

RESERVATIONS TO TREATIES

[Agenda item 5]

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Fifth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

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Multilateral instruments cited in the present report

	<i>Source</i>
Convention on Bills of Exchange and Promissory Notes (The Hague, 23 July 1912)	League of Nations, <i>International Conference for the Unification of the Law on Bills of Exchange, Promissory Notes and Cheques, Preparatory Documents</i> (C.234.M.83.1929.II), p. 42.
Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919)	<i>British and Foreign State Papers, 1919</i> , vol. CXII (London, HM Stationery Office, 1922), p. 1.
Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties (Havana, 20 February 1928)	League of Nations, <i>Treaty Series</i> , vol. CXXXII, No. 3045, p. 301.
General Act (Pacific Settlement of International Disputes) (Geneva, 26 September 1928)	Ibid., vol. XCIII, No. 2123, p. 343.
Convention for the Unification of certain Rules regarding International Transport (Warsaw, 12 October 1929)	Ibid., vol. CXXXVII, No. 3145, p. 13.
Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (The Hague, 28 September 1955)	United Nations, <i>Treaty Series</i> , vol. 478, No. 478, No. 6943, p. 371.
Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930)	League of Nations, <i>Treaty Series</i> , vol. CXLIII, No. 3313, p. 257.
Convention providing a Uniform Law for Cheques (Geneva, 19 March 1931)	Ibid., No. 3316, p. 355.
Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques (Geneva, 19 March 1931)	Ibid., No. 3317, p. 407.
Convention on Extradition (Montevideo, 26 December 1933)	Ibid., vol. CLXV, No. 3803, p. 45.

	<i>Source</i>
Convention (No. 63) concerning statistics of wages and hours of work in the principal mining and manufacturing industries, including building and construction, and in agriculture (Geneva, 20 June 1938)	United Nations, <i>Treaty Series</i> , vol. 40, No. 638, p. 255.
Articles of Agreement of the International Monetary Fund (Washington, 27 December 1945)	Ibid., vol. 2, No. 20, p. 39.
Ibid., as amended in 1969 and 1978	IMF publication (1988), Washington, D.C.
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, No. 814, p. 187.
Protocol of Provisional Application of the General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	Ibid., p. 308.
Revised General Act for the Pacific Settlement of International Disputes (Lake Success, New York, 28 April 1949)	Ibid., vol. 71, No. 912, p. 101.
Convention (No. 96) concerning Fee-Charging Employment Agencies (revised 1949) (Geneva, 1 July 1949)	Ibid., vol. 96, No. 1340, p. 237.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	Ibid., vol. 75, Nos. 970–973, pp. 31 et seq.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	Ibid., vol. 213, No. 2889, p. 221.
Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994)	Council of Europe, <i>European Treaty Series</i> , No. 155.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	United Nations, <i>Treaty Series</i> , vol. 189, No. 2545, p. 137.
Convention (No. 102) concerning Minimum Standards of Social Security (Geneva, 28 June 1952)	Ibid., vol. 210, No. 2838, p. 131.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	Ibid., vol. 360, No. 5158, p. 117.
Convention relating to the settlement of conflicts between the law of nationality and the law of domicile (The Hague, 15 June 1955)	Hague Conference on Private International Law, <i>Collection of Conventions (1951–1996)</i> , p. 24.
Convention concerning the recognition of the legal personality of foreign companies, associations and institutions (The Hague, 1 June 1956)	Ibid., p. 28.
European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957)	United Nations, <i>Treaty Series</i> , vol. 320, No. 4646, p. 243.
European Convention on Extradition (Paris, 13 December 1957)	Ibid., vol. 359, No. 5146, p. 273.
Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children (The Hague, 15 April 1958)	Ibid., vol. 539, No. 7822, p. 27.
Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (The Hague, 15 April 1958)	Hague Conference on Private International Law, <i>Collection of Conventions (1951–1996)</i> , p. 20.
Geneva Conventions on the Law of the Sea (Geneva, April 1958)	
Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	United Nations, <i>Treaty Series</i> , vol. 516, No. 7477, p. 205.
Convention on the High Seas (Geneva, 29 April 1958)	Ibid., vol. 450, No. 6465, p. 11.
Convention on the Continental Shelf (Geneva, 29 April 1958)	Ibid., vol. 499, No. 7302, p. 311.
European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959)	Ibid., vol. 472, No. 6841, p. 185.
European Agreement on the Protection of Television Broadcasts (Strasbourg, 22 June 1960)	Ibid., vol. 546, No. 7951, p. 247.
Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960)	Ibid., vol. 956, No. 13706, p. 251.

	<i>Source</i>
Customs Convention on the Temporary Importation of Packings (Brussels, 6 October 1960)	Ibid., vol. 473, No. 6861, p. 131.
Convention on the Reduction of Statelessness (New York, 30 August 1961)	Ibid., vol. 989, No. 14458, p. 175.
Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (The Hague, 5 October 1961)	Ibid., vol. 527, No. 7625, p. 189.
Convention concerning the powers of authorities and the law applicable in respect of the protection of infants (The Hague, 5 October 1961)	Ibid., vol. 658, No. 9431, p. 143.
European Social Charter (Turin, 18 October 1961)	Council of Europe, <i>European Treaty Series</i> , No. 35.
ILO Convention (No. 118) concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (Geneva, 28 June 1962)	United Nations, <i>Treaty Series</i> , vol. 494, No. 7238, p. 271.
Declaration on the Neutrality of Laos (Geneva, 23 July 1962)	Ibid., vol. 456, No. 6564, p. 301.
Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality (Strasbourg, 6 May 1963)	Ibid., vol. 634, No. 9065, p. 221.
Convention (No. 119) concerning the guarding of machinery (Geneva, 25 June 1963)	Ibid., vol. 532, No. 7717, p. 159.
European Code of Social Security (Strasbourg, 16 April 1964)	Council of Europe, <i>European Treaty Series</i> , No. 48.
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 15 November 1965)	United Nations, <i>Treaty Series</i> , vol. 1144, No. 17957, p. 249.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	Ibid., vol. 660, No. 9464, p. 195.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	Ibid., vol. 993, No. 14531, p. 3.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 99, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid.
European Convention on the Adoption of Children (Strasbourg, 24 April 1967)	Ibid., vol. 634, No. 9067, p. 255.
European Convention on the protection of the archaeological heritage (London, 6 May 1969)	Ibid., vol. 788, No. 11212, p. 227.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, No. 18232, p. 331.
Agreement establishing a Food and Fertiliser Technology Centre for the Asian and Pacific Region (Kawana, 11 June 1969)	Ibid., vol. 704, No. 10100, p. 17.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	Ibid., vol. 1144, No. 17955, p. 123.
Convention on the taking of evidence abroad in civil or commercial matters (The Hague, 18 March 1970)	Ibid., vol. 847, No. 12140, p. 231.
Convention on the recognition of divorces and legal separations (The Hague, 1 June 1970)	Ibid., vol. 978, No. 14236, p. 393.
Convention on the recognition and enforcement of foreign judgements in civil and commercial matters (The Hague, 1 February 1971)	Ibid., vol. 1144, No. 17957, p. 249.
Convention on Psychotropic Substances (Vienna, 21 February 1971)	Ibid., vol. 1019, No. 14956, p. 175.
Convention on the law applicable to traffic accidents (The Hague, 4 May 1971)	Ibid., vol. 965, No. 13925, p. 411.
Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (Washington, D.C., 20 August 1971)	Ibid., vol. 1220, No. 19677, p. 21.
European Convention on State Immunity (Basel, 16 May 1972)	Ibid., vol. 1495, No. 25699, p. 181.
Customs Convention on containers, 1972 (Geneva, 2 December 1972)	Ibid., vol. 988, No. 14449, p. 43.
European Convention on Social Security (Paris, 14 December 1972)	Ibid., vol. 1710, No. 29575, p. 2.

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- Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 3 March 1973) *Ibid.*, vol. 993, No. 14537, p. 243.
- European Convention on Civil Liability for Damage Caused by Motor Vehicles (Strasbourg, 14 May 1973) Council of Europe, *European Treaty Series*, No. 79.
- Convention concerning the International Administration of the Estates of Deceased Persons (The Hague, 2 October 1973) Hague Conference on Private International Law, *Collection of Conventions (1951-1996)*, p. 170.
- Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (The Hague, 2 October 1973) United Nations, *Treaty Series*, vol. 1021, No. 15001, p. 209.
- Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973) *Ibid.*, vol. 1035, No. 15410, p. 167.
- Convention on a Code of Conduct for Liner Conferences (Geneva, 6 April 1974) *Ibid.*, vol. 1334, No. 22380, p. 15, and vol. 1365, p. 360.
- Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) *Ibid.*, vol. 1511, No. 26119, p. 3.
- European Convention on the Legal Status of Children Born out of Wedlock (Strasbourg, 15 October 1975) *Ibid.*, vol. 1138, No. 17868, p. 303.
- Protocol to the Agreement on the importation of educational, scientific and cultural materials of 22 November 1950 (Nairobi, 26 November 1976) *Ibid.*, vol. 1259, No. 20669, p. 3.
- European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977) *Ibid.*, vol. 1137, No. 17828, p. 93.
- International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention) (London, 2 November 1973), as amended by the Protocol of 1978 (London, 17 February 1978) *Ibid.*, vol. 1340, No. 22484, p. 61.
- Convention on Celebration and Recognition of the Validity of Marriages (The Hague, 14 March 1978) Hague Conference on Private International Law, *Collection of Conventions (1951-1996)*, p. 242.
- Convention on the Law Applicable to Matrimonial Property Regimes (The Hague, 14 March 1978) *Ibid.*, p. 228.
- Additional Protocol to the European Convention on Information on Foreign Law (Strasbourg, 15 March 1978) United Nations, *Treaty Series*, vol. 1160, No. A-10346, p. 529.
- Vienna Convention on succession of States in respect of treaties (Vienna, 23 August 1978) *Ibid.*, vol. 1946, No. 33356, p. 3.
- Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) *Ibid.*, vol. 1249, No. 20378, p. 13.
- Agreement establishing the Common Fund for Commodities (Geneva, 27 June 1980) *Ibid.*, vol. 1538, No. 26691, p. 3.
- International Telecommunication Convention (Nairobi, 6 November 1982) *Ibid.*, vol. 1531, No. 26559, p. 2.
- United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) *Ibid.*, vol. 1833, No. 31363, p. 3.
- Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984) *Ibid.*, vol. 1465, No. 24841, p. 112.
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) A/CONF.129/15.
- Convention on mutual administrative assistance in tax matters (Strasbourg, 25 January 1988) United Nations, *Treaty Series*, vol. 1966, No. 33610, p. 215.
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988) *Ibid.*, vol. 1582, No. 27627, p. 95.
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989) *Ibid.*, vol. 1673, No. 28911, p. 57.
- European Convention on Transfrontier Television (Strasbourg, 5 May 1989) Council of Europe, *European Treaty Series*, No. 132.

	<i>Source</i>
Convention on the Law Applicable to Succession to the Estates of Deceased Persons (The Hague, 1 August 1989)	Hague Conference on Private International Law, <i>Collection of Conventions (1951–1996)</i> , p. 340.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	United Nations, <i>Treaty Series</i> , vol. 1989, No. 34028, p. 309.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	Ibid., vol. 2105, No. 36605, p. 457.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	Ibid., vol. 1771, No. 30822, p. 165.
Convention on biological diversity (Rio de Janeiro, 5 June 1992)	Ibid., vol. 1760, No. 30619, p. 79.
European Charter for Regional or Minority Languages (Strasbourg, 5 November 1992)	Council of Europe, <i>European Treaty Series</i> , No. 148).
Convention on Protection of Children and Cooperation in respect of Inter-country Adoption (The Hague, 29 May 1993)	Hague Conference on Private International Law, <i>Collection of Conventions (1951–1996)</i> , p. 356.
Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)	Council of Europe, <i>European Treaty Series</i> , No. 150.
Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994)	United Nations, <i>Treaty Series</i> , vol. 1867, No. 31874, p. 3.
Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994)	Ibid., vol. 1836, No. 31364, p. 3.
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	Ibid., vol. 2051, No. 35457, p. 363.
The Energy Charter Treaty (Lisbon, 17 December 1994)	Ibid., vol. 2080, No. 36116, p. 95.
Framework Convention for the protection of national minorities (Strasbourg, 1 February 1995)	Ibid., vol. 2151, No. 37548, p. 243.
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995)	Ibid., vol. 2167, No. 37924, p. 3.
ASEAN Framework Agreement on Services (Bangkok, 15 December 1995)	<i>International Legal Materials</i> (Washington, D.C.), vol. 35, No. 4 (July 1996), p. 1072.
European Social Charter (revised) (Strasbourg, 3 May 1996)	Council of Europe, <i>European Treaty Series</i> , No. 163.
Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (The Hague, 19 October 1996)	Hague Conference on Private International Law, <i>Collection of Conventions (1951–1996)</i> , p. 378.
Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Amsterdam, 2 October 1997)	<i>Official Journal of the European Communities</i> , No. C 340, vol. 40 (10 November 1997), p. 1.
European Convention on Nationality (Strasbourg, 6 November 1997)	United Nations, <i>Treaty Series</i> , vol. 2135, No. 37248, p. 213.
Agreement on international humane trapping standards between the European Community, Canada and the Russian Federation (Brussels, 15 December 1997)	<i>Official Journal of the European Communities</i> , No. L 42, vol. 41 (14 February 1998), p. 43.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, <i>Treaty Series</i> , vol. 2187, No. 38544, p. 3.

Source

International Convention on Arrest of Ships, 1999
(Geneva, 12 March 1999)

A/CONF.188/6.

Convention on the International Protection of Adults
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PART I

Introduction

1. Formally speaking, this is the fifth report that the Special Rapporteur has submitted on reservations to treaties. Nevertheless, only a very incomplete version of the fourth report was submitted to the Commission in 1999, and in that year both the Commission and the Sixth Committee continued their consideration of the third report, begun in 1998. Thus, at the risk of redundancy, this section reproduces most of the introduction to the fourth report,¹ while including therein the necessary updates concerning new developments with regard to the earlier work of the Commission on the topic, as well as the action taken by other bodies in relation to reservations to treaties.

A. The earlier work of the Commission on the topic

2. The first report of the Special Rapporteur on the law and practice relating to reservations to treaties contains a relatively detailed description of the Commission's earlier work on the topic and the outcome of that work.² It is therefore unnecessary to return to that subject in detail in the present report, except in order to inform Commission members of new developments in that connection since the preparation of the third report, which described the reception given to the first and second reports.³ Sections 1 and 2 deal with the outcome of the first and second reports and the discussion of the third and fourth reports in the Commission and the Sixth Committee; sections B and C deal with a number of subsequent developments.

1. FIRST AND SECOND REPORTS ON RESERVATIONS TO TREATIES AND THE OUTCOME

(a) *Outcome of the first report (1995)*

3. In his first report, the Special Rapporteur briefly examined the problems to which the topic gives rise, noting that where reservations are concerned there are gaps and ambiguities in the relevant Vienna Conventions (1969 Vienna Convention on the Law of Treaties, 1978 Vienna Convention on succession of States in respect of treaties and 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations), which meant that the topic should be considered further in the light of the practice of States and international organizations.⁴ In order to have a clearer picture of such practice, with

the Commission's authorization,⁵ the Special Rapporteur prepared two detailed questionnaires on reservations to treaties, to ascertain the practice of States and international organizations and the problems encountered by them. In its resolution 50/45 of 11 December 1995, the General Assembly invited States and international organizations, particularly those which are depositaries of conventions, to answer the questionnaires promptly;⁶ it reiterated that request in its resolution 51/160 of 16 December 1996.⁷

4. By the time the third report was prepared,⁸ 32 States and 22 international organizations⁹ had replied either partially or fully to the questionnaires. Since then, another State, New Zealand,¹⁰ and two more international organizations¹¹ have transmitted replies to the Secretariat.

5. The Special Rapporteur regards this number of replies, which represents a higher response rate than normal for Commission questionnaires, as encouraging; it indicates that there is great interest in the topic and confirms that studying it meets a real need. The number of replies is nonetheless unsatisfactory: replies have been received from only 33 of the 187 States Members of the United Nations to which the questionnaire was sent and 24 of the international organizations that received questionnaires, or 18 per cent and 40 per cent, respectively. Moreover, the replies are not evenly distributed geographically: they are mainly from European States (or other States in that group) (20 replies) and Latin American States (8 replies); and although five Asian countries have also replied, the Special Rapporteur has so far received no replies from any African countries. Furthermore, one of the most active treaty-making international organizations, the European Communities, has as yet not replied to the questionnaire sent to it.

6. The Special Rapporteur is fully aware that Commission questionnaires are burdensome for the legal departments of ministries for foreign affairs and international organizations, and that this applies particularly in the case of the long and detailed questionnaire on reservations; he is also aware that States that have not yet been able to respond to the questionnaire have other ways of informing the Commission of problems that they encounter and of their expectations, particularly by means

⁵ See *Yearbook ... 1995*, vol. II (Part Two), p. 109, para. 489.

⁶ Para. 5.

⁷ Para. 7.

⁸ In the case of that part of the report, 30 April 1998.

⁹ *Yearbook ... 1998* (see footnote 3 above), p. 230, footnotes 7 and 9.

¹⁰ A number of States that had transmitted only partial replies completed their replies, for which the Special Rapporteur wishes to thank them.

¹¹ The organizations in question are the United Nations (Treaty Section) (1998) and WMO (1999), both of which the Special Rapporteur also wishes to thank.

¹ *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/499, p. 128.

² *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 126–141, paras. 8–90.

³ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, pp. 229–233, paras. 1–30.

⁴ *Ibid.*, pp. 241–249, paras. 89–146.

of statements by their representatives in the Sixth Committee; he attaches the greatest importance to such responses.¹² However, they are no substitute for replies to the questionnaire, which is almost entirely factual; its purpose is not to determine the “normative preferences” of States and international organizations but, rather, to try to assess their actual practice on the basis of their replies, in order to guide the Commission in its task of progressively developing and codifying international law; this cannot really be achieved on the basis of oral statements, which are necessarily brief. Moreover, such comments are made at a later stage, whereas it is easier for both the Commission and the Special Rapporteur to make their proposals in the light of replies made earlier than to adjust them afterwards.

7. It was for these reasons that in his fourth report,¹³ the Special Rapporteur felt strongly that the Commission should recommend to the General Assembly that it appeal once again to States and international organizations that have not yet replied to the questionnaires, and to those that have transmitted only partial responses and thus need to complete their replies, to do so. Nevertheless, although the Commission made an appeal to that effect in its report on its fifty-first session, in 1999,¹⁴ that appeal was transmitted only implicitly by the General Assembly at its fifty-fourth session,¹⁵ and no new replies have been received by the Secretariat since the end of the session. Perhaps the Commission should reiterate that request.

(b) *Outcome of the second report (1996–1997)*

8. Owing to lack of time, the Commission was unable to consider the second report on reservations to treaties¹⁶ at its forty-eighth session, in 1996. It did so at its following session, in 1997. Once it had considered the report, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.¹⁷

9. The Commission also decided to transmit its preliminary conclusions to the human rights treaty-monitoring bodies. By means of letters dated 24 November 1997 transmitted through the Secretary of the Commission, the Special Rapporteur sent the text of the preliminary conclusions and of chapter V of the Commission’s report on the work of its forty-ninth session to the chair-

persons of human rights bodies with universal membership,¹⁸ requesting them to transmit the texts to the members of the bodies in question and to inform him of any comments they made. He sent similar letters to the presiding officers of a number of regional bodies.¹⁹

10. So far, only the chairpersons of two monitoring bodies and the presiding officer of the eighth and ninth meetings of the chairpersons of bodies established pursuant to human rights instruments have transmitted their observations.²⁰ In addition, in a letter dated 23 January 1998, the President of the Inter-American Court of Human Rights thanked the Secretary of the Commission for transmitting the preliminary conclusions.

11. In a letter dated 9 April 1998,²¹ the Chairperson of the Human Rights Committee emphasized the role of universal monitoring bodies in the process of developing the applicable practice and rules. She restated the Committee’s views in a second letter, dated 5 November 1998, in which she indicated that the Committee was concerned at the views expressed by the Commission in paragraph 12 of its preliminary conclusions²² and stressed that the proposition enunciated in paragraph 10,²³ was subject to modification as practices and rules developed by universal and regional monitoring bodies gained general acceptance. She added the following:

Two main points must be stressed in this regard.

First, in the case of human rights treaties providing for a monitoring body, the practice of that body, by interpreting the treaty, contributes—consistent with the Vienna Convention—to defining the scope of the obligations arising out of the treaty. Hence, in dealing with the compatibility of reservations, the views expressed by monitoring bodies necessarily are part of the development of international practices and rules relating thereto.

Second, it is to be underlined that universal monitoring bodies, such as the Human Rights Committee, must know the extent of the States parties’ obligations in order to carry out their functions under the treaty by which they are established. Their monitoring role itself entails the duty to assess the compatibility of reservations, in order to monitor the compliance of States parties with the relevant instrument. When a monitoring body has reached a conclusion about the compatibility of a reservation, it will, in conformity with its mandate, base its interactions with the State party thereon. Furthermore, in the

¹⁸ Letters were sent to the Chairpersons of the Committee on Economic, Social and Cultural Rights, the Committee on Human Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture, and the Committee on the Rights of the Child.

¹⁹ Letters were sent to the presiding officers of the African Commission on Human and People’s Rights, the European Commission of Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

²⁰ The Special Rapporteur intends to reproduce these replies in full in an annex to a future report; see paragraph 18 below.

²¹ The most important paragraph of the letter is reproduced in the third report (*Yearbook ... 1998* (footnote 3 above), p. 231, para. 16).

²² *Yearbook ... 1997* (see footnote 17 above): “The Commission emphasizes that the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts.”

²³ *Ibid.* “The Commission notes also that, in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State’s either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty.”

¹² See paragraphs 32–50 below.

¹³ *Yearbook ... 1999* (see footnote 1 above), para. 6.

¹⁴ “The Commission recalls that, at its forty-seventh session, in 1995, a questionnaire on the topic was sent to States and international organizations. The Commission, while thanking the States and organizations which have already answered, would like to reiterate its plea to those States and organizations which have not answered so far, to do so. Moreover, the Commission welcomes additional answers on the parts of the questionnaire which had not been covered by the States and organizations which answered, indicating that they would respond later on those parts” (*Yearbook ... 1999*, vol. II (Part II), p. 18, para. 30).

¹⁵ See paragraph 3 of General Assembly resolution 54/111 of 9 December 1999.

¹⁶ *Yearbook ... 1996*, vol. II (Part One), p. 37, document A/CN.4/477 and Add.1.

¹⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157.

case of monitoring bodies dealing with individual communications, a reservation to the treaty, or to the instrument providing for individual communications, has procedural implications on the work of the body itself. When dealing with an individual communication, the monitoring body will therefore have to decide on the effect and scope of a reservation for the purpose of determining the admissibility of the communication.

The Human Rights Committee shares the International Law Commission's view, expressed in paragraph 5 of its Preliminary Conclusions, that monitoring bodies established by human rights treaties "are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them". It follows that States parties should respect conclusions reached by the independent monitoring body competent to monitor compliance with the instrument within the mandate it has been given.²⁴

12. In an important decision dated 2 November 1999,²⁵ the Human Rights Committee took this position in a specific case. What was involved was assessing the admissibility of a communication from a person condemned to death, whereas Trinidad and Tobago had, by means of a reservation entered following its re-accession to the Optional Protocol to the International Covenant on Civil and Political Rights which it had previously denounced, rejected the competence of the Committee "to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith".²⁶ Despite the contrary view held by the Government of Trinidad and Tobago, the Committee declared the complaint receivable on the basis of General Comment No. 24:

As opined in the Committee's General Comment No. 24, it is for the Committee, as the treaty body to the International Covenant on Civil and Political Rights and its Optional Protocols, to interpret and determine the validity of reservations made to these treaties. The Committee rejects the submission of the State party that it has exceeded its jurisdiction in registering the communication and in proceeding to request interim measures under rule 86 of the rules of procedure. In this regard, the Committee observes that it is axiomatic that the Committee necessarily has jurisdiction to register a communication so as to determine whether it is or is not admissible because of a reservation. As to the effect of the reservation, if valid, it appears on the face of it, and the author has not argued to the contrary, that this reservation will leave the Committee without jurisdiction to consider the present communication on the merits. The Committee must, however, determine whether or not such a reservation can validly be made.

At the outset, it should be noted that the Optional Protocol itself does not govern the permissibility of reservations to its provisions. In accordance with article 19 of the Vienna Convention on the Law of Treaties and principles of customary international law, reservations can therefore be made, as long as they are compatible with the object and purpose of the treaty in question. The issue at hand is therefore whether or not the reservation by the State party can be considered to be compatible with the object and purpose of the Optional Protocol.

In its General Comment No. 24, the Committee expressed the view that a reservation aimed at excluding the competence of the Committee under the Optional Protocol with regard to certain provisions of the Covenant could not be considered to meet this test:

²⁴ Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 40 (A/54/40)*, vol. I, annex VI.

²⁵ *Ibid.*, *Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. II, annex XI, communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, p. 258.

²⁶ *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1999*, vol. I (United Nations publication, Sales No. E.00.V.2), p. 176.

"The function of the first Optional Protocol is to allow claims in respect of [the Covenant's] rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this *would be contrary to [the] object and purpose of the first Optional Protocol*, even if not of the Covenant"¹¹ (emphasis added).

The present reservation, which was entered after the publication of General Comment No. 24, does not purport to exclude the competence of the Committee under the Optional Protocol with regard to any specific provision of the Covenant, but rather to the entire Covenant for one particular group of complainants, namely prisoners under sentence of death. This does not, however, make it compatible with the object and purpose of the Optional Protocol. On the contrary, the Committee cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population. In the view of the Committee, this constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for this reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol. The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol.²⁷

¹¹ HRI/GEN/I/Rev.3, 15 August 1997, p. 46.

13. The Chairman of the Committee against Torture informed the Secretary of the Commission that the Committee had considered the Commission's preliminary conclusions at its twenty-first session (9–20 November 1998) and that it shared the views expressed by the Human Rights Committee.

In addition, the Committee against Torture believes that the approach taken by monitoring bodies of international human rights instruments to appreciate or determine the admissibility of a reservation to a given treaty so that the object and purpose of that treaty are correctly interpreted and safeguarded is consistent with the Vienna Conventions on the law of treaties.

14. In a letter dated 29 July 1998, the presiding officer of the eighth and ninth meetings of the chairpersons of bodies established pursuant to human rights instruments informed the Chairman of the Commission of the discussions on the matter at the ninth meeting of the chairpersons held in Geneva from 25 to 27 February 1998. He indicated in that letter that the chairpersons of the human rights bodies, after having recalled the emphasis placed in the Vienna Declaration and Programme of Action (as adopted by the World Conference on Human Rights on 25 June 1993) on the need to limit the number and scope of reservations to human rights treaties, welcomed the role that the Commission assigned to human rights bodies with respect to reservations in its preliminary conclusions.

They considered, however, that the draft was unduly restrictive in other respects and did not accord sufficient attention to the fact that human rights treaties, by virtue of their subject matter and the role they recognize to individuals, could not be placed on precisely the same footing as other treaties with different characteristics.

²⁷ *Rawle Kennedy v. Trinidad and Tobago* (see footnote 25 above), pp. 265–266, paras. 6.4–6.7.

The chairpersons believed that the capacity of a monitoring body to perform its function of determining the scope of the provisions of the relevant convention could not be performed effectively if it was precluded from exercising a similar function in relation to reservations. They therefore recalled the two general recommendations adopted by the Committee on the Elimination of Discrimination against Women and noted the proposal by that Committee to adopt a further recommendation on the subject in conjunction with the fiftieth anniversary of the Universal Declaration of Human Rights, and expressed their firm support for the approach reflected in General Comment No. 24, adopted by the Human Rights Committee. They requested their Chairperson to address a letter to the International Law Commission on their behalf to reiterate their support for the approach reflected in General Comment No. 24, and to urge that the conclusions proposed by the International Law Commission be adjusted accordingly.²⁸

15. Moreover, although this document is not, strictly speaking, a reaction to the Commission's preliminary conclusions, the Special Rapporteur wishes to draw the Commission's attention to the important report, dated 28 June 1998, of Working Group II of the Committee on the Elimination of Discrimination against Women, established under article 21 of the Convention on the Elimination of All Forms of Discrimination against Women, concerning reservations to that Convention, which the Committee adopted at its nineteenth session.²⁹ This report calls on States parties to the Convention which have formulated reservations to withdraw or modify them. The Committee bases itself *inter alia* on the second report on reservations to treaties,³⁰ saying that it agrees with the Special Rapporteur that "objections by States are often not only a means of exerting pressure on reserving States, but also serve as a useful guide for the assessment of the permissibility of a reservation by the Committee itself",³¹ and it concludes

that it has certain responsibilities as the body of experts charged with the consideration of periodic reports submitted to it. The Committee, in its examination of States' reports, enters into constructive dialogue with the State party and makes concluding comments routinely expressing concern at the entry of reservations to articles 2 and 16³² or the failure of States parties to withdraw or modify them.³³

And it adds that:

The Special Rapporteur [of the Commission] considers that control of the permissibility of reservations is the primary responsibility of the States parties. However, the Committee again wishes to draw to the attention of States parties its grave concern at the number and extent of impermissible reservations. It also expresses concern that, even when States object to such reservations there appears to be a reluctance on the part of the States concerned to remove and modify them and thereby comply with general principles of international law.³⁴

²⁸ *Official Records of the General Assembly, Fifty-third Session*, item 113 (a) of the preliminary list (A/53/125), annex.

²⁹ *Ibid.*, *Fifty-third Session, Supplement No. 38* (A/53/38/Rev.1), part two, paras. 5–21.

³⁰ *Yearbook ... 1996* (see footnote 16 above). The Committee seems to be referring to paragraphs 241–251 (pp. 80–81), although they are not specifically mentioned.

³¹ *Official Records of the General Assembly* (see footnote 28 above), para. 20.

³² Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women enumerates the general obligations of States parties and article 16 draws specific conclusions from the principle of equality of men and women in all matters stemming from marriage and family relations.

³³ *Official Records of the General Assembly* (see footnote 28 above), para. 23.

³⁴ *Ibid.*, para. 24.

16. In addition, in accordance with the recommendation contained in paragraph 2 of General Assembly resolution 52/156 of 15 December 1997,³⁵ five States transmitted to the Secretariat comments regarding the preliminary conclusions adopted by the Commission in 1997.³⁶ Generally speaking, these States welcomed the adoption of the preliminary conclusions³⁷ and the opportunity to comment on them before the Commission took a final decision on the matters dealt with therein. Monaco and the Philippines (which made several additional suggestions) endorsed the preliminary conclusions. China, while emphasizing the importance it attached to the cooperation of the human rights bodies, considered that the latter should remain strictly within the framework of their mandate, as defined in the respective treaties, adding that where the latter contained no specific provision, the permissibility of reservations was not part of the functions and responsibilities of the monitoring bodies; it also suggested that the term "traditional modalities" in paragraph 6 should be replaced by the words "well-established modalities"³⁸ and that paragraph 12 should be deleted so as not to give the impression that regional practices and rules differ from or take precedence over those in effect at the universal level.³⁹ China agreed with Liechtenstein that the implementation of the recommendation in paragraph 7 of the preliminary conclusions might prove difficult in practice.⁴⁰ Liechtenstein concluded its comments by drawing the Commission's attention to the following points, which it felt deserved particular attention:

³⁵ *The General Assembly*

"...

"Draws the attention of Governments to the importance for the International Law Commission of having their views ... in particular on:

"...

"(b) The preliminary conclusions of the Commission on reservations to normative multilateral treaties, including human rights treaties."

With reference to that request, the Director of the Codification Division addressed a letter on 29 December 1997 to the permanent missions of States Members and to observers, requesting their comments on the preliminary conclusions of the Commission.

³⁶ The three States mentioned in the third report, Liechtenstein, Monaco and the Philippines (*Yearbook ... 1998* (footnote 3 above), p. 232, footnote 35), and also China and Switzerland. The Special Rapporteur wishes to thank those States and to express the hope that other States will follow suit.

³⁷ Liechtenstein wondered, however, whether they were not premature.

³⁸ Paragraph 6 of the preliminary conclusions reads as follows:

"The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties."

(See footnote 17 above)

³⁹ See the text of paragraph 12 in footnote 22 above.

⁴⁰ Paragraph 7 of the preliminary conclusions reads as follows:

"The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation."

