it cannot be entirely "assimilated" to a reservation, a conditional interpretative declaration does come quite close, for as Paul Reuter has written: "*[l']essence de la 'réserve' est de poser une* condition*: l'État ne s'engage qu'à la condition que certains effets juridiques du traité ne lui soient pas appliqués, que ce soit par l'exclusion ou la modification d'une règle ou par l'interprétation de celle-ci*" ("the essence of 'reservations' is to stipulate a condition: the State will commit itself only on condition that certain legal effects of the treaty are not applied to it, either by excluding or modifying a rule or by interpreting it").[223] There is support for this position in doctrine.[224]

(13) It follows that, as the Commission noted following detailed consideration of the matter, while conditional interpretative declarations do not have the same definition as reservations, they are subject to the same rules of form and substance as those applying to reservations. This is stated in the second paragraph of guideline 1.4. Consequently, it is unnecessary to mention conditional interpretative declarations in the remainder of this Guide: the legal regime of reservations is applicable to them.

(14) The Commission considered whether, instead of reproducing the long list of times at which a reservation (and, by extension, a conditional interpretative declaration) may be formulated, as in guideline 1.1, it might not be simpler and more elegant to use a general phrase such as "at the time of expression of consent to be bound". It does not seem possible to adopt this solution, however, since interpretative declarations, like reservations, may be

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[221] Although it did not formally reclassify Switzerland as a reservation, the Court examined "the validity of the interpretative declaration in question, *as in the case of a reservation*" (Judgement of 21 May 1988, *Publications of the European Court of Human Rights*, Series A., vol. 132, para. 49, p. 21). In the *Temeltasch* case, the European Commission of Human Rights was less cautious: completely (and intentionally) adhering to Professor McRae's position (footnote ... above), it "assimilated" the notions of conditional interpretative declarations and reservations (decision of 5 May 1982, *Decisions and Reports*, April 1983, pp. 130–131).

[222] Decision of 30 June 1977, Case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII, para. 55, p. 169.

[223] Paul Reuter, *Introduction au droit des traités*, 3rd ed., revised and expanded by Philippe Cahier (Paris, PUF, 1995), p. 71. The inherent conditional character of reservations is stressed in numerous doctrinal definitions, including that of the Harvard Law School (Research in International Law of the Harvard Law School, "Draft Convention on the Law of Treaties", *A.J.I.L.* 1935, supplement No. 4, p. 843; see also Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, *op. cit.* (footnote … above), p. 35 and the examples cited). The definition proposed by Sir Humphrey Waldock in 1962 also specifically included conditionality as an element in the definition of reservations (see *Yearbook … 1962*, vol. II, A/CN.4/144, p. 31); it was subsequently abandoned under circumstances that are not clear.

[224] See D.M. McRae, "The Legal Effect of Interpretative Declarations", *B.Y.B.I.L.*, 1978, p. 172.

formulated at the time of signature, even in the case of treaties in solemn form. In this case, however, and just as for reservations, conditional interpretative declarations must be confirmed at the time of expression of definitive consent to be bound. There would appear to be no logical reason for a different solution as between reservations and conditional interpretative declarations to which the other States and international organizations must be in a position to react where necessary. Moreover, it will be noted that, in general, States wishing to make their participation in a treaty subject to a specified interpretation of the treaty generally confirm their interpretation at the time of expression of definitive consent to be bound, when it has been formulated at the time of signature or at any earlier point in the negotiations.[225]

1.5 Unilateral statements other than reservations and interpretative declarations

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations (including conditional interpretative declarations) are outside the scope of the present Guide to Practice.

Commentary

(1) Guideline 1.5 may be regarded as a "general exclusionary clause" purporting to limit the scope of the Guide to Practice to reservations, on the one hand, and to interpretative declarations *stricto sensu* (whether "simple" or "conditional"[226]), to the exclusion of other unilateral statements of any kind which are formulated in relation to a treaty, but which generally do not have as close a relationship with the treaty.

(2) As practice indicates, States and international organizations often take the opportunity, when signing or expressing their final consent to be bound by a treaty, to make statements which relate to the treaty but seek neither to exclude or modify the legal effect of certain of its provisions (or of the treaty as a whole with respect to certain specific aspects) in their application to their author nor to interpret the treaty, and which are thus neither reservations nor interpretative declarations, whether "simple" or conditional.

(3) The United Nations online publication "*Multilateral treaties deposited with the Secretary-General*" contains numerous examples of such statements, concerning the legal nature of which the Secretary-General takes no position.[227] Instead, he simply notes that they have been made and leaves their legal definition — an extremely important operation, as it determines the legal regime applicable to them — to the user.

(4) This publication reproduces only those unilateral statements which are formulated when signing or expressing final consent to be bound, ratifying, etc., a treaty deposited with the Secretary-General, but which may in fact be neither reservations nor interpretative declarations. This is obviously because these are the only statements communicated to the

[225] Cf. the confirmation by Germany and the United Kingdom of their declarations formulated upon signing the Basel Convention of 1989 on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (see *Multilateral Treaties* ..., chap. XXVII.3); see also the practice followed by Monaco upon signing and then ratifying the 1966 Covenant on Civil and Political Rights (*ibid.*, chap. IV.4); by Austria in the case of the European Convention of 6 May 1959 on the Protection of the Archaeological Heritage (http://conventions.coe.int/treaty/EN/cadreprincipal.htm) or the European Community in regard to the 1991 Espoo Convention (*Multilateral Treaties* ..., chap. XXVII.4). See also the declarations by Italy or the United Kingdom concerning the 1992 Rio Convention on Biological Diversity (*ibid*., chap. XXVII.8).

[226] On this distinction, see guideline 1.4.

[227] As attested by the wording of the heading introducing these instruments: "Declarations [with no other indication] and Reservations".

Secretary-General, but there is no doubt that this fact is of major practical importance: statements made in the above circumstances raise the most problems as far as distinguishing them from reservations or conditional interpretative declarations is concerned, since *by definition* they may be formulated only "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".[228]

(5) However, although it is true that in practice most of these statements are made at the time of signature or of expression of consent to be bound by the treaty, it is nevertheless possible for them to be made at a different time, even after the entry into force of the treaty for their author. However, it would not be useful for the Commission to take a firm position on this point, as the purpose of guideline 1.5 is precisely to exclude such statements from the scope of the Guide to Practice.

(6) Similarly, and for the same reason, although it might seem *prima facie* that such unilateral statements fall within the general category of unilateral acts of States,[229] the Commission does not intend to take any decision regarding the legal regime applicable to them. It has simply endeavoured, in each of the guidelines in this section of the Guide to Practice, to provide, in as legally neutral a manner as possible, a definition of these different categories of unilateral statements which is sufficient to help distinguish them from reservations and interpretative declarations.

(7) Unilateral statements formulated by States or international organizations in respect of or in relation to a treaty are so numerous and so diverse that it is probably futile to try to make an exhaustive listing of them, and this section does not attempt to do so. The Commission has identified a number of such statements but has drawn up specific guidelines only for those statements that are of the greatest practical importance owing to the frequency with which they are made or the risk of their being confused with reservations or interpretative declarations. The classification contained in the guidelines below is, accordingly, merely illustrative.

(8) On the other hand, the Commission considered it unnecessary to draw up specific guidelines for other statements that are less frequently made or present only a slight risk of being confused with reservations or interpretative declarations. Such is the case for:

- "extensive" statements or statements purporting to undertake unilateral commitments;
- unilateral statements purporting to add further elements to a treaty;
- statements concerning the territorial application of a treaty; or
- general statements of policy.

However, statements of non-recognition, statements concerning modalities of implementation of a treaty at the internal level and unilateral statements made under an optional clause are covered by specific guidelines,[230] but this differential treatment in the Guide to Practice has no special meaning insofar as their nature or legal status are concerned.

[228] See guidelines 1.1 and 1.4. On the other hand, "simple" interpretative declarations may, in the Commission's view, be formulated at any time; see guideline 1.2 and paras. (21) to (32) of the commentary thereto.

[229] See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 367–381.

[230] Guidelines 1.5.1, 1.5.2 and 1.5.3, respectively.

"Extensive" statements or statements purporting to undertake unilateral commitments

(9) A well-known example of an "extensive" reservation that was given by Brierly in his first report on the law of treaties is provided by the statement which South Africa made when it signed the General Agreement on Tariffs and Trade (GATT) in 1948: "As the article reserved against stipulates that the agreement 'shall not apply' as between parties which have not concluded tariff negotiations with each other and which do not consent to its application, the effect of the reservation is to enlarge rather than restrict the obligations of South Africa."[231] Manfred Lachs also relied on that example in asserting the existence of cases "where a reservation, instead of restricting, extended the obligations assumed by the party" in question.[232]

(10) The South African statement gave rise to considerable controversy,[233] but can hardly be regarded as a reservation: this kind of statement cannot have the effect of modifying the legal effect of the treaty or of some of its provisions. Admittedly, they are undertakings that were entered into at the time of expression of consent to be bound by the treaty but have no effect on the treaty, and could have been formulated at any time without resulting in a modification of their legal effects. In other words, it may be considered that whereas reservations are "non-autonomous unilateral acts",[234] such statements impose autonomous obligations on their authors and constitute unilateral legal acts which are subject to the legal rules applicable to that type of instrument[235] and not to the regime of reservations.

Unilateral statements purporting to add further elements to a treaty

(11) The same holds true for unilateral statements purporting to add further elements to a treaty. There is in fact nothing to prevent a party to a treaty from proposing an extension of the scope or purpose of the treaty to its partners. In the Commission's view, this is how the statement whereby the Government of Israel made known its wish to add the Shield of David to the Red Cross emblems recognized by the Geneva Conventions of 1949 may be seen.[236] Such a statement actually seeks not to exclude or modify the effect of the

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[231] *Yearbook ... 1950*, vol. II, p. 239.

[232] *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142. See also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Nijhoff, 2009), p. 89, para. 36.

[233] James Brierly, in keeping with his general definition of reservations, regarded it as a "proposal of reservation", since it involved an "offer" made to the other parties which they had to accept for it to become a valid reservation (*Yearbook ... 1950*, vol. II, p. 239); Lachs regarded it purely and simply as an example of an extensive reservation (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142); Mr. Horn saw it as a mere declaration of intent without any legal significance (Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, *op. cit.* (footnote … above), p. 89); and Professor Imbert considered that "the statement of the South African Union could only have the effect of increasing the obligations of that State. Accordingly, it did not constitute a reservation, which would necessarily restrict the obligations under the treaty" (*Les réserves aux traités multilatéraux*, *op. cit.* (footnote … above), p. 15).

[234] On this concept, see Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (Nguyen Quoc Dinh), Paris, L.G.D.J., 8th ed., 2009, pp. 398–400.

[235] In this connection, see J.M. Ruda, "Reservations to treaties", *Recueil des cours ...*, 1975-III, vol. 146, p. 147. See also the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 367–381.

[236] Legal scholars are divided on this point. Compare Jean Pictet, *Les Conventions de Genève du 12 août 1949 – Commentaire*, ICRC, Geneva, vol. I, pp. 330–341, or Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, *op. cit.* (footnote … above), pp. 82–83 (who doubt whether it is a reservation), and Shabtai Rosenne, "The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David", *Israel Yearbook on Human Rights*, 1975, pp. 9–54, or Pierre-Henri

provisions of the treaties in question (which in fact remain unchanged), but to add a provision to those treaties.

(12) While such statements are relatively uncommon, they nevertheless do occur. Apart from the example of the statement by Israel adding the Shield of David to the list of Red Cross emblems,[237] one can think of cases of unilateral statements which are submitted as reservations but which, instead of limiting themselves to excluding (negatively) the legal effect of certain treaty provisions, actually seek to increase (positively) the obligations of other contracting States or contracting organizations as compared with those arising for them under general international law.[238] Since they are neither reservations nor "simple" or "conditional" interpretative declarations within the meaning of the present Guide to Practice, such unilateral statements fall outside its scope.

Statements concerning the territorial application of a treaty

(13) Some States also formulate statements concerning the territorial application of a treaty in order to prevent the treaty being applied to a territory for which the author of the statement is the international representative[239] or to extend the treaty's application to territories to which it did not previously apply, whether because of a statement having been made to that effect or implicitly.[240] While statements of territorial exclusion may initially appear to be similar to reservations *ratione loci*, they serve as the expression of a "different intention" within the meaning of article 29 of the Vienna Conventions; the State does not purport to exclude application of the treaty but is establishing the scope of its application *ratione loci* by defining what is meant by "its entire territory" within the meaning of article 29.[241] Similarly, statements and notifications of extension of territorial application do not

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Imbert, *Les réserves aux traités multilatéraux*, *op. cit.* (footnote … above), pp. 361–362 (who take the contrary view).

[237] See *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. I, Federal Political Department, Berne, p. 348. Turkey had proceeded in the same way to have the Red Crescent accepted among the Red Cross emblems under The Hague Conventions (see *Conférence internationale de la Paix, La Haye, 18 mai–29 juillet 1899*) (New edition, The Hague, Ministry of Foreign Affairs and Martinus Nijhoff, 1907) Part I, Annex, pp. 16–18; Part III, pp. 4–6, 54–55 and 59–60; *Actes de la Conférence de Révision réunie à Genève du 11 juin au 6 juillet 1906*, pp. 17, 63, 160–163, 175, 260, 271, 286 and 292; *Deuxième Conférence internationale de la Paix, La Haye, 15 juin–18 octobre 1907, Actes et Documents* (The Hague, Ministry of Foreign Affairs, 1907, 3 volumes, vol. I, *Séances plénières de la Conférence*, pp. 66–68, 659–660 and 722; vol. III, *Deuxième, Troisième et Quatrième Commissions*, pp. 292, 296–299 and 556–559).

