

# RESERVATIONS TO TREATIES

[Agenda item 4]

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## Third 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>
Final Act of the Congress (Vienna, 9 June 1815)	<i>British and Foreign State Papers, 1814–1815</i> , vol. II, p. 3.
Convention for the Pacific Settlement of International Disputes (The Hague, 29 July 1899 and 18 October 1907)	J. B. Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , 3rd ed. (New York, Oxford University Press, 1918), p. 41.
International Opium Convention (The Hague, 23 January 1912)	League of Nations, <i>Treaty Series</i> , vol. VIII, p. 187.
Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva, 17 June 1925)	Ibid., vol. XCIV, p. 65.
General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (Paris, 27 August 1928)	Ibid., vol. XCIV, p. 57.
General Act of Arbitration (Pacific Settlement of International Disputes) (Geneva, 26 September 1928)	Ibid., vol. XCIII, p. 343.
International Convention for the Safety of Life at Sea (London, 31 May 1929)	Ibid., vol. CXXXVI, p. 82.
Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes (Geneva, 7 June 1930)	Ibid., vol. CXLIII, p. 319.
Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (Geneva, 13 July 1931)	Ibid., vol. CXXXIX, p. 301.
Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946)	United Nations, <i>Treaty Series</i> , vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	Ibid., vol. 55, p. 187.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	Ibid., vol. 78, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	Ibid., vol. 75, pp. 31 et seq.

	<i>Source</i>
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977)	Ibid., vol. 1125, pp. 3 and 609.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	Ibid., vol. 213, p. 221.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	Ibid., vol. 189, p. 137.
Agreement on the Status of the North Atlantic Treaty Organisation, national representatives and international staff (Ottawa, 20 September 1951)	Ibid., vol. 200, p. 3.
Convention on the Political Rights of Women (New York, 31 March 1953)	Ibid., vol. 193, p. 135.
European Convention on the Equivalence of Diplomas leading to Admission to Universities (Paris, 11 December 1953)	Ibid., vol. 218, p. 125.
Customs Convention on the Temporary Importation of Private Road Vehicles (with annexes) (New York, 4 June 1954)	Ibid., vol. 282, p. 249.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	Ibid., vol. 360, p. 117.
Geneva Conventions on the Law of the Sea (Geneva, April 1958)	
Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	Ibid., vol. 516, p. 205.
Convention on the High Seas (Geneva, 29 April 1958)	Ibid., vol. 450, p. 11.
Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958)	Ibid., vol. 559, p. 285.
Convention on the Continental Shelf (Geneva, 29 April 1958)	Ibid., vol. 499, p. 311.
Convention relating to the unification of certain rules concerning collisions in inland navigation (Geneva, 15 March 1960)	Ibid., vol. 572, p. 133.
Convention on the Organisation for Economic Co-operation and Development (Paris, 14 December 1960)	Ibid., vol. 888, p. 179.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	Ibid., vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	Ibid., vol. 596, p. 261.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (Moscow, 5 August 1963)	Ibid., vol. 480, p. 43.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	Ibid., vol. 660, p. 195.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	Ibid., vol. 993, p. 3.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) (with annexed Additional Protocols I and II) (Mexico, Federal District, 14 February 1967)	Ibid., vol. 634, p. 281.
Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, 1 July 1968)	Ibid., vol. 729, p. 161.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	Ibid., vol. 1144, p. 123.
Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP) (with annexes) (Geneva, 1 September 1970)	Ibid., vol. 1028, p. 121.

	<i>Source</i>
Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof (London, Moscow and Washington, 11 February 1971)	Ibid., vol. 955, p. 115.
Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (London, Moscow and Washington, 10 April 1972)	Ibid., vol. 1015, p. 163.
International Convention on the Suppression and Punishment of the Crime of <i>Apartheid</i> (New York, 30 November 1973)	Ibid., vol. 1015, p. 243.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973)	Ibid., vol. 1035, p. 167.
Convention on a Code of Conduct for Liner Conferences (6 April 1974)	Ibid., vol. 1334, p. 15.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations, <i>Juridical Yearbook 1975</i> (Sales No. E.77.V.3), p. 87.
Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) (with annexes) (Geneva, 14 November 1975)	Ibid., <i>Treaty Series</i> , vol. 1079, p. 89, and vol. 1142, p. 413.
Agreement establishing the International Fund for Agricultural Development (with schedules) (Rome, 13 June 1976)	Ibid., vol. 1059, p. 191.
Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials of 22 November 1950 (Nairobi, 26 November 1976)	Ibid., vol. 1259, p. 3.
Convention on the prohibition of military or any other hostile use of environmental modification techniques (with annex) (New York, 10 December 1976)	Ibid., vol. 1108, p. 151.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	<i>Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April–6 May 1977 and 31 July–23 August 1978</i> , vol. III (United Nations publication, Sales No. E.79.V.10).
Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979)	United Nations, <i>Treaty Series</i> , vol. 1302, p. 217.
Protocol to the 1979 Convention on long-range transboundary air pollution concerning the control of emissions of nitrogen oxides or their transboundary fluxes (Sofia, 31 October 1988)	Ibid., vol. 1593, p. 287.
Agreement governing the activities of States on the moon and other celestial bodies (New York, 5 December 1979)	Ibid., vol. 1363, p. 3.
International Convention against the taking of hostages (New York, 17 December 1979)	Ibid., vol. 1316, p. 205.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	Ibid., vol. 1249, p. 13.
European Outline Convention on transfrontier co-operation between territorial communities or authorities (Madrid, 21 May 1980)	Ibid., vol. 1272, p. 61.
Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (Geneva, 10 October 1980)	Ibid., vol. 1342, p. 137.