(See footnote 17 above)

(a) Reconsideration of the correlation between paragraphs 5 and 7 of the preliminary conclusions;

(b) The possibility of drafting optional protocols should be further elaborated upon. In doing so, the Commission should consider issues such as feasibility, usefulness from a practical point of view, including time frame;

(c) Practical and concrete suggestions for the imminent future to remedy the current state of affairs involving uncertainties concerning the application of multilateral treaties, especially in the field of human rights;

(d) Comments on the legal effect of objections by States parties made to reservations lodged by other States parties;

(e) Study of the potential of an enhanced role played by depositaries of multilateral treaties.

Switzerland, which merely confirmed the comments and observations made by its delegation in the Sixth Committee, had also drawn attention, on that occasion, to the role of the depositaries and to what it saw as a contradiction between the provisions of paragraph 5 of the preliminary conclusions (and those of paragraph 4) stating that the competence of monitoring bodies in respect of reservations could not be evaluated except with reference to the instrument in question and dependent on the will expressed by the States parties.⁴¹

17. The lengthy passages concerning the reactions of States and human rights treaty monitoring bodies have been reproduced above for the information of members of the Commission. The Special Rapporteur believes that it would be pointless, at the present stage, to reopen discussion of the *preliminary* conclusions which the Commission adopted in 1997.

18. Although, as he tried to explain in his third report,⁴² he does not believe that the adoption was premature, it would be preferable not to revise formally the conclusions adopted two years earlier, since such a revision would only be provisional in nature; on the one hand, because other States or human rights bodies may still respond (and those that have already done so may complete their responses) and, on the other hand, and above all, because it seems only reasonable that the Commission should not reopen that aspect of the issue until it has completed consideration of all the substantive questions concerning the regime for reservations to treaties. This should be done by the year 2001, or by 2002 at the latest. At that point, as he indicated in his third report,⁴³ the Special Rapporteur proposes to submit draft final conclusions on the issues dealt with in the preliminary conclusions; if necessary, those conclusions could be incorporated in the Guide to Practice (although they may not lend themselves to such inclusion). The Commission did not voice any objection to that suggestion at its fiftieth session in 1998.

19. Moreover, the Special Rapporteur had annexed to his second report a bibliography concerning reservations to treaties.⁴⁴ As announced in the third report

a complete text of that document was annexed to the fourth report.⁴⁵

2. THIRD AND FOURTH REPORTS AND THE OUTCOME

20. The third report on reservations to treaties⁴⁶ consisted of three chapters of very unequal length. The introduction served the same “purpose” as this one—it recapitulated the Commission’s earlier work on the topic and gave a general presentation of the report, essentially stating the methodology used.⁴⁷ Chapter I dealt with the definition of reservations (and interpretative declarations).⁴⁸ There was also a recapitulation of the draft guidelines proposed by the Special Rapporteur in the context of the Guide to Practice.⁴⁹

21. Owing to lack of time, the Commission was only able to give partial consideration to the third report at its fiftieth session in 1998. It completed the consideration of that report at its fifty-first session in 1999. In the meantime, the Special Rapporteur had submitted his fourth report which, taking into account the aforementioned circumstance, recapitulated the new elements introduced since the consideration of the second report⁵⁰ and proposed a reconsideration of the draft guideline concerning “statements of non-recognition”.⁵¹

(a) Consideration of the third report by the Commission

(i) The fiftieth session

22. At its fiftieth session, in 1998, the Commission considered the third report on reservations to treaties in three stages:

(a) First, it discussed the part of the report dealing with the definition of reservations to multilateral treaties and the corresponding draft guidelines,⁵² which it referred to the Drafting Committee;

(b) The Commission then proceeded—the Drafting Committee having made a number of amendments to

⁴⁵ *Yearbook ... 1999* (see footnote 1 above), annex (A/CN.4/478/Rev.1), p. 139.

⁴⁶ *Yearbook ... 1998* (see footnote 3 above), p. 221.

⁴⁷ *Ibid.*, pp. 229–235, paras. 1–46.

⁴⁸ *Ibid.*, pp. 236–284, paras. 47–413. Notwithstanding what the Special Rapporteur had hoped to do and had initially said he would do (see paragraphs 43 and 46) he was unable in his third report to tackle the issue of the formulation of reservations (and of interpretative declarations), acceptances and objections to reservations (and to interpretative declarations) because of the wealth of material. Moreover, an issue linked to that of the definition of reservations and interpretative declarations, that of “alternatives to reservations” (*ibid.*, p. 299, para. 511) could not be dealt with.

⁴⁹ *Ibid.*, para. 512.

⁵⁰ These elements are largely reproduced in the present report. See paragraph I above.

⁵¹ *Yearbook ... 1999* (see footnote 1 above), pp. 135–137, paras. 44–54.

⁵² *Yearbook ... 1998* (see footnote 3 above), pp. 236–284, paras. 47–413; and draft guidelines 1.1 and 1.1.1–1.1.8 (*ibid.*, p. 299, para. 512), which, in the numbering system adopted in 1999, became 1.1.1–1.1.7 and 1.4.1–1.4.3; a “table of concordances” between the numbers of the draft guidelines proposed by the Special Rapporteur and those adopted by the Commission in 1999 appears as annex I to the present report.

⁴¹ See *Official Records of the General Assembly, Fifty-second Session, Sixth Committee, 22nd meeting (A/C.6/52/SR.22)*, paras. 80–87.

⁴² *Yearbook ... 1998* (see footnote 3 above), p. 232, para. 22.

⁴³ *Ibid.*, para. 23.

⁴⁴ *Yearbook ... 1996* (see footnote 16 above), annex I (A/CN.4/478), p. 85.

the draft guidelines—to consider the amended texts, six of which it adopted after making relatively minor adjustments. In addition, the Commission adopted the text of one “safeguard” guideline, proposed by the Special Rapporteur at the request of several members.⁵³ On the other hand, in full agreement with the Special Rapporteur, the Commission decided to refer back to the Drafting Committee draft guidelines 1.1.5 and 1.1.6 concerning “extensive reservations” since neither the wording proposed by the Special Rapporteur nor that proposed by the Committee itself seemed fully satisfactory;

(c) Lastly, the Commission approved the commentaries on the draft articles it had adopted, which are reproduced in its report to the General Assembly.⁵⁴

23. At the close of the fiftieth session, in 1998, the Special Rapporteur also submitted the part of his third report⁵⁵ which deals with the distinction between reservations and interpretative declarations.⁵⁶ However, owing to lack of time, there was only a very brief exchange of views on that part of the third report and only draft guideline 1.2, regarding the general definition of interpretative declarations, was referred to the Drafting Committee.⁵⁷

(ii) *The fifty-first session*

24. In 1999, at its fifty-first session, the Commission had before it the parts of the third report which it had been unable to consider the year before, concerning, on the one hand, interpretative declarations and, on the other hand, “reservations” and interpretative declarations relating to bilateral treaties.⁵⁸ In addition, the Commission had to re-examine the draft guidelines on “extensive reservations”⁵⁹ and new draft guideline 1.1.7, replacing the one on “statements of non-recognition” proposed by the Special Rapporteur in his third report.⁶⁰

25. Indeed, following the plenary debate at the fiftieth session, in 1998, the Special Rapporteur stated that he was convinced that he had been on the wrong track in considering initially that what was at issue were reservations in the legal sense of the term.⁶¹ Accordingly, in his fourth report,⁶² he proposed a draft guideline which reflected the position of the vast majority of members of the Commission and which was, with a few amendments, adopted by the Commission as draft guideline 1.4.3.

26. Moreover, as it had planned to do at its fiftieth session,⁶³ the Commission re-examined draft guidelines 1.1.1 and 1.1.3 concerning “object of reservations” and “reservations having territorial scope”, respectively, in the light of the discussion on interpretative declarations, which led it to reformulate the former⁶⁴ but to make no amendments to the latter.

27. At its fifty-first session, in 1999, the Commission therefore adopted, with larger or smaller amendments, all the draft guidelines on definition of reservations and interpretative declarations submitted to it in the third report of the Special Rapporteur.⁶⁵ It also re-examined and completed the “safeguard” guideline on “scope of definitions” which it had adopted provisionally in 1998.⁶⁶ Moreover, on the initiative of the Drafting Committee, the Commission proceeded to re-order the presentation of the 25 draft guidelines adopted up to then. They are now grouped in six sections on the following topics, respectively:

(a) Definition of reservations (guidelines 1.1 and 1.1.1–1.1.7);

(b) Definition of interpretative declarations (guidelines 1.2, 1.2.1 and 1.2.2);

(c) Distinction between reservations and interpretative declarations (guidelines 1.3 and 1.3.1–1.3.3);

(d) Unilateral declarations other than reservations and interpretative declarations (guidelines 1.4 and 1.4.1–1.4.5);

(e) Unilateral declarations relating to bilateral treaties (guidelines 1.5.1–1.5.3); and

(f) Scope of definitions (guideline 1.6).⁶⁷

28. The Special Rapporteur wishes to take the opportunity of this report to explain his views on the numbering system which he has adopted for the provisions of the Guide to Practice and which has been criticized by some members of the Commission for its apparent complexity.⁶⁸ This system satisfies two concerns. On the one

⁶³ *Yearbook ... 1998*, vol. II (Part Two), p. 101, footnote 220.

⁶⁴ The initial text read as follows:

“A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which a State, or an international organization, intends to apply the treaty as a whole”.

(*Ibid.*, p. 99, para. 540)

The new text reads:

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

(*Yearbook ... 1999*, vol. II (Part Two), p. 91, para. 470)

⁶⁵ After discussion, and in agreement with the Special Rapporteur, the Commission did not adopt draft guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter, which listed the criteria for distinguishing between reservations and interpretative declarations. It rightly considered that such criteria were already inherent in the definitions themselves (see *Yearbook ... 1999* (*ibid.*), para. 468).

⁶⁶ See paragraph 22 above.

⁶⁷ See the table showing concordances between the draft guidelines proposed by the Special Rapporteur and those adopted by the Commission on first reading, annexed hereto (annex I).

⁶⁸ See, in particular, the comments by Mr. Kabatsi (*Yearbook ... 1999*, vol. I, 2597th meeting, p. 220, para. 53) and Mr. Kateka (*ibid.*, para. 54); contrasting opinion: Mr. Melescanu (*ibid.*, p. 221, para. 64).

⁵³ Initially unnumbered, this draft guideline is numbered 1.6 in the text adopted in 1999; see *Yearbook ... 1998*, vol. II (Part Two), p. 99, para. 540.

⁵⁴ *Yearbook ... 1998* (*ibid.*).

⁵⁵ *Yearbook ... 1998* (see footnote 3 above), pp. 261–284, paras. 231–406.

⁵⁶ See *Yearbook ... 1998*, vol. I, 2551st meeting, pp. 217–223 and *ibid.*, vol. II (Part Two), pp. 94–96, paras. 505–519.

⁵⁷ *Ibid.*, vol. I, 2552nd meeting, p. 228, para. 56.

⁵⁸ *Yearbook ... 1998* (see footnote 3 above), pp. 284–298, paras. 414–510.

⁵⁹ See paragraph 22 (b) above.

⁶⁰ *Yearbook ... 1998* (see footnote 3 above), p. 253, para. 177.

⁶¹ *Ibid.*, pp. 251–253, paras. 164–177.

⁶² *Yearbook ... 1999* (see footnote 1 above), pp. 135–137, paras. 44–54.

hand, it purports to diverge clearly from the usual format of international treaties, which are divided into articles; the Guide to Practice is not a draft treaty and is not, in principle, designed to become one.⁶⁹ Moreover, after some initial trial and error, this format should make it possible to insert any new provisions within the existing sections without undermining the general structure of the text and without resorting to the awkward formula of “bis”, “ter” and “quater” provisions. Perhaps the members of the Commission who might have been disconcerted at the outset by the numbering method adopted will agree that, now that the adjustment period is over, it does not pose any particular problems.⁷⁰

29. Each of the draft guidelines adopted up to now is the subject of a commentary.⁷¹

30. In the light of certain misunderstandings,⁷² it seems useful to recall that the *sole* purpose of section 1 of the Guide to Practice is to *define* what is meant by the term “reservations”, by distinguishing them from other unilateral declarations satisfying different criteria, particularly interpretative declarations. The draft guidelines contained therein do not in any way prejudice the validity of either statement. As the commentary on draft guideline 1.6 adopted by the Commission in 1999 explains clearly:

Defining is not the same thing as regulating. As “a precise statement of the essential nature of a thing”,⁷³ the sole function of a definition is to determine the general category in which a given statement should be classified. However, this classification does not in any way prejudice 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 (and in those which the Commission intends to adopt at the next session), but this does not necessarily mean that such statements are permissible (or impermissible) from the standpoint of other rules of international law. The same is true of interpretative declarations, which might conceivably not be permissible, either because they would alter the nature of the treaty or because they were not formulated at the required time;⁷⁴ etc.⁷⁵

31. The set of draft guidelines adopted in 1998 and 1999 calls for a second observation. While the topic

chosen by the Commission in agreement with the Sixth Committee is entitled “Reservations to treaties”, the Commission sought to define not only reservations *per se*, but also other interpretative statements made concerning a treaty and commonly referred to as “interpretative declarations”; it is often difficult to draw a dividing line between the two statements. For this reason, and in the light of the scope which the practice of interpretative declarations has assumed, the Special Rapporteur believes, despite his initial hesitations,⁷⁶ that it would be appropriate, in subsequent chapters of the Guide to Practice, to define the legal regime of reservations themselves, as well as that of interpretative declarations, and among the latter, to make a distinction between “mere” interpretative declarations and conditional interpretative declarations.⁷⁷ It is possible, moreover, that the legal regime of the latter statements, to which the declaring State or international organization subordinates its consent to be bound by a treaty, will be similar to that of reservations themselves.

(b) *Consideration of the reports of the Commission by the Sixth Committee*

32. Just as the Commission considered the Special Rapporteur’s report (corrected on one point in the fourth report)⁷⁸ twice, the Sixth Committee considered the Commission’s reports on the definition of reservations at both its fifty-third and fifty-fourth sessions, in 1998 and 1999.

33. In both cases, during the debate on the chapter of the report concerning reservations to treaties,⁷⁹ some delegations returned to topics considered in previous years, and many took positions and made useful suggestions on various draft guidelines adopted by the Commission.

(i) *General comments on the topic*

34. In 1998⁸⁰ and 1999⁸¹ several delegations restated their desire not to see the Vienna regime called into

⁶⁹ See *Yearbook ... 1995* (footnote 5 above), pp. 106–108, paras. 467–470, 483–484 and 487 (b)–(c).

⁷⁰ It is interesting to note that the representatives of States who spoke in the Sixth Committee at the past two sessions of the General Assembly did not seem to have special difficulties in that regard.

⁷¹ The commentaries on guidelines 1.1, 1.1.2–1.1.4 and 1.1.7 are contained in *Yearbook ... 1998*, vol. II (Part Two), pp. 99–107, para. 540. Those pertaining to other guidelines are contained in *Yearbook ... 1999*, vol. II (Part Two), pp. 93–126, para. 470.

⁷² See, in particular, the article by Zemanek—literally insulting to the Special Rapporteur—entitled “Alain Pellet’s definition of a reservation”. The author, who did not take the trouble to attempt to understand part one of the Guide to Practice (or, in any event, did not understand it), harshly attacks draft guideline 1.1.1 which, in his view, would legitimize across-the-board reservations. This is tantamount to confusing the definition of reservations with their validity. As the Special Rapporteur has pointed out on several occasions (*Yearbook ... 1998*, vol. I, 2545th, 2548th and 2549th meetings), it is absurd to exclude impermissible reservations from the definition of reservations; to do so is to rob oneself of any opportunity to declare them impermissible!

⁷³ *The Oxford English Dictionary*, 2nd ed. (Oxford, The Clarendon Press, 1989).

⁷⁴ This problem may very likely arise in connection with conditional interpretative declarations.

⁷⁵ *Yearbook ... 1999*, vol. II (Part Two), p. 126, para. (2).

⁷⁶ See, in particular, *Yearbook ... 1998*, vol. I, 2552nd meeting, and *Yearbook ... 1999*, vol. I, 2581st and 2586th meetings.

⁷⁷ The definition of conditional interpretative declarations is provided in draft guideline 1.2.1; see *Yearbook ... 1999*, vol. II (Part Two), pp. 103–106, with the commentary adopted by the Commission.

⁷⁸ *Yearbook ... 1999* (see footnote 1 above), pp. 135–137, paras. 44–54.

⁷⁹ *Yearbook ... 1998*, vol. II (Part Two), pp. 90–99, paras. 469–540, and *Yearbook ... 1999*, vol. II (Part Two), pp. 89–91, paras. 454–470.

⁸⁰ United States of America (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting, para. 52); France (*ibid.*, 16th meeting, para. 64); Sweden, on behalf of the Nordic countries (*ibid.*, 17th meeting, para. 5); Pakistan (*ibid.*, para. 20); Romania (*ibid.*, 18th meeting, para. 4); Germany (*ibid.*, para. 23); Venezuela (*ibid.*, para. 29); Cuba (*ibid.*, para. 55); Tunisia (*ibid.*, para. 57); Hungary, *ibid.*, 19th meeting, para. 23); Singapore (*ibid.*, para. 27); Islamic Republic of Iran (*ibid.*, 20th meeting, para. 9); Portugal (*ibid.*, para. 36); India (*ibid.*, 21st meeting, para. 34); and Egypt (*ibid.*, 22nd meeting, para. 14).

⁸¹ Chile (*Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 16th meeting, para. 3); Pakistan (*ibid.*, 17th meeting, para. 59); Slovenia (*ibid.*, 22nd meeting, para. 35); Croatia (*ibid.*, 25th meeting, para. 51); Russian Federation (*ibid.*, 26th meeting, para. 50); Libyan Arab Jamahiriya (*ibid.*, para. 14);

question, although some believed that a specific reservations regime should apply to human rights treaties,⁸² while others adamantly opposed the idea.⁸³

35. Several delegations drew attention to the growing interest in the subject⁸⁴ and stressed the practical usefulness the Guide to Practice would have for States once it was completed.⁸⁵ In the view of the Special Rapporteur, this point is of particular importance: indeed, it is the first time States are able to assess *in concreto* the form that the future guide could take.⁸⁶ It is encouraging to note that the exercise appeared convincing to those States that spoke on this point, none of which made any major criticism of the form selected.

36. However, two States considered the draft to be too detailed,⁸⁷ while another felt that the ultimate goal should be the elaboration of a draft convention,⁸⁸ while the Commission has never rejected this option outright, it is not in line with the thinking of the majority of its members,⁸⁹ and the Special Rapporteur has serious reservations about it. Yet another State suggested that the

draft should be supplemented by model statements,⁹⁰ which would seem to include not only model clauses, as the Commission has envisaged,⁹¹ but also model acceptances, objections or other reactions to reservations and interpretative declarations similar to those contemplated by the Council of Europe;⁹² this suggestion would appear to merit consideration.

37. More specifically, with regard to the “definition” exercise which the Commission undertook in 1998 and 1999, most delegations expressing views on the matter felt that it was useful and even very important,⁹³ even if some believed that the exercise should not stop there.⁹⁴ This conclusion is obvious;⁹⁵ however, as some delegates noted and as the Special Rapporteur again pointed out when he addressed the Sixth Committee, in keeping with the welcome practice instituted in 1997,⁹⁶ the definition of reservations on the one hand and their permissibility on the other must not be confused. It is only by determining precisely whether or not a particular unilateral statement constitutes a reservation that it is possible to apply—or not apply—the legal regime for reservations, and thus to assess permissibility.⁹⁷

38. That is also why almost all delegations supported the intention of the Special Rapporteur⁹⁸ to define interpretative declarations in relation to reservations and to conduct a parallel study of the legal regimes applying to each.⁹⁹

(Footnote 81 continued.)

Slovakia (ibid., para. 58); Cyprus (ibid., para. 86); Egypt (ibid., 27th meeting, para. 24); Kuwait (ibid., 28th meeting, para. 87); and Cuba (ibid., para. 95).

⁸² Sweden, on behalf of the Nordic countries (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, para. 6); Italy (ibid., para. 33, and ibid., *Fifth-fourth Session, Sixth Committee*, 24th meeting, para. 27); Hungary (ibid., para. 36) and Niger (ibid., 25th meeting, para. 108); see also Ireland (ibid., *Fifty-third Session, Sixth Committee*, 20th meeting, para. 50). Greece said that the role of the human rights treaty monitoring bodies with regard to reservations should be reviewed (ibid., *Fifth-fourth Session, Sixth Committee*, 28th meeting, para. 12).

⁸³ Singapore (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 19th meeting, paras. 27–28); Egypt (ibid., 22nd meeting, para. 15, and ibid., *Fifth-fourth Session, Sixth Committee*, 27th meeting, para. 26); Pakistan (ibid., 17th meeting, para. 59); Tunisia (ibid., 25th meeting, para. 29) and Cuba (ibid., 28th meeting, para. 95); see also Algeria (ibid., *Fifth-third Session, Sixth Committee*, 20th meeting, para. 61) and the statement by the Secretary-General of AALCC (ibid., 17th meeting, para. 45).

⁸⁴ Sweden, on behalf of the Nordic countries (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, paras. 4 and 6); Germany (ibid., 18th meeting, para. 23); India (ibid., 21st meeting, para. 33); and Greece (ibid., 22nd meeting, para. 44); Bahrain (ibid., *Fifth-fourth Session, Sixth Committee*, 28th meeting, para. 54); and Portugal (ibid., para. 90).

⁸⁵ United Kingdom (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting, para. 15); Japan (ibid., 17th meeting, para. 26); Italy (ibid., 18th meeting, para. 33); Tunisia (ibid., para. 57); Chile (ibid., *Fifth-fourth Session, Sixth Committee*, 16th meeting, para. 2); United States (ibid., 19th meeting, para. 32, and 25th meeting, paras. 83 and 85); Slovenia (ibid., 22nd meeting, para. 35); Poland (ibid., 25th meeting, para. 110); Islamic Republic of Iran (ibid., 26th meeting, para. 69); Cyprus (ibid., para. 86); and Kuwait (ibid., 28th meeting, para. 87).

⁸⁶ France (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 65, and ibid., *Fifth-fourth Session, Sixth Committee*, 24th meeting, para. 38) and Niger (ibid., 25th meeting, para. 104) disputed the use of the word “*directives*”, and would prefer the term “*lignes directrices*”; the Special Rapporteur is not convinced that this change is warranted.

⁸⁷ Japan (*Official Records of the General Assembly, Fifth-fourth Session, Sixth Committee*, 25th meeting, para. 15); and Austria (ibid., 27th meeting, para. 17).

⁸⁸ Venezuela (*Official Records of the General Assembly, Fifth-fourth Session, Sixth Committee*, 27th meeting, para. 13).

⁸⁹ See *Yearbook ... 1995*, vol. II (Part Two), pp. 106–107, paras. 467–470, and p. 108, paras. 483 and 487.

⁹⁰ Croatia (*Official Records of the General Assembly, Fifth-fourth Session, Sixth Committee*, 25th meeting, para. 50).

⁹¹ See *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487.

⁹² See paragraphs 54–56 below.

⁹³ Austria (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 15th meeting, para. 16); Italy (ibid., 18th meeting, para. 33); Tunisia (ibid., para. 57); and Slovakia (ibid., 22nd meeting, para. 41).

⁹⁴ See in particular the United Kingdom (ibid., 14th meeting, para. 15) and also the annex to that country’s statement of 2 November 1999, which indicated that the United Kingdom was more than ever convinced that the discussion of definitions was unnecessarily absorbing the Commission’s time and leading it away from the main issues on which States needed guidance; see also Germany (ibid., *Fifth-fourth Session, Sixth Committee*, 25th meeting, para. 16); Sweden, on behalf of the Nordic countries (24th meeting, para. 47); and the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session (A/CN.4/504), paras. 87–88.

⁹⁵ The Special Rapporteur wishes to take his share of responsibility for the delay in the preparation of the Guide to Practice. In his “defence”, he would note that he received no assistance other than what the Commission secretariat was able to provide (assistance which he wholeheartedly welcomed), that he could not place excessive demands on the secretariat, given its heavy workload, and that the topic itself proved to be sprawling and complex.

⁹⁶ On 4 November 1998 (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 20th meeting, paras. 73–84).

⁹⁷ See paragraph 30 and footnote 72 above.

⁹⁸ See paragraph 31 above.

⁹⁹ Sweden, on behalf of the Nordic countries (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, para. 5); Germany (ibid., 18th meeting, para. 24); Venezuela (ibid., para. 30); Italy (ibid., para. 33); Tunisia (ibid., para. 57); Slovenia (ibid., 21st meeting, para. 5); Slovakia (ibid., 22nd meeting, para. 41); Greece (ibid., para. 45); Bosnia and Herzegovina (ibid., para. 47); Republic of Korea (ibid., para. 49); Niger (ibid., *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 105) and Switzerland (ibid., 28th meeting, para. 104). Only the United Kingdom appeared to express doubts on this point (ibid., *Fifty-third Session, Sixth Committee*, 14th meeting, para. 15).

(ii) *Observations on the draft guidelines*

39. The draft guidelines adopted received overall approval from several delegations,¹⁰⁰ although others offered some criticisms, generally on points of detail, or made interesting drafting suggestions.¹⁰¹ It is not possible to reflect all of them here, and only those of immediate interest for the work of the Commission relating to the adoption on first reading of the Guide to Practice are briefly described below.¹⁰²

40. With regard to guideline 1.1, which is noteworthy for being an amalgam of the definitions of reservations contained in the 1969 and 1986 Vienna Conventions, it is reassuring to note that most speakers endorsed the composite method used in adopting the general definition.¹⁰³ Three delegations did propose amendments to guideline 1.1, replacing the word “modify” by “limit” or “restrict”¹⁰⁴ or adding a reference to guideline 1.1.1.¹⁰⁵ However, as one delegation and the Special Rapporteur noted, that would amount to amending the Vienna definition,¹⁰⁶ which the Commission had decided to avoid as far as possible.¹⁰⁷

41. Some delegations nevertheless drew attention to the problems posed by the effects of State succession on the legal regime for reservations to treaties, including the definition itself.¹⁰⁸ They agreed that it would be sufficient to return to that topic when the Commission

addressed reservations from that angle, which it planned to do in a special chapter of the Guide to Practice.¹⁰⁹

42. A single delegation initially cast some doubt on the possibility of “across-the-board” reservations referred to in guideline 1.1.1;¹¹⁰ however, it stated that it was satisfied with the reworded draft adopted in 1999.¹¹¹ Generally speaking, this text, which in the view of the Special Rapporteur provides significant clarification, was approved both in the original version adopted in 1998¹¹² and in 1999,¹¹³ although some delegations cautioned against a practice that had to be governed by specific rules,¹¹⁴ which the Commission would obviously have to consider when taking up the crucial question of the permissibility of reservations.

43. Subject to the possibility of including a reference to notifications of succession in cases of State succession,¹¹⁵ draft guideline 1.1.2 met with unanimous acceptance,¹¹⁶ as did guidelines 1.1.4¹¹⁷ and 1.1.7, with several delegations expressly acknowledging, by way of approval, their contribution to the progressive development of international law.¹¹⁸

44. Draft guideline 1.1.3 was generally approved,¹¹⁹ subject, in some cases, to certain drafting changes.¹²⁰ One delegation did wonder whether it would be appropriate to extend the scope of the draft guideline beyond

¹⁰⁰ United States (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting, para. 52); Argentina (*ibid.*, 15th meeting, para. 98); Algeria (*ibid.*, 20th meeting, para. 62); Slovenia (*ibid.*, 21st meeting, para. 5); India (*ibid.*, para. 34); Indonesia (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 22nd meeting, para. 39); and Sweden, on behalf of the Nordic countries (with the exception of guideline 1.1.3) (*ibid.*, 24th meeting, para. 46).

¹⁰¹ Short of constantly reworking the guidelines adopted, which would delay the work of the Commission considerably, those suggestions cannot be reflected until the second reading, in accordance with current practice. Nevertheless, these comments can be of great importance for the future work of the Commission, even on first reading.

¹⁰² The valuable topical summaries of the discussions in the Sixth Committee on the reports of the Commission provide a fuller picture of the positions taken by States on individual guidelines (see A/CN.4/496, paras. 155–174; and A/CN.4/504, paras. 92–114).

¹⁰³ See, inter alia, the Czech Republic (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 77); Venezuela (*ibid.*, 18th meeting, para. 29); Tunisia (*ibid.*, para. 57); Greece (*ibid.*, 22nd meeting, para. 45); and Bosnia and Herzegovina (*ibid.*, para. 47); see also footnotes 80–81 above.

¹⁰⁴ France (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 66) and Switzerland (*ibid.*, 20th meeting, para. 66).

¹⁰⁵ Guatemala (*Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 43).

¹⁰⁶ Mexico (*ibid.*, 18th meeting, para. 16) and Mr. Pellet (*ibid.*, 20th meeting, paras. 74–75).

¹⁰⁷ See footnote 69 above.

¹⁰⁸ Czech Republic (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, paras. 81–83); Slovenia (*ibid.*, 21st meeting, para. 5, and *Fifty-fourth Session, Sixth Committee*, 22nd meeting, para. 35); Switzerland (*ibid.*, *Fifty-third Session, Sixth Committee*, 20th meeting, para. 67); Bosnia and Herzegovina (*ibid.*, 22nd meeting, para. 47); and Croatia (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 52).

¹⁰⁹ See the second report (*Yearbook ... 1996* (footnote 16 above), pp. 48–49, para. 37, and p. 50, para. 46).

¹¹⁰ Czech Republic (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 78).

¹¹¹ On 3 November 1999 (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 79).

¹¹² See France (*ibid.*, *Fifty-third Session, Sixth Committee*, 16th meeting, para. 67) and Mexico (*ibid.*, 18th meeting, para. 16).

¹¹³ See Italy (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 24th meeting, para. 26); France (*ibid.*, para. 39); Poland (*ibid.*, 25th meeting, para. 111) and Greece (*ibid.*, 28th meeting, paras. 7–8).

¹¹⁴ France (*ibid.*, 24th meeting, para. 39); see also Burkina Faso (*ibid.*, 26th meeting, para. 46).

¹¹⁵ Czech Republic (*ibid.*, *Fifty-third Session, Sixth Committee*, 16th meeting, para. 82), Switzerland (*ibid.*, 20th meeting, para. 67) and Poland (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 112); see also footnote 108 above.

¹¹⁶ See, inter alia, France (*ibid.*, *Fifty-third Session, Sixth Committee*, 16th meeting, para. 68), Mexico (*ibid.*, 18th meeting, para. 16), Venezuela (*ibid.*, para. 29) and Bahrain (*ibid.*, 21st meeting, para. 17).

¹¹⁷ See, inter alia, Bahrain (*ibid.*, para. 18) and Greece (*ibid.*, 22nd meeting, para. 46).

¹¹⁸ See, inter alia, the Czech Republic (*ibid.*, 16th meeting, para. 84), Mexico (*ibid.*, 18th meeting, para. 18), Italy (*ibid.*, para. 34), Switzerland (*ibid.*, 20th meeting, para. 69), Bahrain (*ibid.*, 21st meeting, para. 18) and Greece (*ibid.*, 22nd meeting, para. 46). China drew attention to the problems posed by the withdrawal or modification of reservations and interpretative declarations formulated jointly (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 101); this question is addressed in part II of this report.

¹¹⁹ See, inter alia, France (*ibid.*, *Fifty-third Session, Sixth Committee*, 16th meeting, para. 68), Mexico (*ibid.*, 18th meeting, para. 17), Italy (*ibid.*, para. 34), Bahrain (*ibid.*, 21st meeting, para. 17; Bahrain, however, expressed reservations about a point in the commentary—expressly endorsed by France (*ibid.*, 16th meeting, para. 68)—that will warrant further study when the section of this report dealing with the formulation of reservations is considered) and Greece (*ibid.*, 22nd meeting, para. 46).