[238] This would be the case with the "reservations" of the socialist countries to article 9 of the 1958 Convention on the High Seas mentioned in the commentary to guideline 1.1.1 (paras. (9) and (10) and footnote …), considering that the scope given by those countries to State vessels on the high seas went further than that recognized by the applicable customary rules.

[239] See, for example, the practice of New Zealand concerning Tokelau (*Multilateral Treaties …*, Historical Information (New Zealand), and the declarations of territorial exclusion made in relation to the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality, *ibid*., chap. III.4; and in relation to the Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, *ibid*., chap. III.7); see also the practice of the United Kingdom concerning a number of its territories (for example, the territorial exclusion in respect of the Isle of Man resulting implicitly from the notification of the application of the Convention on the Rights of the Child to that territory (and others), *ibid*., chap. IV.11) and the complex practice of China with regard to the territories of Hong Kong and Macao (*ibid*., Historical Information (China)).

[240] See, among many examples, the declaration of territorial extension made by the United Kingdom in relation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*ibid*., chap. IV.9) and the Convention on the Rights of the Child (*ibid*., chap. IV.11).

[241] See also paras. (5) to (10) of the commentary to guideline 1.1.3.

constitute reservations or interpretative declarations within the meaning of the present Guide to Practice; their authors do not purport to limit application of the treaty or to interpret its terms, but rather to extend its application to a territory to which the treaty did not previously apply. A notification of territorial extension therefore appears to be an expression of consent to be bound by the treaty with respect to a given territory. There is nothing to prevent a State from accompanying a notification of territorial extension with true reservations applying to the territory in question.[242]

General statements of policy

(14) It also frequently happens that, on the occasion of the signing of a treaty or the expression of its definitive consent to be bound, a State expresses its opinion, positive or negative, with regard to the treaty and even sets forth improvements that it feels ought to be made to the treaty, as well as ways of making them, without purporting 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 between it and the other contracting States or contracting organizations, or to interpret it. Hence, these are neither reservations nor interpretative declarations, but simple general statements of policy formulated in relation to the treaty or relating to the area which it covers.

(15) Declarations by several States regarding the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons afford some notable examples.[243] These are simple observations regarding the treaty which reaffirm or

[242] See guideline 1.1.4 and the commentary thereto.

[243] This is the case, for example, with the declarations formulated by China ("1. The Government of the People's Republic of China has decided to sign the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects adopted at the United Nations Conference held in Geneva on 10 October 1980. 2. The Government of the People's Republic of China deems that the basic spirit of the Convention reflects the reasonable demand and good intention of numerous countries and peoples of the world regarding prohibitions or restrictions on the use of certain conventional weapons which are excessively injurious or have indiscriminate effects. This basic spirit conforms to China's consistent position and serves the interest of opposing aggression and maintaining peace. 3. However, it should be pointed out that the Convention fails to provide for supervision or verification of any violation of its clauses, thus weakening its binding force. The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices fails to lay down strict restrictions on the use of such weapons by the aggressor on the territory of his victim and to provide adequately for the right of a State victim of an aggression to defend itself by all necessary means. The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons does not stipulate restrictions on the use of such weapons against combat personnel. Furthermore, the Chinese texts of the Convention and Protocol are not accurate or satisfactory enough. It is the hope of the Chinese Government that these inadequacies can be remedied in due course.") or by France ("After signing the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, the French Government, as it has already had occasion to state, through its representative to the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons in Geneva, during the discussion of the proposal concerning verification arrangements submitted by the delegation of the Federal Republic of Germany and of which the French Government became a sponsor, and at the final meeting on 10 October 1980; on 20 November 1980 through the representative of the Netherlands, speaking on behalf of the nine States members of the European Community in the First Committee of the thirty-fifth session of the United Nations General Assembly; regrets that thus far it has not been possible for the States which participated in the negotiation of the Convention to reach agreement on the provisions concerning the verification of facts which might be alleged and which might constitute violations of the undertakings subscribed to. It therefore reserves the right to submit, possibly in association with other States, proposals aimed at filling the gap at the first conference to be held

supplement some of the positions taken during its negotiation, but which have no effect on its application.[244]

(16) This is also the case when a State makes a declaration in which it calls on all or some other States to become parties to a treaty[245] or to implement it effectively.[246]

(17) The same is true when a State takes the opportunity afforded by its signature of a treaty or its expression of consent to be bound by it to recall certain aspects of its policy with regard to the subject area of the treaty, as China did when it signed the Comprehensive Nuclear-Test-Ban Treaty adopted by the United Nations General Assembly on 10 September 1996[247] or the Holy See when it became a party to the Convention on the Rights of the Child.[248]

(18) In the same spirit, some declarations made in the instruments of ratification of the 1971 Seabed Treaty, notably those of Canada and India, concerning types of weapons other than nuclear weapons, do not purport to modify the rights and obligations ensuing from the Treaty or to interpret it; as was noted, "Their main purpose is to avoid that the Treaty prejudice the positions of States making a declaration with respect to certain issues of the law of the sea on which States have different positions and views".[249]

(19) What the diverse declarations analysed briefly above have in common is that the treaty in respect of which they are made is simply a pretext, and they bear no legal relationship to it: they could have been made under any circumstances, they have no effect on the treaty's implementation, nor do they seek to. They are thus neither reservations nor interpretative declarations. What is more, they are not even governed by the law of treaties,

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pursuant to article 8 of the Convention and to utilize, as appropriate, procedures that would make it possible to bring before the international community facts and information which, if verified, could constitute violations of the provisions of the Convention and the Protocols annexed thereto.") (*Multilateral Treaties ...*, chap. XXVI.2; see also the declarations made by the United States of America, Italy and Romania (*ibid.*)).

244 See also, for example, the long declaration made by the Holy See in 1985 when ratifying the two Additional Protocols of 1977 to the Geneva Conventions of 1949 (text attached to the reply from the Holy See to the Commission's questionnaire on reservations to treaties).

245 See the declaration by the United States of America concerning the above-mentioned Convention of 10 October 1980: "The United States Government welcomes the adoption of this Convention, and hopes that all States will give the most serious consideration to ratification or accession" (*Multilateral Treaties ...*, chap. XXVI.2) or the one by Japan concerning the NTP: "The Government of Japan hopes that as many States as possible, whether possessing a nuclear explosive capability or not, will become parties to this Treaty in order to make it truly effective. In particular, it strongly hopes that the Republic of France and the People's Republic of China, which possess nuclear weapons but are not parties to this Treaty, will accede thereto" (United Nations, *Treaty Series*, vol. 1035, pp. 342–343).

246 See the declaration by China concerning the Paris Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons: "III. States Parties that have abandoned chemical weapons on the territories of other States Parties should implement in earnest the relevant provisions of the Convention and undertake the obligation to destroy the abandoned chemical weapons" (*Multilateral Treaties ...*, chap. XXVI.3, pp. 890–891).

247 "1. China has all along stood for the complete prohibition and thorough destruction of nuclear weapons and the realization of a nuclear-weapon-free world ..." (*ibid*., chap. XXVI.4).

248 "By acceding to the Convention on the Rights of the Child, the Holy See intends to give renewed expression to its constant concern for the well-being of children and families ..." (*ibid*., chap. IV.11); see also the aforementioned declaration (footnote …) by the Holy See on the subject of the 1977 Protocols additional to the 1949 Geneva Conventions: "Finally, the Holy See reasserts, on this occasion, its strong conviction as to the fundamentally inhumane nature of war ...".

249 Luigi Migliorino, "Declarations and Reservations to the 1971 Seabed Treaty", *I.Y.B.I.L.* 1985, p. 107; see also pp. 115 ff. and p. 119.

which in turn offers no help in assessing their validity (which is dependent on other rules of international law, both general and specialized), and this justifies the fact that they, like the other categories of unilateral declarations defined in section 1.5, are excluded from the latter's scope.

1.5.1 Statements of non-recognition

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 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.

Commentary

(1) States frequently accompany the expression of their consent to be bound by a treaty with a statement in which they indicate that such consent does not imply recognition of one or more of the other contracting States or, in a more limited way, of certain situations, generally territorial, relating to one or more of the other parties. Such statements are often called "reservations relating to non-recognition"; this is a convenient but misleading heading that covers some very diverse situations.

(2) The term in fact applies to two types of statements which have the common feature of specifying that the State formulating them does not recognize another entity that is (or wishes to become) a party to the treaty, but which seek to produce very different legal effects: in some cases, the author of the statement is simply taking a "precautionary step" by pointing out that, in accordance with a well-established practice, its participation in a treaty to which an entity that it does not recognize as a State is a party does not amount to recognition; in other cases, the State making the statement expressly excludes the application of the treaty between itself and the non-recognized entity.

(3) In this regard, we may, for example, compare the reactions of Australia and Germany to the accession of certain States to the 1949 Geneva Conventions. While repeating its non-recognition of the German Democratic Republic, the Democratic People's Republic of Korea, Viet Nam and the People's Republic of China, Australia nevertheless "notes their acceptance of the provisions of the Conventions and their intention to apply the said provisions".[250] Germany, however, excludes any treaty relations with South Viet Nam:

[250] See International Committee of the Red Cross (ICRC), Geneva Conventions of 12 August 1949 for the Protection of War Victims – Reservations, declarations and communications made at the time of or in connection with ratification, accession or succession (DOM/JUR/91/1719-CRV/1), p. 13; see also, for example, the statement of the Syrian Arab Republic at the time of signature of the Agreement establishing the International Fund for Agricultural Development (IFAD): "It is understood that the ratification of this Agreement by the Syrian Arab Republic does not mean in any way recognition of Israel by the Syrian Arab Republic" (*Multilateral Treaties* ..., chap. X.8), or the Syrian Arab Republic's first, albeit slightly more ambiguous, statement in respect of the Vienna Convention on Diplomatic Relations (*ibid*., chap. III.3): "The Syrian Arab Republic does not recognize Israel and will not enter into dealings with it." The statement made by Argentina on acceding to the Convention relating to the Status of Stateless Persons of 28 September 1954 is not in the least ambiguous: "The application of this Convention in territories whose sovereignty is the subject of discussion between two or more States, irrespective of whether they are parties to the Convention, cannot be construed as an alteration, renunciation or relinquishment of the position previously maintained by each of them" (*ibid*., chap. V.3); this is an example of non-recognition of a situation (see also Spain's statements concerning the 1958 Geneva Conventions on the Law of the Sea in respect of Gibraltar, *ibid*., chaps. XXI.1, XXI.2, XXI.3 and XXI.4).

> "... the Federal Government does not recognize the Provisional Revolutionary Government as a body empowered to represent a State and [...] accordingly is not able to consider the Provisional Revolutionary Government as a Party to the Geneva Conventions of 12 August 1949".[251]

(4) In the first case, there can be no doubt that the statements in question are not reservations. They add nothing to existing law, since it is generally accepted that participation in the same multilateral treaty does not signify mutual recognition, even implicit.[252] Even if that were not the case,[253] it would still not mean that the statements were reservations: these unilateral statements do not purport to have an effect on the treaty or on its provisions.

(5) Categorizing a unilateral statement whereby a State expressly excludes the application of the treaty between itself and the entity it does not recognize is an infinitely more delicate matter. Unlike "precautionary" statements, a statement of this type clearly purports to have (and does have) a legal effect on the application of the treaty, which is entirely excluded, but only in the relations between the declaring State and the non-recognized entity. Now, the definition of reservations does not preclude a reservation from having an effect *ratione personae*;[254] moreover, in accordance with the provisions of article 20, paragraph 4 (b), of the Vienna Convention of 1969, through an objection, accompanied by a clearly worded refusal to be bound by the treaty with respect to the reserving State, an objecting State can prevent the entry into force of the treaty as between itself and the reserving State.

(6) However, according to most legal writers, "[i]t is questionable whether a statement on this subject, even when designated as a reservation, constitutes a reservation as generally understood since it does not purport, in the usual circumstances, to amend or modify any substantive provision [*sic*] of the treaty".[255]

(7) There are several reasons for not categorizing a statement of non-recognition as a reservation, even if it purports to exclude the application of the treaty in the relations

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[251] ICRC document DOM/JUR/91/1719-CRV/1, footnote ... above, p. 6. See also the statement by the Kingdom of Saudi Arabia on signing the Agreement establishing IFAD: "The participation of the Kingdom of Saudi Arabia in the Agreement shall in no way imply recognition of Israel and shall not lead to entry into dealings with Israel under this Agreement" (*Multilateral Treaties …*, chap. X.8); see also the statements of Iraq and Kuwait, couched in similar terms, *ibid*.

[252] See J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine* (Paris, Pedone, 1975), pp. 429–431. Kuwait clearly reaffirms this in the statement which it made on acceding to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid: "It is understood that the accession of the State of Kuwait to the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the United Nations General Assembly [on 30 November 1973], does not mean in any way recognition of Israel by the State of Kuwait" (*Multilateral Treaties* ..., chap. IV.7).

[253] That is, if participation in the same multilateral treaty did imply mutual recognition.

[254] See, however, Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, *op. cit.* (footnote ... above), p. 109.