¹²⁰ Switzerland (*ibid.*, 20th meeting, para. 68) and Poland (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 113).

situations of colonialism,¹²¹ and two others expressed some doubts as to the merits of the chosen solution or, in any event, to the possibility of making it general.¹²²

45. Curiously, draft guidelines 1.1.5–1.1.6, concerning unilateral statements by which States intend to increase the rights conferred by a treaty or discharge an obligation by an equivalent means, and 1.4.1–1.4.2, concerning unilateral statements purporting to undertake unilateral commitments, or add further elements to a treaty, which had been the subject of extensive debate in the Commission,¹²³ did not elicit very many comments from States. At most one can say that while some States felt in 1998 that the specific problem of “extensive reservations” ought to be taken up in order to remove any ambiguity,¹²⁴ others found the question to be a theoretical one.¹²⁵

46. Since 1998, some States have supported the Special Rapporteur’s position regarding the definition of interpretative declarations.¹²⁶ On this important aspect of the Commission’s work delegations to the Sixth Committee in 1999 did not differ in their views from the positions taken in the Commission and approved both the decision to define interpretative declarations in the Guide to Practice and the definition selected¹²⁷ with

only a few slight changes,¹²⁸ or the distinction criterion in guideline 1.3.¹²⁹

47. The distinction between “mere” and conditional interpretative declarations was approved by States.¹³⁰ Several States felt that the latter were closer to reservations than to mere interpretative declarations,¹³¹ while others insisted that the two concepts were different.¹³²

48. Many delegations in the Sixth Committee made comments, both general and detailed, about the draft guidelines contained in section 1.4 or the commentary thereto.¹³³ Guideline 1.4.3, concerning statements of non-recognition, on which there were major differences of view in the Commission,¹³⁴ was approved as to substance by all States that spoke,¹³⁵ although one of them felt that since certain statements did not constitute reservations, such a provision had no place in the Guide to Practice.¹³⁶

49. As for “reservations” to bilateral treaties, the draft texts proposed by the Special Rapporteur¹³⁷ and adopted by the Commission in 1999 were unanimously approved¹³⁸ with only minor changes.

50. The few delegations that commented on draft guideline 1.6, on “safeguards” (scope of definitions), approved them as well.¹³⁹

¹²¹ Mexico (*ibid.*, *Fifty-third Session, Sixth Committee*, 18th meeting, para. 17); Mexico extended this observation to draft guideline 1.1.4 (*ibid.*).

¹²² Sweden, on behalf of the Nordic countries (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 24th meeting, para. 46) and Spain (*ibid.*, 26th meeting, para. 2); in addition, the United Kingdom, which did not bring this point up again during the public debate in 1999, transmitted to the Special Rapporteur in July 1999 a long, forcefully argued note entitled “Draft guidelines on reservations to treaties provisionally adopted by the International Law Commission on first reading”, in which it concluded that State practice was contrary to the position taken by the Commission in that the latter included unilateral statements having the effect of excluding the application of an entire treaty to a non metropolitan territory. This note reached the Special Rapporteur too late to be of use during the Commission’s discussions in 1999, but should be a valuable tool during the second reading of the Guide to Practice.

¹²³ See paragraph 22 above.

¹²⁴ See France (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 69) and Switzerland (*ibid.*, 20th meeting, para. 70). Switzerland maintains that guideline 1.1.5 is useful but has some reservations about guideline 1.1.6; see also Switzerland (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 28th meeting, para. 102).

¹²⁵ Austria (*ibid.*, *Fifty-third Session, Sixth Committee*, 15th meeting, para. 16), Sweden, on behalf of the Nordic countries (*ibid.*, 17th meeting, para. 4) and the Russian Federation (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 26th meeting, para. 57, concerning guideline 1.1.6 only); Guatemala felt that guideline 1.1.5 did little more than state the obvious (*ibid.*, 25th meeting, para. 45, and also *Fifty-third Session, Sixth Committee*, 20th meeting, para. 42). Several States felt that statements purporting to undertake unilateral commitments (guideline 1.4.1) were in fact unilateral acts (see Italy (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 24th meeting, para. 28), Tunisia (*ibid.*, 25th meeting, para. 29), Venezuela (*ibid.*, 27th meeting, para. 13), Austria (*ibid.*, para. 17) and Bahrain (*ibid.*, 28th meeting, para. 58)), which is also what the Special Rapporteur thinks (see the third report (*Yearbook ... 1998* (footnote 3 above), p. 258, para. 212, draft guideline 1.1.5)).

¹²⁶ Mexico (*Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 18th meeting, para. 15) and Greece (*ibid.*, 22nd meeting, para. 45).

¹²⁷ See, *inter alia*, Chile (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 16th meeting, para. 5), Italy (*ibid.*, 24th meeting, para. 29), France (*ibid.*, para. 41), Croatia (*ibid.*, 25th meeting, para. 53), Poland (*ibid.*, para. 114) and Venezuela (*ibid.*, 27th meeting, para. 13).

¹²⁸ See the comments by Guatemala (*ibid.*, 25th meeting, para. 48), which believed that the word “attributed” left too much to the discretion of the declarant; the Republic of Korea (*ibid.*, para. 95), which wanted the definition of reservations to be reworded *a contrario*; France (*ibid.*, 24th meeting, para. 41); and Switzerland (*ibid.*, 28th meeting, para. 103), which suggested the reintroduction of time limits.

¹²⁹ Similarly, guideline 1.3.2, concerning the phrasing and name of interpretative declarations elicited little opposition.

¹³⁰ Only Japan criticized what it seemed to consider to be an unnecessary complication (*Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 15).

¹³¹ See the Republic of Korea (*ibid.*, para. 96) and Spain (*ibid.*, 26th meeting, para. 3). Switzerland thought that this could only be determined later (*ibid.*, 28th meeting, para. 104).

¹³² See Israel (*ibid.*, 25th meeting, para. 75), the Czech Republic (*ibid.*, para. 81) and China (*ibid.*, para. 100).

¹³³ See A/CN.4/504 (footnote 94 above), paras. 109–113.

¹³⁴ See paragraph 25 above and the fourth report (*Yearbook ... 1999* (footnote 1 above), pp. 135–137, paras. 44–54).

¹³⁵ France (*Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 24th meeting, para. 42), the Czech Republic (*ibid.*, 25th meeting, para. 81), Poland, which suggested that the question of the effects of such declarations should be considered by the Commission in the context of unilateral acts (*ibid.*, para. 115) and Spain (*ibid.*, 26th meeting, para. 2).

¹³⁶ Israel (*ibid.*, 25th meeting, para. 77); *contra*: China (*ibid.*, para. 102).

¹³⁷ See Argentina (*ibid.*, *Fifty-third Session, Sixth Committee*, 15th meeting, para. 98) and Venezuela (*ibid.*, 18th meeting, para. 30).

¹³⁸ Including by the United States (*ibid.*, *Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 87), a fact which should be noted, owing to the wealth of practice existing in this area in that country. See also Hungary (*ibid.*, 24th meeting, para. 37), France (*ibid.*, para. 44), the Czech Republic (*ibid.*, 25th meeting, para. 82), the Niger (*ibid.*, para. 106), Poland (*ibid.*, para. 116) and Spain (*ibid.*, 26th meeting, para. 4); Spain points out, not without reason, that the title of draft guideline 1.5.1 is rather unsatisfactory.

¹³⁹ France (*ibid.*, *Fifty-third Session, Sixth Committee*, 16th meeting, para. 70) and Singapore (*ibid.*, 19th meeting, para. 27); Bahrain, however, felt that the question could not be separated from that of the permissibility of reservations (*ibid.*, 21st meeting, para. 19). On this

B. Action by other bodies

51. In his third report, the Special Rapporteur had drawn attention to another sign of the interest in the topic of reservations to treaties demonstrated by the action taken by two bodies with which the Commission has a cooperative relationship: the Council of Europe and AALCC.¹⁴⁰ These bodies continued their exploration of the topic in 1998–1999.

52. The third report noted that AALCC had given special consideration to the question of reservations to treaties during its thirty-seventh session, held in New Delhi from 13 to 18 April 1998.¹⁴¹ During that session a special meeting devoted to reservations to treaties was held on 14 April 1998.

53. According to the report prepared by Mr. W. Z. Kamil,¹⁴² who had been appointed rapporteur of the special meeting, the participants had focused particular attention on the Commission's preliminary conclusions adopted in 1997.¹⁴³ Their deliberations yielded the following consensus views:

(a) The regime of reservations provided for in the 1969 Vienna Convention has proved effective and does not need to be changed;

(b) In particular, it is sufficiently flexible and it satisfactorily ensures both the right of States to enter reservations and the necessary preservation of the object and purpose of the treaty;

(c) It would be better not to introduce differences in the regime applicable to different categories of treaties, including human rights treaties; accordingly,

(d) Most participants opposed paragraph 5 of the preliminary conclusions.¹⁴⁴

54. The Group of Specialists on Reservations to International Treaties (DI-S-RT) established by the Committee of Ministers of the Council of Europe¹⁴⁵ continued its work and held several meetings which led to significant progress. During one meeting, held in Paris from 14 to 16 September 1998, the Group engaged in a rapid exchange of views with the Special Rapporteur on the progress of the Commission's work and heard a communication from Mr. Pierre-Henri Imbert, Director of Human Rights of the Council of Europe and an eminent specialist on the question of reservations to treaties.¹⁴⁶ It

point, see paragraph 27 above. Guatemala suggested that the scope of this measure should be broadened (*Fifty-fourth Session, Sixth Committee*, 25th meeting, para. 47).

¹⁴⁰ *Yearbook ... 1998* (see footnote 3 above), p. 233, paras. 27–30.

¹⁴¹ *Ibid.*, para. 30.

¹⁴² *AALCC Bulletin*, vol. 22, issue No. 1 (New Delhi, June 1998), pp. 12–18. This same publication contains a summary of the portion of the Commission's report on reservations.

¹⁴³ See paragraph 8 above.

¹⁴⁴ *AALCC Bulletin* (see footnote 142 above), pp. 15–17.

¹⁴⁵ See third report (*Yearbook ... 1998* (footnote 3 above), p. 233, para. 28).

¹⁴⁶ See Council of Europe, CAHDI, document DI-S-RIT (98) 9/CAHDI (98) 23; this document clearly spells out the "Strasbourg approach" and discusses whether it can be applied in a general fashion.

also considered the "Model-objection clauses to reservations to international treaties considered as inadmissible", prepared by Sweden, and a document submitted by the Netherlands entitled "Key issues regarding reservations at the various stages of the process of concluding treaties (negotiation, signature and ratification) and post-ratification stage".

55. On the proposal of this group, which became the Group of Experts on Reservations to International Treaties (DI-E-RIT), the Committee of Ministers of the Council of Europe on 18 May 1999 adopted recommendation No. R (99) 13 on responses to inadmissible reservations to international treaties; it called on the Governments of member States to be guided by the "model response clauses to non-specific reservations" annexed to the recommendation.¹⁴⁷

56. At its second meeting,¹⁴⁸ the Group discussed the report of the Commission on reservations¹⁴⁹ and held a debate on the basis of a document by the Netherlands on key issues concerning the formulation of reservations to international treaties, a new version of which had been adopted at the third meeting;¹⁵⁰ this highly practical document looks at several major problems and will be discussed in this report in the context of the topics it covers. In addition, at these meetings the Group, in its capacity as a European observatory of reservations to international treaties, considered a list of reservations and declarations to international treaties and expressed doubts as to the lawfulness of some of them.

C. General presentation of the fifth report

57. Following the consideration of the first report on reservations to treaties, the Special Rapporteur concluded that:

(b)¹⁵¹ The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.¹⁵²

58. These conclusions met with general approval both in the Sixth Committee and in the Commission itself,

¹⁴⁷ These model response clauses will be discussed in a later report.

¹⁴⁸ Held at Strasbourg, France, on 6 September 1999; see Council of Europe, CAHDI, document DI-E-RIT (99) 9 rev.

¹⁴⁹ And noted its concern at the current rate of progress of the Commission's work on the topic; see footnote 95 above.

¹⁵⁰ Held in Berlin on 10 March 2000. The document adopted is now entitled "Practical issues regarding reservations to international treaties" (DI-E-RIT (2000) 2, appendix 3).

¹⁵¹ Subparagraph (a) concerned the amendment of the title of the topic; the original title was "The law and practice relating to reservations to treaties".

¹⁵² *Yearbook ... 1995* (see footnote 5 above), p. 108, para. 487.

and they were not called into question during consideration of the second and third reports.¹⁵³ The Special Rapporteur views the conclusions as general guidelines to be used as a basis for consideration of the topic.

59. This report has been prepared according to the general method described in the third report on reservations to treaties.¹⁵⁴ This method is

(a) Empirical (the Special Rapporteur is unable to analyse the extensive documentation on the subject¹⁵⁵ as systematically as he might wish);

(b) “Viennese” (these arguments are consistently based on the three Vienna Conventions of 1969, 1978 and 1986, whose text, preparatory work, lacunae and implementation are described as systematically as possible); and

(c) “Composite” insofar as the relevant provisions of the Vienna Conventions have been combined wherever possible into single guidelines which have been reproduced at the beginning of the various sections of the Guide to Practice.

60. The third report, devoted to the definition of reservations, covered the majority of part two of the provisional plan of the study set forth in chapter I of the second report.¹⁵⁶ Two of the planned sections, “Distinction between reservations and other procedures aimed at modifying the application of treaties” and “The legal regime of interpretative declarations”, have, however, been omitted for different reasons.

61. In the second case, the omission was deliberate. As the Special Rapporteur indicated in his third report,¹⁵⁷ the legal regime for interpretative declarations poses complex problems that could not have been solved without lengthy consideration by the Commission at the cost of delaying its discussion of the problems relating to reservations. The fact that the rules applicable to interpretative declarations can be defined only by comparison with those relating to reservations makes such an approach seem even more illogical. This is particularly true in the case of conditional interpretative declarations, which it would doubtless not be excessive to consider “quasi-reservations”¹⁵⁸ and where it must be

determined to what extent they correspond to the legal regime applicable to reservations and to what extent they vary from it (if they do so at all, which is not certain). Therefore, the Special Rapporteur stated in his third report that he planned systematically to present the draft guidelines of the Guide to Practice relating to the legal regime of interpretative declarations at the same time as the corresponding provisions relating to reservations.¹⁵⁹ This proposal met with the approval of both the members of the Commission who spoke on the matter¹⁶⁰ and the Sixth Committee.¹⁶¹ Thus, that approach will be followed in this and any subsequent report.

62. The second omission mentioned in the third report, which did not comment on the distinction between reservations and other procedures purporting to modify the application of treaties, is entirely fortuitous and is simply the consequence of insufficient time. This question will therefore be the subject of chapter I of this report.

63. In accordance with the above-mentioned provisional general outline,¹⁶² the following chapters will be devoted, respectively, to the formulation and withdrawal of reservations, the formulation of acceptances of reservations and the formulation and withdrawal of objections to reservations and to the corresponding rules governing interpretative declarations.

64. In addition, time permitting, the Special Rapporteur will devote a final chapter of this report to an overview of the issues raised by the effects of reservations (and of interpretative declarations), their acceptance and objections to them.

65. This report will thus be organized as follows:

(a) Chapter I: Alternatives to reservations and interpretative declarations;

(b) Chapter II: Formulation, modification and withdrawal of reservations and interpretative declarations.

¹⁵³ *Yearbook ... 1997*, (see footnote 17 above), pp. 52–53, paras. 116–123.

¹⁵⁴ *Yearbook ... 1998* (see footnote 3 above), pp. 233–235, paras. 31–41.

¹⁵⁵ See footnote 95 above.

¹⁵⁶ *Yearbook ... 1996* (see footnote 16 above), p. 48, para. 37.

¹⁵⁷ *Yearbook ... 1998* (see footnote 3 above), p. 235, para. 45.

¹⁵⁸ See the discussion of this issue in the third report (*ibid.*, pp. 271–274, paras. 306–327, pp. 275–276, paras. 337–339, and pp. 280–281, paras. 381–391); see also the views expressed by

Messrs Kateka (*Yearbook ... 1998*, vol. I, 2552nd meeting, p. 225, paras. 24–27), Illueca (*ibid.*, pp. 226–227, paras. 39–43), Addo (*ibid.*, p. 227, para. 44), Gaja (*Yearbook ... 1999*, vol. I, 2582nd meeting, pp. 105–106, paras. 46–47), Elaraby (*ibid.*, 2583rd meeting, pp. 109–110, para. 23) and Kamto (*ibid.*, p. 110, para. 24).

¹⁵⁹ *Yearbook ... 1998* (see footnote 3 above), p. 235, para. 46.

¹⁶⁰ *Yearbook ... 1998*, vol. I, 2552nd meeting. See the statements made by Messrs Brownlie (p. 225, para. 32), Simma (p. 226, para. 37), Al-Baharna (p. 227, para. 45), Herdocia Sacasa (para. 46), Economides (para. 47), Bennouna (para. 48) and Galicki (para. 49); see also *Yearbook ... 1998*, vol. II (Part Two), p. 98, paras. 533–539.

¹⁶¹ See paragraph 38 above.

¹⁶² See footnote 156 above.

CHAPTER I

Alternatives to reservations and interpretative declarations

66. In his first report, the Special Rapporteur mentioned a number of problems resulting from several specific treaty approaches which appeared to be rival institutions of reservations. Like the latter, these approaches are “aimed at modifying participation in treaties, but, like them, [put] at risk the universality of the conventions in question (additional protocols, bilateralization, selective acceptance of certain provisions, etc.)”.¹⁶³

67. As indicated in the second report, it seems useful to link the consideration of the definition of reservations to that of other procedures, which, while not constituting reservations, are, like them, “designed to and do, enable States to modify obligations under treaties to which they are parties; this is a question of alternatives to reservations, and recourse to such procedures may likely make it possible, in specific cases, to overcome some problems linked to reservations”.¹⁶⁴

68. Such consideration, to which this chapter is devoted, has two aims.¹⁶⁵ In the first place, such procedures can be a source of inspiration for the progressive development of the law applicable to reservations. Secondly—and it is for this reason that their description should be linked to the definition of reservations—some of these procedures are so close to reservations that the question arises whether they should not simply be treated as equivalent. Draft guidelines intended to facilitate distinctions between such procedures and reservations in the strict sense round out the discussion; it is proposed to include them in section 1 of the Guide to Practice, on definitions, which should thus be complete.

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

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

A. Different procedures for modifying or interpreting treaty obligations

71. Neither reservations nor interpretative declarations, as defined in sections 1.1 and 1.2, respectively, of the Guide to Practice, are the only approaches available

to the parties for modifying the effects of the provisions of a treaty (in the first case) and clarifying its meaning (in the second case).

1. DIFFERENT PROCEDURES FOR MODIFYING THE EFFECTS OF A TREATY

72. In the first judgment which it rendered, PCIJ declined, not without reason, to

see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.¹⁶⁶

73. The fact remains that, once concluded through the expression of the free consent of the parties, treaties prove to be “voluntary traps” from which States (or international organizations) can “escape” only under very stringent, rarely fulfilled conditions, as codified and listed exhaustively¹⁶⁷ in the 1969 Vienna Convention.

74. In order to avoid this trap or, at least, mitigate its severity, States and international organizations strive to preserve their freedom of action by limiting treaty obligations. At the risk of undermining legal safeguards, “the ideal, for the diplomat and the politician, is, without any doubt, the non-binding obligation”.¹⁶⁸

75. This “concern of each government with preserving its capacity to reject or adopt [and adapt] the law (a minimal, defensive concern)”¹⁶⁹ is particularly present in two situations: where the treaty in question deals with especially sensitive matters or contains exceptionally onerous obligations,¹⁷⁰ or where it binds States whose situations are very different and whose needs are not necessarily met by a uniform set of rules. It is this type of consideration which led the authors of the ILO Constitution to state:

In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.¹⁷¹

¹⁶⁶ S.S. “Wimbledon”, *Judgments*, 1923, P.C.I.J., Series A, No. 1, p. 25.

¹⁶⁷ See article 42, paragraph 2, of the 1969 Vienna Convention.

¹⁶⁸ Virally, “Des moyens utilisés dans la pratique pour limiter l’effet obligatoire des traités”, p. 7.

¹⁶⁹ Lacharrière, *La politique juridique extérieure*, p. 31.

¹⁷⁰ Such is the case, for example, of the charters of “integrating” international organizations (see the Treaties establishing the European Communities; see also the Rome Statute of the International Criminal Court).

¹⁷¹ Art. 19, para. 3. This article reproduces the provisions of article 405 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).

¹⁶³ *Yearbook ... 1995* (see footnote 2 above), p. 150, para. 149; see also paragraphs 145–147 (*ibid.*, pp. 149–150).

¹⁶⁴ *Yearbook ... 1996* (see footnote 16 above), p. 49, para. 39.

¹⁶⁵ See, in this connection, the approach taken with regard to treaties concluded within the Council of Europe by Spiliopoulou Åkermark, “Reservation clauses in treaties concluded within the Council of Europe”, p. 506.

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

This would suggest that the object of the framers of the Treaty of Peace, in imposing on the Conference this obligation to give preliminary consideration to the special circumstances of each country, was to prevent States from pleading, after the adoption of a convention, a special situation which had not been submitted to the Conference's judgment.¹⁷²

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.¹⁷³

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

77. Reservations are one of the means intended to bring about this reconciliation.¹⁷⁴ But they are far from "the only procedure which makes it possible to vary the content of a treaty in its application to the parties"¹⁷⁵ without undermining its purpose and object. Many other procedures are used.

78. Some authors have endeavoured to reduce all these procedures to one. Thus, Georges Droz, former Deputy Secretary General of the Hague Conference on Private International Law, has proposed to classify these alternatives to reservations under the single heading "options":

Like reservations, they undermine the uniformity created by the treaty. But unlike reservations, in which the reserving State is seen to withdraw to some extent from the treaty on a specific point, options simply allow for a modification, an extension or a clarification of the terms of the treaty within a framework and limits expressly provided for therein. Reservations and options have as their purpose to facilitate accession to the treaty for the largest number of States, despite the deep differences which may exist in their legal systems and despite certain national interests, but they do so differently. Reservations are a "surgical" procedure which amputates certain provisions from the treaty,¹⁷⁶ while options are a more "therapeutic" procedure which adapts the treaty to certain specific needs.¹⁷⁷

¹⁷² "The admissibility of reservations to general conventions," memorandum by the Director of the International Labour Office, submitted to the Council on 15 June 1927 (League of Nations, *Official Journal* (July 1927), p. 883. See also "Written statement of the International Labour Organization", *I.C.J. Pleadings, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pp. 224 and 236.

¹⁷³ 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 one", 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.

¹⁷⁴ See the second report, *Yearbook ... 1996* (footnote 16 above), p. 56, para. 90.

¹⁷⁵ Combacau and Sur, *Droit international public*, p. 133.

¹⁷⁶ This is a somewhat reductionist conception of reservations, as shown by some of the draft guidelines adopted up to now (see guidelines 1.1.1, 1.1.3 and 1.1.6).

¹⁷⁷ "Les réserves et les facultés dans les conventions de La Haye de droit international privé", p. 383.

79. While it has been severely criticized,¹⁷⁸ the notion of "options" has the advantage of showing that reservations are not the only means by which the parties to a multilateral treaty can modify the application of its provisions, to which a number of other procedures can lend a flexibility made necessary by the different situations of the States or international organizations seeking to be found by the treaty.

80. The common feature of these procedures, which makes them alternatives to reservations, is that, like the latter, they purport "to exclude or to modify the legal effect of certain provisions of the treaty"¹⁷⁹ or "of the treaty as a whole with respect to certain specific aspects"¹⁸⁰ in their application to certain parties. But there the similarities end, and drawing up a list of them proves difficult, "for the imagination of legal scholars and diplomats in this area had proved to be unlimited".¹⁸¹ In addition, on the one hand, some treaties combine several of these procedures with each other and with reservations, and on the other hand, it is not always easy to differentiate them clearly from one another.¹⁸²

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

82. Some procedures for modifying the legal effects of the provisions of a treaty are provided for in the treaty itself; others are external to it. This was the distinction adopted by Virally, one of the few authors to undertake a general enquiry into "the means used in practice to limit the binding effect of treaties". In general, it can be stated that the States has two methods at its disposal. The first consists of introducing limits on [treaty] obligations into the very texts in which they are defined. The second, on the other hand, consists of introducing these limits into the application of the texts by which States have bound themselves.¹⁸³

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

(a) Restrictive clauses, "which limit the purpose of the obligation by making exceptions to and placing limits on it"¹⁸⁴ in respect of the area covered by the obligation or its period of validity;

¹⁷⁸ Particularly by Majoros, who believes that "the set of 'options' is merely an amorphous group of provisions which afford various options" ("Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", p. 88.

¹⁷⁹ See draft guideline 1.1 of the Guide to Practice.

¹⁸⁰ See draft guideline 1.1.1.

¹⁸¹ Virally, *loc. cit.*, p. 6.

¹⁸² *Ibid.*, p. 17.

¹⁸³ *Ibid.*, p. 8.

¹⁸⁴ *Ibid.*, p. 10. This notion corresponds to "clawback clauses" as they have been defined by 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", p. 281); see also Ouguergouz, "L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général", p. 296. Other authors propose a more restrictive definition; according to Gittleman, 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", p. 691, cited by Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles: étude sur l'article 15 de la Convention européenne des droits de l'homme*, p. 24).

(b) Escape clauses, “which have as their purpose to suspend the application of general obligations in specific cases”,¹⁸⁵ and among which mention can be made of savings clauses and derogations;¹⁸⁶

(c) 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”,¹⁸⁷

(d) Opting-[or contracting-]out clauses, “under which a State will be bound by rules adopted by majority vote if it does not express its intent not to be bound within a certain period of time”,¹⁸⁸ or

(e) Those which offer the parties a choice among several provisions; or again,

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

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

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

(b) Suspension of the treaty,¹⁸⁹ whose causes are enumerated and codified in part V of the 1969 and 1986 Vienna Conventions, particularly the application of the principles *rebus sic stantibus*¹⁹⁰ and *non adimpleti contractus*;¹⁹¹

(c) Amendments to the treaty, where they do not automatically bind all the parties thereto;¹⁹² and

(d) Protocols or agreements having as their purpose (or effect) to supplement or modify a multilateral treaty only between certain parties,¹⁹³ including in the framework of “bilateralization”.¹⁹⁴

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

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

87. They can, for example, be classified according to the procedures used. Some are treaty-based; they are provided for either in the treaty whose effects are to be modified (such is the case with regard to restrictive clauses or amendments) or in a different treaty (protocols). Others are unilateral (reservations in cases where a treaty is silent, suspension of treaty provisions). Most are “mixed” in the sense that, being envisaged in the treaty, these procedures are implemented through unilateral declarations of the “receiving” State (reservations provided for in the treaty, including “negotiated reservations”,¹⁹⁵ unilateral statements formulated pursuant to escape clauses,¹⁹⁶ opting-in or opting-out clauses or clauses offering a choice among the treaty provisions).

88. In most cases, these procedures purport to limit, on behalf of one or more contracting parties, the obligations imposed in principle by the treaty. Such is the purpose not only of reservations¹⁹⁷ but also of restrictive or escape clauses. It may happen, however, that they increase such obligations, as opting-in clauses clearly demonstrate. As to the other procedures listed above, they are “neutral” in this respect, since they may purport either to limit or to increase the obligations, as the case may be (choice among treaty provisions, amendments, protocols).

89. Lastly, among these various procedures, some are “reciprocal” and purport to modify the effects of the treaty provisions in their application not only by the “receiving” State, but also by the other contracting parties in respect of that State. Such is the case, under certain conditions, of the reservations formulated under article 21 of the 1969 and 1986 Vienna Conventions, and, in general, of restrictive clauses, amendments and protocols (unless they expressly provide for discriminatory regimes). On the other hand, statements formulated under escape clauses (derogations or savings clauses) are in essence non-reciprocal (although the treaty may expressly provide the opposite¹⁹⁸). As to the opting-in or opting-out mechanisms or the provisions offering the parties a choice, they raise interesting questions in this regard (some of which will be considered more extensively in section 2 below), but generally speaking, it can be considered that everything depends on the wording of the relevant provisions or on the nature of the treaty concerned.

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

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, *in relation to any other state accepting the same obligation*,* the jurisdiction of the Court in all legal disputes concerning:

¹⁸⁵ Virally, loc. cit., p. 12.

¹⁸⁶ See paragraphs 138–139 below.

¹⁸⁷ Virally, loc. cit., p. 13.

¹⁸⁸ Simma, “From bilateralism to community interest in international law”, p. 329; see also Tomuschat, “Obligations arising for States without or against their will”, pp. 264 et seq.

¹⁸⁹ Termination of the treaty is a different matter; it puts an end to the treaty relations (see paragraph 133 below).

¹⁹⁰ See the 1969 and 1986 Vienna Conventions, art. 62.

¹⁹¹ Ibid., art. 60.

¹⁹² Ibid., arts. 40, para. 4, and 30, para. 4.

¹⁹³ Ibid., art. 41.

¹⁹⁴ See paragraphs 120–130 below.

¹⁹⁵ See paragraphs 164–165 and 169–170 below.

¹⁹⁶ The “mixed” nature of this procedure is particularly apparent in the case of derogations (as opposed to savings clauses), as they are not only provided for in the treaty, but must further be authorized by the other contracting parties on the initiative of the receiving party.

¹⁹⁷ See draft guidelines 1.1.5 and 1.1.6.

¹⁹⁸ See article XIX, paragraph 3, of the General Agreement on Tariffs and Trade.

- 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.¹⁹⁹

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

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

91. On the other hand, the implementation of the escape clauses contained in human rights treaties is in essence non-reciprocal, and it is inconceivable that, for example, if a State party to the European Convention on Human Rights makes use of the option afforded by article 15 of that Convention,²⁰⁰ the other States parties would be released from their own obligations under the Convention, even with regard to the nationals of that State.

92. The fairly frequent combination of these various procedures further complicates their necessary²⁰¹ classification. To take but three examples:

(a) The optional declarations under article 36, paragraph 2, of the ICJ Statute²⁰² can be, and frequently are, accompanied by reservations;

(b) States can formulate reservations to restrictive clauses contained in escape clauses appearing in multilateral conventions; the reservation by France to article 15 of the European Convention on Human Rights (which is an escape clause and, more specifically, a savings clause)²⁰³ constitutes an abundantly commented²⁰⁴ illustration of this; and

¹⁹⁹ The drafting of article 36, paragraph 3 (“The declarations referred to above may be made unconditionally or on condition of reciprocity ...”) introduces an element of uncertainty. In practice, however, optional declarations under article 36, paragraph 2, are generally made on condition of reciprocity and the Court ensures its strict observance (see, among numerous examples: *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 22, *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, pp. 23–24, and *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 298–299).

²⁰⁰ “(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

“... ”

“(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor ...”

²⁰¹ Necessary again for the same reason (see paragraph 30 above): in the absence of clear distinctions and definitions, it is not possible to determine the legal regime applicable to a specific unilateral provision or declaration.

²⁰² See paragraphs 90 above and 191–193 below.

²⁰³ United Nations, *Treaty Series*, vol. 1496, annex A, p. 233. See also paragraphs 138–139 below.

²⁰⁴ See, for example, Pellet, “La ratification par la France de la Convention européenne des droits de l’homme”, pp. 1358–1363; Coussirat-Coustère, “La réserve française à l’article 15 de la Convention Européenne

(c) The entry into force of the derogation regimes provided for in certain conventions can be subordinated to the conclusion of a supplementary agreement; such is the case, for example, of article 23, paragraph (5), of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters, whereby:

In the Supplementary Agreements referred to in article 21²⁰⁵ the Contracting States may agree:

...

- (5) Not to apply this Convention to decisions rendered in the course of criminal proceedings;

93. The Special Rapporteur hesitated for a long time before proposing the inclusion in the Guide to Practice of draft guidelines on alternatives to reservations. Upon reflection, however, he found it useful to include them for reasons comparable to those which led the Commission to include in the Guide a section 1.4 on unilateral statements other than reservations and interpretative declarations;²⁰⁶ the Guide to Practice has a strictly “utilitarian” purpose, and it is probably not superfluous to remind negotiators of international conventions that within the law of treaties there are, alongside reservations, various approaches making it possible to modify the effects of treaties through recourse to different procedures.

94. It seems useful, therefore, to include in the Guide to Practice a draft guideline 1.7.1²⁰⁷ with the following wording:

“1.7.1 *Alternatives to reservations*

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

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

des Droits de l’Homme; Cohen-Jonathan, *La Convention européenne des droits de l’homme*, Economica, Paris, 1989, pp. 564–566; and Tavernier, “Article 15”, pp. 493–494.

²⁰⁵ Article 21 provides as follows:

“Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect.”

²⁰⁶ See, in particular, *Yearbook ... 1999*, (footnote 75 above), p. 112, paras. (1)–(2) of the commentary on draft guideline 1.4.