[255] Marjorie M. Whiteman, *Digest of International Law*, vol. 14, 1970, p. 158; it should be recalled that, according to the definition given in guideline 1.1, a reservation purports to modify not the provisions of the treaty, but their effects. See also B.R. Bot, *Non-Recognition and Treaty Relations* (Leyden, Sijthoff, 1968), pp. 30–31, 132–139 and 252–254; M. Lachs, "Recognition and Modern Methods of International Cooperation", *British Yearbook of International Law* 1959, pp. 252–259; H. Lauterpacht, *Recognition in International Law* (Cambridge, Cambridge University Press, 1947), pp. 369–374 or J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine*, *op. cit.* (footnote ... above), pp. 428–448.

between the State formulating it and the non-recognized entity. These reasons are both practical and theoretical.

(8) In practice, it seems to be actually very difficult, if not impossible, to apply the reservations regime to statements of non-recognition:

- Objections to such statements are hardly likely to be made and would, in any event, be incapable of having any real effect;
- It would hardly be reasonable to conclude that such statements are prohibited under article 19 (a) and (b) of the 1969 and 1986 Conventions if the treaty in question prohibits, or permits only certain types of, reservations; and
- It must be acknowledged that recognizing them as reservations would hardly be compatible with the letter of the Vienna definition, since the cases in which such statements may be made cannot be limited to those covered by article 2, paragraph 1 (d), of the 1969 Convention.

(9) Moreover, from a more theoretical point of view, statements of this kind, unlike reservations, do not concern the legal effect of the treaty itself or its provisions, but rather the capacity of the non-recognized entity to be bound by the treaty.[256]

(10) Such statements are also not interpretative declarations since their aim is not to *interpret* the treaty but to exclude its application in the relations between two parties thereto.

(11) The Commission intentionally avoided specifying the nature of the non-recognized entity. Whether it is a State, a Government or any other entity (a national liberation movement, for example), the problem is posed in identical terms. *Mutatis mutandis*, the same holds true for statements concerning the non-recognition of certain situations (in particular territorial ones). In all these cases, the two categories of statements of non-recognition referred to above[257] — "precautionary statements"[258] and "statements of exclusion"[259] — can be found.

(12) The problem appears to be a marginal one insofar as international organizations are concerned; it could, however, arise in the case of some international integration organizations such as the European Union. In that event, there would be no reason not to extend the solution adopted for statements by States, *mutatis mutandis*, to statements which international organizations might be required to formulate. The Commission nevertheless

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[256] See Joe Verhoeven, *La reconnaissance internationale dans la pratique contemporaine*, *op. cit.* (footnote ... above), p. 431, footnote 284.

[257] See paras. (2) and (3) above.

[258] Cf. the statement by Cameroon concerning the Partial Nuclear Test-Ban Treaty of 5 August 1963: "Under no circumstances could the signing by the Federal Republic of Cameroon have the effect of entailing recognition by Cameroon of Governments or regimes which, prior to such signing, had not yet been recognized by the Federal Republic of Cameroon according to the normal traditional procedures established by international law." Similarly, see the statement by Benin in connection with the same treaty (Status of Multilateral Arms Regulation and Disarmament Agreements, Fifth Edition, 1996 (United Nations publication, Sales No. E.97.IX.3, p. 40)) or the one by the Republic of Korea when it signed the Convention on Biological Weapons (*ibid*., p. 176).

[259] Cf. the statement by the United States concerning its participation in the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed in Geneva on 13 July 1931, which "does not involve any contractual obligation on the part of the United States of America to a country represented by a regime or entity which the Government of the United States of America does not recognize as the government of that country until such country has a Government recognized by the Government of the United States of America" (*Multilateral Treaties* ..., chap. VI.8).

feels that this possibility is too hypothetical at present to warrant making a specific reference to it in guideline 1.5.1.

(13) In adopting guideline 1.5.1, the Commission was guided by the fundamental consideration that the central problem here is that of non-recognition, which is peripheral to the right to enter reservations. The Commission felt that it was essential to mention this particular category of statements, which play a major role in contemporary international relations; as for all unilateral statements that are neither reservations nor interpretative declarations, however, it chose to focus on what it saw as strictly necessary to make a distinction between them and refrained from "spilling over" into issues relating to the recognition of States.

1.5.2 Statements concerning modalities of implementation of a treaty at the internal level

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 affecting its rights and obligations towards the other contracting States or contracting organizations, is outside the scope of the present Guide to Practice.

Commentary

(1) "Informative declarations", whereby a State informs its partners, for example, of the internal authorities that will be responsible for implementing the treaty, regardless of how it will discharge its obligations or how it will exercise its rights under the treaty, are outside the scope of the present Guide to Practice.

(2) The practice of this type of unilateral declaration seems particularly developed in the United States of America, where three categories have been noted: "Statements initiated by the Senate may authorize the President to issue more concrete instructions for the implementation of the treaty obligations on the internal level or by means of agreements of a special kind with the other parties or they may let certain measures of implementation pend later authorization by Congress."[260]

(3) Thus, authorization to ratify the Statute of the International Atomic Energy Agency (IAEA) was given by the United States Senate:

> "subject to the interpretation and understanding which is hereby made a part and condition of the resolution of ratification, that (1) any amendment to the Statute shall be submitted to the Senate for its advice and consent, as in the case of the Statute itself, and (2) the United States will not remain a member of the Agency in the event of an amendment to the Statute being adopted to which the Senate by a formal vote shall refuse its advice and consent".[261]

(4) This declaration was attached to the United States instrument of ratification (the State party called it an "interpretation and understanding"), with the following explanation:

[260] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, *op. cit*. (footnote ... above), p. 102.

[261] Text in Marjorie M. Whiteman, *Digest of International Law*, vol. 14, 1970, p. 191; see also the "interpretation and explanation" attached to the instrument of ratification of the Convention establishing the Organization for Economic Cooperation and Development (OECD) (*ibid*., p. 192).

> "The Government of the United States of America considers that the above statement of interpretation and understanding pertains only to United States constitutional procedures and is of a purely domestic character."[262]

(5) As widespread as this practice is on the part of the United States, the latter is not the only country to use it. For example, in ratifying the United Nations Convention on the Law of the Sea, Greece declared that it:

> "secures all the rights and assumes all the obligations deriving from the Convention" and that
>
> "[It] shall determine when and how it shall exercise these rights, according to its national strategy. This shall not imply that Greece renounces these rights in any way".[263]

(6) Occasionally, however, the distinction between an informative declaration and an interpretative declaration may be unclear, as Sweden notes in its reply to the Commission's questionnaire on reservations:[264] "It should be noted that some of the declarations referred to include purely informative as well as interpretative elements. Only the latter are being dealt with here, although the distinction may sometimes be vague." By way of example, Sweden, explaining the reasons for the declaration attached to its instrument of ratification of the 1980 European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, stated: "The reason for the declaration [...] was not only to provide information on which Swedish authorities and bodies would fall within the scope of the Convention, but also to convey that its application would be confined to those indicated; e.g. to exclude other bodies such as parishes which under Swedish law are local public entities." Here one can probably say that this is really a reservation by means of which the author purports to exclude the application of the treaty to certain types of institution to which it might otherwise apply. At the very least, it might be a true interpretative declaration explaining how Sweden understands the treaty.

(7) This is not, however, the case with purely informative declarations, which, like those of the United States cited earlier,[265] cannot and do not purport to have any international effect and concern only relations between Congress and the President. The problem arose in connection with a declaration of this type made by the United States in respect of a treaty concluded with Canada in 1950 on the subject of the Niagara River. The Senate would only authorize ratification through a "reservation" that specifically identified the competent national authorities for the American side;[266] this reservation was transmitted to Canada, which accepted it, stating that it did so "because its provisions relate only to the internal application of the treaty within the United States and do not affect Canada's rights or obligations under the treaty".[267] Following an internal dispute, the District of Columbia Court of Appeal ruled, in a judgement dated 20 June 1957, that the "reservation" had not modified the treaty in any way and that, as it related only to the expression of purely domestic concerns, it did not constitute a true reservation in the sense of international

[262] *Ibid*., pp. 191–192.
[263] *Multilateral Treaties* …, chap. XXI.6.
[264] Reply to question 3.1.
[265] Paras. (2) to (6).
[266] This famous declaration is known as the "Niagara reservation"; see Louis Henkin, "The Treaty Makers and the Law Makers: The Niagara reservation", *Columbia Law Review* 1956, pp. 1151–1182.
[267] Quoted by Marjorie M. Whiteman, *op. cit*. (footnote ... above), p. 168.

law.[268] This reasoning is further upheld[269] by the fact that the declaration did not purport to produce any effect at the international level.

(8) For the same reasons, it would be difficult to call such a unilateral declaration "an interpretative declaration": it does not interpret one or more of the provisions of the treaty, but is directed only at the internal modalities of its implementation. It can also be seen from United States practice that such declarations are not systematically attached to the instrument by which the country expresses its consent to be bound by a treaty,[270] and this clearly demonstrates that they are exclusively domestic in scope.

(9) Accordingly, it would appear that declarations which simply give indications of the manner in which the State that formulates them will implement the treaty at the internal level are not interpretative declarations, even though they bear a definite relationship to the treaty.

(10) The above comments may also apply to certain unilateral declarations formulated by an international organization in relation to a treaty. For example, the European Community made the following declaration when depositing the instrument of approval of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005: "As regards the Community competences described in the Declaration pursuant to Article 27 (3) (c) of the Convention, the Community is bound by the Convention and will ensure its due implementation. It follows that the Member States of the Community which are party to the Convention in their mutual relations apply the provisions of the Convention in accordance with the Community's internal rules and without prejudice to appropriate amendments being made to these rules."[271]

(11) The Commission considers that the expression "at the internal level" is not excessive as regards unilateral declarations of this type formulated by international organizations, there no longer being any doubt as to the existence of an "internal" law peculiar to each international organization.[272]

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[268] *Power of Authority of the State of New York v. Federal Power Commission*, 247 F.2d 538-544 (D.C. Cir, 1957); for a fuller account of the case, see Marjorie M. Whiteman, *op. cit*., pp. 165–169; William W. Bishop, Jr., "Reservations to treaties", *op. cit*., pp. 317–322; or Frank Horn, *op. cit*. (footnote ... above), pp. 107–108.

[269] The fact that the "Niagara reservation" was formulated in the context of a bilateral treaty does not weaken this reasoning; quite the contrary: while a "reservation" to a bilateral treaty can be viewed as an offer to renegotiate (see guideline 1.6.1), which, in this case, Canada accepted, it is quite significant that the Court of Appeals held that it had no international scope. It would in fact be difficult to see how Canada could have "objected" to a declaration that did not concern it.

[270] See David Hunter Miller, *Reservations to Treaties – Their Effect and the Procedure in Regard Thereto* (Washington, 1919), pp. 170–171, or Marjorie M. Whiteman, *op. cit*. (footnote ... above), pp. 186 ff.

[271] See text of the declaration on the UNESCO website at the following address: http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION =201.html#RESERVES or in the *Official Journal of the European Communities*, OJ L 201 of 25.7.2006, pp. 15–30, Annex 2. Along the same lines, see the declaration made by the European Community when signing the Convention of 25 February 1991 on Environmental Impact Assessment in a Transboundary Context: "It is understood that the Community Member States, in their mutual relations, will apply the Convention in accordance with the Community's internal rules, including those of the EURATOM Treaty, and without prejudice to appropriate amendments being made to those rules" (*Multilateral Treaties* ..., chap. XXVII.4). See also similar declarations by the European Community in respect of the 1982 Convention on the Law of the Sea (*ibid.*, chap. XXI.6) and the United Nations Framework Convention on Climate Change (*ibid.*, chap. XXVII.7).

[272] See, for example, P. Reuter, "*Principes de droit international public*", *Recueil des cours* ..., 1961-II,

(12) The words "without affecting" inserted in guideline 1.5.2 are intended to draw attention to the fact that States and international organizations which formulate unilateral declarations do not have the objective of affecting the rights and obligations of the declarant in relation to the other contracting States and contracting organizations, but that it cannot be excluded that those declarations may have such effects, in particular through estoppel or, more generally, owing to the application of the principle of good faith. Moreover, if, as is sometimes asserted, unilateral declarations made in respect of the manner in which their authors will implement their obligations under the treaty at the internal level may constitute genuine reservations (especially in the field of human rights), these declarations must clearly be treated as such; but this is true of all the unilateral declarations listed in this section.

1.5.3 Unilateral statements made under a clause providing for options

1. A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty permitting the parties to accept an obligation that is not otherwise imposed by the treaty, or permitting them to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in a statement by which a State or an international organization accepts, by virtue of a clause in a treaty, an obligation that is not otherwise imposed by the treaty does not constitute a reservation.

Commentary

(1) Paragraph 1 of guideline 1.5.3 covers two cases in which a statement is made under an express treaty provision that offers contracting States and contracting organizations an element of choice: the first concerns an optional clause that the author of the statement is free to choose or not, while the second involves a clause that permits the contracting State or contracting organization to accept only certain obligations[273] from among several specified in the treaty.

(2) The unilateral statements referred to in the first case covered by guideline 1.5.3 may seem similar to those mentioned in guideline 1.1.6 (which constitute reservations): *i.e.* statements made under a clause expressly authorizing the exclusion or the modification of certain provisions of a treaty. In both cases, the treaty expressly provides for such statements, which contracting States and contracting organizations are free to make in order to modify the obligations imposed on them by the treaty. However, they are also very different in nature: while statements made under an exclusionary clause (or an opting-out or contracting-out clause) purport to exclude or modify the legal effect of certain provisions of the treaty as they apply to their authors and must therefore be viewed as genuine reservations, those made under optional clauses have the effect of increasing the declarant's

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vol. 103, particularly pp. 526–530; C.W. Jenks, *The Proper Law of International Organizations* (London, Stevens, 1962), 282 p.; P. Cahier, "*Le droit interne des organisations internationales*", *Recueil general de droit international public*, 1963, pp. 563–602; or G. Balladore-Pallieri, "*Le droit interne des organisations internationales*", *Recueil des cours ...*, 1969-II, vol. 127, pp. 1–138 or C. Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2005), pp. 15–45. See also the text of the draft articles on the responsibility of international organizations adopted by the Commission on first reading, in particular, article 2, subparagraph (b), and paras. (15) to (17) of the commentary thereto, Report of the International Law Commission on the work of its sixty-first session, *Official Records of the General Assembly*, *Sixty-fourth Session*, *Supplement No. 10* (A/64/10), pp. 50–51.