²⁰⁷ This numbering is provisional. The Commission may perhaps prefer to place the section provisionally numbered 1.7 on alternatives to reservations and interpretative declarations before draft guideline 1.6 on scope of definitions.

of procedure is used in a codification convention. This could be the subject of the following draft guideline:

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

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

“(a) Restrictive clauses that limit the object of the obligations imposed by the treaty by making exceptions and setting limits thereto;

“(b) Escape clauses that allow the contracting parties not to apply general obligations in specific instances and for a specific period of time;

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

“2. Modification of the effects of the provisions of a treaty may also result in:

“(a) Their suspension in accordance with the provisions of articles 57 to 62 of the 1969 and 1986 Vienna Conventions;

“(b) Amendments to the treaty entering into force only between certain parties; or

“(c) Supplementary agreements and protocols purporting to modify the treaty only as it affects the relations between certain parties.”

2. PROCEDURES FOR INTERPRETING A TREATY OTHER THAN INTERPRETATIVE DECLARATIONS

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

97. Leaving aside the third-party interpretation mechanisms provided for in the treaty,²⁰⁸ the variety of such alternative procedures in the area of interpretation is nonetheless not as great. To the best of the Special Rapporteur's knowledge, hardly more than two procedures of this type can be mentioned.

98. In the first place, it is very often the case that the treaty itself specifies the interpretation to be given to its own provisions. Such is the primary purpose of the clauses containing the definition of the terms used in the treaty.²⁰⁹ 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 itself²¹⁰ or in a separate instrument.²¹¹

99. Secondly, the parties, or some of them,²¹² may conclude an agreement for the purposes of interpreting a treaty previously concluded between them. This possibility is expressly envisaged in article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, which requires the interpreter to

take 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.

100. Moreover, it may happen that the interpretation is “bilateralized”.²¹³ Such is the case where a multilateral convention delegates to bilateral agreements the task of clarifying the meaning or scope of certain provisions. Thus, article 23 of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters, referred to earlier,²¹⁴ provides that contracting States shall have the option of concluding supplementary agreements in order, *inter alia*:

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

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

101. It therefore seems desirable to include in the Guide to Practice a provision on alternatives to interpretative declarations, if only for the sake of symmetry with the proposal made above concerning alternatives to reservations.²¹⁵ On the other hand, in view of the small number of these alternatives, it does not appear necessary to devote a separate draft guideline to their enumeration. A single draft guideline can cover the two draft guidelines 1.7.1 and 1.7.2.

102. This draft guideline could be drafted as follows:

“1.7.5 Alternatives to interpretative declarations

“In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, the contracting parties may have recourse to procedures other than interpretative declarations. They may include in the treaty

²¹⁰ See, here again among countless examples, article 13, paragraph 4, of the International Covenant on Economic, Social and Cultural Rights: “No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions.”

²¹¹ See notes and supplementary provisions in annex I to GATT. This corresponds to the possibility envisaged in article 30, paragraph 2, of the 1969 and 1986 Vienna Conventions.

²¹² Where all the parties to the interpretative agreement are also parties to the original treaty, the interpretation is authentic (see paragraph (14) of the commentary to article 27, paragraph 3 (a), of the draft articles on the law of treaties, which became article 30, paragraph 3 (a), of the 1969 Vienna Convention (*Yearbook ... 1966*, vol. II, p. 221, document A/6309/Rev.1)); see, with regard to bilateral treaties, draft guideline 1.5.3.

²¹³ On the “bilateralization” of reservations, see paragraphs 120–130 below, and draft guideline 1.7.4.

²¹⁴ See paragraph 92 above.

²¹⁵ See paragraphs 93–94 above.

²⁰⁸ See Simon, *L'interprétation judiciaire des traités d'organisations internationales*.

²⁰⁹ See, among countless examples, article 2 of the 1969 and 1986 Vienna Conventions or article XXX of the Articles of Agreement of the International Monetary Fund.

express provisions whose purpose is to interpret the treaty or may conclude supplementary agreements to that end."

103. No special provision concerning alternatives to conditional interpretative declarations²¹⁶ appears to be necessary: the alternative procedures listed above are treaty-based and require only the agreement of the contracting parties. It matters little, therefore, whether or not the agreed interpretation constitutes the *sine qua non* of their consent to be bound.

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

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

105. The fact that provision may be made in the treaty itself for ways of modifying treaty commitments thus provides no indication as to whether or not the procedures chosen can be described as reservations.²¹⁷ The problem is all the trickier in that according to the Vienna definition, which is reflected in draft guideline 1.1 in the Guide to Practice, the manner in which a unilateral act is phrased or named does not constitute an element of its definition as a reservation; a treaty may well not use the term "reservation" in describing a method of modifying treaty commitments, whereas the method in question matches the definition of reservations in all respects and must therefore be regarded as a reservation.²¹⁸ As pointed out by Droz: "It is sometimes difficult to distinguish between a reservation and an option, in terms of substance. Some provisions are presented as options but are in fact reservations, while other provisions whereby States 'reserve' certain possibilities are in fact only options."²¹⁹

106. For example, there is little doubt that the "declarations" made under article 25 of the European Convention on Nationality²²⁰ constitute reservations even though neither the title nor the relevant provision itself contains the word "reservations". On the other hand, in article 17 of the Energy Charter Treaty "[e]ach Contracting Party reserves the right to deny the advantages of this Part", even though what is involved here is much more a restrictive clause than a reservation.

107. The fact remains that in some cases the distinction between "options" or "alternatives to reservations" and reservations themselves does not pose any particular problem. This is basically so in the case of two hypotheses: on the one hand, when modification of the effects

of a treaty does not result from a unilateral statement but from a treaty procedure, despite the doctrinal confusion that has arisen with respect to the notions of "treaty reservations" or "bilateralization", and, on the other hand, when a unilateral statement by a State has the effect of suspending the application of certain provisions of a treaty or of the treaty as a whole or of terminating it. Much trickier problems arise in the case of hypotheses whereby a treaty provides that the parties may choose between treaty provisions, by means of unilateral statements.

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

1. TREATY METHODS OF MODIFYING THE EFFECTS OF A TREATY

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

(a) Restrictive clauses

110. The fact that a unilateral statement purporting to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author,²²¹ 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 should²²² formulate reservations and even the content of such reservations";²²³ however, other exclusion clauses with the same or similar effects are nevertheless not reservations within the precise meaning of the word, as defined by the 1969 and 1986 Vienna Conventions and the Guide to Practice.

111. Imbert gives two examples that highlight this fundamental difference, by comparing article 39 of the Revised General Act for the Pacific Settlement of International Disputes²²⁴ with article 27 of the European Convention for the Peaceful Settlement of Disputes.²²⁵ Under article 39, paragraph 2, of the Revised General

²¹⁶ See draft guideline 1.2.1.

²¹⁷ See paragraphs 110–111 below.

²¹⁸ In this connection, see, for example, Majoros, *loc. cit.*, p. 88.

²¹⁹ *Loc. cit.*, p. 383.

²²⁰ "Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, that it will exclude Chapter VII from the application of the Convention" (on the subject of this provision, see paragraph 153 below). See also, for example, article 10 of the Agreement on international humane trapping standards, and article 19 of the Framework Convention for the protection of national minorities.

²²¹ See draft guidelines 1.1 and 1.1.1.

²²² It would be more accurate to use the word "may".

²²³ Imbert, *Les réserves aux traités multilatéraux*, p. 12. If the Commission decides to devote part of the Guide to Practice to definitions (other than the part on reservations and interpretative declarations), it would be desirable to include a definition of reservation clauses. "Negotiated reservations" (see paragraphs 164 et seq. below) fall within this category.

²²⁴ Article 38 of the General Act (Pacific Settlement of International Disputes) of 26 September 1928 was similarly worded.

²²⁵ Imbert, *op. cit.*, p. 10.

Act, reservations that are exhaustively enumerated must be indicated at the time of accession and

may be such as to exclude from the procedure described in the present Act:

(a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute;

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

Article 27 of the European 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.

112. There are striking similarities here: in both cases the aim is to exclude identical types of disputes from methods of settlement provided for by the treaty in question. However, the two approaches “work” differently: in the European Convention for the Peaceful Settlement of Disputes the exclusion is comprehensive and based on the treaty itself; in the Revised General Act for the Pacific Settlement of International Disputes the exclusion is just one of a number of possibilities available to States parties, and this exclusion is permitted by the treaty but takes effect only if a unilateral statement is made at the time of accession.²²⁶ Article 39 of the Revised General Act is a reservation clause; article 27 of the European Convention is a restrictive clause that limits the “object of the obligations imposed by the treaty by making exceptions and setting limits thereto”, as stated in the definition proposed above, in draft guideline 1.7.2.

113. There are many such restrictive clauses, in treaties on a wide range of subjects, such as the settlement of disputes,²²⁷ the safeguarding of human rights,²²⁸

²²⁶ It is therefore not entirely accurate to assert, as 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.). This is true only of the reserving State’s relations with other parties to the Revised General Act for the Pacific Settlement of International Disputes, and not of such other parties’ relations among themselves, to which the treaty applies in its entirety.

²²⁷ In addition to article 27 of the above-mentioned European Convention, see, for example, article I of the Agreement between Great Britain and France, providing for the Settlement by Arbitration of certain Classes of Questions which may arise between the two Governments (London, 14 October 1903) (*British and Foreign State Papers, 1902–1903*, vol. 96, p. 35), which has served as a model for a great number of subsequent treaties:

“Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 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.”

²²⁸ See the references to “clawback clauses” (footnote 184 above). For example (again, there are innumerable examples), article 4 of the International Covenant on Economic, Social and Cultural Rights:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be

protection of the environment,²²⁹ trade,²³⁰ and the law of armed conflicts.²³¹

114. At first glance, there would appear to be no likelihood of confusion between such restrictive clauses and reservations. However, not only is language usage deceptive and “terms such as ‘public order reservations’, ‘military imperatives reservations’, or ‘sole competence reservations’ are frequently encountered”,²³² but authors, including the most distinguished among them, have caused an unwarranted degree of confusion. For example, in an oft-quoted passage²³³ from the dissenting opinion that he appended to the ICJ judgment in the *Ambatielos* 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.²³⁴

115. More ambiguously, but nevertheless in an unfortunate manner, Scelle also causes confusion in defining a reservation as “a *treaty clause** emanating from one or several* Governments that have signed or acceded to a treaty setting up a legal regime that derogates from the general treaty regime”.²³⁵

116. Although the confusion appears to be only doctrinal, the Commission could help to clear up the misunderstandings in question if it were to include in the Guide to Practice, an appropriate draft guideline, which could be inserted in section 1.7 on alternatives to reservations²³⁶ and would read:

“1.7.3 Restrictive clauses

compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

²²⁹ See article VII (Exemptions and other special provisions relating to trade) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or article 4 (Exceptions) of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

²³⁰ See articles XII (Restrictions to safeguard the balance of payments), XIV (Exceptions to the rule of non-discrimination), XX (General exceptions) and XXI (Security exceptions) of GATT.

²³¹ See article 3 common to the Geneva Conventions of 12 August 1949 (minimum level of protection).

²³² Imbert, op. cit., p. 10. For an example of a “public order reservation”, see the first paragraph of article 6 of the Convention 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 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.”

²³³ See Fitzmaurice, “The law and procedure of the International Court of Justice 1951–4: treaty interpretation and other treaty points”, pp. 272–273; however, although he quotes this definition with apparent approval, this distinguished author departs from it considerably in his commentary.

²³⁴ *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 76.

²³⁵ *Précis de droit des gens: Principes et systématique*, p. 472.

²³⁶ Another option would be to include it in section 1.1 on the definition of reservations.

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

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

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

118. This procedure, which is provided for in article 40, paragraphs 4–5,²³⁷ (and article 30, paragraph 4)²³⁸ and article 41²³⁹ of the 1969 and 1986 Vienna Conventions,²⁴⁰ is applied as a matter of rou-

²³⁷ Article 40. Amendment of multilateral treaties:

“4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

“5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

“(a) be considered as a party to the treaty as amended; and

“(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.”

²³⁸ Article 30. Application of successive treaties relating to the same subject matter:

“3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59 [on termination or suspension of the operation of a treaty implied by conclusion of a later treaty], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

“4. When the parties to the later treaty do not include all the parties to the earlier one:

“(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

“(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”

²³⁹ Article 41. Agreements to modify multilateral treaties between certain of the parties only:

“1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

“(a) the possibility of such a modification is provided for by the treaty; or

“(b) the modification in question is not prohibited by the treaty and:

“(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

“(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

“2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.”

²⁴⁰ In its commentary to the corresponding draft articles (art. 40 (former draft art. 36), paras. 4–5, art. 30 (former draft art. 26), para. 4, and art. 41 (former draft art. 37)), the Commission takes great care to distinguish between “formal amendments” and agreements making “modifications” (see *Yearbook ... 1966* (footnote 212 above), p. 232, para. (3) of the commentary to part IV, and p. 235, para. (1) of

tine. 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:

(a) 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;

(b) Such agreement may be reached at any stage, generally following the treaty’s entry into effect for its parties,²⁴¹ 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;

(c) It is not a question here of excluding or modifying the legal effect of certain provisions of the treaty in their application, but in fact of modifying the provisions in question themselves;²⁴²

(d) Moreover, whereas reservations can only limit their author’s treaty obligations or make provision for equivalent ways of implementing a treaty,²⁴³ amendments and protocols can have the effect of both extending and limiting the obligations of States and international organizations parties to a treaty.

119. Since there is no fear of confusion in the case of reservations, no clarification is called for and it would appear unnecessary to devote a specific guideline in the Guide to Practice to drawing a distinction which is already quite clear. It will suffice to mention that in this case there is a possible alternative to reservations, in draft guideline 1.7.2, as suggested above. However, some specific agreements concluded between two or more States Parties to basic treaties purporting to produce the same effects as those produced by reservations pose special problems, and it would be possible (and desirable) to combine the two in a single draft guideline.²⁴⁴

(c) *“Bilateralization” of “reservations”*

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

121. The bilateralization regime has been described as permitting “contracting States, while being parties to a multilateral convention, to choose the part-

the commentary to article 41 (former draft art. 37)). Such a distinction does not seem relevant for the purposes of a comparison with reservations.

²⁴¹ This is not always the case, however; see the well-known Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

²⁴² In this connection, see Ruda, “Reservations to treaties”, pp. 107–108.

²⁴³ Cf. draft guidelines 1.1.5–1.1.6 and, on the other hand, 1.4.1, 1.4.2 and 1.5.1.

²⁴⁴ See draft guideline 1.7.4 and paragraph 130 below.

ners with which they will proceed to implement the regime provided for".²⁴⁵ This is not an innovation of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters, since it can be traced back to article XXXV, paragraph 1, of GATT.²⁴⁶ Moreover, a number of conventions on private international law adopted earlier in the context of the Hague Conference on Private International Law had already at least partially achieved the goal of free choice of partners, by allowing the parties to refuse to be bound vis-à-vis States that had not participated in the conventions' adoption²⁴⁷ or making the effect of the accession of such States subject to the specific consent of contracting States.²⁴⁸ The same applies to article 37, paragraph 3, of the European Convention on State Immunity, adopted in the context of the Council of Europe.²⁴⁹

²⁴⁵ Hoogstraten, "L'état présent de la Conférence de La Haye de droit international privé", p. 387.

²⁴⁶ "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 Imbert, *op. cit.*, p. 199. The practice of "lateral agreements" (see Carreau and Juillard, *Droit international économique*, pp. 54–56 and 126–127) has accentuated this bilateralization. See also article XIII of the Marrakesh Agreement Establishing the World Trade Organization.

²⁴⁷ See, for example, article 13, paragraph 4, of the Convention concerning recognition of the legal personality of foreign companies, associations and institutions: "The adhesion shall have effect only for relations between the adhering State and States which do not make objection within six months from such communication" (quoted by Imbert, *op. cit.*, p. 200, who also refers to article 12 of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, article 31 of the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, and article 42 of the Convention concerning the International Administration of the Estates of Deceased Persons). For more recent examples, see article 44, paragraph 3, of the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption; article 58, paragraph 3, of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; and article 54, paragraph 3, of the Convention on the International Protection of Adults.

²⁴⁸ See, for example, article 17, paragraphs 2–3, of the Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children:

"The Convention shall enter into force, between the acceding State and the State declaring acceptance of such accession on the sixtieth day following the date of deposit of the instrument of accession.

"The accession shall have effect only in relations between the acceding State and those Contracting States which have declared that they accept such accession ..."

(Quoted by Imbert, *op. cit.*, p. 200, who also refers to article 13 of the Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods, article 21 of the Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, article 39 of the Convention on the taking of evidence abroad in civil or commercial matters, article 28 of the Convention on the recognition of divorces and legal separations, and article 18 of the Convention on the law applicable to traffic accidents; see also Jenard, "Une technique originale: la bilatéralisation de conventions multilatérales", p. 389).

²⁴⁹ "... 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."

122. The general approach involved in this procedure is not comparable with the approach on which the reservations method is based; it allows a State to exclude by means of its silence or by means of a specific declaration, the application of a treaty as a whole in its relations with one or more other States and not to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain aspects. It is more comparable with statements of non-recognition, where such statements purport to exclude the application of a treaty between a declaring State and the non-recognized entity.²⁵⁰

123. However, in response to a Belgian proposal, the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters goes further than these traditional bilateralization methods. It not only makes the Convention's entry into effect with respect to relations between two States subject to the conclusion of a supplementary agreement,²⁵¹ but it also permits the two States to modify their commitment *inter se* within the precise limits set in article 23;²⁵²

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

Below is a list of 22 possible ways of modifying the Convention, whose purposes, as summarized in the explanatory report of C. N. Fragistas, are as follows:

1. *To clarify a number of technical expressions used by the Convention whose meaning may vary from one country to another (article 23 of the Convention, Nos. 1, 2, 6 and 12);*
2. *To include within the scope of the Convention matters that do not fall within its scope (article 23 of the Convention, Nos. 3, 4 and 22);*
3. *To apply the Convention in cases where its normal requirements have not been met (article 23 of the Convention, 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 (article 23 of the Convention, No. 5);*
5. *To declare a number of provisions inapplicable (article 23 of the Convention, No. 20);*
6. *To make a number of optional provisions of the Convention mandatory (article 23 of the Convention, 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 (article 23 of the Convention, Nos. 14, 15, 16, 17, 18 and 19).²⁵³*

124. According to Imbert, many of these alternatives "simply permit States to define words or to make provision for procedures; however, a number of them restrict the effect of the Convention and are genuine reserva-

²⁵⁰ See draft guideline 1.4.3 and paragraphs (5)–(9) of the commentary (*Yearbook ... 1999* (footnote 75 above), pp. 114–116).

²⁵¹ See footnote 205 above for the text of article 21 of the Convention.

²⁵² Mentioned above in paragraphs 92 and 100. The initial Belgian proposal did not envisage this possibility of modification, which was established subsequently as the discussions progressed (see Jenard, *loc. cit.*, pp. 392–393).

²⁵³ The Hague Conference on Private International Law, *Actes et documents de la session extraordinaire, 13 to 26 April 1966, Exécution des jugements* (The Hague, Imprimerie nationale, 1969), p. 364. See also Droz, "Le récent projet de Convention de La Haye sur la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale", p. 240.

tions (particularly those set out in paragraphs 5, 8, 13, 19 and 20)".²⁵⁴ The Special Rapporteur does not agree.

125. These options, which permit States concluding a supplementary agreement to exclude from the application of the basic treaty certain categories of jurisdictional decisions or not to apply certain provisions thereof, either as a general rule or in particular circumstances, do indeed purport to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the two States. However, and this is a fundamental difference, such exclusions or modifications are not the product of a unilateral statement, which constitutes an essential element of the definition of reservations,²⁵⁵ but, rather, an agreement between two of the States parties to the basic treaty that does not affect the other contracting parties to the treaty.

126. As Droz states, "if such provisions had been set out in the body of the Treaty itself, they would have constituted genuine reservations,²⁵⁶ but as a result of bilateralization they are confined to relations between two partners. The wish to eliminate the classic reservation system is obvious".²⁵⁷

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.²⁵⁸

The supplementary agreement is, so to speak, an instrument that is not a prerequisite for the entry into effect of the treaty, but for ensuring that the treaty has effects on relations between the two States concluding the agreement, since its effects will otherwise be diminished (and it is in this respect that its similarity to the reservations procedure is particularly obvious) or increased; however, its treaty nature precludes any equation with reservations.

127. The Convention on the recognition and enforcement of foreign judgements in civil and commercial matters 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:²⁵⁹ article 20 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which permits contracting States to "agree to dispense with" a number of provisions; "but its application is not based on the free choice of a partner";²⁶⁰ article 34 of the Convention on the Limitation Period in the International Sale of Goods, which prompts the same com-

ment; articles 26, 56 and 58 of the European Convention 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 Convention 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.²⁶¹

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

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

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

129. Such a draft guideline might read:

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

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

130. The alternative titles proposed for this draft guideline are intended to indicate that two approaches are conceivable: the Commission may wish to limit the guideline strictly to supplementary "bilateralization" agreements and, in that event, the logical title is the first one (even though using inverted commas does not work well)²⁶² and it would be desirable to include in the text the wording inside square brackets: or the Commission may wish to opt for a more general formulation to cover comprehensively all agreements containing derogations, in other words, both "bilateralized reservations"

²⁶¹ Once again, one cannot truly speak of bilateralization in a strict sense since this provision does not call for the choice of a partner. See also article 52 of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, or article 49 of the Convention on the International Protection of Adults.

²⁶² Inverted commas were used in the title of draft guideline 1.5.1 on reservations to bilateral treaties, but that approach was criticized by Spain in the Sixth Committee (see footnote 135 above).

²⁵⁴ Imbert, *op. cit.*, p. 200.

²⁵⁵ See draft guideline 1.1.

²⁵⁶ See paragraphs 110–116 above, including draft guideline 1.7.3.

²⁵⁷ "Les réserves et les facultés ...", p. 391.

²⁵⁸ Jenard, Rapport du Comité restreint sur la bilatéralisation, The Hague Conference on Private International Law (see footnote 253 above), p. 145. See also the explanatory report by Fragistas, *ibid.*, pp. 363–364.

²⁵⁹ These examples are taken from Imbert, *op. cit.*, p. 201.

²⁶⁰ *Ibid.*; see also Droz, "Les réserves et les facultés ...", pp. 390–391. In fact, this procedure bears a resemblance to amendments between certain parties to the basic convention alone.

and amendments and protocols between certain parties to treaties only and the second solution (without the words inside square brackets) would seem to be preferable. The Special Rapporteur himself has a preference for the second alternative, in the interest of achieving the greatest completeness possible, even though, as indicated above,²⁶³ amendments and protocols do not give rise to serious problems of definition vis-à-vis reservations. In either case, the nuances of the various possible formulations should be discussed in the commentary to this draft guideline.

2. UNILATERAL DECLARATIONS PURPORTING TO SUSPEND A TREATY OR CERTAIN PROVISIONS THEREOF

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

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

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

A party which, under the provisions of the present Convention,²⁶⁴ invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

133. Unquestionably, unilateral statements are what are being dealt with here. However, that is where all possible comparisons with reservations end. These notifications do not 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*”*,²⁶⁵ but to put an end to the instrument that the treaty constitutes (in the case of notification of termination,²⁶⁶ to treaty relations (in the case of notification of withdrawal or denunciation of a multilateral treaty)²⁶⁷ or to release “the parties between which the operation of the

treaty is suspended from the obligation to perform the treaty [as a whole] in their mutual relations during the period of the suspension”.²⁶⁸

134. The problem of a possibly increasing similarity to reservations could, however, arise if the suspension did not affect the treaty as a whole, but only certain provisions thereof: in such a case,²⁶⁹ it is indeed a question of temporarily excluding the legal effect of certain provisions of a treaty in their application to the State or international organization that made the notification of partial suspension. And the temporary nature of such exclusion is not a decisive element in the differentiation from reservations, since reservations may be formulated for just a fixed period.²⁷⁰ Moreover, reservation clauses can impose such a provisional nature.²⁷¹

135. However, even in the case of a notification of partial suspension, a fundamental element of the definition of reservations is still lacking, since it can be assumed that such a notification is not made by a State “when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty”²⁷² or, more generally, by its author when “expressing consent to be bound”,²⁷³ but, on the contrary, after the treaty has taken effect for the author, which suffices in order to distinguish clearly between such unilateral statements and reservations.

136. Furthermore, the 1969 and 1986 Vienna Conventions make such statements subject to a legal regime that differs clearly from the reservations regime.²⁷⁴

²⁶⁸ Ibid., art. 72, para. 1 (a).

²⁶⁹ This possibility is not excluded by the 1969 and 1986 Vienna Conventions (despite their obvious caution); see article 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties), subparagraph (a), and article 44 (Separability of treaty provisions) of those two Conventions. See Reuter, “Solidarité et divisibilité des engagements conventionnels”, also reproduced in Reuter, *Le développement de l'ordre juridique international: écrits de droit international*, pp. 361–374.

²⁷⁰ Horn offers the example of ratification by the United States of the 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 of America” (*Reservations and Interpretative Declarations to Multilateral Treaties*, p. 100).

²⁷¹ See article 25, paragraph 1, of the European Convention on the Adoption of Children, and article 14, paragraph 2, of the 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 Convention on the recognition of divorces and legal separations, 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.”

²⁷² Draft guideline 1.1.

²⁷³ Draft guideline 1.1.2.

²⁷⁴ See, in particular, articles 65, 67–68 and 72.

²⁶³ In paragraphs 117–119.

²⁶⁴ See paragraph 73 above.

²⁶⁵ See draft guidelines 1.1 and 1.1.1.

²⁶⁶ See the 1969 and 1986 Vienna Conventions, art. 70, para. 1.

²⁶⁷ Ibid., para. 2.

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

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

138. As indicated above,²⁷⁵ such escape clauses fall into two categories:²⁷⁶ waivers and escape clauses. Although some authors do not draw a clear distinction between the two,²⁷⁷ it can be assumed that escape clauses permit a contracting party temporarily not to meet certain treaty requirements owing to the difficulties it is encountering in fulfilling them as a result of special circumstances, whereas waivers, which produce the same effect, must be authorized by the other contracting parties or by an organ responsible for monitoring treaty implementation. That is to say, notifications made on the basis of an escape clause produce effects ipso facto, owing solely to the fact that they are notified to the other parties or to the depositary by the beneficiary State, whereas only authorization by the other contracting States or, more often, by an organ of an international organization, gives effect to notifications under a waiver.

139. A comparison of article XIX, paragraph 1 (a), and article XXV, paragraph 5, of GATT shows the difference clearly.²⁷⁸ The former 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 or directly competitive products, the contracting party shall be free, in respect of such product, 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.²⁷⁹

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

In exceptional circumstance not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority

²⁷⁵ Para. 83.

²⁷⁶ See Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, pp. 218 and 302.

²⁷⁷ Manin provides a broad definition of “escape clauses”, which covers both escape clauses *sensu stricto* and waivers:

“The term ‘escape clauses’ is used to refer to the provisions set out in certain international agreements which offer contracting parties which invoke them the option of temporarily derogating, either fully or partially, from the provisions contained in such agreements as and when certain circumstances justify their application upon completion of a procedure determined by each agreement considered”

(“À propos des clauses de sauvegarde”, p. 1). See also see Virally, loc. cit., pp. 14–15, and Ouguergouz, loc. cit., p. 290.

²⁷⁸ See Carreau and Juillard, op. cit., p. 104. Article 15 of the European Convention on Human Rights (see footnote 200 above) provides another well-known example of an escape clause, in a very different field.

²⁷⁹ This option has been regulated but not abolished by the Agreement on Safeguards contained in annex IA to the Marrakesh Agreement Establishing the World Trade Organization.

of the votes cast and that such majority shall comprise more than half of the contracting parties.²⁸⁰

140. The shared characteristic of these two types of clause is that they authorize States parties to the treaty containing them to suspend their treaty obligations temporarily. In that respect they bear a similarity to reservations, without there being any reason to focus on the distinction between escape clauses and waivers, since a treaty may make the formulation of a reservation subject to the reactions of the other parties,²⁸¹ which means that it is closer to a waiver than to an escape clause.

141. As stated by Manin,

[T]he identical approach taken in the case of the two methods is noteworthy. Both approaches appear to show little concern for the integrity of an international agreement, since they prefer a more universal application thereof. The option of formulating reservations is an element that is likely to promote more widespread acceptance of international treaties. Similarly, the fact that it is possible to release oneself or be released for a given period of time from one’s international obligations is such as to encourage a hesitant State to enter finally into a commitment that offers it a number of advantages.²⁸²

142. “There, however, the similarity between the two procedures ends.”²⁸³ In fact, in the case of a reservation, the partners of the reserving State or international organization are informed at the outset of the limits on the commitment of that State or organization, whereas in the case of a declaration under an escape clause, the aim is to remedy unforeseeable difficulties arising from the application of the treaty. The time element of the definition of reservations is thus absent, as it is in the case of all unilateral statements purporting to suspend the provisions of a treaty.²⁸⁴

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

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

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

²⁸⁰ The same applies, for example, to article VIII, section 2 (a), of the Articles of Agreement of the International Monetary Fund: “... no member shall, *without the approval of the Fund*,* impose restrictions on the making of payments and transfers for current international transactions.”

²⁸¹ See the examples given by Imbert, op.cit., pp. 174–176.

²⁸² Manin, loc. cit., p. 3.

²⁸³ Ibid.

²⁸⁴ See paragraph 135 above. See also, in that connection, Spiliopoulou Åkermark, loc. cit., pp. 501–502.

3. PROCEDURES PROVIDING FOR A CHOICE BETWEEN PROVISIONS OF A TREATY BY MEANS OF A UNILATERAL STATEMENT

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

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

(a) Statements by which a State, exercising an option provided for in a treaty, excludes the application of certain provisions of the treaty;

(b) Statements by which, conversely, a State accepts obligations which the treaty specifically presents as being optional;

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

147. Three preliminary comments must be made here:

(a) First, the specific purpose of these unilateral statements is, once again, to modify the application of the treaty to which they relate in order to facilitate accession thereto; in this way such statements come close to being reservations as defined in the 1969 and 1986 Vienna Conventions and the Guide to Practice;

(b) Secondly, as has already been noted,²⁸⁵ the fact that such options are provided for in the treaty whose application they seek to modify clearly does not of itself afford sufficient grounds for distinguishing between such unilateral statements and reservations: the purpose of reservation clauses is also to allow States to suspend the application of certain provisions of the treaty even though this may entail certain conditions;

(c) Thirdly, and lastly, the distinction between the three formulas above is not always obvious,²⁸⁶ particularly as they can occasionally be combined. Nevertheless, from an intellectual standpoint, they can and must be considered separately when comparing them to reservations as defined in draft guideline 1.1 and those that follow.

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

148. This case is dealt with in article 17, paragraph 1, of the 1969 and 1986 Vienna Conventions:

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

149. This provision, which was adopted without modification at the United Nations Conference on the Law of

Treaties,²⁸⁷ 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 effective only if the treaty or the other contracting States authorize such a partial consent.²⁸⁸

150. One thing that is immediately obvious about this provision is the fact that while it appears in part II, section 1 (Conclusion of treaties), it creates a link with articles 19 to 23, in part II, section 2, which are specifically devoted to reservations. Thus it becomes even more important to determine whether statements by which a State or an international organization expresses its consent to be bound only to part of a treaty when a treaty so permits are reservations or not.

151. Such exclusionary clauses (opting or contracting out) are quite common. Samples can be found in the conventions adopted under the auspices of the Hague Conference on Private International Law, the Council of Europe, ILO and in various other conventions.²⁸⁹ Among the latter, one may cite by way of example, article 14, paragraph 1, of the International Convention for the Prevention of Pollution from Ships, 1973:

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

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

(a) First paragraph of Article 8 of the Convention 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.

²⁸⁷ See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968* (United Nations publication, Sales No. E.68.V.7), report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, pp. 129–130, paras. 156–157.

²⁸⁸ *Yearbook ... 1966* (see footnote 212 above), pp. 219–220, para. (2) of the commentary to article 14.

²⁸⁹ 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, Imbert, op. cit., pp. 171–172.

²⁸⁵ See paragraph 110 above.

²⁸⁶ For examples, see paragraphs 180 and 203–204 below.

(b) Article 9 of the Convention concerning the recognition of the legal personality of foreign companies, associations and institutions:

Each contracting State, on signing or ratifying the present Convention or on adhering hereto, may reserve the faculty of limiting the scope of its application, as defined in article 1.

153. The appearance of exclusionary clauses in conventions concluded by the Council of Europe is also common:²⁹⁰

(a) Article 34, paragraph 1, of the European Convention for the Peaceful Settlement of Disputes:

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;

(b) Article 7, paragraph 1, of the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality:

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;

(c) Article 25, paragraph 1, of the European Convention on Nationality:

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

154. International labour conventions also make use of this technique, in keeping with the spirit of article 19 of the ILO Constitution:²⁹¹

(a) Article 2 of ILO Convention (No. 63) concerning statistic of wages and hours of work in the principal mining and manufacturing industries, including building and construction, and in agriculture:

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

- (a) any one of Parts II, III or IV; or
- (b) Parts II and IV; or
- (c) Parts III and IV.

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

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

²⁹⁰ For other examples, see Spiliopoulou Åkermark, loc. cit., pp. 504–505.

²⁹¹ See paragraph 75 above.

(b) Article 17, paragraph 1,²⁹² of ILO Convention (No. 119) concerning the guarding of machinery:

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

155. International labour conventions (and other treaties) also contain more complex provisions that cannot be compared to exclusionary clauses, since ultimately they allow States Parties to exclude the application of certain provisions of the convention in respect of themselves while compelling them to accept others which are nevertheless quite different.²⁹³

156. As far as the Special Rapporteur knows, the great majority of authors who have taken up the question of whether or not statements made in application of such exclusionary clauses are reservations maintain that they are.²⁹⁴

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

It has been the consistent and long-established practice of the ILO not to accept for registration instruments of ratification of international labour Conventions when accompanied with reservations. As has been written, "this basic proposition of refusing to recognize any reservations is as old as ILO itself" (see W. P. Gormley, "The Modification of Multilateral Conventions by Means of Negotiated Reservations and Other Alternatives: A Comparative Study of the ILO and Council of Europe", 39 *Fordham Law Review*, 1970, at 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:

²⁹² Paragraph 2 governs statements made in accordance with paragraph 1 and limits the application of the provisions of the Convention.

²⁹³ See paragraphs 197–210 below.

²⁹⁴ Some authors, however, without specifically taking a position, see distinct differences between contracting out and reservations (see Simma, loc. cit., pp. 329–331).

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

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

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

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

It is interesting to note that, in the early years of the Organization, the view was taken that ratification of a labour Convention might well be made subject to the specific condition that it would only become operative if and when certain other States would have also ratified the same Convention (see International Labour Conference, 3rd session, 1921, at p. 220). In the words of the ILO Director General in his 1927 Memorandum to the Council of the League of Nations,

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

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

Notwithstanding the prohibition of formulating reservations, ILO member States are entitled, and, at times, 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 *ICJ Pleadings, 1951*, at p. 234). Yet for some, these flexibility devices have “for all practical purposes the same operational effect as reservations” (see Gormley, op. cit., *supra*, at p. 75).²⁹⁵

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

(a) 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;

(b) 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;

(c) 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 1969 and 1986 Vienna Conventions.

159. In fact, the 1969 and 1986 Vienna Conventions do not preclude the making of reservations, not because of an authorization implicit in the general international law of treaties as codified in articles 19–23 of the Conventions, but on the basis of specific treaty provisions: reservation clauses.²⁹⁶ This is quite clear from article 19 (b) of the Conventions, which concerns treaties that provide “that only *specified** reservations ... may be made”, or article 20, paragraph 1, which stipulates that “a reservation expressly authorized by a treaty does not require any subsequent acceptance”.

160. In fact, exclusionary clauses are clearly related to reservation clauses, and the resulting unilateral statements are related to the “specified” reservations “expressly authorized” by a treaty, including international labour conventions.²⁹⁷ They are indeed unilateral statements made at the time consent to be bound is expressed and purporting to exclude the legal effect of certain provisions of the treaty as they apply to the State or the international organization making the statement, all of which corresponds exactly to the definition of reservations, and, at first glance at least,²⁹⁸

²⁹⁵ Reply to questionnaire, pp. 3–5.

²⁹⁶ See paragraph 110 above.

²⁹⁷ At the same time, there is little doubt that a practice accepted as law has developed in ILO. Under this practice, any unilateral statement seeking to limit the application of the provisions of international labour conventions that is not explicitly stipulated is inadmissible. This is also clearly the case with regard to the conventions adopted by the Hague Conference on Private International Law (see Droz, “Les réserves et les facultés ...”, pp. 388–392). However, this is an altogether different question from that of defining reservations.

²⁹⁸ This needs to be verified, but at least it is no longer a question of definition.

it would seem that they are not and need not be subject to a separate legal regime.

161. Except for the absence of the word “reservations”, there appears to be little difference between the aforementioned exclusionary clauses²⁹⁹ and:

(a) Article 16 of the Convention on Celebration and Recognition of the Validity of Marriages: “A Contracting State may reserve the right to exclude the application of Chapter I”, article 28 of which provides for the possibility of “reservations”;

(b) Article 33 of the Convention on the taking of evidence abroad in civil or commercial matters, concluded in the context of the Hague Conference on Private International Law: “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”; and

(c) Article 35, entitled “Reservations”, of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment:

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

...

‘(c) not to apply Article 18’.”

And there are countless other examples.

162. The only disturbing element is the simultaneous presence in some conventions (at least those of the Council of Europe) of exclusionary *and* reservation clauses.³⁰⁰ The Special Rapporteur sees no other explanation for this situation than terminological vagueness.³⁰¹ And it is striking that, in its reply to the Commission’s questionnaire, ILO should mention among the problems encountered in the areas of reservations those relating to article 34 of the European Convention for the Peaceful Settlement of Disputes, since the word “reservation” does not even appear in this standard exclusionary clause.³⁰²

163. The distinction is not crystal clear,³⁰³ to say the least, and both in their form and their effects³⁰⁴ the statements made when expressing consent to be bound under exclusionary clauses are in every way comparable to reservations when provision is made for the latter, with restrictions, by reservation clauses.

164. In reality, exclusionary clauses take the form of “negotiated reservations”, as the term is currently (and

²⁹⁹ Paras. 151–154.

³⁰⁰ See articles 7 (para. 153 above) and 8 of the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, and the examples given by Spiliopoulou Åkermark, loc. cit., p. 506, footnote 121.

³⁰¹ This uncertainty is also stressed by Spiliopoulou Åkermark, loc. cit., p. 513.

³⁰² See paragraph 154 above.

³⁰³ Similarly, see Imbert, op. cit., p. 169, and Spiliopoulou Åkermark, loc. cit., pp. 505–506.

³⁰⁴ Similarly, see Gormley, loc. cit., pp. 75–76.

erroneously) accepted in the context of the Hague Conference on Private International Law and further developed in the context of the Council of Europe.³⁰⁵ As Imbert notes: “Strictly speaking, this means that it is the *reservation*—and not only the right to make one—that is the subject of the negotiations. In other words, unlike traditional clauses, clauses that apply such a procedure should make it possible to know beforehand not only what the reservation is but also what State will actually make it.”³⁰⁶ At the same time, the term is used in the Council of Europe in a broader sense, seeking to cover the “*procedure*” intended to enumerate either in the body of the Convention itself or in an annex the limits of the options available to States in formulating a reservation.”³⁰⁷

165. These, then, are not “reservations” at all in the proper sense of the term, but *reservation clauses* that impose limits and are precisely defined when the treaty is negotiated. And they are truly nothing more,³⁰⁸ even in the very rare cases where a specific State is mentioned in the clause as being its only beneficiary.³⁰⁹

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

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

“1.1.8³¹⁰ *Reservations formulated under exclusionary clauses.*

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

³⁰⁵ See Droz, “Les réserves et les facultés ...”, pp. 385–388; Golsong, “Le développement du droit international régional”, p. 228, and Spiliopoulou Åkermark, loc. cit., pp. 489–490.

³⁰⁶ Op. cit., p. 196.

³⁰⁷ Golsong, loc. cit., p. 228; see also Spiliopoulou Åkermark, loc. cit., p. 498 and also pp. 489–490.

³⁰⁸ On this point, see Spiliopoulou Åkermark, loc. cit., pp. 498–499, and Imbert, op. cit., pp. 197–199.

³⁰⁹ See the annex to the European Convention on Civil Liability for Damage Caused by Motor Vehicles, which allowed Belgium to make a specific reservation for a three-year period, and article 32, paragraph 1 (b), of the European Convention on Transfrontier Television, which allowed the United Kingdom alone to formulate a specific reservation; examples cited by Spiliopoulou Åkermark, loc. cit., p. 499.

³¹⁰ This numbering is provisional; the Commission may wish to insert the draft text after draft guideline 1.1.2.

168. On the other hand, and not without some hesitation, the Special Rapporteur does not propose to include in the Guide to Practice a draft guideline defining “negotiated reservations”. This term is surely misleading,³¹¹ yet there does not seem to be any particular reason for dealing with it any differently than by means of the draft guideline proposed above for reservation clauses.³¹²

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

“‘Negotiated reservations’

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

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

170. Draft guideline 1.1.8 proposed above is fully compatible with the provisions of article 17, paragraph 1, of the 1969 and 1986 Vienna Conventions.³¹³ The question has already been raised: “What is the legal meaning of the reference in Article 17 (‘without prejudice to ...’) to Articles 19 to 23 of the Vienna Convention on the Law of Treaties, if not to imply that in some cases options amount to reservations?”³¹⁴

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

172. As indicated below,³¹⁵ this is certainly true of statements made under opting-in clauses. But one might also ask whether it is not true of certain statements made under opting-out clauses as well.

173. It so happens that some treaties allow the parties to exclude, by means of a unilateral statement, the legal effect of certain of the treaty 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,

(a) Article 82 of the ILO Convention (No. 102) concerning Minimum Standards of Social Security 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;

(b) Article 22 of the Convention 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”,³¹⁶

(c) Article 30 of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons 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;

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

174. Unilateral statements made under provisions of this type are clearly not reservations.³¹⁷

175. In this respect, the fact that they are formulated (or may be formulated) at a time other than the time of consent to be bound is perhaps not in itself absolutely decisive insofar as nothing prevents negotiators from departing from the provisions of the 1969 and 1986 Vienna Conventions, which are merely auxiliary in character; this aspect will be studied in more detail in the next chapter of this report.

176. Nevertheless, statements made under these exclusionary clauses after the entry into force of the treaty are very different from reservations in that they do not place conditions on the accession of the State or the international organization which makes them. Reservations are an element of the conclusion and entry into force of a treaty, as is demonstrated by the inclusion of articles 19–23 of the 1969 and 1986 Vienna Conventions in part II (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 (Invalidity, termination and suspension of the operation of treaties) of the Vienna Conventions. They may also be linked to article 44, paragraph 1, which does not exclude the right of a party to withdraw partially from a treaty if the treaty so provides.

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

“Unilateral statements formulated under an exclusionary clause after the entry into force of the treaty

³¹⁶ Concerning the circumstances under which this provision was adopted, see Droz, “Les réserves et les facultés ...”, pp. 414–415. This, typically, is a “negotiated reservation” in the sense referred to earlier (para. 169) whose sole beneficiary is the United Kingdom and which in reality has the same effects as an optional clause (see paragraph 180 below).

³¹⁷ Significantly, article 22, already cited (para. 173), of the Convention on the recognition of divorces and legal separations, is omitted from the list of reservation clauses given in article 25 of the Convention.

³¹¹ See paragraph 165 above.

³¹² See footnote 223 above.

³¹³ Quoted in paragraph 148 above.

³¹⁴ Spiliopoulou Åkermark, loc. cit., p. 506.

³¹⁵ See paragraphs 179–196 below.

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

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

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

179. In contrast to the exclusionary clauses under which the unilateral statements analysed above are made, “optional clauses” (or “opting-in” or “contracting-in” clauses) should be the terms used to designate clauses which envisage that the parties to a treaty may accept provisions which, in the absence of express acceptance, would not be applicable to them.³¹⁸

180. Paradoxically, the distinction between optional clauses and exclusionary clauses is not always obvious. In addition to the particular problems posed by clauses which offer a choice among the provisions of a treaty, some of which resemble both types of clause,³¹⁹ there are clauses which appear to be exclusionary clauses, but are really optional clauses in that statements made under these provisions actually result in granting additional rights to the other parties to the treaty, and therefore increase the *obligations* of the State or international organization which made the statement.

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

This power seems very mysterious. It must be remembered that the Convention takes the competence of the national authorities of the spouses as the basis for the recognition of foreign divorces. The purpose of this power is to enable the United Kingdom to specify that certain persons who are *British subjects*, but are not nationals of the United Kingdom itself (England, Scotland, Wales, Northern Ireland), for example nationals of Hong Kong, will not be regarded as “nationals” for the purposes of the application of the Convention. This means that a State which is bound by the Treaty to the United Kingdom will, of course, recognize the judgements issued in the United Kingdom concerning English or Scottish people, but, *merely on the basis of the nationality of the spouses*, will not be obliged to recognize judgements issued in London for the benefit of two nationals of Hong Kong. This is actually a power to make a certain specification, not a reservation. Indeed, the United Kingdom is not in any way seeking to *lessen* the effect on it of the Convention, but instead wishes to spare its partners from a considerable extension of the obligations of the Convention which would result solely from the concept of British nationality.³²⁰

182. Beyond these, often delicate, problems of the “dividing line” between different categories of treaty

³¹⁸ Here again, this expression should, undoubtedly, be defined in the Guide to Practice if the Commission decides to include in it the definition of the terms used (other than reservations and interpretative declarations).

³¹⁹ Which will be considered below (paras. 197–210).

³²⁰ Droz, “Les réserves et les facultés...”, pp. 414–415.

provisions allowing States to choose among the provisions of a treaty, it remains true that the optional clauses referred to here have the objective not of lessening but of increasing the obligations deriving from the treaty for the author of the unilateral statement.

183. The most famous of these clauses is Article 36, paragraph 2, of the ICJ Statute,³²¹ but there are many others; such clauses are either drawn up on the same model and result in the acceptance of the competence of a certain mode of settlement of disputes or of monitoring by an organ created by the treaty, as envisaged in article 41, paragraph 1, of the International Covenant on Civil and Political Rights:

A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.³²²

or are exclusively prescriptive in nature, as in the case of, among many other examples, article 25 of the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations:

Any Contracting State may, at any time, declare that the provisions of this Convention will be extended, in relation to other States making a declaration under this Article, to an official deed (“*acte authentique*”) drawn up by or before an authority or public official and directly enforceable in the State of origin insofar as these provisions can be applied to such deeds.³²³

184. Although, curiously, one author has found it possible to affirm that unilateral statements made under such optional clauses “*function*[ed] as reservations”,³²⁴ in reality, at the technical level, they have very little in common with reservations, apart from the (important) fact that they both purport to modify the application of the effects of the treaty.

³²¹ See paragraph 90 above.

³²² Compare with article 1 of the Optional Protocol. See also the former articles 25 (Acceptance of the right to address individual petitions to the Commission), 46 (Acceptance of inter-State declarations) of the European Convention on Human Rights (these articles have been modified, to provide for automatic compulsory jurisdiction, by articles 33–34 of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms) and 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.”

³²³ See also article 16 and the second paragraph of article 17 of the Convention on the taking of evidence abroad in civil or commercial matters, and article 15 of the Convention 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) concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (see also the examples given in the “Written statement of the International Labour Organization”, memorandum by ILO (*I.C.J. Pleadings, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, p. 232) (*Advisory Opinion, I.C.J. Reports 1951*, p. 15), or again article 4, paragraph 2 (g), of the United Nations Framework Convention on Climate Change.

³²⁴ “[I]t is valid to conclude that they *function* as reservations” Gormley, *loc. cit.*, part two, p. 430). The author makes this comment with regard to former article 25 of the European Convention on Human Rights; see also pages 68–75 (*loc. cit.*, part one) regarding comparable clauses appearing in the international labour conventions.

185. It is quite clear that “opt-out clauses seem to be much closer to reservations than opt-in clauses”.³²⁵ Indeed, not only can (a) statements made under optional clauses be formulated, generally speaking, at any time, but also; (b) optional clauses “start from a presumption that parties are not bound by anything other than they have explicitly chosen”,³²⁶ 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 author³²⁷ or to limit the obligations imposed on [the author] by the treaty,³²⁸ but, instead, to increase them, while the mere entry into force of the treaty for the author does not have this effect.

186. Here again, to a certain degree, the complex problems of “extensive reservations”³²⁹ arise. However, draft guideline 1.4.1 adopted by the Commission at its fifty-first session in 1999 states that:

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

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

188. Given the great differences between them, a confusion between reservations, on the one hand, and statements made under an optional clause, on the other, need hardly be feared, so that it might be asked whether it is necessary to include a guideline in the Guide to Practice in order to distinguish between them. The Special Rapporteur believes, however, that this question should be answered in the affirmative: even if statements based on optional clauses are clearly, at the technical level, very different from reservations, with which statements made under exclusionary clauses may be (and must be) equated, such statements are nevertheless the counterpart of statements made under exclusionary clauses and their general objective is too similar for them to be ignored, particularly since they are often presented jointly.³³⁰

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

“1.4.6³³¹ *Unilateral statements adopted under an optional clause*

³²⁵ Spiliopoulou Åkermark, loc. cit., p. 505.

³²⁶ Ibid.

³²⁷ Draft guideline 1.1 of the Guide to Practice.

³²⁸ Draft guideline 1.1.5.

³²⁹ See *Yearbook ... 1998* (footnote 3 above), pp. 258–260, paras. 213–222.

³³⁰ See, for example, Virally, who includes them under the same heading, “optional clauses” (loc. cit., pp. 13–14).

³³¹ This numbering is provisional: the Commission may wish to place this guideline after draft guideline 1.4.1.

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

190. It goes without saying that, if the treaty so provides or, given the silence of the treaty, if it is not contrary to the object and purpose of the provision in question,³³² 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.

191. This is the case with the reservations frequently made by States when they accept the optional clause recognizing the optional jurisdiction of ICJ under Article 36, paragraph 2, of its Statute.³³³

192. There can be no question, in the context of the present report, of entering into a detailed analysis of the legal nature of these reservations and conditions.³³⁴ It is sufficient to express support for the views expressed by Rosenne in his masterpiece on the law and practice of ICJ.³³⁵

There is a characteristic difference between these reservations, and the type of reservation to multilateral treaties encountered in the law of treaties ... Since the whole transaction of accepting the compulsory jurisdiction is *ex definitione* unilateral and individualized and devoid of any multilateral element or element of negotiation, the function of reservations in a declaration cannot be to exclude or vary the legal effect of some existing provision in relation to the State making the declaration. Their function, together with that of the declaration itself, is to define the terms on which that State unilaterally accepts the compulsory jurisdiction—to indicate the disputes which are included within that acceptance, in the language of the *Right of Passage* (Merits) case.³³⁶

³³² In the *Loizidou* case (*Loizidou v. Turkey*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 310 (*Preliminary Objections*), *Judgment of 23 March 1995* (Council of Europe, Strasbourg, 1995), p. 139, para. 75), 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 322 above).

³³³ 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/1 of Commission IV of the United Nations Conference on International Organization (see IV/7, p. 39), is quite clear. See Rosenne, *The Law and Practice of the International Court, 1920–1996*, pp. 767–769; see also the dissenting opinion of Judge Bedjaoui in the *Fisheries Jurisdiction* case (*Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, *I.C.J. Reports 1998*), p. 533, para. 42; and, for a recent discussion of this question, see the pleadings in *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction, Judgment*, *I.C.J. Reports 2000*, pp. 29–30, paras. 37–38.

³³⁴ Rosenne makes a distinction between these two concepts (op. cit., pp. 768–769) which is not convincing to the Special Rapporteur, but this is irrelevant for the purposes of the present report.

³³⁵ However, the second reason mentioned by Rosenne does not seem conclusive: it is based on the control exercised by the Court on the validity of reservations included in optional declarations (op. cit., pp. 769–770); but if it is not inherent to the institution of reservations to treaties, this control may also be exercised, if necessary, on reservations to multilateral treaties (see *Yearbook ... 1996* (footnote 16 above), paras. 177–251).

³³⁶ Op. cit., p. 769. The passage in question of the judgment appears in *Right of Passage over Indian Territory, Merits, Judgment*, *I.C.J. Reports*

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

Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court ... All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout.³³⁷

194. The same goes for the reservations which States attach to statements made under other optional clauses such as, for example, those resulting from the acceptance of the jurisdiction of ICJ under article 17 of the General Act of Arbitration³³⁸ in respect of which the Court has stressed "the close and necessary link that always exists between a jurisdictional clause and reservations to it".³³⁹

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

196. In view of the great theoretical and practical importance³⁴⁰ of the distinction, it seems necessary that this should be reflected in a guideline of the Guide to Practice, which is the necessary complement to draft guideline 1.4.6 proposed above. It could be drafted as follows:

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

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

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

197. While article 17, paragraph 1, mentioned above,³⁴¹ of the 1969 and 1986 Vienna Conventions concerns the partial exclusion of the provisions of a

1960, p. 34.

³³⁷ *I.C.J. Reports 1998* (see footnote 333 above), p. 453, para. 44. See also page 454, para. 47: "Therefore, declarations and reservations are to be read as a whole."

³³⁸ Without prejudice to the exact legal nature of article 38 of this Act; see paragraph 200 below.

³³⁹ *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 33, para. 79. For a recent discussion of this question, see again the pleadings in the *Aerial Incident of 10 August 1999* case (footnote 333 above).

³⁴⁰ Particularly as regards interpretation; see the aforementioned judgment of ICJ in the *Fisheries Jurisdiction* case (footnote 333), paras. 42–56.

³⁴¹ Para. 148.

treaty under an exclusionary clause, paragraph 2 of the same provision envisages the intellectually different hypothesis in which the treaty contains a clause allowing a choice between several of its provisions:

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

198. The commentary to this provision, reproduced without change by the United Nations Conference on the Law of Treaties,³⁴² is concise but is sufficiently clear about the hypothesis envisaged:

Paragraph 2 takes account of a practice which is not very common but which is sometimes found, for example, in the General Act for the Pacific Settlement of International Disputes and in some international labour conventions. The treaty offers each State a choice between differing provisions of the treaty.³⁴³

199. As has been noted,³⁴⁴ it is not accurate (or, at all events, not very accurate) to say that such a practice is, today, not very common. It is actually fairly widespread, at least in the apparently rather vague sense given to it by the Commission at its eighteenth session in 1966. This includes two different hypotheses, however, which do not fully overlap.

200. The first is illustrated, for example, by the statements made under the General Act of Arbitration,³⁴⁵ article 38, paragraph 1, of which provides:

Accessions to the present General Act may extend:

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

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

201. The same is true of several ILO conventions, in which this technique, often used subsequently,³⁴⁶ was introduced by Convention (No. 102) concerning Minimum Standards of Social Security, article 2 of which provides:

Each Member for which this Convention is in force—

(a) shall comply with—

(i) Part I;

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

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

(iv) Part XIV.

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

³⁴² See footnote 287 above.

³⁴³ *Yearbook ... 1966* (see footnote 212 above), p. 202, para. (3) of the commentary to article 14 (became article 17 in 1969).

³⁴⁴ Spiliopoulou Åkermark, loc. cit., p. 504.

³⁴⁵ The Revised General Act for the Pacific Settlement of International Disputes 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)."

³⁴⁶ See Imbert, op. cit., p. 172.

(a) The European Social Charter, article 20, paragraph 1, of which provides for a partially optional system of acceptance:³⁴⁷

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;

this complex system was used again in article A, paragraph 1, of the revised European Social Charter;³⁴⁸

(b) Article 2 of the European Charter for Regional or Minority Languages is similar:

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

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

203. A superficial reading of these provisions could perhaps give rise to the impression that they are optional clauses within the meaning proposed above.³⁴⁹ In reality, however, they are very different: the statements which they invite the parties to make are not optional, but binding, and condition the entry into force of the treaty for them,³⁵⁰ and they have to be made at the time of giving consent to be bound by the treaty.

204. Similarly, these statements cannot be completely equated with those made in application of an exclusionary clause.³⁵¹ Clearly, they end up by excluding the application of provisions which do not appear in them. But they do so indirectly, through partial acceptance,³⁵² and not by excluding the legal effect of those provisions, but because of the silence of the author of the statement in their regard.

205. The same 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). This is no longer a question of choosing *among* the provisions of a treaty but of choosing *between them*, on the understand-

ing that, in contrast to the previous case, there can be no accumulation,³⁵³ and the acceptance of the treaty is not partial (even if the obligations deriving from it may be more or less binding depending on the option selected).

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

(a) Article 2 of ILO Convention (No. 96) concerning Fee-Charging Employment Agencies (revised 1949):³⁵⁴

1. Each Member ratifying this Convention shall indicate in its instrument of ratification whether it accepts the provisions of Part II of the Convention, providing for the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies, or the provisions of Part III, providing for the regulation of fee-charging employment agencies including agencies conducted with a view to profit.

2. Any Member accepting the provisions of Part III of the Convention may subsequently notify the Director General that it accepts the provisions of Part II; as from the date of the registration of such notification by the Director General, the provisions of Part III of the Convention shall cease to be applicable to the Members in question and the provisions of Part II shall apply to it;

(b) Or article XIV, section 1, of the Articles of Agreement of the International Monetary Fund (as amended in 1978) whereby:

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

207. As has been observed, “[o]ptional commitments ought to be distinguished from authorized reservations, although they in many respects resemble such reservations”.³⁵⁵ Moreover, the silence of article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions, which differs greatly from the reference in paragraph 1 to articles 19 to 23 on reservations³⁵⁶ constitutes, in contrast with unilateral statements made under an exclusionary clause, an indication of the clear dividing line between reservations and these alternative commitments.

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

³⁴⁷ Wiebringhaus, “La Charte sociale européenne: vingt ans après la conclusion du Traité”, p. 936.

³⁴⁸ See also articles 2–3 of the European Code of Social Security.

³⁴⁹ Para. 179.

³⁵⁰ This may be seen from the rest of the wording of article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions cited above (para. 197).

³⁵¹ See paragraphs 148–178 above.

³⁵² Imbert, *op. cit.*, p. 170.

³⁵³ Article 287 of the United Nations Convention on the Law of the Sea is midway between the two approaches: States must choose one or more binding procedures for the settlement of disputes leading to binding decisions, failing which the arbitral procedure provided for in annex VII applies. But there may be an accumulation of different procedures.

³⁵⁴ 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 Horn, *op. cit.*, p. 134.

³⁵⁵ Horn, *op. cit.*, p. 133.

³⁵⁶ See paragraphs 150 and 170 above.

them from reservations, since reservations may also be provided for in a restrictive way by a reservation clause.

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

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

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

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

Conclusion of part I

211. In the opinion of the Special Rapporteur, this draft guideline should come at the end of section 1 of

the Guide to Practice concerning the definition of reservations and interpretative declarations.

212. It goes without saying that the 34 draft guidelines of which section 1 is composed cannot attempt to cover all the hypotheses which could occur or resolve in advance all the problems which could arise, so great is the “imagination of legal scholars and diplomats”.³⁵⁷ However, they probably do cover all the *categories* of doubtful cases in which it can legitimately be questioned whether a procedure purporting to modify the application of the treaty is or is not a reservation or an interpretative declaration.

213. The next parts of the Guide to Practice will be strictly confined to unilateral statements corresponding to the various definitions contained in sections 1.1 and 1.2. It is to these definitions alone that the legal regime of reservations and interpretative declarations, as specified in these other parts, applies, which does not mean either that it will necessarily be a uniform regime for each of these categories³⁵⁸ or that certain elements of these regimes are not applicable to other unilateral statements which do not fall within the scope of the present Guide to Practice.

³⁵⁷ Virally, *loc. cit.*, p. 6. See paragraph 80 above.

³⁵⁸ Thus, for example, the Commission seems to be inclined towards the definition of a set of rules applicable to conditional interpretative declarations which is markedly closer to the legal regime of reservations than to that of “simple interpretative declarations” (*Yearbook ... 1999*, (see footnote 75 above), pp. 105–106, paras. 13–18 of the commentary to draft guideline 1.2.1).

PART II

PROCEDURE REGARDING RESERVATIONS AND INTERPRETATIVE DECLARATIONS

Introduction

214. In his second report, the Special Rapporteur proposed a “provisional general outline of the study” on reservations,³⁵⁹ which the Commission endorsed.³⁶⁰ According to this outline, the first two parts of the study on reservations to treaties would deal with, respectively, the unity or diversity of the legal regime for reservations to multilateral treaties (reservations to human rights treaties) and the definition of reservations. The first of these topics was addressed in chapter II of the second report³⁶¹ and the second was addressed in the third report,³⁶² a

small part of the fourth report³⁶³ and chapter I of the present report.³⁶⁴

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

III. FORMULATION AND WITHDRAWAL OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS

A. Formulation and withdrawal of reservations

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

³⁵⁹ *Yearbook ... 1996* (see footnote 16 above), p. 48, para. 37.

³⁶⁰ See *Yearbook ... 1996*, vol. II (Part Two), p. 80, para. 113, and *Yearbook ... 1997* (footnote 17 above), pp. 52–53, paras. 116–123.

³⁶¹ *Yearbook ... 1996* (see footnote 16 above), p. 52.

³⁶² *Yearbook ... 1998* (see footnote 3 above), pp. 236–284, paras. 47–413.

³⁶³ *Yearbook ... 1999* (see footnote 1 above), pp. 135–137, paras. 44–54.

³⁶⁴ All the draft guidelines dealing with the definition of reservations are contained in annex II to the present report.

2. Procedure regarding formulation of a reservation (1969 and 1986, art. 23, paras. 1 and 4);

3. Withdrawal (1969 and 1986, arts. 22, paras. 1 and 3 (a), and 23, para. 4).

B. Formulation of acceptances of reservations

1. Procedure regarding formulation of an acceptance (1969 and 1986, art. 23, paras. 1 and 3);

2. Implicit acceptance (1969 and 1986, art. 20, paras. 1 and 5);

3. Obligations and express acceptance (1969 and 1986, art. 20, paras. 1–3) (paras. 124 (b), 148 (l)).

C. Formulation and withdrawal of objections to reservations

1. Procedure regarding formulation of an objection (1969 and 1986, art. 23, paras. 1 and 3);

2. Withdrawal of an objection (1969 and 1986, arts. 22, paras. 2 and 3 (b), and 23, para. 4).³⁶⁵

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

217. Nevertheless, he has seen fit to make some adjustments in the light, essentially, of the inclusion in section 1 of the Guide to Practice of a number of definitions dealing with interpretative declarations.³⁶⁶

218. Although he had hoped to be able to begin dealing comprehensively with the “legal regime of interpretative declarations” in his third report,³⁶⁷ the Special Rapporteur found, when he came to write that report, that this was neither feasible nor desirable.³⁶⁸ The legal regime of interpretative declarations cannot be studied independently of the related element of reservations.³⁶⁹ This is particularly true of conditional interpretative declarations, the legal regime of which undoubtedly is (or should be) very close to that of reservations.³⁷⁰

³⁶⁵ *Yearbook ... 1996* (see footnote 16 above), p. 48, para. 37. The references in parentheses are to the relevant articles of the 1969 and 1986 Vienna Conventions. Moreover, a footnote (*ibid.*, footnote 59) stated that: “To the extent that the role of depositories seems, in the predominant system, to have been exclusively ‘mechanical’, this chapter will probably be the logical—although probably not exclusive—place to discuss that topic.”

³⁶⁶ See draft guidelines 1.2, 1.2.1 and 1.2.2.

³⁶⁷ *Yearbook ... 1996* (see footnote 16 above), provisional general outline of the study, p. 48, para. 37.

³⁶⁸ See, for instance, *Yearbook ... 1997*, vol. II (Part Two), p. 52, para. 115, and *Yearbook ... 1998*, vol. II (Part Two), p. 98, paras. 534 and 539. See also the following summary records of the Commission: *Yearbook ... 1997*, vol. I, 2487th meeting, paras. 15 (Mr. Pellet) and 28 (Mr. Pambou-Tchivounda); 2500th meeting, para. 35 (Mr. Addo); 2552nd meeting, paras. 5 (Mr. Lukashuk), 9 (Mr. Pambou-Tchivounda), 15–16 (Mr. Pellet), 29–31 (Mr. Hafner), 32 (Mr. Brownlie) and 37–38 (Mr. Simma).

³⁶⁹ In a recent study, Sapienza accepts that the legal regime of reservations must be a starting point for studying the legal regime of interpretative declarations, but argues that the latter regime is a separate issue (*Dichiarazioni interpretative unilaterali e trattati internazionali*, p. 222). See likewise Horn, *op. cit.*, pp. 243–244.