[273] Or at least one of the treaty obligations.

obligations beyond what is normally expected of the parties under the treaty and do not affect its entry into force in their case.

(3) The purpose of optional clauses or opting-in (or contracting-in) clauses, which may be defined as provisions stipulating that the parties to a treaty may accept obligations which, in the absence of explicit acceptance, would not be automatically applicable to them, is not to reduce, but to increase, the obligations arising from the treaty for the author of the unilateral statement.[274]

(4) The most famous optional clause is certainly Article 36, paragraph 2, of the Statute of the International Court of Justice,[275] 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 contemplated in article 41, paragraph 1, of the 1966 International Covenant on Civil and Political Rights,[276] or are exclusively prescriptive in nature, as in the case, for example, of article 25 of the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations.[277]

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[274] According to Michel Virally, these are clauses "to which the parties accede only through special acceptance as distinct from accession to the treaty as a whole" ("*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. 13).

[275] "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."

[276] "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 …"; 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, and correspond to current article 34 of the Convention) 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 which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

[277] "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"; 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 the ILO to the ICJ in 1951, in ICJ, *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).

(5) Despite some academic opinions to the contrary,[278] statements made under such clauses actually have little in common at the technical level with reservations, apart from the (important) fact that they both purport to modify the application of the effects of the treaty, and it is quite clear that "opt-out clauses seem to be much closer to reservations than opt-in clauses".[279] Indeed, not only can

(a) Statements made under optional clauses be formulated, in most cases, at any time, but also,

(b) Optional clauses "start from a presumption that parties are not bound by anything other than what they have explicitly chosen",[280] while exclusionary clauses, like the mechanism for reservations, start from the opposite assumption; and

(c) 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[281] or to limit the obligations imposed on [the author] by the treaty,[282] but, instead, to increase them, while the mere entry into force of the treaty for the author does not have this effect.

(6) Here again, to a certain degree, the complex problems associated with "extensive reservations"[283] arise. The only difference between these extensive reservations and those under consideration here is that the former are formulated solely on the initiative of the author, while the latter are made under a treaty.

(7) If the treaty so provides or, given the silence of the treaty, if it is not contrary to the object and purpose of the provision in question,[284] 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. This is the case with the "reservations" frequently made by States when they accept jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Court's Statute.[285]

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[278] 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", *Fordham Law Review*, 1970–1971, Part I, pp. 68 and 75, and Part II, p. 450.

[279] Sia Spiliopoulo Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", *I.C.L.Q.*, 1999, pp. 479–514, especially p. 505.

[280] *Ibid.*

[281] See guideline 1.1.

[282] See guideline 1.1.1.

[283] See paras. (9) and (10) of the commentary to guideline 1.5.

[284] 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 [on 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 footnote ... above) (judgment of 23 March 1995, para. 75, *R.U.D.H.* 1995, p. 139).

[285] 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*, 1920–2005, vol. II. *Jurisdiction*, pp. 737–744; see also the dissenting opinion of Judge Bedjaoui attached to the judgment of the ICJ of 4 December 1998 in the case concerning *Fisheries Jurisdiction (Spain v. Canada)*, para. 42, and the judgment of 21 June 2000 in the case concerning the *Aerial Incident of 10 August 1999 (Pakistan v. India)*, paras. 37–38.

(8) While no purpose would be served by deciding whether a distinction needs to be drawn between "reservations" and "conditions",[286] it is sufficient to state that:

> "These reservations have nothing in common with reservations encountered in multilateral 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."[287]

(9) These observations are consistent with the jurisprudence of the International Court of Justice and, in particular, its 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 ..."[288]

(10) The same is true for the reservations which States attach to statements made under other optional clauses, such as those resulting from acceptance of the jurisdiction of the International Court of Justice under article 17 of the General Act of Arbitration, in respect of which the Court has stressed "the close and necessary link that always exists between a jurisdictional clause and reservations to it".[289]

(11) 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 it. However, the reservation in question cannot be separated from the statement and does not in itself constitute a unilateral statement.

(12) By means of the phrase "or permitting them to choose between two or more provisions of the treaty", guideline 1.5.3 also covers the separate case in which the treaty requires States to choose between certain of its provisions, on the understanding, as shown by the examples given below, that the expression "two or more provisions of the treaty" is taken to cover not only articles and subparagraphs, but also chapters, sections and parts of a treaty and even annexes forming an integral part of it.

(13) This case is expressly dealt with in article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions. While paragraph 1 concerns the partial exclusion of the provisions of

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[286] Shabtai Rosenne makes a distinction between these two concepts (*ibid.*, pp. 768–769).

[287] *Ibid.*, pp. 737–738. The passage in question from the judgment relating to the *Right of Passage over Indian Territory* case of 12 April 1960 appears on page 34 of *I.C.J. Reports 1960*.

[288] Paragraph 44. See also paragraph 47: "Therefore, declarations and reservations are to be read as a whole."

[289] Judgment of 19 December 1978 in the *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1978*, p. 33, para. 79.

a treaty under an exclusionary clause, paragraph 2 relates to the conceptually different case 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."

(14) The commentary to this provision, reproduced without change by the Vienna Conference,[290] is concise but sufficiently clear about the case covered:

> "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 conventions. The treaty offers each State a choice between differing provisions of the treaty."[291]

(15) As has been noted,[292] it is not accurate (or, at all events, it is no longer 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, but this, in turn, includes two different hypotheses which do not fully overlap.

(16) The first is illustrated, for example, by the statements made under the 1928 General Act for Conciliation, Judicial Settlement and Arbitration, 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)."[293]

The same is true of several International Labour Organization (ILO) conventions, in which this technique, often used subsequently,[294] 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, including at least one of Parts IV, V, VI, IX and X;
>
> (iii) the relevant provisions of Parts XI, XII and XIII; and
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> (iv) Part XIV."

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[290] 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.

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

[292] Sia Spiliopoulo Åkermark, *op. cit.*, p. 504.

[293] 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)."

[294] See P.-H. Imbert, *op. cit.*, p. 172.

Along the same lines, mention may be made of the European Social Charter of 18 October 1961, article 20, paragraph 1, of which provides for a partially optional system of acceptance.[295]

> "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;
>
> (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."[296]

(17) The same is true of 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). The question is no longer one 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,[297] and the acceptance of a treaty is not partial (even if the obligations deriving from it may be more or less binding depending on the option selected).

(18) These "alternative clauses" are less common than those analysed above. They nevertheless exist, as demonstrated by, for example, article 2 of ILO Convention No. 96 (revised) of 1949 concerning Fee-Charging Employment Agencies:[298]

> "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.

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

[296] This complex system was used again in article A, paragraph 1, of the revised Social Charter on 3 May 1996. See also articles 2 and 3 of the 1964 European Code of Social Security and article 2 of the European Charter for Regional or Minority Languages of 5 November 1992: "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."

[297] Article 287 of the 1982 United Nations Convention on the Law of the Sea falls 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 provided for in annex VII applies. But there may be an accumulation of different procedures.

[298] 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 (*op. cit.*, p. 172); see also Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, *op. cit.*, p. 134.

> 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 Members in question and the provisions of part II shall apply to it."[299]

(19) As has been observed, "[o]ptional commitments ought to be distinguished from authorized reservations, although they in many respects resemble such reservations".[300] Moreover, the silence of article 17, paragraph 2, of the Vienna Conventions, which differs greatly from the reference in paragraph 1 to articles 19 to 23 on reservations,[301] constitutes, in contrast with unilateral statements made under an exclusionary clause, an indication of the clear dividing line between reservations and these alternative commitments.

(20) 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 those 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 expression of consent to be bound (even if they may subsequently be modified, although, under certain conditions, reservations, too, may be modified). And the fact that provision must be made for them in the treaty to which they apply does not constitute a factor differentiating them from reservations, since reservations may also be provided for in a restrictive way by a reservation clause.

(21) Yet there are striking differences between these statements and reservations, for, unlike a reservation, a statement made under a clause providing for options is the condition *sine qua non* of the participation of the author of the statement in the treaty, contrary to a statement made under the optional clause referred to in the first case mentioned in the guideline. Moreover, although they exclude the application of certain provisions of the treaty in respect of the State or international organization making the statement, such 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.

1.6 Unilateral statements in respect of bilateral treaties

Commentary

(1) The above guidelines seek to delimit as closely as possible the definition of reservations to multilateral treaties and other unilateral statements that are formulated in connection with a treaty and with which they may be compared, or even confused, including interpretative declarations. The Commission questioned whether it was possible to transpose these individual definitions to unilateral statements formulated in respect of bilateral treaties or at the time of their signature or of the expression of the final consent of the parties to be bound. This is the subject matter of section 1.6 of the Guide to Practice.

(2) Strictly speaking, it would have been logical to include the individual definitions which appear in the guidelines hereafter respectively in section 1.5, insofar as guideline

[299] See also section 1 of article XIV of the IMF Statutes (amended 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."

[300] F. Horn, *ibid.*, p. 133.

[301] Cf. paras. (12) to (14) of the commentary to guideline 1.1.6.

1.6.1 is concerned (since the Commission considers that so-called "reservations" to bilateral treaties do not correspond to the definition of reservations), and in section 1.2, insofar as guidelines 1.6.2 and 1.6.3 are concerned (since they deal with genuine interpretative declarations). Given its particular nature, however, the Commission felt that the Guide would better serve its practical purpose if the guidelines devoted more specifically to unilateral statements formulated in respect of bilateral treaties were to be grouped in a single separate section.

(3) The Commission considers, moreover, that the guidelines on unilateral statements other than reservations and interpretative declarations, grouped in section 1.5, can be applied, where necessary, to those dealing with bilateral treaties.[302]

1.6.1 "Reservations" to bilateral treaties

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, does not constitute a reservation within the meaning of the present Guide to Practice.

Commentary

(1) The 1969 and 1986 Vienna Conventions are silent on the subject of reservations to bilateral treaties: neither article 2, paragraph 1 (d), which defines reservations, nor articles 19 to 23,[303] which set out their legal regime, raise or exclude expressly the possibility of such reservations. The 1978 Convention on Succession of States in respect of Treaties explicitly contemplates only reservations to multilateral treaties.

(2) While at the outset of its work on reservations the Commission was divided with regard to reservations only to multilateral treaties,[304] in 1956, Sir Gerald Fitzmaurice stressed, in his initial report, the particular features of the regime of reservations to treaties with limited participation,[305] a category in which he expressly included bilateral

[302] It being understood that transposition is not always possible. In particular, guideline 1.5.1, concerning statements of non-recognition, is not relevant to bilateral treaties.

[303] At best, one can say that article 20, paragraph 1, and article 21, paragraph 2, are directed at "the other contracting States [and contracting organizations]" or "the other parties to the treaty", both in the plural, and that article 20, paragraph 2, deals separately with treaties in whose negotiation a limited number of States or international organizations have participated, which is exactly what happens when a treaty involves only two parties. However, this argument does not in itself provide sufficient justification to say that the Conventions acknowledge the existence of reservations to bilateral treaties: the phrase "limited number of ... negotiating States" may mean "two or more States", but it can also be interpreted as indicating only those multilateral treaties that bind a small number of States.

[304] As early as 1950, the Commission stated that "the application ... in detail" of the principle that a reservation could become effective only with the consent of the parties "to the great variety of situations which may arise in the making of *multilateral* treaties was felt to require further consideration" (Report of the International Law Commission covering its second session, *Official Records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316), para. 164, emphasis added). The study requested of the Commission in General Assembly resolution 478 (V) was supposed to (and did) focus exclusively on "the question of reservations to multilateral conventions".

[305] The Commission also questioned whether the particular features of "reservations" to bilateral treaties did not characterize rather the unilateral statements made with respect to "plurilateral" (or "multiple-party bilateral") treaties, such as, for example, the peace treaties concluded at the end of the First and Second World Wars. Those instruments have the appearance of multilateral treaties but may in fact be regarded as bilateral treaties. It is doubtful whether the distinction, although interesting from a theoretical point of view, affects the scope of guideline 1.6.1: either the treaty will be considered to

agreements.[306] Likewise, in his first report, in 1962, Sir Humphrey Waldock did not exclude the case of reservations to bilateral treaties but treated it separately.[307]

(3) However, this reference to bilateral treaties disappeared from the draft text after Sir Humphrey's proposals were considered. The introductory paragraph of the commentary to draft articles 16 and 17 (future articles 19 and 20 of the 1969 Convention), contained in the Commission's 1962 report and included in its final report in 1966, explains this as follows:

> "A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement — either adopting or rejecting the reservation — the treaty will be concluded; if not, it will fall to the ground."[308]

Following a suggestion by the United States of America, the Commission had furthermore expressly entitled the section of the draft articles on reservations as "Reservations to multilateral treaties".[309]

(4) It is hardly possible, however, to draw any conclusion from this in view of the positions taken during the Vienna Conference and the decision of that Conference to revert to the heading "Reservations" for Part II, section 2, of the 1969 Convention on the Law of Treaties. It should in particular be noted that the Conference's Drafting Committee approved a Hungarian proposal to delete the reference to multilateral treaties from the title of the section on reservations[310] in order not to prejudge the issue of reservations to bilateral treaties.[311]

(5) However, after that decision, the question occasioned an exchange of views between the President of the Conference, Mr. Roberto Ago, and the Chairman of the Drafting Committee, Mr. Mustapha K. Yasseen,[312] which indicates that the Conference had not, in

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have two actual parties (notwithstanding the number of those contracting), the situation covered by guideline 1.6.1, or the statement is made by one constituent of the "multiple party" and constitutes a conventional reservation within the meaning of guideline 1.1.