³⁷⁰ See *Yearbook ... 1998* (footnote 3 above), p. 274, para. 328.

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

220. Once again, the Special Rapporteur wishes to explain that he intends to adhere strictly to the approach proposed in the 1996 provisional general outline and to deal in this part of the study only with the *procedural* issue of the *formulation* of the various kinds of interpretative declaration, and not with the issue of whether or not they are lawful, which he will take up in his next report. However, this does not mean that there is no link whatsoever between the two issues: the respect for form considered in this part is an element of the lawfulness of reservations and determines their legal effects, as the wording of the opening phrase of article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions clearly shows.³⁷¹ “A reservation established with regard to another party *in accordance with articles 19, 20 and 23* ...*” produces the effects indicated in the subparagraphs that follow that paragraph.

221. Moreover, as in the case of definitions and in accordance with the decision taken by the Commission at its forty-seventh session in 1995,³⁷² one should start systematically with the relevant provisions of the 1969 and 1986 Vienna Conventions whenever those Conventions, no matter how incomplete, contain rules on some of the procedural problems dealt with in this part. This is obviously true of article 23 of the Vienna Conventions, entitled “Procedure regarding reservations”, but other provisions of the Conventions contain rules on the formulation of reservations, their acceptance or objections thereto. These provisions are listed in the excerpt from the provisional general outline reproduced above;³⁷³ they are the *chapeau* to article 19, part of article 20, and article 22. As a result, as was done for the definition of reservations,³⁷⁴ the Special Rapporteur will propose reproducing these provisions in the Guide to Practice, adapting them where necessary to the Guide’s form and layout.

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

(a) Chapter III: Formulation, modification and withdrawal of reservations and interpretative declarations;

(b) Chapter IV: Formulation and withdrawal of acceptances of and objections to reservations and of reactions to interpretative declarations (“reservations dialogue”).

³⁷¹ See likewise Jennings and Watts, eds., *Oppenheim’s International Law*, p. 1247.

³⁷² *Yearbook ... 1995*, (See footnote 5 above), p. 108, para. 487 (d).

³⁷³ Para. 215.

³⁷⁴ See draft guideline 1.1.

CHAPTER II

Formulation, modification and withdrawal of reservations and interpretative declarations

223. According to Ruda: “The procedure regarding reservations should necessarily be analogous to the procedure for the conclusion of treaties, because a reservation modifies the application of the provisions of a treaty, i.e., it modifies the substance of a contractual stipulation.”³⁷⁵ This is true in part, but disregards the fact that reservations are, by definition, *unilateral* declarations, an essential characteristic that makes them very different from the treaty to which they relate and which explains the procedural particularities of their formulation.

224. As one writer has said: “The formulation of reservations to a treaty is regulated by *diplomatic-procedural* norms, which concern the *moment* at which the reservation can be made; the *form* which it must take; the *publicity* which must be given to it; and, lastly, the *revocability* which is its defining feature.”³⁷⁶ However, this ignores the fact that the withdrawal of reservations, a consequence of their “revocability”, is subject to special rules which are not entirely symmetrical with those applicable to their formulation, since the modification of reservations can be a means of partially withdrawing them, something which remains highly problematic and should therefore be studied at the same time as withdrawal *sensu stricto*.

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

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

A. Formulation of reservations and interpretative declarations

227. While the three Vienna Conventions of 1969, 1978 and 1986 define reservations as being “made” at specific moments,³⁷⁷ it is the verb “formulate” that is used in the substantive provisions on reservations:

(a) “A State may, when signing, ratifying, accepting, approving or acceding to a treaty, *formulate** a reserva-

³⁷⁵ Loc. cit., p. 193.

³⁷⁶ Maresca, *Il diritto dei trattati: la Convenzione codificatrice di Vienna del 23 Maggio 1969*, p. 299.

³⁷⁷ See article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and article 2, paragraph 1 (j) of the 1978 Vienna Convention.

tion unless ...” (art. 19 (Formulation of reservations) of the 1969 Vienna Convention);³⁷⁸

(b) “A reservation ... must be *formulated** in writing ...” (art. 23 (Procedure regarding reservations), para. 1, of the 1969 and 1986 Vienna Conventions);

(c) “If *formulated** when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed ...” (art. 23, para. 2, of the 1969 Vienna Convention);³⁷⁹

(d) When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty ... it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States ... unless, when making the notification of succession, it expresses a contrary intention or *formulates** a reservation which relates to the same subject matter as that reservation (art. 20, para. 1, of the 1978 Vienna Convention);

(e) “When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty ... a newly independent State may *formulate** a reservation unless the reservation is one the *formulation** of which would be excluded ...” (art. 20, para. 2, of the 1978 Vienna Convention);

(f) “When a newly independent State *formulates** a reservation ...” (art. 20, para. 3, of the 1978 Vienna Convention).

228. The use of the verb “formulate” rather than “make” in the above provisions is the result of a deliberate choice:³⁸⁰ the authors of the Vienna Conventions wanted to make it clear that a reservation is not sufficient in itself and produces effects (hence is “made”) only if it is either accepted³⁸¹ or expressly authorized by the treaty.³⁸² This choice does not, of course, solve

³⁷⁸ Article 19 of the 1986 Vienna Convention is identical, except that it also gives international organizations the power to formulate reservations.

³⁷⁹ Article 23, paragraph 2, of the 1986 Vienna Convention is identical, except that it adds act of formal confirmation to the list of ways of expressing consent to be bound by a treaty.

³⁸⁰ See with regard to future article 19 of the 1969 Vienna Convention, the first and fourth reports of Sir Humphrey Waldock on the law of treaties (*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 62, para. (1) of the commentary on articles 17, 18 and 19, and p. 65, para. (9) of the commentary on article 17, and *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 50, para. 6), and the rejection of the proposal by China at the United Nations Conference on the Law of Treaties that the words “formulate a reservation” should be replaced by “make reservations” (*Official Records of the United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on the first session of the Conference (A/CONF.39/14), p. 133, para. 176, p. 134, para. 177 (ii) and p. 137, para. 183 (b)).

³⁸¹ See article 20 of the 1969 and 1986 Vienna Conventions.

³⁸² Which is why article 19, paragraph 2 (b), of the 1969 and 1986 Vienna Conventions refers to “specified reservations” which “may be made*”.

every problem,³⁸³ and the Commission will have to come back to it when it takes up the question of the legal effects of reservations; it nevertheless shows, quite rightly, that the formulation of a reservation is part of a *process* of which it is the starting point and which continues (in theory) with its acceptance (or rejection—by means of an objection), which are dealt with in the next chapter of this report.

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

1. MOMENT OF FORMULATION OF RESERVATIONS AND INTERPRETATIVE DECLARATIONS

230. Although the moment at which a reservation or a conditional interpretative declaration may be formulated is mentioned in their definitions,³⁸⁴ it is necessary to come back to it: first of all, simply listing the “instances in which a reservation may be formulated”, to use the title chosen by the Commission for draft guideline 1.1.2, does not solve all the problems raised in this regard; secondly, the Vienna Conventions themselves address the issue in several places.

231. The limit on the time within which a unilateral declaration may be formulated in order to constitute a reservation under article 2, paragraph 1 (*d*), is in fact confirmed by articles 19 and 23, paragraph 2, of the 1969 Vienna Convention and the corresponding provisions of the 1986 Vienna Convention.³⁸⁵

Article 19. Formulation of reservations

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

Article 23. Procedure regarding reservations

...

2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

232. Moreover, article 20, paragraph 1, of the 1978 Vienna Convention accepts that a reservation may be maintained or formulated at the moment when “a newly

³⁸³ See the developments recorded by Imbert, *op. cit.*, pp. 83–86; see also pages 89–90 (*ibid.*) and Ruda, *loc. cit.*, p. 179. Moreover, it is hard to see why article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions uses the word “made” in the definition of reservations.

³⁸⁴ See draft guidelines 1.1, 1.1.2, 1.1.4 and 1.2.1.

³⁸⁵ It is the latter provisions which are reproduced here, since they include the act of formal confirmation among the means of expressing consent to be bound, which the 1969 Vienna Convention, dealing exclusively with treaties among States, omits.

independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession”.

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

(a) The list in article 19 of the 1969 and 1986 Vienna Conventions includes “all the means of expressing consent to be bound by a treaty mentioned” in the two Conventions,³⁸⁶

(b) A reservation may be formulated in relation to a territory in respect of which it makes a notification of territorial application,³⁸⁷

(c) The omission from the list in article 19 of the possibility of formulating a reservation on the occasion of a succession of States was remedied, at least in part, by article 20 of the 1978 Vienna Convention,³⁸⁸ and

(d) It is not useful to state expressly that a treaty may provide for the possibility of formulating a reservation at any other moment, since all the guidelines in the Guide to Practice are intended to substitute for an absence of will and the contracting parties to a treaty can always derogate therefrom if they see fit.³⁸⁹

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

(a) *Reservations and interpretative declaration formulated ratione temporis*

(i) *The travaux préparatoires of articles 19 and 23, paragraph 2, of the 1969 and 1986 Vienna Conventions*

³⁸⁶ See draft guideline 1.1.2 and its commentary (*Yearbook ... 1998* (footnote 63 above), pp. 103–104); see also the third report on reservations to treaties, *ibid.* (footnote 3 above), pp. 247–248, paras. 138–143.

³⁸⁷ See draft guideline 1.1.4 and its commentary (*Yearbook ... 1998* (footnote 63 above), pp. 105–106); see also the third report on reservations to treaties, *ibid.* (footnote 3 above), pp. 248–249, paras. 144–146.

³⁸⁸ See draft guideline 1.1 and paragraphs (5) (*a*) and (8) (*b*) of its commentary (*Yearbook ... 1998* (footnote 63 above), pp. 99–100); see also the third report on reservations to treaties, *ibid.* (footnote 3 above), p. 239, paras. 70–72, and p. 247, para. 138. The specific problems with regard to succession of States will be dealt with in a separate study and in a specific part of the Guide to Practice.

³⁸⁹ See, for instance, the second report on reservations to treaties, *Yearbook ... 1996* (footnote 16 above), pp. 63 and 67, paras. 133 and 163, and the third report, *Yearbook ... 1998* (footnote 3 above), p. 243, paras. 102–103 and pp. 247–248, paras. 138–140; see also *Yearbook ... 1997* (footnote 17 above), p. 53, para. 122, and *Yearbook ... 1998* (footnote 63 above) ..., p. 103, para. (5) of the commentary to draft guideline 1.1.2.

235. The text of article 23, paragraph 2, of the 1986 Vienna Convention,³⁹⁰ which requires the confirmation of reservations made when signing if they have been formulated “subject to ratification, act of formal confirmation, acceptance or approval”, is reproduced above (para. 231).

236. This provision originated in the proposal, made by Sir Humphrey Waldock in his first report on the law of treaties, to include a provision (draft art. 17, para. 3 (b)), based on the principle that “the reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained”.³⁹¹ The Special Rapporteur did not conceal that “[c]learly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all”,³⁹² mentioning, in particular, article 14 (d)³⁹³ of the Harvard Draft Convention on the Law of Treaties, which posited the contrary assumption.³⁹⁴

237. The members of the Commission, absorbed in the discussion of the provisions concerning the lawfulness of reservations, attached hardly any importance to the part of the draft of what was then article 17 during discussion in the plenary meeting.³⁹⁵ After considering it on two successive occasions, the Drafting Committee adopted the principle proposed by the Special Rapporteur, while making several changes (not all of them felicitous³⁹⁶) to the initial draft.³⁹⁷

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

A statement of reservation is sometimes made during the negotiation and duly recorded in the *procès-verbaux*. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. It seems essential, however, that the State concerned should formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear.³⁹⁸

239. Governments made hardly any comments on the substance of draft article 18. Nevertheless (leaving aside

³⁹⁰ The text of the same provision in the 1969 Vienna Convention is identical, the only difference being that it does not mention the procedure to be followed by an international organization.

³⁹¹ *Yearbook ... 1962* (see footnote 380 above), p. 66, para. (11) of the commentary on article 17.

³⁹² *Ibid.*

³⁹³ Sir Humphrey cited article 15 (d) by mistake.

³⁹⁴ “If a State has made a reservation when signing a treaty, its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty”; the Harvard draft is reproduced in *Yearbook ... 1950*, vol. II, pp. 243–244.

³⁹⁵ See the summary records of the 651st to 656th meetings (25 May–4 June 1962), *Yearbook ... 1962*, vol. I, pp. 139–179. See, however, the comments by Mr. Castrén (*ibid.*, 652nd meeting, p. 148) and Sir Humphrey Waldock (*ibid.*, 656th meeting, pp. 174–175, para. 33).

³⁹⁶ The Drafting Committee referred, in particular, to confirmation of the reservation by the State which formulates it “when carrying out the act establishing its own consent to be bound by the treaty” (*Yearbook ... 1962*, vol. I, 663rd meeting, p. 221, para. 3).

³⁹⁷ See the summary records of the 663rd and 668th meetings, *Yearbook ... 1962*, vol. I, pp. 221–223 and 257.

³⁹⁸ *Yearbook ... 1962*, vol. II, document A/5209, p. 180.

the observations of Denmark and Finland, which concerned minor drafting questions³⁹⁹), note can be taken of Sweden’s comment that articles 18–19, which dealt with acceptance of and objections to reservations, contained much that “simply exemplifies what the parties may prescribe or that merely amounts to procedural rules which would fit better into a code of recommended practices”.⁴⁰⁰ Further to these observations, the Special Rapporteur, Sir Humphrey Waldock, proposed in his fourth report a new article 20 dealing with the question of reservations from a procedural standpoint.⁴⁰¹ The first two paragraphs of this article, entitled “Procedure regarding reservations”, corresponded to article 18, paragraphs 2–3, and article 19 of the former draft, and read as follows:

1. A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.⁴⁰²

2. A reservation put forward upon the occasion of the adoption of the text or upon signing a treaty subject to ratification, acceptance or approval, shall be effective only if the reserving State formally confirms the reservation when ratifying, accepting or approving the treaty.⁴⁰³

240. During the discussions in the Commission on second reading, few observations were made on the formulation of reservations.⁴⁰⁴ Nevertheless, interesting comments were made on the “status” of a reservation formulated at the time of signing, pending its confirmation at the time of ratification.⁴⁰⁵ In this connection, the Special Rapporteur believed that the rules on acceptance of reservations should be applicable only after the reservation was confirmed; “otherwise, it might be difficult to frame a rule governing the case of tacit consent”.⁴⁰⁶ After certain changes had been made to it by the Drafting Committee, new article 20 was adopted by the Commission.⁴⁰⁷

241. Draft article 20, paragraph 2, as finally adopted, differed from the current text of article 23, paragraph 2, only by the inclusion of a reference to reservations formulated “on the occasion of the adoption of the text”,⁴⁰⁸

³⁹⁹ *Yearbook ... 1965* (see footnote 380 above), pp. 46–47. Japan also submitted draft articles which roughly recapitulated the Commission’s wording concerning the moment of formulation of reservations (*Yearbook ... 1966* (see footnote 212 above), p. 305).

⁴⁰⁰ *Yearbook ... 1965* (see footnote 380 above), p. 47. This allusion to a “code of recommended practices” testifies to an interesting intuition of the needs which the elaboration of the Guide to Practice is designed to meet.

⁴⁰¹ *Ibid.*, pp. 53–54.

⁴⁰² This paragraph recapitulates the preliminary clause of former article 18, paragraph 2 (a) (*Yearbook ... 1962* (see footnote 398 above), p. 176) and in a simplified form, paragraph 3 of that article.

⁴⁰³ This paragraph was a slightly simplified version of former article 18, paragraph 2 (b) (*ibid.*). For their part, paragraphs 3–4 dealt with express and tacit acceptance of a reservation and paragraphs 5–6 with objections to reservations.

⁴⁰⁴ See, however, the observations by Mr. Ruda (*Yearbook ... 1965*, vol. I, 797th meeting, p. 154, para. 71) and Mr. Rosenne (*ibid.*, 813rd meeting, p. 264, paras. 5–8).

⁴⁰⁵ See, in particular, the comments by Mr. Bartoš and Mr. Lachs (*ibid.*, 813rd meeting, p. 269).

⁴⁰⁶ *Ibid.*, para. 74.

⁴⁰⁷ *Ibid.*, 816th meeting, p. 284, para. 55.

⁴⁰⁸ “If formulated on the occasion of the adoption of the text or upon signing the treaty ...” (*Yearbook ... 1966* (see footnote 212 above), p. 208).

a reference that was deleted at the Vienna Conference under circumstances that have been described as “mysterious”.⁴⁰⁹ The commentary on this provision reproduces the 1962 text⁴¹⁰ almost verbatim and adds:

Paragraph 2 concerns reservations made at a later stage [after negotiation]: on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval. Here again the Commission considered it essential that, when definitely committing itself to be bound, the State should leave no doubt as to its final standpoint in regard to the reservation. The paragraph accordingly requires the State formally to confirm the reservation if it desires to maintain it. At the same time, it provides that in these cases the reservation shall be considered as having been made on the date of its confirmation, a point which is of importance for the operation of paragraph 5 of article [20 in the text of the Convention].⁴¹¹

242. The rule in article 23, paragraph 2, of the 1969 Vienna Convention was reproduced in its essence by Special Rapporteur Paul Reuter in his fourth and fifth reports on the question of treaties concluded between States and international organizations or between two or more international organizations, with only the drafting changes made necessary by the inclusion of international organizations⁴¹² and the introduction of the concept of “formal confirmation” (with the risks of confusion which this implies between that concept and the notion of simple “confirmation” of the reservation in article 23⁴¹³). This provision was adopted on first reading with the new drafting changes made necessary by the introduction into the draft of the concept of “formal confirmation”—equivalent to ratification for international organizations—in the form of two separate articles, owing to the distinction that was adopted for a while between, on the one hand, treaties between several international organizations and, on the other hand, treaties between States and one or more international organizations or between international organizations and one or more States.⁴¹⁴ The two articles 23 and 23 bis, which received no comments from Governments,⁴¹⁵ were again combined in a single provision on second reading. This provision differs from article 23 of the 1969 Vienna Convention only by the mention of international organizations and the mechanism of formal confirma-

tion (of the treaty itself).⁴¹⁶ The Vienna Conference on the Law of Treaties of 1986 adopted the text prepared by the Commission without making any changes to the French text.⁴¹⁷

(ii) *The obligation to confirm reservations made when signing*

243. While there can be hardly any doubt that at the time of its adoption, article 23, paragraph 2, of the 1969 Vienna Convention pertained more to progressive development than to codification in the strict sense,⁴¹⁸ it may probably be considered that the obligation formally to confirm reservations formulated when treaties in formal form are signed has become part of positive law. Crystallized by the 1969 Convention and confirmed in 1986, the rule is followed in practice and seems to satisfy an *opinio necessitatis juris* which allows a customary value to be assigned to it.

244. Thus, in an aide-memoire dated 1 July 1976, the United Nations Legal Counsel, describing the “practice of the Secretary-General in his capacity as depositary of multilateral treaties regarding ... reservations and objections to reservations relating to treaties not containing provisions in that respect”, relied on article 23, paragraph 2, of the 1969 Vienna Convention in concluding that: “If formulated at the time of signature subject to ratification, the reservation has only a declaratory effect, having the same legal value as the signature itself. It must be confirmed at the time of ratification; otherwise, it is deemed to have been withdrawn”.⁴¹⁹ The Council of Europe changed its practice in this regard in 1980;⁴²⁰ and in their answers to the Commission’s questionnaire on reservations to treaties, the States which replied to question 1.10.2⁴²¹ indicated that, in general, they confirmed reservations formulated when the treaty was signed at the time of ratification or accession.⁴²²

⁴¹⁶Tenth report of Mr. Reuter, *Yearbook ... 1981* (see footnote 414 above), and report of the Commission, *Yearbook ... 1982*, vol. II (Part Two), p. 37.

⁴¹⁷The Chairman of the Drafting Committee, Mr. Al-Khasawneh, stated that a correction had been made to the English text (replacing “by a treaty” with “by the treaty”) (*United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986, Official Records*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5, Vol.I), fifth plenary meeting, 18 March 1986, p. 15, para. 63).

⁴¹⁸See the first report of Sir Humphrey Waldock (*Yearbook ... 1962* (footnote 380 above) and paragraph 236 above. See also Greig, “Reservations: equity as a balancing factor?”, p. 28, and Horn, *op. cit.*, p. 41.

⁴¹⁹*United Nations Juridical Yearbook, 1976* (United Nations publication, Sales No. E.78.V.5), pp. 209 and 211. See also Whiteman, *Digest of International Law*, pp. 158–159.

⁴²⁰See Horn, *op. cit.*, and Polakiewicz, *Treaty-Making in the Council of Europe*, pp. 95–96.

⁴²¹“If reservations were formulated at the time when the treaty was signed, were they formally confirmed when the State expressed its definitive consent to be bound?” (*Yearbook ... 1996* (footnote 16 above), annex II, p. 99).

⁴²²See the replies by Japan, Switzerland (with the exception, it would appear, however, of the International Telecommunication Convention and the additional protocols thereto, but no explanation is given concerning this exception), France and Mexico. Bolivia indicated that on one occasion it formulated reservations when signing but did not

⁴⁰⁹“In paragraph 2, the phrase ‘on occasion of the adoption of the text’ mysteriously disappeared from the ILC text, when it was finally approved by the Conference” (Ruda, *loc. cit.*, p. 195). The Special Rapporteur found no trace of any amendment to this effect in the official records of the Conference.

⁴¹⁰See paragraph 238 above.

⁴¹¹*Yearbook ... 1966* (see footnote 212 above), p. 208.

⁴¹²*Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 38, and *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/290 and Add.1, p. 146.

⁴¹³See the discussions on this subject at the 1434th meeting on 6 June 1977 (*Yearbook ... 1977*, vol. I, pp. 101–103). At the same meeting, a discussion began on the notion of international organizations having the capacity to become parties to a treaty (*ibid.*).

⁴¹⁴See the text and its commentary in *Yearbook ... 1976* (footnote 412 above), p. 146 (fifth report of Mr. Reuter) and *Yearbook ... 1977*, vol. II (Part Two), pp. 115–116 (report of the Commission—two separate articles; this distinction was abandoned in 1981—see the tenth report of Mr. Reuter, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, pp. 63–64). See also the discussions at the 1434th and 1451st meetings, *Yearbook ... 1977* (footnote 413 above) pp. 101–103 and 195–196).

⁴¹⁵The Council of Europe stated, however, that the rule contained in paragraph 2 of the article was in conformity with its practice (*Yearbook ... 1982*, vol. II (Part Two), annex, p. 143, para. 36).

245. Curiously, however, the practice of the Secretary-General of the United Nations is inconsistent with the conviction expressed by the Legal Counsel in 1976,⁴²³ since the former includes in the valuable publication entitled *Multilateral Treaties Deposited with the Secretary-General* reservations formulated when the treaty was signed, whether or not they were confirmed subsequently,⁴²⁴ even on the assumption that the State formulated other reservations when expressing its definitive consent to be bound.

246. In legal writing, the rule laid down in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions is the object of what now appears to be general approval,⁴²⁵ even if that was not always true in the past.⁴²⁶ In any event, whatever arguments might be advanced against it, they would not be of such a nature as to challenge a clear rule appearing in the Vienna Conventions that the Commission has decided to follow in principle, except in case of an overwhelming objection.

247. Accordingly, it seems both necessary and desirable to recapitulate in the Guide to Practice, in the form of a draft guideline, the rule laid down in article 23, paragraph 2, of the 1986 Vienna Convention.⁴²⁷ Two problems arise, however, with regard to the specific formulation of this draft.

248. First, is it appropriate simply to reproduce the wording of article 23, paragraph 2, or should it be supplemented to take into account the possibility afforded to a successor State to formulate a reservation when it makes a notification of succession in accordance with draft guideline 1.1, which thus rounds out the definition of reservations contained in article 2, paragraph 1 (d), of the 1986 Vienna Convention? The answer is not very simple. At first glance, the successor State can either confirm or invalidate an existing reservation

made by the predecessor State,⁴²⁸ or formulate a new reservation when it makes a notification of succession;⁴²⁹ in neither of these two cases is the successor State thus led to confirm a reservation when signing. Nevertheless, under article 18, paragraphs 1–2, of the 1978 Vienna Convention, a newly independent State may, under certain conditions, establish through a notification of succession its capacity as a contracting State or party to a multilateral treaty which was not in force on the date of the State succession and to which the predecessor State was itself a contracting State. Under article 2, paragraph (f), of the 1969 and 1986 Vienna Conventions, however, “‘contracting State’ means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force”—a State, not a mere signature. It follows, conversely, that there can be no “succession to the signing” of a treaty (in formal form⁴³⁰)⁴³¹ and that the concept of notification of succession should not be introduced into draft guideline 2.2.1.⁴³²

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

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

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

(Footnote 422 continued.)

confirm them, since they were the subject of a protocol annexed to the treaty. In its reply to question 1.10.1 (“Was the timing of the formulation of the reservations based on any particular considerations? If so, what considerations?”) (*Yearbook ... 1996* (footnote 16 above), annex II, p. 99), Denmark, which stated that it formulated all its reservations when expressing definitive consent to be bound, expressly based its answer on article 23, paragraph 2, of the 1969 Vienna Convention.

⁴²³ See paragraph 244 above.

⁴²⁴ Examples of reservations formulated when signing and not confirmed subsequently: the reservations made by the Islamic Republic of Iran and Peru to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (United Nations, *Treaty Series*, vol. 1582, No. 27627, pp. 398 and 402) and those made by Turkey to the Customs Convention on containers, 1972 (*ibid.*, *Multilateral Treaties Deposited with the Secretary-General ...* (see footnote 26 above), p. 487). Examples of reservations made when signing and confirmed when expressing consent to be bound: the reservation made by the United Kingdom to the Protocol to the Agreement on the importation of educational, scientific and cultural materials of 22 November 1950 (*ibid.*, vol. II, p. 66), the reservations made by Argentina and Venezuela to the Agreement establishing the Common Fund for Commodities (*ibid.*, pp. 139–140), and the reservation made by Slovakia to the Convention on the Safety of United Nations and Associated Personnel (*ibid.*, p. 121).

⁴²⁵ See, in particular, Greig, *loc. cit.*, p. 28, and Imbert, *op. cit.*, p. 285.

⁴²⁶ See Imbert, *op. cit.*, pp. 283–284.

⁴²⁷ Rather than the 1969 formulation, which is less comprehensive because international organizations are omitted.

⁴²⁸ See the 1978 Vienna Convention, art. 20, para. 1.

⁴²⁹ *Ibid.*, para. 2.

⁴³⁰ See paragraphs 259–260 below.

⁴³¹ The publication *Multilateral Treaties Deposited with the Secretary-General ...* (see footnote 26 above) mentions, however—in the footnotes and without special comment—reservations formulated when signing by a predecessor State and apparently not formally confirmed by the successor State or States; see, for example, Czechoslovakia’s reservations to the United Nations Convention on the Law of the Sea, noted in connection with the Czech Republic and Slovakia (*ibid.*, p. 239, note 4). Moreover, irrespective of the question of reservations, some States expressly indicated that they intended to succeed to the signature of a predecessor State (see, for example, the notifications made by the Czech Republic and Slovakia concerning the Convention on the Territorial Sea and the Contiguous Zone (*ibid.*, p. 239, note 4), the Convention on the High Seas (*ibid.*, p. 200, note 2), the Convention on the Continental Shelf (*ibid.*, p. 206, note 2) and the 1978 Vienna Convention (*ibid.*, pp. 277–278).

⁴³² According to Pilloud, “in applying by analogy the rule provided in article 23, paragraph 2 of the Vienna Convention concerning reservations expressed at the time of signature, one might say that the States which had made declarations of continuity” to the Geneva Conventions of 1949 “should, if they had intended to assume on their own account the reservations expressed [by the predecessor State], have stated this specifically in their respective declarations of continuity” (“Reservations to the Geneva Conventions of 1949”, p. 111). It is doubtful whether such an analogy could be made; the matter will be considered in a future report on succession to reservations.

ance or approval) is too small and does not correspond to the one in article 11.

250. In the view of the Special Rapporteur, however, such a concern is excessive; the differences in wording between article 11 and article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions lie in the omission from the latter of these provisions of two possibilities contemplated in the former: “exchange of instruments constituting a treaty” and “any other means if so agreed”.⁴³³ The probability that a State or an international organization would subordinate the expression of its definitive consent to be bound by a multilateral treaty subject to reservations to one of these modalities is sufficiently low that it does not seem useful to overburden the wording of draft guideline 2.2.1 or to include, in chapter 2 of the Guide to Practice, a draft guideline equivalent to draft guideline 1.1.2. No doubt it will be sufficient to mention this point in the commentary.

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

“2.2.1 *Reservations formulated when signing and formal confirmation*

“*If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.*”

252. It may be asked, furthermore, whether a reservation can be formulated when initialling⁴³⁴ or signing a treaty *ad referendum*, which are mentioned along with signing in article 10 of the 1969 and 1986 Vienna Conventions as methods of authenticating the text of a treaty. The answer to this question is certainly affirmative: nothing prevents a State or an international organization from indicating formally to its partners the “reservations” which it has regarding the adopted text at the authentication stage,⁴³⁵ or, for that matter, at any previous stage of negotiation.

253. This had, moreover, been contemplated by the Commission in draft article 18 (which became article 23 of the 1969 Vienna Convention), of which paragraph 2, as it appeared in the final text of the draft articles adopted at the eighteenth session in 1966, provided that: “If formulated on the occasion of the adoption of the text ... a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered

⁴³³ For a similar comment concerning the comparison of article 2, paragraph 1 (*d*), and article 11, see paragraph (8) of the commentary to draft guideline 1.1.2, *Yearbook ... 1998* (see footnote 63 above), p. 104.

⁴³⁴ See Szafarz, “Reservations to multilateral treaties”, p. 295.

⁴³⁵ On authentication “as a distinct part of the treaty-making process”, see the commentary on article 9 of the Commission’s draft articles on the law of treaties (which became article 10 at the United Nations Conference on the Law of Treaties), *Yearbook ... 1966* (footnote 212 above), p. 195.

as having been made on the date of its confirmation”.⁴³⁶ Commenting on this provision, the Commission stated:

Statements of reservations are made in practice at various stages in the conclusion of a treaty. Thus, a reservation is not infrequently expressed during the negotiations and recorded in the minutes. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. The Commission, however, considered it essential that the State concerned should formally reiterate the statement when signing, ratifying, accepting, approving or acceding to a treaty in order that it should make its intention to formulate the reservation clear and definitive. Accordingly, a statement during the negotiations expressing a reservation is not, as such, recognized in article 16 as a method of formulating a reservation and equally receives no mention in the present article.⁴³⁷

254. As indicated above,⁴³⁸ the reference to the adoption of the text disappeared from the text of article 23, paragraph 2, of the 1969 Vienna Convention under “mysterious” circumstances during the Vienna Conference on the Law of Treaties, probably out of concern for consistency with the wording of the *chapeau* of article 19 (the summary records of the Conference give no indication about this, however). The question arises whether it might not be appropriate to reinstate the reference in the Guide to Practice.

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

(a) On the one hand, any reservation formulated prior to the expression of definitive consent to be bound⁴³⁹ by the treaty must be confirmed by its author; that is the very purpose of this clarification; and

(b) On the other hand, there does not seem to be any reason to limit the clarification to “embryonic” reservations formulated when adopting or authenticating the text; the obligation to confirm formally is, of course, required, especially when the “intention to formulate a reservation” is expressed at a prior stage of negotiation.

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

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

“*If formulated when negotiating, adopting or authenticating the text of the treaty, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.*”

⁴³⁶ *Yearbook ... 1966* (see footnote 212 above), p. 208.

⁴³⁷ *Ibid.*, para. (3) of the commentary.

⁴³⁸ Para. 241 above.

⁴³⁹ “Negotiated reservations”, that is to say, reservation clauses inserted in a treaty during negotiation (see paragraphs 164–171 above), are often adopted following the expression by one or more States of their disagreement with some of the proposed provisions; such expressions of disagreement may be regarded as “embryonic reservations”.

257. This wording is taken from that of draft guideline 2.2.1,⁴⁴⁰ itself modelled on article 23, paragraph 2, of the 1986 Vienna Convention, and the question arises whether it might not be advantageous to combine the two drafts. This would “economize” on provisions, but would have the drawback of altering the text of the Vienna Convention. It may, of course, be asserted that the Commission did the same thing with regard to draft guideline 1.1; however, the question was not posed in exactly the same terms; the definition of reservations adopted in the draft “is none other than the composite text of the definitions contained in the 1969, 1978 and 1986 Vienna Conventions to which no changes have been made”.⁴⁴¹ The combining in a single draft of the texts proposed for draft guidelines 2.2.1 and 2.2.2 would not be of the same nature and would be tantamount to adding to the text of the Vienna Conventions a possibility that they did not contemplate. For this reason, the Special Rapporteur is inclined to favour two separate drafts.

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

“Reservations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation

“If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, an act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.”

259. Whatever solution is adopted in this respect,⁴⁴² the proposed wording (which is, in any event, faithful to the Vienna text) clearly implies that the rule thus codified applies only to treaties in formal form, those that do not enter into force solely by being signed.⁴⁴³ On the other hand, with regard to treaties not requiring any post-signing formalities in order to enter into force, which are referred to in French legal writing as “agreements

⁴⁴⁰ See paragraph 251 above.

⁴⁴¹ *Yearbook ... 1998* (see footnote 63 above), p. 99, para. (1) of the commentary to draft guideline 1.1.

⁴⁴² What is involved is not a fundamental issue. The solution to be adopted by the Commission in this regard will constitute a precedent, however, for the question cannot fail to arise again with respect to other provisions of the Vienna Conventions. Taking into account the advantage of deviating as little as possible from the Conventions, it seems to the Special Rapporteur that the Commission should take another look at the matter before combining draft guidelines 2.2.1 and 2.2.2, as envisaged in paragraph 258 above.

⁴⁴³ On the distinction between treaties in formal form and agreements in simplified form, see, in particular: Chayet, “Les accords en forme simplifiée”; Nguyen Quoc Dinh, Daillier and Pellet, *op. cit.*, pp. 136–144; and Smets, *La conclusion des accords en forme simplifiée*. This distinction is more common among authors writing in the Roman-Germanic tradition than among those schooled in common law, which is more concerned with executive agreements, a concept that does not fully coincide with the notion of agreements in simplified form (see Horvath, “The validity of executive agreements”). Sinclair (*The Vienna Convention on the Law of Treaties*), p. 41) and Brownlie (*Principles of Public International Law*, p. 611), however, mentioned the concept of “agreements” or “treaties in simplified form” in connection with discussions on the law of treaties in the Commission.

in simplified form”,⁴⁴⁴ it is self-evident that, if formulated when the treaty is signed, a reservation becomes effective immediately, without any formal confirmation being necessary or even conceivable.⁴⁴⁵

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

“2.2.3 Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]”⁴⁴⁶

“A reservation formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.”

261. It is self-evident, however, that if an “embryonic reservation” to an agreement in simplified form is formulated when negotiating, adopting or authenticating the text of a treaty, it must be confirmed when signing. Nevertheless, just as, in this case, signing constitutes the expression of definitive consent to be bound, the possibility is covered expressly by draft guidelines 2.2. and 2.2.2 (“when expressing its consent to be bound”), and it seems completely unnecessary to repeat it in a separate draft guideline.

262. There is, moreover, another hypothetical case in which the confirmation of a reservation formulated when signing appears to be superfluous, namely, where the treaty itself provides expressly for such a possibility without requiring confirmation. Thus, for example, article 8, paragraph 1, of the Convention on reduction

⁴⁴⁴ While the procedure involving agreements in simplified form is more commonly used for concluding bilateral rather than multilateral treaties, it is not at all unknown in the second case, and major multilateral agreements may be cited which have entered into force solely by being signed. This is true, for example, of the General Agreement on Tariffs and Trade of 1947 (at least in terms of the entry into force of the bulk of its provisions following the signing of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade), the Declaration on the Neutrality of Laos and the Agreement establishing a Food and Fertiliser Technology Centre for the Asian and Pacific Region. There are also “mixed” treaties that can, if the contracting parties so choose, enter into force solely upon signature or following ratification (see article XIX of the Agreement relating to the International Telecommunications Satellite Organization “INTELSAT”; see also the following footnote).

⁴⁴⁵ The Special Rapporteur is not aware, however, of any clear example of a reservation made at the time when a multilateral agreement in simplified form was signed. This eventuality certainly cannot be ruled out, however; as the preceding footnote indicates, there are also “mixed treaties” which can, if the parties so choose, enter into force solely upon signature or following ratification, and which are subject to reservations or contain reservation clauses (see the Convention on Psychotropic Substances (art. 32), the Convention on a Code of Conduct for Liner Conferences and the International Convention on Arrest of Ships, 1999 (art. 12, para. 2)).

⁴⁴⁶ The alternative draftings that have been proposed relate to the fact that, as indicated in footnote 443 above, the term “agreements in simplified form”, familiar to jurists schooled in the Roman law tradition, might bewilder those with training in common law.

of cases of multiple nationality and military obligations in cases of multiple nationality provides that:

Any Contracting Party may, *when signing this Convention or* depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the Annex to the present Convention.⁴⁴⁷

263. In a case of this kind, it seems that practice consists of not requiring a party which formulates a reservation when signing to confirm it when expressing definitive consent to be bound; thus, to return to the previous example, France made a reservation when it signed the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality and did not confirm it subsequently.⁴⁴⁸ Likewise, Hungary and Poland did not confirm their reservation to article 20 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, which provides, in its article 28, paragraph 1, that such a reservation can be made when signing. Nor did Luxembourg confirm its reservation to the Convention relating to the Status of Refugees, or Ecuador its reservation to the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents.⁴⁴⁹ It is true that other States⁴⁵⁰ nonetheless confirmed their reservations, to the same provision of the Convention against torture at the time of ratification. In the view of the Special Rapporteur, reservations made when signing the Convention against torture were sufficient in and of themselves. While nothing prevented the reserving States from confirming them,⁴⁵¹ nothing compelled them to do so. The rule set out in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions should be applicable only where the treaty is silent; otherwise, the provisions providing for the possibility of reservations when signing would have no useful effect.

264. Despite the uncertainties in practice—which may be explained by the fact that if a formal confirmation in a case of this kind is not essential, it is also not ruled out—it does not seem futile to endorse the “minimum” practice (this seems logical, since the treaty expressly provides for the formulation of reservations when sign-

⁴⁴⁷ See also, among numerous examples: article 17 of the Convention on the Reduction of Statelessness; article 30 of the Convention on mutual administrative assistance on tax matters; article 29 of the European Convention on Nationality; and article 24 of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons.

⁴⁴⁸ Council of Europe, European Committee on Legal Cooperation (CCJ), *CCJ Conventions and Reservations to those Conventions*, note by the secretariat, CCJ (99) 36, Strasbourg, 30 March 1999, p. 11. The same applied to Belgium’s reservations to the Convention on mutual administrative assistance on tax matters (*ibid.*, p. 50).

⁴⁴⁹ *Multilateral Treaties Deposited with the Secretary-General ...* (see footnote 26 above), pp. 213–214; p. 265; and *ibid.*, vol. II, p. 115. The Hungarian reservation was subsequently withdrawn.

⁴⁵⁰ Belarus, Bulgaria (reservation subsequently withdrawn), Czechoslovakia (reservation subsequently withdrawn by the Czech Republic and Slovakia), Morocco, Tunisia and Ukraine (reservation subsequently withdrawn); see *Multilateral Treaties Deposited with the Secretary-General ...* (footnote 26 above), pp. 212–214.

⁴⁵¹ And such “precautionary confirmations” are quite common (see, for example, the reservations by Belarus, Brazil (which, however, confirmed only two of its three initial reservations), Hungary, Poland, Turkey and Ukraine to the Convention on Psychotropic Substances (*ibid.*, vol. I, pp. 327–329)).

ing⁴⁵²) by embodying it in a draft guideline that might read as follows:

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

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

(iii) *Time of formulation of interpretative declarations (recapitulation)*

265. The third report on reservations to treaties discusses in some detail the time at which an interpretative declaration may be formulated.⁴⁵³ The report indicates in particular that a “mere” interpretative declaration may be formulated at any time, unless otherwise stipulated by the treaty that it concerns, whereas a conditional interpretative declaration may be formulated only when signing or when expressing consent to be bound, since by definition it makes participation in the treaty by the declarant State or international organization subject to certain conditions.

266. These views were accepted by the Commission and are reflected in draft guideline 1.2, which defines interpretative declarations independently of any time factor,⁴⁵⁴ and draft guideline 1.2.1, which on the contrary specifies that a conditional interpretative declaration, like a reservation, is a “unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty”.⁴⁵⁵

267. However, in the case of this second hypothesis, the Commission noted that if the conditional interpretative declaration was formulated when signing the treaty, it would “probably” be “confirmed at the time of expression of definitive consent to be bound”.⁴⁵⁶ There is no logical reason for advocating one solution for reservations and another for conditional interpretative declarations.

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

⁴⁵² If this principle was not recognized, many unconfirmed reservations would have to be deemed illegal (or without effect), even where the States which formulated them did so on the basis of the text of the treaty itself.

⁴⁵³ *Yearbook ... 1998* (see footnote 3 above), pp. 274–276, paras. 328–339.

⁴⁵⁴ See *Yearbook ... 1999* (footnote 75 above), pp. 101–103, paras. (21)–(32) of the commentary to draft guideline 1.2.

⁴⁵⁵ *Ibid.*, pp. 105–106, paras. 15–18 of the commentary to draft guideline 1.2.1.

⁴⁵⁶ *Ibid.*, p. 106, footnote 371.

(a) Germany and the United Kingdom, upon ratifying the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, confirmed “declarations”⁴⁵⁷ that could be regarded as being conditional;⁴⁵⁸

(b) Monaco proceeded in the same manner when it signed and then ratified the International Covenant on Civil and Political Rights;⁴⁵⁹

(c) Austria set out in its instrument of ratification of the European Convention on the protection of the archaeological heritage a declaration made when signing;⁴⁶⁰

(d) The European Community, when approving the Convention on Environmental Impact Assessment in a Transboundary Context, also confirmed a declaration that it had made when signing.⁴⁶¹

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

270. First, there is a methodological problem as to whether to include one or more draft guidelines reproducing the substance of the corresponding draft text on the confirmation of reservations formulated when signing, or whether it would suffice to follow the procedure adopted by the Commission in draft guideline 1.5.2 on interpretative declarations in respect of bilateral treaties,⁴⁶² and to refer to draft guidelines 2.2.1 and 2.2.2. The chief reason for adopting that procedure in draft guideline 1.5.2 was that the Commission had decided not to deal with “reservations” to bilateral treaties in the remainder of the Guide to Practice.⁴⁶³ This reason no longer applies: even if the Guide to Practice is to focus essentially on reservations, it has been agreed that wherever appropriate the Guide should also contain guidelines on the legal regime of interpretative declarations (mere or conditional).⁴⁶⁴ It would therefore be desirable to include in the Guide substantive provisions on the obligation to confirm formally conditional interpretative declarations formulated prior to expressing definitive consent to be bound, unless the corresponding rules on

reservations are simply transposed to conditional interpretative declarations.⁴⁶⁵

271. If the Commission agrees to this initial suggestion, it will still have to take a position on a second problem concerning form: whether one or two draft guidelines should be devoted to the question of formal confirmation of conditional interpretative declarations, as in the case of reservations. In the Special Rapporteur’s view, this problem should be approached from a different angle. It was in order to avoid “touching up” the provisions of the Vienna Conventions on the law of treaties that he expressed a clear preference for adopting two separate draft guidelines: one linked to the time of the confirmation of the reservations formulated when signing, and the other to negotiations.⁴⁶⁶ This consideration does not apply in the case of interpretative declarations, in respect of which the 1969 and 1986 Vienna Conventions have nothing at all to say.

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

“2.4.4 Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation

“If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, an act of formal confirmation, acceptance or approval, a conditional interpretative declaration must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the declaration shall be considered as having been made on the date of its confirmation.”

273. For the same reasons, it would seem legitimate to transpose to interpretative declarations⁴⁶⁷ draft guidelines 2.2.3 and 2.2.4 concerning non-confirmation of reservations formulated when signing an agreement in simplified form or of a treaty making express provision for them. The draft guidelines in question might read as follows:

“2.4.5 Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]

“An interpretative declaration formulated when signing [an agreement in simplified form] [a treaty that

⁴⁵⁷ See *Multilateral Treaties Deposited with the Secretary-General ...* (footnote 26 above), vol. II, pp. 356–357.

⁴⁵⁸ Moreover, the question may be asked whether confirmation of an interpretative declaration made when signing constitutes (among others) of its conditional nature.

⁴⁵⁹ *Multilateral Treaties Deposited with the Secretary-General ...* (footnote 26 above), p. 139.

⁴⁶⁰ United Nations, *Treaty Series*, vol. 788, No. 11212, p. 240, and *ibid.*, vol. 1338, No. 11212, p. 335.

⁴⁶¹ *Multilateral Treaties Deposited with the Secretary-General ...* (footnote 26 above), vol. II, p. 363. See also the declarations by Italy and the United Kingdom on the Convention on biological diversity (*ibid.*, pp. 379–380).

⁴⁶² This draft guideline reads: “Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.”

⁴⁶³ See draft guideline 1.5.1 and paragraphs (19)–(20) of the commentary thereto (*Yearbook ... 1999* (footnote 75 above), pp. 120 and 123–124).

⁴⁶⁴ See paragraph 218 above.

⁴⁶⁵ Here again (see footnote 447 above), this is not a crucial problem, but the decision taken by the Commission on this matter will constitute a precedent, which should probably be followed in the subsequent parts and chapters of the Guide to Practice.

⁴⁶⁶ See paragraph 257 above.

⁴⁶⁷ It is unnecessary to distinguish between conditional interpretative declarations and mere interpretative declarations, because there is in any event no obligation to confirm mere interpretative declarations, which unless otherwise provided may be formulated at any time (see paragraphs 265–266 above).

enters into force solely by being signed] does not require any subsequent confirmation.

“2.4.6 Interpretative declarations formulated when signing for which the treaty makes express provision

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

274. However, precisely because they may in principle be formulated at any time,⁴⁶⁸ mere interpretative declarations pose a particular problem not encountered in the case of reservations and which does not arise in the case of conditional interpretative declarations either: what happens in cases where the treaty to which they apply expressly provides that they may be formulated only at specified times, as in the case of article 310 of the United Nations Convention on the Law of the Sea?⁴⁶⁹

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

276. However, there are two reasons for including such a provision. First, this could be an opportunity to recall that a mere interpretative declaration may in principle be formulated at any time—which none of the draft guidelines adopted so far currently do, other than draft guideline 1.2, which does so by omission, since it does not introduce any time element into the definition of interpretative declarations.⁴⁷⁰ Secondly, such a clarification is in fact neither any more nor any less superfluous than those set out, for example, in article 19 (a)–(b) of the 1969 and 1986 Vienna Conventions, which deal with the option of entering reservations.⁴⁷¹

277. The existence of an express treaty provision limiting the option of formulating interpretative declarations is not the only instance in which a State or an international organization is prevented, *ratione tempo-*

ris, from formulating an interpretative declaration. The same applies in cases where the State or organization has already formulated an interpretation which its partners have taken as a basis or were entitled to take as a basis (*estoppel*). In such a case, the author of the initial declaration is prevented from modifying it. This hypothesis will be considered below in section (b), together with questions relating to the modification of reservations and interpretative declarations. However, it should be reflected in draft guideline 2.4.3.

278. Moreover, this draft guideline must exclude special rules relating to conditional interpretative declarations. It might read as follows:

“2.4.3 Times at which an interpretative declaration may be formulated

“Without prejudice to the provisions of guidelines 1.2.1, 2.4.4, 2.4.7 and 2.4.8, an interpretative declaration may be formulated at any time, [unless otherwise provided by an express provision of the treaty] [the treaty states that it may be made only at specified times].”

(b) Late reservations and interpretative declarations

(i) Late reservations

279. Unless otherwise provided by a treaty, which is always possible, the expression of definitive consent to be bound constitutes for the contracting parties the last time (and in view of the requirement concerning formal confirmation of reservations formulated during negotiations and when signing, the only time) when a reservation may be formulated.⁴⁷² This rule, which is unanimously recognized in the relevant doctrine,⁴⁷³ and which arose from the very definition of reservations and is also implied by the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions, is widely observed in practice.⁴⁷⁴ It was regarded as forming part of positive law by ICJ in its judgment in the case concerning *Border and Transborder Armed Actions*:

Article LV of the Pact of Bogotá enables the parties to make reservations to that instrument which “shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity”. In the absence of special procedural provisions, those reservations may, in accordance

⁴⁶⁸ See paragraphs 265–266 above.

⁴⁶⁹ “Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention,* from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and its regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.” Also see, for example, article 26, paragraph 2, of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and article 43 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

⁴⁷⁰ See paragraphs 265–266.

⁴⁷¹ Article 19 of the 1969 Vienna Convention reads: “A State may ... formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made ...”

⁴⁷² However, some reservation clauses specify that “reservations to one or more of the provisions of this Convention may be made at any time prior to ratification of or accession to this Convention” (Convention on Third Party Liability in the Field of Nuclear Energy, art. 18) or “at the latest at the moment of ratification or at accession, each State may make the reserves contemplated in articles ...” (Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, art. 23)—these examples are quoted by Imbert, *op. cit.*, pp. 163–164.

⁴⁷³ It has been stated particularly forcefully by Gaja: “[T]he latest moment in which a State may make a reservation is when it expresses its consent to be bound by a treaty” (“Unruly treaty reservations”, p. 310).

⁴⁷⁴ Moreover, this explains why States sometimes try to get around the prohibition on formulating reservations after the entry into effect of a treaty by calling unilateral statements “interpretative declarations”, which actually match the definition of reservations (see paragraph (27) of the commentary to draft guideline 1.2 (Definition of interpretative declarations), *Yearbook ... 1999* (footnote 75 above), p. 102; see also the third report on reservations to treaties, *Yearbook ... 1998* (footnote 3 above), p. 276, para. 340.

with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties, be made only at the time of signature or ratification of the Pact or at the time of accession to that instrument.⁴⁷⁵

280. Moreover, it has interesting specific consequences—which the Special Rapporteur will expand on and clarify in the report that he will in principle prepare next year on the permissibility of reservations (since the fundamental problem is clearly how to determine whether a belated reservation is impermissible solely owing to that fact). However, two of the consequences in question should be considered at the current stage since they help to clarify the scope of the rule implied by the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions.⁴⁷⁶

281. On the one hand, the principle that a reservation may not be formulated after the expression of definitive consent to be bound appeared to be sufficiently established at the Inter-American Court of Human Rights for the Court to consider, in its advisory opinion concerning *Restrictions to the Death Penalty*, that, once made,⁴⁷⁷ a reservation “escapes” from its author and may not be interpreted outside the context of the treaty itself. The Court adds the following:

A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation relates, including even all such matters which the State might subsequently declare that it intended the reservation to cover.

The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting or acceding to a treaty (Vienna Convention, art. 19).⁴⁷⁸

282. On the other hand, following the *Belilos* case,⁴⁷⁹ the Government of Switzerland initially revised its 1974 “interpretative declaration”, which the European Court of Human Rights regarded as an impermissible reservation, by adding a number of clarifications to its new “declaration”.⁴⁸⁰ The permissibility of this new declaration, which was criticized by the relevant doctrine,⁴⁸¹ was challenged before the Federal Court, which in its

⁴⁷⁵ *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 85.

⁴⁷⁶ It would seem unnecessary to reproduce formally in the Guide to Practice the rule enunciated in the provision in question: that would overlap with the definition set out in draft guidelines 1.1 and 1.1.2. However, it is included in order to introduce the exceptions that may be made with respect to it by draft guideline 2.3.4 (see paragraph 286 below).

⁴⁷⁷ The word “made” is probably more appropriate here than “formulated”, since the Inter-American Court of Human Rights considers (perhaps questionably) that “a reservation becomes an integral part of the treaty”, which is conceivable only if it is “in effect”.

⁴⁷⁸ *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3, paras. 63–64. Gaja interprets this advisory opinion the same way (*loc. cit.*, p. 310).

⁴⁷⁹ *Belilos v. Switzerland, European Court of Human Rights, Series A, No. 132*, judgement of 29 April 1988.

⁴⁸⁰ See United Nations, *Treaty Series*, vol. 1496, No. 2889, p. 234–235; vol. 1525, p. 213; and vol. 1561, pp. 386–387.

⁴⁸¹ See in particular Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”, p. 314. Also see the other references made by Flauss, “Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: requiem pour la déclaration interprétative relative à l’article 6, paragraphe 1”, p. 300, footnote 28.

decision *Elisabeth B. v. Council of State of Thurgau Canton* of 17 December 1992 declared the declaration invalid on the ground that it was a new reservation⁴⁸² that was incompatible with article 64, paragraph 1, of the European Convention on Human Rights.⁴⁸³ *Mutatis mutandis*, the limit on the formulation of reservations imposed by article 64 of the Convention is similar to the limit resulting from article 19 of the 1969 and 1986 Vienna Conventions, and the judgement of the Swiss Federal Court should certainly be regarded as a reaffirmation of the prohibition in principle on reservations formulated following the definitive expression of consent to be bound and also, perhaps, of the impossibility of formulating a new reservation in the guise of an interpretation of an existing reservation.⁴⁸⁴

283. The decision of the European Commission of Human Rights in the *Chrysostomos* case leads to the same conclusion, but provides an additional lesson. In the case in question, the European Commission believed that it followed from the “clear wording” of article 64, paragraph 1, of the European Convention on Human Rights “that a High Contracting Party may not, in subsequent recognition of the individual right of appeal, make a major change in its obligations arising from the Convention for the purposes of procedures under article 25”.⁴⁸⁵ Here again, the decision of the European Commission may be interpreted as a confirmation of the rule resulting from the introductory wording of the provision in question, with the important clarification that a State may not circumvent the prohibition on reservations following ratification by adding to a declaration made under an opting-in clause (which, does not in itself, constitute a reservation)⁴⁸⁶ conditions or limitations with effects identical to those of a reservation, at least in cases where the optional clause in question does not make any corresponding provision.

284. Although in the *Loizidou* judgement rendered in the same case the European Court of Human Rights was not as precise, the following passage can be regarded as a reaffirmation of the position in question:

⁴⁸² The European Court of Human Rights would have declared the 1974 “declaration” as a whole invalid: “The interpretative declaration concerning article 6, paragraph 1, of the European Convention on Human Rights, formulated by the Federal Council at the time of ratification could therefore not have a full effect in either the field of criminal law or in that of civil law. As a result, the 1988 interpretative declaration cannot be regarded as a restriction, a new formulation or a clarification of the reservation that existed previously. Rather, it represents a reservation formulated subsequently” (*Journal des Tribunaux*, 1995, p. 536; German text in *Europäische Grundrechte-Zeitschrift*, vol. 20 (1993), p. 72).

⁴⁸³ “Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.”

⁴⁸⁴ For a discussion of the other problems posed by this judgement, see below.

⁴⁸⁵ Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Applications Nos. 15299/89, 15300/89 and 15318/89, *Chrysostomos et al. v. Turkey*, vol. 68 (Strasbourg, 1993), p. 216. See also Decision of 4 March 1991, *Revue universelle des droits de l’homme*, vol. 3, No. 5 (July 1991), p. 200, para. 15.

⁴⁸⁶ See paragraphs 179–196 above and draft guidelines 1.4.6 and 1.4.7.

The Court further notes that article 64 of the Convention enables States to enter reservations when signing the Convention or when depositing their instruments of ratification. The power to make reservations under article 64 is, however, a limited one, being confined to particular provisions of the Convention.⁴⁸⁷

285. The decisions of the Inter-American Court of Human Rights, the European Court of Human Rights and the Swiss Federal Court reaffirm the stringency of the rule set out at the beginning of article 19 of the 1969 and 1986 Vienna Conventions and draws very direct and specific consequences therefrom, which certainly should be made explicit in the Guide to Practice.

286. This draft guideline could be worded as follows:

“2.3.4 Late exclusion or modification of the legal effects of a treaty by procedures other than reservations

“Unless otherwise provided in the treaty, a contracting party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

“(a) Interpretation of a reservation made earlier; or

“(b) A unilateral statement made under an optional clause.”

287. The Special Rapporteur is aware that, in the draft guideline proposed above, he has reverted to certain “alternatives” to reservations, which, he proposed in the previous chapter, should be excluded from the scope of the Guide to Practice. He believes, however, that such a guideline is essential once it is a matter not of regulating these procedures as such, but of emphasizing that they may not be used to circumvent the rules relating to reservations themselves. By contrast, since draft guideline 1.4.6⁴⁸⁸ defines unilateral statements made under an optional clause and is to be the subject of a commentary, it does not appear necessary to expand further here on the meaning of the rule reflected in subparagraph (a); it will be quite sufficient to refer back to draft guideline 1.4.6 and the related commentary.

288. Despite its far-reaching implications, the principle that a reservation may not be formulated after expression of consent to be bound “is not absolute. It applies only if the contracting States do not authorize by agreement the formulation, in one form or another, of new reservations”.⁴⁸⁹

289. Although this hypothesis “has never been contemplated, either in the context of the International Law Commission or during the Vienna Conference”,⁴⁹⁰ it is relatively frequent.⁴⁹¹ Thus, for example:

(a) Article 29 of the 1912 Convention on Bills of Exchange and Promissory Notes provided that:

The State which desires to avail itself of the reservations in Arti-

⁴⁸⁷ *Loizidou v. Turkey*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 310 (*Preliminary Objections*), *Judgment of 23 March 1995* (Council of Europe, Strasbourg, 1995), p. 28, para. 76.

⁴⁸⁸ See paragraph 189 above.

⁴⁸⁹ Flauss, *loc. cit.*, p. 302.

⁴⁹⁰ Imbert, *op. cit.*, p. 12, footnote 14.

⁴⁹¹ In addition to the examples cited below, see those given by Imbert, *op. cit.*, pp. 164–165.

cle 1, paragraph 2, or in Article 22, paragraph 1, must specify the reservation in its instrument of ratification or adhesion ...

The contracting State which *hereafter** desires to avail itself of the reservations⁴⁹² above mentioned, must notify its intention in writing to the Government of the Netherlands;⁴⁹³

(b) Likewise, under article XXVI of the Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air:

No reservation may be made to this Protocol except that a State may *at any time** declare by a notification addressed to the Government of the People’s Republic of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities;

(c) Article 38 of the Convention concerning the International Administration of the Estates of Deceased Persons provides that:

A Contracting State desiring to exercise one or more of the options envisaged in Article 4, the second paragraph of Article 6, the second and third paragraphs of Article 30 and Article 31, shall notify this to the Ministry of Foreign Affairs of the Netherlands, either at the time of the deposit of its instrument of ratification, acceptance, approval or accession *or subsequently*;⁴⁹⁴

(d) Under article 30, paragraph 3, of the Convention on mutual administrative assistance in tax matters:

After the entry into force of the Convention in respect of a Party, that Party may make one or more of the reservations listed in paragraph 1 which it did not make at the time of ratification, acceptance or approval. Such reservations shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the reservation by one of the Depositories;⁴⁹⁵

(e) Similarly also, article 10, paragraph 1, of the International Convention on Arrest of Ships, 1999 provides that:

Any State may, at the time of signature, ratification, acceptance, approval or accession, *or at any time thereafter**, reserve the right to exclude the application of this Convention to any or all of the following.

⁴⁹² In fact, what is meant here is not *reservations*, but *reservation clauses*.

⁴⁹³ See also article 1, paragraphs 3–4, of the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes and article 1, paragraphs 3–4, of the Convention providing a Uniform Law for Cheques: “The reservations referred to in Articles ... may, however, be made after ratification or accession, provided that they are notified to the Secretary-General of the League of Nations ...”; “Each of the High Contracting Parties may, in urgent cases, make use of the reservations contained in Articles ... even after ratification or accession.”

⁴⁹⁴ See also article 26 of the Convention on the Law Applicable to Matrimonial Property Regimes: “A Contracting State having at the date of the entry into force of the Convention for that State a complex system of national allegiance may specify *from time to time** by declaration how a reference to its national law shall be construed for the purposes of the Convention.” This hypothesis may refer to an interpretative statement rather than a reservation.

⁴⁹⁵ This Convention entered into force on 1 April 1995; it seems that no State party has exercised the option envisaged in this provision. See also article 5 of the Additional Protocol to the European Convention on Information on Foreign Law, “[a]ny Contracting Party which is bound by the provisions of both chapters I and II may at any time declare by means of a notification addressed to the Secretary General of the Council of Europe that it will only be bound by one or the other of chapters I and II. Such notification shall take effect six months after the date of the receipt of such notification”.

290. This is not especially problematic in itself and is in conformity with the idea that the Vienna rules are only of a supplementary nature (as will be the guidelines of the Guide to Practice, and with all the more reason).⁴⁹⁶ However, since what is involved is a derogation from a rule now accepted as customary and enshrined in the Vienna Conventions, it seems necessary that such a derogation should be expressly provided for in the treaty.

291. It is true that the European Commission of Human Rights, curiously,⁴⁹⁷ is more flexible in this respect, having appeared to rule that a State party to the European Convention on Human Rights could invoke the amendment of national legislation covered by an earlier reservation to modify, at the same time, the scope of that reservation without violating the time limit placed on the option of formulating reservations by article 64 of the Convention.⁴⁹⁸ The import of this jurisprudence⁴⁹⁹ is not clear, however, and it may be that the European Commission took this position because, in reality, the amendment of its legislation did not in fact result in an additional limitation on the obligations of the State concerned.⁵⁰⁰

292. Whatever the case, the requirement that there should be a clause expressly authorizing the formulation of a reservation after expression of consent to be bound seems all the more crucial given that it was necessary, for particularly pressing practical reasons, which the Commission set out in paragraph (3) of its commentary to draft guideline 1.1.2, to include a time limit in the definition of reservations itself:

[T]he idea of including time limits on the possibility of making reservations in the definition of reservations itself had progressively gained ground, given the magnitude of the drawbacks in terms of stability of legal relations of a system which would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta sunt servanda* itself which would be called into question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question; in addition, this would excessively complicate the task of the depositary.⁵⁰¹

293. Thus, there is undoubtedly a need to specify this requirement in a draft guideline. However, since this is not the only exception to the rule that a reservation must, in principle, be made not later than the moment at which consent to be bound is expressed, it is doubtless preferable to include the two exceptions in a single draft

⁴⁹⁶ See paragraph 233 and footnote 424 above.

⁴⁹⁷ Curiously, because the organs of the European Convention on Human Rights are certainly inclined to have little sympathy for the institution of reservations itself.

⁴⁹⁸ See footnote 509 below.

⁴⁹⁹ See for instance *Association X v. Austria*, application No. 473/59, *Yearbook of the European Convention on Human Rights 1958–1959*, vols. 1–2 (1960), p. 400; *X v. Austria*, application No. 1731/62, *ibid.*, 1964, vol. 7 (1966), p. 192; and *X v. Austria*, application 8180/78, Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 20, p. 26.

⁵⁰⁰ In the *X v. Austria* case, application No. 1731/62, the European Commission took the view that “the reservation made by Austria on 3 September 1958 ... covers the law of 5 July 1962, the result of which was not to enlarge a posteriori the field removed from the control of the Commission*”, p. 202.

⁵⁰¹ *Yearbook ... 1998* (see footnote 63 above) p. 103, para. (3); see also the third report on reservations to treaties, *Yearbook ... 1998* (footnote 3 above), p. 247, para. 136.

guideline. It is not clear, moreover, that they are as different from one another as they appear.

294. It emerges from current practice that the other contracting parties may unanimously accept a late reservation, and this consent (which may be tacit) can be seen as a collateral agreement extending *ratione temporis* the option of formulating reservations—if not reservations to the treaty concerned in general, then at least the reservation or reservations in question.