306 See draft article 38 ("Reservations to bilateral treaties and other treaties with limited participation") which he proposed: "In the case of bilateral treaties, or plurilateral treaties made between a limited number of States for purposes specially interesting those States, no reservations may be made, unless the treaty in terms so permits, or all the other negotiating States expressly so agree" (*Yearbook ... 1956*, vol. II, p. 115).

307 See draft article 18, para. 4 (a): "In the case of a bilateral treaty, the consent of the other negotiating State to the reservation shall automatically establish the reservation as a term of the treaty between the two States" (*Yearbook ... 1962*, vol. II, p. 61).

308 *Yearbook ... 1962*, vol. II, pp. 180–181, and *Yearbook ... 1966*, vol. II, p. 203. In his first report, Sir Humphrey Waldock simply said: "Reservations to bilateral treaties present no problem" (*Yearbook ... 1962*, vol. II, p. 62).

309 See the report of the Commission to the General Assembly on the work of the first part of its seventeenth session, *Yearbook ... 1965*, vol. II, p. 161, and the report of the Commission to the General Assembly on the work of its eighteenth session, *Yearbook ... 1966*, vol. II, p. 202; see also the comments of Sir Humphrey Waldock, fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, p. 45.

310 Document A/CONF.39/C.1/L.137; see also similar amendments submitted by China (A/CONF.39/C.1/L.13) and Chile (A/CONF.39/C.1/L.22).

311 See the explanations of Mr. Yasseen, Chairman of the Drafting Committee, *United Nations Conference on the Law of Treaties, Second session, Vienna, 9 April–22 May 1969, Official Records*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations, New York, 1970, Second session, 10th plenary meeting, 29 April 1969, para. 23, p. 28.

312 *Ibid.*, 11th plenary meeting, 30 April 1969, p. 37:

> "19. **The President** said that, personally, he had been surprised to hear that the Drafting

fact, taken a firm position as to the existence and legal regime of possible reservations to bilateral treaties.[313]

(6) The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations sheds no new light on the question.[314] However, the 1978 Vienna Convention on Succession of States in respect of Treaties tends to confirm the general impression gathered from a review of the 1969 and 1986 Conventions that the legal regime of reservations provided for in those Conventions (to which article 20, paragraph 3, of the 1978 Convention refers) is applicable solely to multilateral treaties and not to bilateral treaties. Indeed, article 20, the only provision of that instrument to deal with reservations, is included in section 2 of Part III,[315] which deals with multilateral treaties,[316] and expressly stipulates that it is applicable "when a newly independent State establishes its status as a party or as a contracting State to a *multilateral*

Committee had entertained the idea of reservations to bilateral treaties. As a law student, he had been taught that that idea was a contradiction in terms, for when one party to such a treaty proposed a change, that constituted a new proposal, not a reservation. He had interpreted the abbreviation of the title of Section 2 as an admission that the applicability of reservations only to multilateral treaties was self-evident. If there were any doubt on the matter, the Drafting Committee would do well to revert to the title proposed by the International Law Commission.

"20. **Mr. Yasseen**, Chairman of the Drafting Committee, said that some members of the Drafting Committee had thought that the practice of certain States might convey the impression that reservations could be made to bilateral treaties. The deletion of the reference to multilateral treaties from the title of Section 2 did not, however, mean that the Drafting Committee had decided that reservations to bilateral treaties were possible. The purpose of the deletion had merely been not to prejudge the question in any way.

"21. Speaking as the representative of Iraq, he said he fully shared the President's view that any change proposed to a bilateral treaty represented a new offer and could not be regarded as a reservation.

"22. **The President** asked whether the Drafting Committee agreed that the procedures set out in the articles in Section 2 related only to multilateral treaties.

"23. **Mr. Yasseen**, Chairman of the Drafting Committee, said he was not in a position to confirm that statement on behalf of the entire Drafting Committee, which had not been unanimous on the point.

"24. **The President** said that, independently of the principle involved, the procedures laid down in the articles on reservations that the Conference had considered were not applicable to bilateral treaties."

313 Writers interpret this exchange of views differently. Compare J.M. Ruda, "Reservations to Treaties", *Recueil des cours ...*, 1975-III, vol. 146, p. 110, Renata Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, 1970, p. 294, and Richard W. Edwards, Jr., "Reservations to Treaties", *Michigan Journal of International Law*, 1989, p. 404.

314 In his fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, Paul Reuter said: "treaties concluded by international organizations are almost always bilateral treaties, for which reservations may come into play in theory but are of no interest in practice", *Yearbook ... 1975*, vol. II, p. 36. See also the Report of the Commission to the General Assembly on the work of its twenty-ninth session, *Yearbook ... 1977*, vol. II, Part Two, commentary to draft article 19, p. 106, the Report of the Commission to the General Assembly on the work of its thirty-third session, *Yearbook ... 1981*, vol. II, Part Two, pp. 137–138, and the Report of the Commission on the work of its thirty-fourth session, *Yearbook ... 1982*, vol. II, Part Two, p. 34.

315 Which concerns only "Newly independent States".

316 Section 3 deals with "Bilateral treaties".

treaty by a notification of succession", the notification of succession being generally admitted in respect of open multilateral treaties.

(7) Here again, however, the only conclusion one can draw is that the Vienna regime is not applicable to reservations to bilateral treaties, including in cases of succession of States. This does not mean, however, that the concept of "reservations" to bilateral treaties is inconceivable or non-existent.

(8) In practice some States do not hesitate to make unilateral statements which they call "reservations" with respect to bilateral treaties, while others declare themselves hostile to them.

(9) This is a practice which has been in existence for a long time,[317] widely used by the United States of America[318] and, less frequently, by other States in their relations with the United States.[319] The fact remains that, of all the States which replied to the International Law Commission questionnaire on reservations, only the United States gave an affirmative to question 1.4[320] all the others answered in the negative.[321] Some of them simply said that

[317] The oldest example of a "reservation" to a bilateral treaty goes back to the resolution of 24 June 1795, in which the United States Senate authorized ratification of the Jay Treaty of 19 November 1794, "on condition that there be added to the said treaty an article, whereby it shall be agreed to suspend the operation of so much of the 12th article as respects the trade which his said Majesty thereby consents may be carried on, between the United States and his islands in the West Indies, in the manner, and on the terms and conditions therein specified" (quoted by William W. Bishop, Jr., *Recueil des cours ...*, 1961-II, vol. 103, pp. 260–261; Bishop even cites a precedent that goes back to the Articles of Confederation: in 1778, the United States Congress demanded and obtained renegotiation of the Treaty of Commerce with France of 6 February 1778 (*ibid.*, note 13)).

[318] In 1929, Marjorie Owen estimated somewhere between 66 and 87 bilateral treaties had been subject to a "reservation" by the United States after the Senate had imposed a condition on their ratification ("Reservations to Multilateral Treaties", *Yale Law Journal*, 1928–1929, p. 1091). More recently, Kevin Kennedy compiled detailed statistics covering the period from 1795 to 1990. These data show that the United States Senate made its advice and consent to ratify conditional for 115 bilateral treaties during that period, a figure that includes interpretative declarations, which account for 15 per cent on average of all bilateral treaties to which the United States has become a party in just under two centuries (Kevin C. Kennedy, "Conditional approval of treaties by the U.S. Senate", *Loyola of Los Angeles International and Comparative Journal*, October 1996, p. 98). The same statistics show that this practice of "amendments" or "reservations" involves all categories of agreement and is particularly frequent in the area of extradition, friendship, commerce and navigation treaties ("*FCN treaties*"), and even peace treaties (see *ibid.*, pp. 99–103 and 112–116). In its response to the questionnaire on reservations, the United States of America confirmed that this practice remains important where the country's bilateral treaties are concerned. The United States attached to its response a list of 13 bilateral treaties that were accepted with reservations between 1975 and 1985. Such was the case, for example, of the Treaties concerning the permanent neutrality and operation of the Panama Canal of 7 September 1977, the Special Agreement under which Canada and the United States agreed to submit their dispute on the delimitation of maritime zones in the Gulf of Maine area to the International Court of Justice, and the Supplementary Extradition Treaty with the United Kingdom of 25 June 1985.

[319] Either its partners make counter-proposals in response to the reservations of the United States (see examples given by Marjorie Owen, "Reservations to multilateral treaties", *Yale Law Journal*, 1928–1929, pp. 1090–1091 and William W. Bishop, Jr., "Reservations to treaties", *Recueil des cours ...*, 1961-II, vol. 103, pp. 267–269), or they themselves take the initiative (see the examples given by Marjorie M. Whiteman, *Digest of International Law*, vol. 14, 1970, p. 161 (Japan), M. Owen, *ibid.*, p. 1093 (New Grenada), Green Haywood Hackworth, *Digest of International Law*, vol. V, Washington, D.C., United States Printing Office, 1943, pp. 126–130 (Portugal, Costa Rica, El Salvador, Romania).

[320] The question read: "Has the State formulated reservations to bilateral treaties?".

[321] Bolivia, Canada, Chile, Croatia, Denmark, Finland, France, Germany, Holy See, India, Israel, Italy, Japan, Republic of Korea, Kuwait, Mexico, Monaco, New Zealand, Panama, Peru, San Marino,

they do not formulate reservations to bilateral treaties, but others expressed concerns about that practice.[322]

(10) Another important feature of the practice of States in this area is the fact that, in all cases where the United States or its partners have entered "reservations" (often called "amendments")[323] to bilateral treaties, they have endeavoured in all cases to renegotiate the treaty in question and to obtain the other contracting State's acceptance of the modification which is the subject of the "reservation".[324] If agreement is obtained, the treaty enters into force with the modification in question;[325] if not, the ratification process is discontinued and the treaty does not enter into force.[326]

Slovakia, Slovenia, Spain, Sweden and Switzerland.

[322] Cf. Germany's position: "The Federal Republic has not formulated reservations to bilateral treaties. It shares the commonly held view that a State seeking to attach a reservation to a bilateral treaty would in effect refuse acceptance of that treaty as drafted. This would constitute an offer for a differently formulated treaty incorporating the content of the reservation and would thus result in the reopening of negotiations." The replies from Italy and the United Kingdom were very similar. However, the United Kingdom added: "The United Kingdom does not itself seek to make reservations a condition of acceptance of a bilateral treaty. If Parliament were (exceptionally) to refuse to enact the legislation necessary to enable the United Kingdom to give effect to a bilateral treaty, the United Kingdom authorities would normally seek to renegotiate the treaty in an endeavour to overcome the difficulties."

[323] Kevin C. Kennedy has identified 12 different categories of conditions set by the United States Senate for ratification of treaties (bilateral and multilateral) but notes that 4 of these account for 90 per cent of all cases: "understandings", "reservations", "amendments" and "declarations". However, the relative share of each varies over time, as the following table shows:

Type of condition	*1845–1895*	*1896–1945*	*1946–1990*
Amendments	36	22	3
Declarations	0	3	14
Reservations	1	17	44
Understandings	1	38	32

("Conditional approval of treaties by the U.S. Senate", *Loyola of Los Angeles International and Comparative Law Journal*, October 1996, p. 100).

[324] As the Department of State noted in its instructions to the United States Ambassador in Madrid following Spain's refusal to accept an "amendment" to a 1904 extradition treaty which the Senate had adopted, "[t]he action of the Senate consists in advising an amendment which, if accepted by the other party, is consented to in advance. In other words, the Senate advises that the President negotiate with the foreign Government with a view to obtaining its acceptance of the advised amendment". (Quoted by Green Haywood Hackworth, *Digest of International Law*, vol. V (Washington, D.C., United States Printing Office, 1943), p. 115.)

[325] In some cases, the other contracting State makes counter-offers which are also incorporated into the treaty. For example, Napoleon accepted a modification made by the Senate to the Treaty of Peace and Amity of 1800 between the United States and France, but then attached his own condition to it, which the Senate accepted (see Marjorie Owen, "Reservations to Multilateral Treaties", *Yale Law Journal*, 1928–1929, pp. 1090–1091, or William W. Bishop, Jr., "Reservation to Treaties", *Recueil des cours ...*, 1960-II, vol. 103, pp. 267–268).

[326] See, for example, the United Kingdom's rejection of amendments to an 1803 convention concerning the border between Canada and the United States and an 1824 convention for suppression of the African slave trade which the United States had requested (see William W. Bishop, Jr., "Reservations to Treaties", *Recueil des cours ...*, 1961-II, vol. 103, p. 266) or the United Kingdom's refusal to accept the United States reservations to the treaty of 20 December 1900 dealing with the Panama Canal, which was consequently renegotiated and led to the signing of a new agreement, the Hay-Pauncefote Treaty of 28 November 1902 (see Green Haywood Hackworth, *Digest of International Law*, vol. V

(11) The following conclusions may be drawn from this review:

1. With the exception of the United States of America, States seldom formulate reservations to bilateral treaties, although exceptions do exist (but these apparently occur only in the context of bilateral treaty relations with the United States); and

2. This practice, which may elicit constitutional objections in some countries, does not do so at the international level, if only because the States concluding treaties with the United States of America, having on occasion rejected reservations proposed by that country, have never raised any objections of principle and have even, in some cases, submitted their own "counter-reservations" of a similar nature.