295. This possibility has been seen as translating the principle that “the parties are the ultimate guardians of a treaty and may be prepared to countenance unusual procedures to deal with particular problems”.⁵⁰² In any event, according to another author:

The solution must be understood as dictated by pragmatic considerations. A party remains always⁵⁰³ at liberty to accede anew to the same treaty, this time by proposing certain reservations. As the result will remain the same whichever of these two alternative actions one might choose it seemed simply more expedient to settle for the more rapid procedure ...⁵⁰⁴

296. Initially, the Secretary-General of the United Nations, in keeping with his great caution in this area, had held to the position that: “[i]n accordance with established international practice to which the Secretary-General conforms in his capacity as depositary, a reservation may be formulated only at the time of signature, ratification or accession”, and, as a result, he had taken the view that a party to the International Convention on the Elimination of All Forms of Racial Discrimination which did not make any reservations at the time of ratification was not entitled to make any later.⁵⁰⁵ Two years later, however, he softened his position considerably in a letter to the permanent mission to the United Nations of a Member State⁵⁰⁶ that was contemplating denouncing the Convention providing a Uniform Law for Cheques with a view to reaccessing to it with new reservations. Taking as a basis “the general principle that the parties to an international agreement may, by unanimous decision, amend the provisions of an agreement or take such measures as they deem appropriate with respect to the application or interpretation of that agreement”, the Legal Counsel states:

Consequently, it would appear that your Government could address to the Secretary-General, over the signature of the Minister for Foreign Affairs, a letter communicating the proposed reservation together with an indication of the date, if any, on which it is decided that it should take effect. The proposed reservation would be communicated to the States concerned (States parties, Contracting States and signatory States) by the Secretary-General and, in the absence of any objection by States parties within 90 days from the date of that communication (the period traditionally set, according to the practice of the Secretary-General, for the purpose of tacit acceptance and corresponding, in the present case, to the

⁵⁰² Greig, *loc. cit.*, pp. 28–29.

⁵⁰³ The author is referring to a specific treaty: the Convention providing a Uniform Law for Cheques (see paragraph 296 below), in which article VIII expressly provides for the option of denunciation; but the practice also applies in the case of treaties that do not include a withdrawal clause (see paragraph 298 below).

⁵⁰⁴ Horn, *op. cit.*, p. 43.

⁵⁰⁵ Memorandum to the Director of the Division of Human Rights, 5 April 1976, *United Nations Juridical Yearbook, 1976* (see footnote 419 above), p. 221.

⁵⁰⁶ The Member State in question was France (see Horn, *op. cit.*, p. 42).

period specified in the third paragraph of article I of the Convention for acceptance of the reservations referred to in articles 9, 22, 27 and 30 of annex II), the reservation would be considered to take effect on the date indicated.⁵⁰⁷

297. That is indeed what happened: the Government of France addressed to the Secretary-General, on 7 February 1979, a letter drafted in accordance with this information; the Secretary-General circulated this letter on 10 February and “[s]ince no objections by the Contracting States were received within 90 days from the date of circulation of this communication ... the reservation was deemed accepted and took effect on 11 May 1979”; curiously, the Government of the Federal Republic of Germany expressly stated, on 20 February 1980, that it “raise[d] no objections thereto”.⁵⁰⁸

298. Since then, the Secretary-General of the United Nations appears to have adhered continuously to this practice in the performance of his functions as depositary.⁵⁰⁹ It was formalized in a legal opinion of the Secretariat of 19 June 1984 to the effect that “the parties to a treaty may always decide, *unanimously*, at any time, to accept a reservation in the absence of, or even contrary to, specific provisions in the treaty”, and irrespective of whether the treaty contains express provisions as to when reservations may be formulated.⁵¹⁰

299. This practice is not limited to the treaties of which the Secretary-General is the depositary. In the above-mentioned 1978 legal opinion, the Legal Counsel of the United Nations had referred to a precedent involving a late reservation to the Customs Convention on the Temporary Importation of Packings deposited with the Secretary-General of the Customs Co-operation Council, article 20 of which

provides that any Contracting Party may, at the time of signing and ratifying the Convention, declare that it does not consider itself bound by article 2 of the Convention. Switzerland, which had ratified the Convention on 30 April 1963, made a reservation on 21 December 1965, which was submitted by the depositary to the States concerned and, in the absence of any objection, was considered accepted with retroactive effect to 31 July 1963.⁵¹¹

300. Several States parties to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, which entered into force

⁵⁰⁷ Letter to the Permanent Mission of a Member State to the United Nations (14 September 1978), *United Nations Juridical Yearbook, 1978* (United Nations publication, Sales No. E.80.V.1), p. 200.

⁵⁰⁸ *Multilateral Treaties Deposited with the Secretary-General ...* (see footnote 26 above), vol. II, part II, p. 422, note 4.

⁵⁰⁹ In addition to the examples given by Gaja, loc. cit., p. 311, see for instance Belgium’s reservation (which in fact amounts to a general objection to the reservations formulated by other parties) to the 1969 Vienna Convention: while this country had acceded to the Convention on 1 September 1992, “On 18 February 1993, the Government of Belgium notified the Secretary-General that its instrument of accession should have specified that the said accession was made subject to the said reservation. None of the Contracting Parties to the Agreement having notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its circulation (23 March 1993), the reservation is deemed to have been accepted” (*Multilateral Treaties Deposited with the Secretary-General ...* (see footnote 26 above), vol. II, p. 275, note 9).

⁵¹⁰ Letter to a governmental official in a Member State, *United Nations Juridical Yearbook, 1984* (United Nations publication, Sales No. E.91.V.1), p. 183.

⁵¹¹ See footnote 542 below.

on 2 October 1983, have widened the scope of their earlier reservations⁵¹² or added new ones after expressing their consent to be bound.⁵¹³

301. Likewise, late reservations to certain conventions of the Council of Europe have been formulated without any objection being raised. This was true, for example, of:

(a) Greece’s reservation to the European Convention on the Suppression of Terrorism;⁵¹⁴

(b) Portugal’s reservations to the European Convention on Mutual Assistance in Criminal Matters;⁵¹⁵ and

(c) The “declaration” by the Netherlands of 14 October 1987 restricting the scope of its ratification (on 14 February 1969) of the European Convention on Extradition.^{516, 517}

302. This brief (and incomplete) picture proves one point: it is not out of the question that late reservations should be deemed to have been legitimately made, in the absence of any objection by the other contracting parties consulted by the depositary.⁵¹⁸ But it also shows that the cases involved have almost always been fairly borderline ones; either the delay in communicating the reservation was minimal, or the notification occurred after ratification, but before the entry into force of the treaty for the reserving State,⁵¹⁹ or else the planned reservation was

⁵¹² France (ratification—25 September 1981; amendment—11 August 1982—IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999*, p. 77).

⁵¹³ Liberia (ratification—28 October 1980; new reservations—27 July 1983, subject of a procès-verbal of rectification of 31 August 1983), *ibid.*, p. 81; Romania (accession—8 March 1993, rectified subsequently, in the absence of any objection, to include reservations adopted by Parliament), *ibid.*, p. 83; United States (ratification—12 August 1980, reservations communicated—27 July 1983, subject of a procès-verbal of rectification of 31 August 1983), *ibid.*, p. 86; in the case of Liberia and the United States, the French Government stated that, in view of their nature, it had no objection to those rectifications, but such a decision could not constitute a precedent.

⁵¹⁴ Ratification—4 August 1988; rectification communicated to the Secretary-General—6 September 1988. Greece invoked an error: the reservation expressly formulated in the act authorizing ratification had not been transmitted at the time of the deposit of the instrument of ratification (United Nations, *Treaty Series*, vol. 1525, No. 17828, p. 377).

⁵¹⁵ Deposit of the instrument of ratification—27 September 1994; entry into force of the Convention for Portugal—26 December 1994; notification of reservations and declarations—19 December 1996; in this case too, Portugal invoked an error due to the non-transmission of the reservations contained in the Assembly resolution and the decree of the President of the Republic published in the official gazette of Portugal (United Nations, *Treaty Series*, vol. 1934, No. A-6841, p. 328, and vol. 2045, p. 214).

⁵¹⁶ United Nations, *Treaty Series*, vol. 719, No. 5146, pp. 341–343, and vol. 1496, p. 325.

⁵¹⁷ See also the example of the late reservations by Belgium and Denmark to the European Agreement on the Protection of Television Broadcasts, cited by Gaja, loc. cit., p. 311.

⁵¹⁸ Regarding the exact modalities for such consultation and the parties consulted, see below.

⁵¹⁹ In this connection Gaja cites two reservations added on 26 October 1976 by the Federal Republic of Germany to its instrument of ratification (dated 2 August 1976) of the 1954 Convention relating to the Status of Stateless Persons (see *Multilateral Treaties Deposited with the Secretary-General ...* (footnote 26 above), p. 275) and observes that the Secretary-General’s position that, in the absence of any objection,

duly published in the official publications, but was “forgotten” at the time of the deposit of the instrument of notification, which can, at a pinch, be considered “rectification of a material error”.

303. In a pamphlet published by the Council of Europe, Mr. Jörg Polakiewicz, Deputy Head of the organization’s Legal Advice Department and Head of the Treaty Office, emphasizes the exceptional nature of the derogations permitted within that organization from the agreed rules on formulating reservations and adds: “Accepting the belated formulation of reservations may create a dangerous precedent which could be invoked by other states in order to formulate new reservations or to widen the scope of existing ones. Such practice would jeopardise legal certainty and impair the uniform implementation of European treaties.”⁵²⁰ For the same reasons, some authors are reluctant to acknowledge the existence of such a derogation from the principle of the limitation *ratione temporis* of the possibility of formulating reservations.⁵²¹

304. Yet, it is a fact that “[a]ll the instances of practice here recalled point to the existence of a rule that allows States to make reservations even after they have expressed their consent to be bound by a treaty, provided that the other Contracting States acquiesce to the making of reservations at that stage”.⁵²² In fact, it is difficult to imagine what might prevent all the contracting States from agreeing to such a derogation, whether this agreement is seen as an amendment to the treaty or as the mark of the “collectivization” of control over the permissibility of reservations.⁵²³

305. It is this requirement for unanimity, be it passive or tacit, that makes the exception to the principle acceptable and limits the risk of abuse. It is an indissociable element of this derogation, observable in current practice and consistent with the role of “guardian” of the treaty that States parties may collectively assume.⁵²⁴ But this requirement is not meaningful, nor does it fulfil its objectives, unless a single objection renders the reservation impossible. Failing this, the very principle established in the first phrase of article 19 of the 1969 and 1986 Vienna Conventions would be reduced to nothing: any State could add a new reservation to its acceptance of a treaty at any time because there would always be one other contracting State that would not object to such a reservation, and the situation would revert to that in which States or international organizations find them-

the reservations could be deemed to have been made on the date of ratification was “questionable, as the instrument of ratification could not be withdrawn” (Gaja, *loc. cit.*, p. 311). Obviously, this is correct, but the “departure” from the rule contained in the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions is limited for all that.

⁵²⁰ *Op. cit.*, p. 194.

⁵²¹ See Edwards Jr., “Reservations to treaties”, p. 383, and Baratta, *Gli effetti delle riserve ai trattati*, p. 27, footnote 65.

⁵²² Gaja, *loc. cit.*, p. 312.

⁵²³ This “control” must, of course, be exercised in conjunction with the “organs of control”, where they exist. In the *Chrysostomos* and *Loizidou* cases, control by States over the permissibility *ratione temporis* of reservations (introduced by Turkey by means of an optional statement accepting individual petitions) was superseded by the organs of the European Convention on Human Rights (see paragraphs 283–284 above).

⁵²⁴ See paragraph 295 above.

selves at the time of becoming parties, when they enjoy very broad scope for formulating reservations, subject only to the limits set in articles 19–20.

306. It does not then seem compatible with the spirit of either the “Vienna definition” or the principle set forth in article 19 to consider that “an objection on the part of a Contracting State would arguably concern only the effects of the late reservation in the relations between the reserving and the objecting States”.⁵²⁵ The caution demonstrated in practice and the clarifications provided on several occasions by the Secretary-General, together with doctrinal considerations and concerns relating to the maintenance of legal certainty, justify, in this particular instance, the strict application of the rule of unanimity—it being understood that, contrary to the traditional rules applicable to all reservations (except in Latin America), this unanimity concerns the acceptance of (or at least the absence of any objection to) late reservations. It is without effect, however, on the participation of the reserving State (or international organization) in the treaty itself: in the event of an objection, it remains bound, in accordance with the initial expression of its consent; and it can only opt out (with a view to re-accepting subsequently and formulating anew the rejected reservations) in conformity with either the provisions of the treaty itself or the general rules codified in articles 54–64 of the 1969 and 1986 Vienna Conventions.

307. The question arises, however, whether a distinction should not be made between, on the one hand, objections in principle to the formulation of late reservations and, on the other hand, “traditional” objections, such as those that can be made to reservations pursuant to article 20, paragraph 4 (b), of the 1969 and 1986 Vienna Conventions. This distinction appears to be necessary, for it is hard to see why co-contracting States or international organizations should not have a choice between all or nothing, that is to say, either accepting both the reservation itself and its lateness or preventing the State or organization which formulated it from doing so, whereas they may have reasons that are acceptable to their partners. Furthermore, in the absence of such a distinction, States and international organizations which are not parties when the late reservation is formulated, but which become parties subsequently through accession or other means would be confronted with a *fait accompli*. Paradoxically, they could not object to a late reservation, whereas they are permitted to do so under article 20, paragraph 5,⁵²⁶ relating to reservations formulated when the reserving State expresses its consent to be bound.⁵²⁷

308. The unanimous consent of the other contracting parties should therefore be regarded as necessary for the *late formulation* of reservations. On the other hand, the

⁵²⁵ Gaja, *loc. cit.*, p. 312.

⁵²⁶ “... a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.”³⁷

⁵²⁷ It would be equally paradoxical to allow States or international organizations which become parties to the treaty after the reservation is entered to object to it under article 20, paragraph 4 (b), whereas the original parties cannot do so.

normal rules regarding acceptance of and objections to reservations, as codified in articles 20–23 of the 1969 and 1986 Vienna Conventions, should be applicable as usual with regard to the actual content of late reservations, to which the other parties should be able to object “as usual”.

309. In view of these remarks, the Commission could adopt two draft guidelines. The first one could establish the principle that a late reservation must be accepted unanimously, while the second would explain the consequences of an objection to such a reservation.

310. With regard to the principle, it would no doubt be useful to present it clearly as an exception to the basic principle that late reservations are prohibited. Accordingly, draft guideline 2.3.1 could be drafted as follows:

“2.3.1 *Reservations formulated late*

“Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty unless the other contracting parties do not object to the late formulation of the reservation.”

311. In view of the interest attached to avoiding late reservations to the extent possible, the phrase “unless the treaty provides otherwise”, which introduces the draft guideline proposed above, should be interpreted strictly. Under these circumstances, the Commission might do well to adopt “model clauses” (as it expressed the intention to do in 1995⁵²⁸), indicating to States and international organizations the type of provisions which it might be useful to include in a treaty in order to avoid any ambiguity in this regard.

312. Such model clauses could be based on the provisions cited above,⁵²⁹ on the understanding that in order to avoid any uncertainty with regard to reservations formulated after the expression of consent to be bound, but before the entry into force of the treaty, it would no doubt be preferable for such clauses to avoid referring to the entry into force. They might read as follows (alternatively, of course):

“Model clause 2.3.1 *Reservations formulated after the expression of consent to be bound*

“(a) A contracting party may formulate a reservation after expressing its consent to be bound by the present treaty;

“(b) A contracting party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] when signing, ratifying, formally ratifying, accepting or approving the treaty or acceding thereto at any time thereafter;

⁵²⁸ See the report of the Commission on the work of its forty-seventh session: “The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission’s statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses*” (*Yearbook ... 1995* (footnote 5 above), p. 108, para. 487 (b)).

⁵²⁹ Para. 289.

“(c) A contracting party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] at any time by means of a notification addressed to the depositary.”

313. Draft guideline 2.3.3 might read as follows:

“2.3.3 *Objection to reservations formulated late*

“If a contracting party to a treaty objects to a reservation formulated late, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being made.”

314. The considerations which explain the hesitations seen in practice with regard to late reservations apply also with regard to the length of time in which the other contracting parties must give their consent and the form that such consent must take.⁵³⁰ On the one hand, there would be no way to prevent all the contracting parties from accepting a modification in the way that the treaty applies to one of them; on the other hand, that possibility must be confined within narrow and specific limits, or else the very principle laid down in article 19 of the 1969 and 1986 Vienna Conventions would be undermined.

315. With regard to the form, just as reservations formulated within the set periods may be accepted tacitly,⁵³¹ it should likewise be possible for late reservations to be accepted in that manner (whether their late formulation or their content is at issue), and for the same reasons. It seems fairly clear that to require an express unanimous consent would rob the (at least incipient) rule that late reservations are possible under certain conditions of any substance, for, in practice, the express acceptance of reservations at any time is rare indeed.

316. Such is, moreover, the practice followed by the Secretary-General of the United Nations⁵³² and by the Secretaries-General of the Customs Co-operation Council (now World Customs Organization (WCO))⁵³³ and IMO,⁵³⁴ all of whom considered that a new reservation entered into force in the absence of objections from the other contracting parties.

317. It remains to be determined, however, how much time the other contracting parties have to respond to a late reservation. A similar question arises with regard to amendments to existing reservations.

318. With regard to late reservations in the strict sense, practice is ambiguous. To the knowledge of the Special

⁵³⁰ One might consider that what is involved here are questions relating to the formulation of acceptances of or objections to reservations. From a purely abstract standpoint, that is correct. In the view of the Special Rapporteur, however, these questions are so closely related to the issue of late reservations that it would be useful, as a practical matter, to address them at the same time as the latter.

⁵³¹ See article 20, paragraph 5, of the 1986 Vienna Convention: “... unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty ...”

⁵³² See paragraphs 296–298 above.

⁵³³ See paragraph 299 above.

⁵³⁴ See paragraph 300 above.

Rapporteur, the Secretaries-General of IMO, the Council of Europe and WCO proceeded in an empirical manner and did not set any specific periods when they consulted the other contracting parties.⁵³⁵ That was not true for the Secretary-General of the United Nations.

319. In the first place, when the Secretary-General's current practice was inaugurated in the 1970s, the parties were given a period of 90 days in which to object to a late reservation, where appropriate. Nevertheless, the choice of this period seems to have been somewhat circumstantial; it happens to have coincided with the period provided for in the relevant provisions of the Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques, to which France sought to make a new reservation.⁵³⁶ That notwithstanding, the 90-day period was adopted whenever a State availed itself thereafter of the opportunity to formulate a new reservation, or modify an existing one, after the entry into force with respect to that State of a new treaty of which the Secretary-General was the depositary.⁵³⁷

320. In practice, however, the period proved to be too short; owing to the delays in transmission of the communication by the Office of the Legal Counsel to States, the latter had very little time in which to examine these notifications and respond to them, whereas such communications are likely to raise "complex questions of law" for the parties to a treaty, requiring "consultations among them, in deciding what, if any, action should be taken in respect of such a communication".⁵³⁸ It is significant, moreover, that in the few situations in which parties took action, such actions were formulated well after the 90-day period that had theoretically been set for them.⁵³⁹

321. For this reason, following a note verbale from Portugal reporting, on behalf of the European Union, on difficulties linked to the 90-day period, the Secretary-General announced, in a circular addressed to all Member States, a change in the practice in that area:

[T]he Secretary-General as depositary will in future, when circulating a reservation which a State may seek to formulate subsequently to having established its consent to be bound by a treaty, stipulate twelve months as the period within which other parties must inform him if they do not wish him to consider them to have accepted that reservation.⁵⁴⁰

322. In taking this decision, which will also apply to the amendment of an existing reservation, "the Secretary-General [was] guided by Article 20, paragraph 5,

⁵³⁵ It would appear, however, that the Secretary-General of IMO considers that, in the absence of a response within one month following notification, the reservation becomes effective (see footnote 548 below and IMO, *Status of Multilateral Conventions ...* (footnote 512 above), concerning the reservation of Liberia, p. 81, and that of the United States, p. 86).

⁵³⁶ See paragraphs 296–297 above.

⁵³⁷ See paragraph 298 above.

⁵³⁸ Note verbale from the Legal Counsel (modification of reservations), 2000, addressed to the Permanent Representatives to the United Nations (4 April 2000), *Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2.

⁵³⁹ See the response by Germany to the French reservation to the Convention providing a Uniform Law for Cheques, issued one year following the date of the French communication (para. 297 above).

⁵⁴⁰ See footnote 537 above.

of the [Vienna] Convention, which indicates a period of twelve months to be appropriate for Governments to analyse and assess a reservation that has been formulated by another State and to decide upon what action, if any, should be taken in respect of it".⁵⁴¹ The decision meets the concerns of States and falls within the current trend towards establishing a "reservation dialogue" between a State which intends to formulate a reservation and the other contracting parties, facilitating such a dialogue through the length of time it allows.

323. This long period has one drawback, however: during the 12 months following notification by the Secretary-General,⁵⁴² total uncertainty prevails as to the fate of the reservation that has been formulated, and if a single State objects to it at the last minute, that is sufficient to consider it as not having been made.⁵⁴³ The question arises, therefore, whether an intermediate solution (six months, for example), would not have been wiser. Nevertheless, taking into account the provisions of article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions and the recent announcement by the Secretary-General of his intentions, it probably makes more sense to bring the Commission's position—which, in any event, has to do with progressive development and not with codification in the strict sense—into line with theirs.

324. Likewise, in view of the different practices followed by other international organizations acting as depositaries,⁵⁴⁴ it would no doubt be wise to reserve the possibility for an organization acting as depositary to maintain its usual practice, provided that it has not elicited any particular objections.

325. Based on article 20, paragraph 5, of the 1986 Vienna Convention, as adapted to the specific case of late reservations, draft guideline 2.3.2 could therefore be drafted as follows:

"2.3.2 Acceptance of reservations formulated late

"Unless the treaty provides otherwise or the usual practice followed by the depositary differs, a reservation formulated late shall be deemed to have been accepted by a contracting party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received."

(ii) *Late interpretative declarations*

326. Like reservations, interpretative declarations can be late. This is obviously true for conditional interpretative declarations, which, like reservations themselves, can be formulated (or confirmed) only when expressing consent to be bound, as stipulated in draft guidelines 1.2.1 and 2.4.4. But it may also be true for mere interpretative declarations which may, in principle, be formulated at any time,⁵⁴⁵ either because the treaty itself

⁵⁴¹ Ibid.

⁵⁴² In other words, not the communication from the State announcing its intention to formulate a late reservation. This is highly debatable.

⁵⁴³ See paragraphs 304–305 above.

⁵⁴⁴ See paragraph 316 above.

⁵⁴⁵ See draft guideline 2.4.3.

sets the period in which they can be made or because of circumstances surrounding their formulation.⁵⁴⁶

327. The declarations formulated on 31 January 1995 by the Government of Egypt, which had ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, constitute a striking example of late formulation.⁵⁴⁷

328. Under article 26, paragraph 2, of the Basel Convention, a State may, within certain limits, formulate such declarations, but only “when signing, ratifying, accepting, approving, or formally confirming or acceding to this Convention”. Several parties contested the admissibility of the Egyptian declarations, either because, in their view, the declarations were really reservations (prohibited by article 26, paragraph 1) or because they were late.⁵⁴⁸

329. Accordingly, the Secretary-General of the United Nations, depositary of the Basel Convention, “[i]n keeping with the depositary practice followed in similar cases ... proposed to receive the declarations in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of their circulation”.⁵⁴⁹ Subsequently, in view of the objections received from certain contracting States,⁵⁵⁰ the Secretary-General “[took] the view that he [was] not in a position to accept these declarations [formulated by Egypt] for deposit”,⁵⁵¹ declined to include them in the section entitled “Declarations and Reservations”, and reproduced them only in the section entitled “Notes”, accompanied by the objections concerning them.

⁵⁴⁶ See paragraphs 274–277 above.

⁵⁴⁷ See *Multilateral Treaties Deposited with the Secretary-General* ... (footnote 26 above), vol. II, pp. 358–359.

⁵⁴⁸ *Ibid.*, p. 359, observations by the United Kingdom, Finland, Italy, the Netherlands and Sweden.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ See paragraph 328 above.

⁵⁵¹ *Multilateral Treaties Deposited with the Secretary-General* ... (see footnote 26 above), p. 359.

330. In truth, whether what is at issue are conditional declarations formulated after the expression of consent to be bound or mere interpretative declarations whose formulation is limited to certain periods, there does not seem to be any reason to deviate from the rules applicable to late reservations.

331. These rules should therefore be transposed to late interpretative declarations (whether what is at issue are mere interpretative declarations, where the treaty limits the possibility of making such declarations to specified periods, or conditional declarations) in draft guidelines 2.4.7 and 2.4.8, based on draft guideline 2.3.1:

“2.4.7 Interpretative declarations formulated late

“Where a treaty provides that an interpretative declaration can be made only at specified times, a State or an international organization may not formulate an interpretative declaration on that treaty at another time, unless the late formulation of the interpretative declaration does not elicit any objections from the other contracting parties.”

“2.4.8 Conditional interpretative declarations formulated late

“A State or an international organization may not formulate a conditional interpretative declaration on a treaty after expressing its consent to be bound by the treaty unless the late formulation of the declaration does not elicit any objections from the other contracting parties.”

332. It is self-evident that the approaches laid down in draft guidelines 2.3.2 and 2.3.3 can also be transposed to acceptances of interpretative declarations formulated late and objections to such formulation. Nevertheless, it is probably not useful to overburden the Guide to Practice by including express draft guidelines in this respect, and it probably suffices to state as much in the commentary on the draft guidelines proposed above.

Annex I

**TABLE SHOWING CONCORDANCES* BETWEEN THE DRAFT GUIDELINES
PROPOSED BY THE SPECIAL RAPPORTEUR AND THOSE ADOPTED BY THE
COMMISSION ON FIRST READING**

	<i>Commission's numbering</i>	<i>Special Rapporteur's numbering</i>
1.	Definitions	–
1.1	Definition of reservations	1.1
1.1.1	Object of reservations	1.1.4
1.1.2	Instances in which reservations may be formulated	1.1.2
1.1.3	Reservations having territorial scope	1.1.8
1.1.4	Reservations formulated when notifying territorial application	1.1.3
1.1.5	Statements purporting to limit the obligations of their author	1.1.6
1.1.6	Statements purporting to discharge an obligation by equivalent means	–
1.1.7	Reservations formulated jointly	1.1.1
1.2	Definition of interpretative declarations	1.2
1.2.1	Conditional interpretative declarations	1.2.4
1.2.2	Interpretative declarations formulated jointly	1.2.1
1.3	Distinction between reservations and interpretative declarations	1.3
1.3.1	Method of implementation of the distinction between reservations and interpretative declarations	1.3.1
1.3.2	Phrasing and name	1.2.2
1.3.3	Formulation of a unilateral statement when a reservation is prohibited	1.2.3
1.4	Unilateral statements other than reservations and interpretative declarations	–
1.4.1	Statements purporting to undertake unilateral commitments	1.1.5
1.4.2	Unilateral statements purporting to add further elements to a treaty	1.1.6
1.4.3	Statements of non-recognition	1.1.7
1.4.4	General statements of policy	1.2.5
1.4.5	Statements concerning modalities of implementation of a treaty at the internal level	1.2.6
1.5	Unilateral statements in respect of bilateral treaties	–
1.5.1	“Reservations” to bilateral treaties	1.1.9
1.5.2	Interpretative declarations in respect of bilateral treaties	1.2.7
1.5.3	Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party	1.2.8
1.6	Scope of definitions	[1.4]

*This table is presented in response to a request by the Chairman of the Commission at its fifty-first session (*Yearbook ... 1999*, vol. I, 2597th meeting, p. 221, para. 59).

**DEFINITIONS: CONSOLIDATED TEXT OF ALL DRAFT GUIDELINES
DEALING WITH DEFINITIONS ADOPTED ON FIRST READING OR PROPOSED
IN THE PRESENT REPORT¹**

1.1 Definition of reservations²

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

1.1.2 Object of reservations³

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

1.1. Instances in which reservations may be formulated⁴

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

1.1.3 Reservations having territorial scope⁵

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

1.1.4 Reservations formulated when notifying territorial application⁶

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions

of the treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 Statements purporting to limit the obligations of their author⁷

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 Statements purporting to discharge an obligation by equivalent means⁸

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

1.1.7 Reservations formulated jointly⁹

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

1.1.8 Reservations formulated under exclusionary clauses¹⁰

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

¹ The text of the draft guidelines proposed in the present report appears in italics.

² For the commentary on this draft guideline, see *Yearbook ... 1998*, vol. II (Part Two), pp. 99–100.

³ For the commentary to this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 93–95.

⁴ For the commentary to this draft guideline, see *Yearbook ... 1998* (footnote 2 above), pp. 103–104.

⁵ *Ibid.*, pp. 104–105.

⁶ *Ibid.*, pp. 105–106.

⁷ For the commentary to this draft guideline, see *Yearbook ... 1999* (footnote 3 above), pp. 95–97.

⁸ *Ibid.*, p. 97.

⁹ For the commentary to this draft guideline, see *Yearbook ... 1998* (footnote 2 above), pp. 106–107.

¹⁰ Concerning this draft guideline, see paragraphs 148–178 of the present report, above.

1.2 Definition of interpretative declarations¹¹

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

1.2.1 Conditional interpretative declarations¹²

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

1.2.2 Interpretative declarations formulated jointly¹³

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

1.3 Distinction between reservations and interpretative declarations¹⁴

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

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations¹⁵

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

1.3.2 Phrasing and name¹⁶

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 Formulation of a unilateral statement when a reservation is prohibited¹⁷

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

1.4 Unilateral statements other than reservations and interpretative declarations¹⁸

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

1.4.1 Statements purporting to undertake unilateral commitments¹⁹

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

1.4.2 Unilateral statements purporting to add further elements to a treaty²⁰

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

1.4.3 Statements of non-recognition²¹

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

1.4.4 General statements of policy²²

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

¹¹ For the commentary to this draft guideline, see *Yearbook ... 1999* (footnote 3 above), pp. 97–103.

¹² *Ibid.*, pp. 103–106.

¹³ *Ibid.*, pp. 106–107.

¹⁴ *Ibid.*, p. 107.

¹⁵ *Ibid.*, pp. 107–109.

¹⁶ *Ibid.*, pp. 109–111.

¹⁷ *Ibid.*, pp. 111–112.

¹⁸ *Ibid.*, pp. 112–113.

¹⁹ *Ibid.*, pp. 113–114.

²⁰ *Ibid.*, p. 114.

²¹ *Ibid.*, pp. 114–116.

²² *Ibid.*, pp. 116–118.

1.4.5 Statements concerning modalities of implementation of a treaty at the internal level²³

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

1.4.6 Unilateral statements adopted under an optional clause²⁴

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

1.4.7 Restrictions contained in unilateral statements adopted under an optional clause²⁵

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

1.4.8 Unilateral statements providing for a choice between the provisions of a treaty²⁶

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

1.5 Unilateral statements in respect of bilateral treaties

1.5.1 "Reservations" to bilateral treaties²⁷

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

1.5.2 Interpretative declarations in respect of bilateral treaties²⁸

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

1.5.3 Legaleffect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party²⁹

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 the authentic interpretation of that treaty.

1.6 Scope of definitions³⁰

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

1.7 Alternatives to reservations and interpretative declarations

1.7.1 Alternatives to reservations³¹

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

1.7.2 Different procedures permitting modification of the effects of the provisions of a treaty³²

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

(a) *Restrictive clauses that limit the object of the obligations imposed by the treaty by making exceptions and setting limits thereto;*

(b) *Escape clauses that allow the contracting parties not to apply general obligations in specific instances and for a specific period of time;*

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

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

(a) *Their suspension, in accordance with the provisions of articles 57 to 62 of the 1969 and 1986 Vienna Conventions;*

²³ Ibid., p. 118.

²⁴ Concerning this draft guideline, see paragraphs 179–189 of the present report, above.

²⁵ Ibid., paras. 190–196 above.

²⁶ Ibid., paras. 197–210.

²⁷ For the commentary to this draft guideline, see *Yearbook ... 1999* (footnote 3 above), pp. 120–124.

²⁸ Ibid., pp. 124–125.

²⁹ Ibid., pp. 125–126.

³⁰ Ibid., p. 126.

³¹ Concerning this draft guideline, see paragraphs 72–94 of the present report, above.

³² Ibid., paras. 72–95 above.

(b) Amendments to the treaty entering into force only for certain parties; or

(c) Supplementary agreements and protocols purporting to modify the treaty only as it affects the relations between certain parties.

1.7.3 Restrictive clauses³³

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

1.7.4 [“Bilateralized reservations”] [Agreements between States having the same object as reservations]³⁴

An agreement[, concluded under a specific provision of a treaty,] by which two or more States purport to

exclude or to modify the legal effect of certain provisions [of the] [of a] treaty or of the treaty as a whole in their application to their relations inter se does not constitute a reservation within the meaning of the present Guide to Practice.

1.7.5 Alternatives to interpretative declarations³⁵

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

³³ Ibid., paras. 110–116 above.

³⁴ Ibid., paras. 117–130 above.

³⁵ Ibid., paras. 96–103 above.