(12) In the light of the practice described above it would appear that, despite some obvious points in common with reservations to multilateral treaties, "reservations" to bilateral treaties are different in one key respect: their intended and their actual effects.

(13) There is no doubt that "reservations" to bilateral treaties are formulated unilaterally by States (and, *a priori*, nothing prevents an international organization from doing the same) once the negotiations have ended, and that they bear different names that may reflect real differences in domestic law, although not in international law. From these different standpoints, they meet the first three criteria set out in the Vienna definition, reproduced in guideline 1.1.

(14) The Commission has found that a "reservation" to a bilateral treaty may be made at any time after the negotiations have ended, once a signature has been put to the final agreed text but before the treaty enters into force, as such statements are aimed at modifying its text.

(15) It is precisely this feature, however, which distinguishes such "reservations" to bilateral treaties from reservations formulated in respect of multilateral treaties. There is no doubt that with a "reservation", one of the parties to a bilateral treaty intends to modify the legal effect of the provisions of the original treaty. Yet while a reservation does not affect the provisions of the instrument in the case of a multilateral treaty, a "reservation" to a bilateral treaty purports to modify it: if the reservation is established,[327] it is not the "*legal effect*" of the provisions in question that will be modified or excluded "*in their application*" to the author; it is the provisions themselves which, by the very nature of things, will be modified. A reservation to a multilateral treaty has a subjective effect: if it is accepted, the legal effect of the provisions in question is modified *vis-à-vis* the State or the international organization that formulated it. A reservation to a bilateral treaty has an objective effect: if it is accepted by the other State, it is the treaty itself that is amended.

(16) As is the case with a reservation to a multilateral treaty,[328] a reservation to a bilateral treaty produces effects only if it is accepted, in one way or another, expressly or implicitly: the co-contracting State or international organization must accept the "reservation", or else the treaty will not enter into force. Thus the difference does not have to do with the need for acceptance, which is present in both cases, in order for the reservation to produce its effects, but with the consequences of acceptance:

(Washington, D.C., United States Printing Office, 1943), pp. 113–114). An even more complicated case concerns ratification of the Convention of Friendship, Reciprocal Establishments, Commerce and Extradition between the United States of America and Switzerland of 25 November 1850, which was the subject of a request for amendments, first by the United States Senate, then by Switzerland, and then again by the Senate, all of which were adopted and the instruments of ratification, which had been amended three times, exchanged five years after the date of signature (*ibid.*, p. 269).

[327] Concerning the concept of the establishment of a reservation, see section 4.1 of the Guide to Practice.

[328] See section 4.1 of the Guide to Practice.

- In the case of a multilateral treaty, an objection does not prevent the instrument from entering into force, even, at times, between the objecting State or international organization and the author of the reservation,[329] and its provisions remain intact;
- In the case of a bilateral treaty, the absence of acceptance by the co-contracting State or international organization prevents the entry into force of the treaty; acceptance entails its modification.

(17) Thus a "reservation" to a bilateral treaty appears to be a proposal to amend the treaty in question or an offer to renegotiate it. This analysis corresponds to the prevailing views in doctrine.[330] Moreover, saying that acceptance of a "reservation" to a bilateral treaty is equivalent to amending the treaty does not make the reservation an amendment: it is simply a unilateral proposal to amend, prior to the treaty's entry into force,[331] while the amendment itself is treaty-based, is the result of an agreement between the parties[332] and is incorporated into the negotiated text, even if it can be contained in one or more separate instruments.

(18) As the Solicitor for the Department of State noted in a memorandum dated 18 April 1921:

> "The action of the Senate when it undertakes to make so-called 'reservations' to a treaty is evidently the same in effect as when it makes so-called 'amendments', whenever such reservations and amendments in any substantial way affect the terms of the treaty. The so-called reservations which the Senate has been making from time to time are really not reservations as that term has generally been understood in international practice up to recent times."[333]

(19) This is also the view of the Commission, which believes that unilateral statements by which a State (or an international organization) purports to obtain a modification of a treaty whose final text has been agreed by the negotiators does not constitute a reservation in the usual meaning of the term in the context of the law of treaties, as has been confirmed by the 1969, 1978 and 1986 Vienna Conventions.

(20) Although most of the members of the Commission consider such a statement to constitute an offer to renegotiate the treaty, which, if accepted by the other contracting State

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[329] See article 20, paragraph 4 (b), of the 1969 and 1986 Conventions and guideline 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation).

[330] Some authors have concluded that a reservation to a bilateral treaty is purely and simply inconceivable (see Charles Rousseau, *Droit international public*, vol. I, *Introduction et sources* (Paris, Pedone, 1970), p. 122, or Alfredo Maresca, *Il diritto dei tratatti – La Convenzione codificatrice di Vienna del 23 Maggio 1969* (Milan, Giuffrè, 1971), pp. 281–282). But all stress the need for the express consent of the other party and the resulting modification of the treaty's actual text (see David Hunter Miller, *Reservations to Treaties: The Effect and the Procedure in Regard Thereto* (Washington, D.C., 1919), pp. 76–77; Marjorie Owen, "Reservations to multilateral treaties", *Yale Law Journal*, 1928–1929, pp. 1093–1094; William W. Bishop, Jr., "Reservations to Treaties", *Recueil des cours* ..., 1961-II, vol. 103, p. 271, note 14).

[331] The term "counter-offer" has been used. Marjorie Owen ("Reservations to multilateral treaties", *Yale Law Journal*, 1928–1929, p. 1091) traces this idea of a "counter-offer" back to Hyde, *International Law*, 1922, para. 519. The expression also appears in the American Law Institute's *Restatement of the Law Third – The Foreign Relations Law of the United States*, Washington, D.C., vol. 1, 14 May 1986, para. 113, p. 182; see also the position of Mr. Ago and Mr. Yasseen, cited in footnote ... above, and that of Paul Reuter, footnote ... above).

[332] See article 39 of the 1969 and 1986 Conventions.

[333] Quoted by Green Haywood Hackworth, *Digest of International Law*, vol. V (United States Printing Office, Washington, 1943), p. 112; along the same lines, see the position of David Hunter Miller, footnote ... above.

or the other contracting organization, becomes an amendment to the treaty, it does not appear essential for this to be stated in the Guide to Practice, since, as the different categories of unilateral statement mentioned in section 1.5 above are neither reservations in the usual meaning of the term nor interpretative statements, they do not fall within the scope of the treaty.[334]

1.6.2 Interpretative declarations in respect of bilateral treaties

Guidelines 1.2 and 1.4 are applicable to interpretative declarations in respect of both multilateral and bilateral treaties.

Commentary

(1) The silence of the Vienna Conventions on the Law of Treaties extends *a fortiori* to interpretative declarations made in respect of bilateral treaties: the Conventions do not mention interpretative declarations in general[335] and are quite cautious insofar as the rules applicable to bilateral treaties are concerned.[336] Such declarations are nonetheless common and, unlike "reservations" to the same treaties,[337] they correspond in all respects to the definition of interpretative declarations adopted for guideline 1.2.

(2) Almost as old as the practice of "reservations" to bilateral treaties,[338] the practice of interpretative declarations in respect of such treaties is less geographically limited[339] and does not seem to give rise to objections where principles are concerned. Of the 22 States that answered question 3.3[340] of the Commission's questionnaire on reservations, 4 said that they had formulated interpretative declarations in respect of bilateral treaties; and one international organization, the International Labour Organization, wrote that it had done so in one situation, while noting that the statement was in reality a "corrigendum", "made in order not to delay signature". However incomplete, these results are nevertheless significant: while only the United States claimed to make "reservations" to bilateral treaties,[341] it is joined here by Panama, Slovakia and the United Kingdom and by one international organization;[342] and while several States criticized the very principle of "reservations" to bilateral treaties,[343] none of them showed any hesitation concerning the formulation of interpretative declarations in respect of such treaties.[344]

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334 See guideline 1.5 and the commentary thereto.

335 See para. (1) of the commentary to guideline 1.2.

336 See para. (1) of the commentary to guideline 1.6.

337 See guideline 1.6.1 and the commentary thereto.

338 William Bishop notes a declaration attached by Spain to its instrument of ratification of the Treaty of 22 February 1819 ceding Florida ("Reservations to Treaties", *Recueil des cours* ..., 1961-II, vol. 103, p. 316).

339 See paras. (9) to (11) of the commentary to guideline 1.6.1. However, as with "reservations" to bilateral treaties, the largest number of examples can be found in the practice of the United States of America; in just the period covered by that country's reply to the questionnaire on reservations (1975–1995), it mentions 28 bilateral treaties to which it attached interpretative declarations upon expressing its consent to be bound.

340 "Has the State attached any interpretative declarations to the expression of its consent to be bound by bilateral treaties?"

341 See para. (7) of the commentary to guideline 1.6.1.

342 In addition, Sweden said: "It may have happened, although very rarely, that Sweden has made interpretative declarations, properly speaking, with regard to bilateral treaties. [...] Declarations of a purely informative nature of course exist."

343 See the commentary to guideline 1.6.1, footnote ...

344 The United Kingdom criticizes the United States "understanding" on the matter of the Treaty concerning the Cayman Islands relating to Mutual Legal Assistance; but what the Government of the

(3) The extent and consistency of the practice of interpretative declarations in respect of bilateral treaties leave little doubt as to how this institution is viewed in international law: it is clearly a "general practice accepted as law".

(4) Whereas the word "reservation" certainly does not have the same meaning when it is applied to a unilateral statement made in respect of a bilateral treaty as it does when it concerns a multilateral instrument, the same is not true in the case of interpretative declarations: in both cases, they are unilateral statements, however named or phrased, made "by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions".[345] Thus, guideline 1.2, which provides this definition, may be considered to be applicable to declarations which interpret bilateral as well as multilateral treaties.

(5) On one point, however, the practice of interpretative declarations in respect of bilateral treaties seems to differ somewhat from the common practice for multilateral treaties. Indeed, it appears from what has been written that "in the case of a bilateral treaty it is the invariable practice, prior to the making of arrangements for the exchange of ratifications and sometimes even prior to ratification of the treaty, for the government making the statement or declaration to notify the other government thereof in order that the latter may have an opportunity to accept, reject, or otherwise express its views with respect thereto".[346] And, once approved, the declaration becomes part of the treaty:

> "... where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument [...], and when the treaty is afterwards ratified by the other party with the declaration attached to it, and their ratifications duly exchanged – the declaration thus annexed is part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged".[347]

(6) It is difficult to argue with this reasoning, which leads one to ask whether interpretative declarations that are made in respect of bilateral treaties, just like "reservations" to such treaties,[348] must necessarily be accepted by the other party. In reality, this does not seem to be the case: in (virtually) all cases, interpretative declarations made in respect of bilateral treaties have been accepted because their author requested it, but one can easily imagine that it might not make such a request. Indeed, the logic which leads one to distinguish between interpretative declarations which are conditional and those which are not[349] would seem to be easily transposed to the case of bilateral treaties: everything depends on the author's intention. It may be the condition *sine qua non* of the author's consent to the treaty, in which case it is a conditional interpretative declaration, identical in nature to those made in respect of multilateral treaties and consistent with the definition proposed in guideline 1.4. But it may also be simply intended to inform the partner of the meaning and scope which the author attributes to the provisions of the treaty without, however, seeking to impose that interpretation on the partner, and in this case it is a

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United Kingdom seems to be rejecting here is the possibility of modifying a bilateral treaty under the guise of interpretation (by means of "understandings" which are really "reservations").

345 Cf. guideline 1.2.

346 Marjorie M. Whiteman, *Digest of International Law*, vol. 14, 1970, pp. 188–189.

347 Judgement of the United States Supreme Court concerning the Spanish declaration made in respect of the Treaty of 22 February 1819, *Doe v. Braden*, 16 How. 635, 656 (US 1853), cited by William W. Bishop, Jr., *op. cit.*, p. 316.

348 See paras. (16) to (20) of the commentary to guideline 1.6.1.

349 See guideline 1.4 and the commentary thereto.

"simple" interpretative declaration, which, like those made in respect of multilateral treaties,[350] can actually be made at any time.

(7) Accordingly, the Commission felt that it was not necessary to adopt specific draft guidelines on interpretative declarations in respect of bilateral treaties, since these fall under the same definition as interpretative declarations in respect of multilateral treaties, whether it be their general definition, as given in guideline 1.2, or the distinction between simple and conditional interpretative declarations which follows from guideline 1.4. It therefore seems to be sufficient to take note of this in the Guide to Practice.

(8) On the other hand, guideline 1.2.1, concerning interpretative declarations formulated jointly, is not, of course, relevant in the case of bilateral treaties.

(9) As regards section 1.3 of this chapter, concerning the distinction between reservations and interpretative declarations, it is difficult to see how, if the term "reservations" in respect of bilateral treaties does not correspond to the definition of reservations given in guideline 1.1, it would be applicable to the latter. At best, it may be thought that the principles set forth therein can be applied, *mutatis mutandis*, to distinguish interpretative declarations from other unilateral statements made in respect of bilateral treaties.

1.6.3 Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party

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

Commentary

(1) Although acceptance of an interpretative declaration formulated by a State in respect of a bilateral treaty is not inherent in such a declaration,[351] it might be asked whether acceptance modifies the legal nature of the interpretative declaration.

(2) In the Commission's opinion, the reply to this question is affirmative: when an interpretative declaration made in respect of a bilateral treaty is accepted by the other party,[352] it becomes an integral part of the treaty and constitutes the authentic interpretation thereof. As the Permanent Court of International Justice noted, "the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it".[353] Yet in the case of a bilateral treaty this power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of a treaty, regardless of its form,[354] exactly as "reservations" to bilateral treaties do once they have been accepted by the co-contracting State or international organization.[355] It becomes an agreement collateral to the treaty which forms part of its context in the sense of paragraphs 2 and 3 (a) of article 31 of the 1969 and 1986 Vienna Conventions; as such, it must be taken into consideration in interpreting the

[350] See guideline 1.2 and paras. (21) to (30) of the commentary thereto.
[351] See paras. (5) and (6) of the commentary to guideline 1.6.2.
[352] And one can imagine that this would be the case even when an interpretative declaration is not conditional.
[353] Advisory Opinion of 6 December 1923, *Jaworzina* case, Series B, No. 8, p. 37.
[354] Exchange of letters, protocol, simple oral agreement, etc.
[355] See guideline 1.6.1 and paras. (15) to (19) of the commentary thereto.

treaty.[356] Moreover, this analysis is consistent with that of the United States Supreme Court in the *Doe* case.[357]

(3) While it is aware that considering this phenomenon in the first part of the Guide to Practice exceeds the scope of that part, which is devoted to the definition, and not the legal regime, of reservations and interpretative declarations,[358] the Commission has seen fit to mention it in a guideline. It does not in fact return to the highly specific question of "reservations" and interpretative declarations in respect of bilateral treaties: in the first case, because they are not reservations, and in the second, because interpretative declarations to bilateral treaties have no distinguishing feature with respect to interpretative declarations to multilateral treaties, except the very one covered in guideline 1.6.2. For purely practical reasons, then, it seems appropriate to make that clear at this stage.

1.7 Alternatives to reservations and interpretative declarations

Commentary

(1) Reservations are not the only procedure enabling the parties to a treaty to exclude or modify the legal effect of certain provisions of the treaty or of certain particular aspects of the treaty as a whole. Accordingly, 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 enable and do indeed enable States and international organizations to modify obligations under treaties to which they are parties; what are involved are alternatives to reservations, and recourse to such procedures may probably make it possible, in specific cases, to overcome some problems linked to reservations. In the Commission's view, these procedures, far from constituting invitations to States to limit the effects of the treaty, would instead help to make recourse to reservations less "necessary" or frequent by offering more flexible treaty techniques.

(2) Some of these alternatives differ profoundly from reservations in that they constitute, not unilateral statements, but clauses in the treaty itself and thus relate more to the process of drafting a treaty than to its application. As they produce effects almost identical to those produced by reservations, these techniques nevertheless deserve to be mentioned in the part of the Guide to Practice devoted to the definition of reservations, if only so as to identify more clearly the key elements of the concept, distinguish them from reservations and, where applicable, draw appropriate conclusions with regard to the legal regime of reservations.

(3) The same problem arises, *mutatis mutandis*, with regard to interpretative declarations whose objective may be achieved by other means.

(4) Some of these alternative procedures are the subject of guidelines in section 1.5 of the Guide to Practice. However, these deal only with "unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations",[359] excluding

[356] Article 31 of the 1969 Convention reads: "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."

[357] See the commentary to guideline 1.6.2, footnote ...

[358] Cf. guideline 1.8.

[359] Cf. guideline 1.5.

other techniques for modifying the provisions of a treaty or their interpretation. Given the practical nature of the Guide, the Commission considered that it might be useful to devote a short section of the instrument to the range of procedures constituting alternatives to reservations and interpretative declarations, to serve as a reminder to users and, in particular, to the negotiators of treaties of the wide range of possibilities available to them for that purpose.

1.7.1 Alternatives to reservations

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- the insertion in the treaty of a clause purporting to limit its scope or application;
- the conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

Commentary

(1) The formulation of reservations constitutes a means for States (and to some extent, for international organizations) partially to preserve their freedom of action while accepting in principle to limit that freedom by becoming bound by a treaty. This "concern of each Government with preserving its capacity to reject or adopt [and adapt] the law (a minimal, defensive concern)"[360] is particularly present in two situations: where the treaty in question deals with especially sensitive matters or contains exceptionally onerous obligations[361] or where it binds States whose situations are very different and whose needs are not necessarily met by a uniform set of rules.

(2) It is this type of consideration which led the authors of the Constitution of the International Labour Organization (ILO) to state in article 19, paragraph 3:

> "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 organization, 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."[362]

According to the ILO, which bases its refusal to permit reservations to the international labour conventions on this article:[363]

> "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 judgement."[364]

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

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

[362] This provision reproduces the provisions of article 405 of the Treaty of Versailles.

[363] See para. (3) of the commentary to guideline 1.1.6.

[364] "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*

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".[365]

(3) The quest to reconcile these two goals is the aim both of reservations in the strict sense and of the alternative procedures that are the subject of guideline 1.7.1. Reservations are one of the means intended to bring about this reconciliation. However, they are far from "the only procedure which makes it possible to vary the content of a treaty in its application to the parties"[366] without undermining its purpose and object. Many other procedures are used to give treaties the flexibility necessitated by the diversity of situations of the States or international organizations seeking to be bound,[367] it being understood that the word "may" in the text of guideline 1.7.1 must not be interpreted as implying any value judgement as to the use of one or the other technique, but must be construed as being purely descriptive.

(4) 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 effect of certain provisions of the treaty" or "of the treaty as a whole with respect to certain specific aspects"[368] in their application to certain parties. There the similarities end, however, 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".[369] Furthermore, 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.[370]

(5) There are many ways of grouping them: by techniques used (treaty or unilateral), by the object pursued (extension or restriction of obligations under the treaty) or by the reciprocal or non-reciprocal nature of their effects. They may also be distinguished according to whether the modification of the legal effects of the provisions of a treaty is provided for in the treaty itself or results from exogenous elements.

(6) In the first of these two categories, mention can be made of the following:

Journal, July 1927, p. 883. See also "Written Statement of the International Labour Organization", in *I.C.J. Pleadings, Oral Arguments, Documents – Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pp. 224 and 236.

365 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.

366 Jean Combacau and Serge Sur, *Droit international public*, 9th edition (Paris, Montchrestien, 2010), p. 136.

367 Some authors have endeavoured to reduce all these procedures to one: see, *inter alia*, Georges Droz, who contrasts "reservations" and "options" ("*Les réserves et les facultés dans les Conventions de La Haye de droit international privé*", *R.C.D.I.P.* 1969, p. 383). On the other hand, Ferenc Majoros 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*", *J.D.I.*, 1974, p. 88 (italics in original).

368 See guideline 1.1.

369 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* (Brussels, Bruylant, 1982), p. 6.

370 *Ibid.*, p. 17.

- Restrictive clauses, "which limit the purpose of the obligation by making exceptions to and placing limits on it"[371] 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",[372] and among which mention can be made of saving and derogations clauses;[373]
- 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";[374]
- Opting-[or contracting-]out clauses, "under which a State will be bound by rules adopted by majority vote even if it does not express its intent not to be bound within a certain period of time";[375] or
- Those which offer the parties a choice among several provisions; or again,

[371] *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", *B.Y.B.I.L.*, 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*", *R.G.D.I.P.* 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 Peoples' Rights", *Virg. J. Int. L. 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* (Brussels, Bruylant, 1987), p. 25).

[372] M. Virally, "*Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités*", *op. cit.*, p. 12.

[373] Escape clauses permit a contracting State or contracting organization 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 Parties or by an organ responsible for monitoring treaty implementation. 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. 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." This is an escape clause (this option has been regulated but not abolished by the 1994 GATT Agreement on Safeguards (Marrakesh, 15 April 1994)). 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 circumstances 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" (see also article VIII, section 2 (a), of the IMF Agreement).

[374] Michel Virally, *op. cit.*, p. 13.

[375] Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des cours …*, 1994-VI, vol. 250, p. 329; see also Christian Tomuschat, "Obligations Arising for States Without or Against Their Will", *Recueil des cours …*, 1993, vol. 241, pp. 264 ff.

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

(7) In the second category,[376] which includes all procedures that, although not expressly envisaged therein, enable the parties to modify the effect of the provisions of the treaty, 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,[377] 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*[378] and *non adimpleti contractus*;[379]
- amendments to the treaty, where they do not automatically bind all the parties thereto;[380] or
- protocols or agreements having as their purpose (or effect) to supplement or modify a multilateral treaty only between certain parties,[381] including within the framework of "bilateralization".[382]

(8) This list by no means claims to be exhaustive: as emphasized above,[383] negotiators display seemingly limitless ingenuity which precludes any pretensions to exhaustiveness. Consequently, guideline 1.7.1 is restricted to mentioning two procedures that are not mentioned elsewhere and are sometimes characterized as "reservation", although they do not by any means meet the definition contained in guideline 1.1.

(9) Other "alternatives to reservations", which take the form of unilateral statements made in accordance with a treaty, are the subject of guidelines appearing in section 1.5 of the Guide to Practice.

(10) There are other alternative procedures that so obviously do not belong in the category of reservations that it does not seem useful to mention them specifically in the Guide to Practice. Such is the case, for example, of notifications of the suspension of a treaty. These, too, are unilateral statements, as are reservations, and, like reservations, they may purport to exclude the legal effects of certain provisions of the treaty, if separable,[384] in their application to the author of the notification, but only on a temporary basis. Governed

[376] Among the latter modification techniques, 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.

[377] Termination of the treaty is a different matter; it puts an end to the treaty relations.

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

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

[380] Cf. article 40, para. 4, and article 30, para. 4, of the Vienna Conventions.

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

[382] See paras. (19) to (23) of the commentary.

[383] See para. (4) of the commentary.

[384] 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* (Dordrecht, Nijhoff, 1989), pp. 623–634, also reproduced in Paul Reuter, *Le développement de l'ordre juridique international – Écrits de droit international* (Paris, Économica, 1995), pp. 361–374.

by article 65, paragraph 1, of the 1969 and 1986 Vienna Conventions,[385] their purpose is to release the parties "between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension",[386] and they are clearly different from reservations, not so much by the temporary nature of the exclusion of the operation of the treaty[387] as by the timing of their occurrence, which is necessarily subsequent to the entry into force of the treaty in respect of the author of the statement. Furthermore, the Vienna Conventions make such statements subject to a legal regime that differs clearly from the reservations regime.[388]

(11) The same applies when the suspension of the effect of the provisions of a treaty is the result of a notification made not, as in the case referred to above, under the rules of the general international law of treaties but on the basis of specific provisions in the treaty itself.[389] The identical approach taken when applying this method and that of reservations 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. There, however, the similarity between the two procedures ends."[390] 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.[391] Since there is no

[385] "A party which, under the provisions of the present Convention, 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."

[386] Article 72 of the Vienna Conventions.

[387] Certain reservations can be made only for a specific period; thus, 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). And certain reservation clauses even impose such a provisional nature (cf. article 25, para. 1, of the 1967 European Convention on the adoption of children and article 14, para. 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").

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

[389] As indicated above (footnote ...), such exclusionary clauses fall into two categories: waivers and escape clauses.

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

[391] See para. (10) above. See also, in this connection, Sia Spiliopoulo Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", *International and Comparative Law Quarterly*, 1999, pp. 501–502.

likelihood of serious confusion between such notifications and reservations, it is not essential to include a guideline relating to the former in the Guide to Practice.

(12) The situation is different with regard to two other procedures that may also be considered alternatives to reservations, in the sense that they purport (or may purport) to modify the effects of a treaty in respect of specific features of the situation of the parties: restrictive clauses and agreements whereby two or more States or international organizations purport, under a specific provision of a treaty, to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

(13) It would seem that everything but their purpose differentiates these procedures from reservations. They are purely conventional techniques which take the form not of unilateral statements, but of one or more agreements between the parties to a treaty or between some of them. Where restrictive clauses in the treaty, amendments that enter into force only for certain parties to the treaty or "bilateralization" procedures are concerned, however, problems may arise, if only because certain legal positions have been adopted which, in a most questionable manner, characterize such procedures as "reservations".

(14) There are countless restrictive clauses purporting to limit the purpose of obligations resulting from the treaty by introducing exceptions and limits, and they are to be found in treaties on a wide range of subjects, such as the settlement of disputes,[392] the safeguarding of human rights,[393] protection of the environment,[394] trade[395] and the law of armed conflicts.[396] Although such provisions are similar to reservations in their object,[397] the two

[392] In addition to article 27 of the above-mentioned 1957 European Convention, see, for example, article 1 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 29 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."

[393] Cf. the "clawback clauses" referred to above in footnote ... For example (again, there are innumerable examples), article 4 of the International Covenant on Economic, Social and Cultural Rights of 1966: "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."

[394] 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 or article 4 of the Stockholm Convention on Persistent Organic Pollutants of 22 May 2001 ("Register of specific exemptions").

[395] 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.

[396] Cf. article 5 of the Geneva Conventions of 12 August 1949 ("Derogations"), article 9 of the Convention relating to the Status of Refugees of 22 April 1954 ("Provisional measures").

[397] 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 with article 27 of the European Convention of 29 April 1957 for the peaceful settlement of disputes (*Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 10); under article 39, paragraph 2, of the General Act, reservations that are exhaustively enumerated and "must be indicated at the time of accession … 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

procedures "operate" differently: in the case of restrictive clauses, there is a general exclusion arising out of the treaty itself; in the case of reservations, it is merely a possibility available to the States parties, permitted under the treaty, but becoming effective only if a unilateral statement is made at the time of accession.[398]

(15) 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 "such terms as 'public order reservations', 'military imperatives reservations', or 'sole competence reservations' [are] frequently encountered",[399] yet authors, including the most distinguished among them, have caused an unwarranted degree of confusion. For example, in an often quoted passage[400] 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."[401]

(16) Guideline 1.7.1 refers to restrictive clauses both as a warning against this frequent confusion and as an indication that they are a possible alternative to reservations.

(17) The reference to agreements, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves is made for the same reasons. For example, the European Union and its member States have inserted in multilateral treaties so-called "disconnection clauses" on the basis of which they purport to exclude the

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solely within the domestic jurisdiction of States". Meanwhile, article 27 of the 1957 Convention reads: "The provisions of this Convention shall not apply to: (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." Article 39 of the 1949 General Act of Arbitration is a reservation clause; article 27 of the 1957 Convention is a restrictive clause. There are striking similarities: in both cases, the aim is to exclude identical types of disputes from methods of settlement provided for by the treaty in question.

398 In the preceding example, therefore, it is 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.

399 Pierre-Henri Imbert, *ibid.*, p. 10. For an example 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."

400 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.

401 *I.C.J. Reports 1952*, p. 76. For another example, see Georges Scelle, *Précis de droits des gens (Principes et systématiques)*, vol. 2 (Paris, Sirez, 1934), p. 472.

application of the treaty in their relations with one another, which continue to be governed by European Union law.[402]

(18) While it would not appear to be necessary to dwell on another treaty procedure that would make for flexibility in the application of a treaty, which consists of amendments (and additional protocols) that enter into effect only as between certain parties to a treaty,[403] it does seem necessary to consider certain specific agreements which are concluded between two or more States parties to basic treaties, which purport to produce the same effects as reservations and in connection with which reference has been made to the "bilateralization" of "reservations".

(19) 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

[402] See, for example, article 26, paragraph 3, of the 2005 Council of Europe Convention on the Prevention of Terrorism: ("Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.") or article 40, paragraph 3, of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings; article 53, paragraph 3, of the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism and article 54 *ter*, paragraph 1, of the Lugano Convention (Convention on jurisdiction and the enforcement of judgments in civil and commercial matters). See also CJCE, Assemblée plénière, avis consultatif 1/03, 7 June 2006, *Recueil de la jurisprudence de la Cour de justice et du Tribunal de première instance 2006*, p. I-1145 (points 78–85); see also Committee of Legal Advisers on Public International Law (CAHDI), *Report on the consequences of the so-called "disconnection clause" in international law in general and for Council of Europe conventions containing such a clause in particular*, Council of Europe Committee of Ministers, document CM (2008)164, 27 October 2008; C.P. Economides et A.G. Kolliopoulos, "*La clause de déconnexion en faveur du droit communautaire: une pratique critiquable*", *R.G.D.I.P.*, vol. 110, 2006, pp. 273–302, or Magdalena Ličková, "The European Exceptionalism in International Law", *European Journal of International Law*, vol. 19, No. 3, 2008, pp. 463–490.

[403] This procedure, which is provided for in article 40, paragraphs 4 and 5 (and article 30, paragraph 4), and article 41 of the 1969 and 1986 Vienna Conventions, 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, 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
- there is no 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;
- moreover, whereas reservations can only limit their author's treaty obligations or make provision for equivalent ways of implementing a treaty, amendments and protocols can have the effect of both extending and limiting the obligations of States and international organizations parties to a treaty. 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.

proceed to implement the regime provided for".[404] It can be traced back to article XXXV, paragraph 1, of the 1947 General Agreement on Tariffs and Trade.[405] The general approach involved in this procedure is not comparable to 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 easily compared to statements of non-recognition, where such statements purport to exclude the application of a treaty between a declaring State and the non-recognized entity.[406]

(20) However, the same is not true when bilateralization involves an agreement to derogate from a treaty concluded among certain parties in application of treaty provisions expressly authorizing this, as can be seen in the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters, adopted on 1 February 1971 within the framework of The Hague Conference on Private International Law. It was in fact during the elaboration of this Convention that the doctrine of "bilateralization of reservations" was elaborated.

(21) However, in response to a Belgian proposal, the 1971 Enforcement Convention goes further than these traditional bilateralization methods. Not only does article 21 of this instrument make the Convention's entry into effect with respect to relations between two States subject to the conclusion of a supplementary agreement,[407] but it also permits the two States to modify their commitment *inter se* within the precise limits set in article 23:[408]

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[404] M.H. Van Hoogstraten, "*L'état présent de la Conférence de La Haye de Droit International Privé*", in *The Present State of International Law and other essays written in honour of Centenary Celebration of the International Law Association 1873–1973* (Netherlands, Kluwer, 1973), p. 387.

[405] "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* (Paris, Pedone, 1979), p. 199. The practice of "lateral agreements" (cf. Dominique Carreau and Patrick Juillard, *Droit international économique* (Paris, Libraire générale de droit et de jurisprudence, 1998), pp. 54–56 and 127) has accentuated this bilateralization. See also article XIII of the Agreement Establishing the World Trade Organization or certain conventions adopted at The Hague Conference on Private International Law: for example, article 13, paragraph 4, of the Companies Convention of 1 June 1956, article 12 of the Legalization Convention of 5 October 1961, article 31 of the Maintenance-enforcement Convention of 2 October 1973, article 42 of the Administration of Estates Convention of 2 October 1973, 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, article 54, paragraph 3, of the Convention of 2 October 1999 on the international protection of adults or article 37 of the European Convention of 16 May 1972 on State Immunity, adopted in the context of the Council of Europe: "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".

[406] Cf. guideline 1.5.1 and paras. (5) to (9) of the commentary thereto.

[407] "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."

[408] 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–

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

This is followed by a list of 23 possible ways of modifying the Convention, the purposes of which, as summarized in the explanatory report of C.N. Fragistas, are:

> "1. *To clarify a number of technical expressions used by the Convention* whose meaning may vary from one country to another (art. 23 of the Convention, items Nos. 1, 2, 6 and 12);
>
> 2. *To include within the scope of the Convention matters that do not fall within its scope* (art. 23 of the Convention, items Nos. 3, 4 and 22);
>
> 3. *To apply the Convention in cases where its normal requirements have not been met* (art. 23 of the Convention, items Nos. 7, 8, 9, 10, 11, 12 and 13);
>
> 4. *To exclude the application of the Convention in respect of matters normally covered by it* (art. 23 of the Convention, item No. 5);
>
> 5. *To declare a number of provisions inapplicable* (art. 23 of the Convention, item No. 20);
>
> 6. *To make a number of optional provisions of the Convention mandatory* (art. 23 of the Convention, items Nos. 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* (art. 23 of the Convention, items Nos. 14, 15, 16, 17, 18 and 19)."[409]

Undoubtedly, many of these alternatives "simply permit States to define words or to make provision for procedures";[410] however, a number of them restrict the effect of the Convention and have effects very comparable to those of reservations, which they nevertheless are not.[411]

(22) 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:[412]

- 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;[413]

393).

409 Conférence de la Haye, *Actes et documents de la session extraordinaire*, 1966, p. 364 – emphasis in the original text. See also 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.

410 Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 200.

411 *Contra* P-H. Imbert, *ibid*.

412 These examples have been borrowed from Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 201.

413 But the application of this provision does not depend on the free choice of partner; see P-H. Imbert, *ibid*.; see also 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, pp. 390–391. In fact, this procedure bears a resemblance to amendments between certain parties to the basic convention alone.

- article 34 of the Convention of 14 June 1974 on the Limitation Period in the International Sale of Goods;[414]

- 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 concluded such an agreement shall transmit a copy to the depositary of the Convention";[415]

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."

(23) These options, which permit parties concluding a supplementary agreement to exclude the application of certain provisions of the basic treaty 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 treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the two parties bound by the agreement. However, and this is a fundamental difference from true reservations, such exclusions or modifications are not the product of a unilateral statement, which constitutes an essential element of the definition of reservations,[416] but, rather, an agreement between two of the parties to the basic treaty that does not affect the other contracting States and contracting organizations to the treaty. "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."[417] The supplementary agreement is, so to speak, an

[414] The same remark applies to this provision.

[415] Once again, one cannot truly speak of bilateralization in the 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.

[416] Cf. guideline 1.1: "'Reservation' means *a unilateral statement* …".

[417] P. Jenard, *Rapport du Comité restreint sur la bilatéralisation*, Conférence de La Haye, *Actes et documents de la session extraordinaire*, 1966, p. 145. See also the explanatory report by C.N.

instrument that is a prerequisite not for the entry into force of the treaty but for ensuring that the treaty has effects on the relations between the two parties 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.

(24) It is such agreements, which have the same object as reservations and which are described, frequently but misleadingly, as "bilateralized reservations", that are the subject of the second subparagraph of guideline 1.7.1.

1.7.2 Alternatives to interpretative declarations

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the treaty;
- The conclusion of a supplementary agreement to the same end, simultaneously or subsequently to the conclusion of the treaty.

Commentary

(1) Just as reservations are not the only means at the disposal of contracting States and organizations 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. Leaving aside the third-party interpretation mechanisms provided for in the treaty,[418] the variety of such alternative procedures in the area of interpretation is nonetheless not as great. Two procedures of this type can be mentioned by way of example.

(2) 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.[419] 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[420] or in a separate instrument.[421]

(3) Secondly, the parties, or some of them,[422] may conclude an agreement for the purposes of interpreting a treaty previously concluded between them. This possibility is

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Fragistas, *ibid*., pp. 363–364, or 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.

418 Cf. Denys Simon, *L'interprétation judiciaire des traités d'organisations internationales* (Paris, Pedone, 1981), p. 936.

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

420 Cf., 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, ...".

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

422 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, paragraph 3 (a), of the draft articles on the law of treaties, which became article 30, paragraph 3 (a), of the Vienna Convention of 1969: *Yearbook ..., 1966*, vol. II, p. 241, para. 14); cf., with regard to bilateral treaties, guideline 1.6.3.

expressly envisaged in article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, which requires the taking into account, together with the context, of:

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

(4) Moreover, it may happen that the interpretation is "bilateralized".[423] This occurs when 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 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; ...".[424]

(5) It therefore seemed desirable to include in the Guide to Practice a provision on alternatives to interpretative declarations, if only for the sake of symmetry with guideline 1.7.1 on alternatives to reservations. On the other hand, it does not appear necessary to devote a separate guideline to the enumeration of alternatives to conditional interpretative declarations:[425] the alternative procedures listed above are treaty-based and require the agreement of the contracting States and contracting organizations. It matters little, then, whether or not the agreed interpretation constitutes the *sine qua non* of their consent to be bound.

1.8 Scope of definitions

The definitions of unilateral statements included in the present Part are without prejudice to the validity and legal effects of such statements under the rules applicable to them.

Commentary

(1) Defining is not the same as regulating. As "a precise statement of the essential nature of a thing",[426] the sole function of a definition is to determine the general category in which a given statement should be classified. However, such classification does not in any way prejudge the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. *A contrario*, it is not a reservation if it does not meet the criteria set forth in these draft guidelines, but this does not necessarily mean that such statements are valid (or invalid) from the standpoint of other rules of international law. The same is true of interpretative declarations, which might conceivably not be valid either because they would alter the nature of the treaty or because they were not formulated at the required time,[427] etc.[428]

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[423] On the "bilateralization" of reservations, see guideline 1.7.1 and paras. (18) to (23) of the commentary thereto.

[424] On this provision, see para. (20) of the commentary to guideline 1.7.1.

[425] See guideline 1.4.

[426] *The Oxford English Dictionary*, 2nd ed. (Oxford, The Clarendon Press, 1989).

[427] This problem may very likely arise in connection with conditional interpretative declarations (see

(2) Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime and, above all, for the assessment of its validity. It is only once a particular instrument has been defined as a reservation (or an interpretative declaration, either simple or conditional) that one can decide whether it is valid, evaluate its legal scope and determine its effect. However, this validity and these effects are not otherwise affected by the definition, which requires only that the relevant rules be applied.

(3) For example, the fact that a reservation was formulated "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" (in keeping with the wording of guideline 1.1, paragraph 1) does not mean that such a reservation is necessarily valid; its validity depends upon whether it meets the conditions stipulated in the law on reservations to treaties and, in particular, those stipulated in article 19 of the 1969 and 1986 Vienna Conventions. Similarly, the Commission's confirmation of the well-established practice of "across-the-board" reservations in guideline 1.1, paragraph 2, is in no way meant to constitute a decision on the validity of such a reservation in a specific case, which would depend on its contents and context; the sole purpose of the draft is to show that a unilateral statement of this nature is indeed a reservation and as such subject to the legal regime governing reservations.

(4) The "rules applicable" referred to in guideline 1.8 are, first of all, the relevant rules in the 1969, 1978 and 1986 Vienna Conventions and, in general, the customary rules applicable to reservations and to interpretative declarations, which this Guide to Practice is intended to codify and develop progressively in accordance with the Commission's mandate, and those relating to other unilateral statements which States and international organizations may formulate in respect of treaties but which are not covered in the Guide to Practice.

(5) More generally, all the guidelines contained in the Guide to Practice are interdependent and cannot be read and understood in isolation from one another.

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guideline 1.4).

[428] The same may obviously be said about unilateral statements which are neither reservations nor interpretative declarations, referred to in section 1.5.