	<i>Source</i>
International Telecommunication Convention (with annexes, final protocol, additional protocols, and resolutions, recommendation and opinions) (Nairobi, 6 November 1982)	Ibid., vol. 1531, p. 2.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	Ibid., vol. 1833, p. 3.
Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)	Ibid., vol. 1465, p. 85.
Protocol of Amendment to the Charter of the Organization of American States: "Protocol of Cartagena de Indias" (Cartagena de Indias, 12 May 1985)	OAS, <i>Treaty Series</i> , No. 66.
Regional Agreement Concerning the Planning of the Maritime Radionavigation Service (Radiobeacons) in the European Maritime Area (Geneva, 1985)	ITU, <i>Final Acts of the Regional Administrative Conference for the Planning of the Maritime Radionavigation Service (Radiobeacons) in the European Maritime Area</i> (Geneva, 1986).
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	Document A/CONF.129/15.
Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)	United Nations, <i>Treaty Series</i> , vol. 1522, p. 3.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	<i>Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November–20 December 1988</i> , vol. I (United Nations publication, Sales No. E.94.XI.5).
Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel, 22 March 1989)	United Nations, <i>Treaty Series</i> , vol. 1673, p. 57.
Convention on the Rights of the Child (New York, 20 November 1989)	<i>Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49</i> , resolution 44/25, annex.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	ECE, <i>Environmental Conventions</i> , United Nations publication, 1992, p. 95.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	United Nations, <i>Treaty Series</i> , vol. 1771, p. 107.
Convention on biological diversity (Rio de Janeiro, 5 June 1992)	Ibid., vol. 1760, p. 79.

	<i>Source</i>
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Paris, 13 January 1993)	<i>Status of Multilateral Arms Regulation and Disarmament Agreements</i> , 4th ed. (United Nations publication, Sales No. E.93.IX.11 (vol. 2)), p. 113.
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 December 1995)	<i>Law of the Sea Bulletin No. 29</i> (United Nations publication, 1995), p. 25, document A/CONF.164/37.
Comprehensive Nuclear-Test-Ban Treaty (New York, 10 September 1996)	Document A/50/1027, annex.

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#### Works cited in the present report

- ANDERSON, D. R.  
 “Reservations to multilateral conventions: a re-examination”, *International and Comparative Law Quarterly* (London), vol. 13, 1964, pp. 450–481.
- ANZILOTTI, Dionisio  
*Cours de droit international*. French translation by Gilbert Gidel, 3rd ed. Paris, Sirey, 1929. Vol. I.
- ARNAUD, André-Jean  
 “Le médium et le savant: signification politique de l’interprétation juridique”, *Archives de philosophie du droit*. Paris, Dalloz, 1972.
- BASDEVANT, Jules  
 “La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités”, *Recueil des cours de l’Académie de droit international de La Haye, 1926–V*. Paris, Hachette, 1928. Vol. 15.
- BASTID, Suzanne  
*Les traités dans la vie internationale: conclusion et effets*. Paris, Economica, 1985.
- BISHOP JR., William W.  
 “Reservations to treaties”, *Recueil des cours de l’Académie de droit international de La Haye, 1961–II*. Leyden, Sijthoff, 1962. Vol. 103, pp. 245–341.
- BONIFACE, Pascal  
*Les sources du droit du désarmement*. Paris, Economica, 1989.
- BOS, Marteen  
 “Theory and practice of treaty interpretation”, *Netherlands International Law Review*, vol. XXVII, 1980, pp. 3–38 and 135–170.
- BOT, Bernard Rudolf  
*Nonrecognition and Treaty Relations*. Leyden, Sijthoff, 1968.
- BOURGUIGNON, Henry J.  
 “The Belilos case: new light on reservations to multilateral treaties”, *Virginia Journal of International Law*, vol. 29, No. 2, winter 1989, pp. 347–386.
- BOWETT, D. W.  
 “Reservations to non-restricted multilateral treaties”, *British Year Book of International Law, 1976–1977* (Oxford), vol. 48, pp. 67–92.
- BROWNLIE, Ian  
*Principles of Public International Law*. 4th ed. Oxford, Clarendon Press, 1990.
- CAMERON, Iain and Frank HORN  
 “Reservations to the European Convention on Human Rights: the Belilos case”, *German Yearbook of International Law* (Berlin), vol. 33, 1990, pp. 69–129.
- CARREAU, Dominique  
*Droit international*. 5th ed. Paris, Pedone, 1997.
- COCCIA, Massimo  
 “Reservations to multilateral treaties on human rights”, *California Western International Law Journal*, vol. 15, No. 1, winter 1985.
- COHEN-JONATHAN, Gérard  
 “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt Belilos du 29 avril 1988)”, *RGDIP*, vol. 93/1989/2, pp. 273–315.
- COMBACAU Jean and Serge SUR  
*Droit international public*. 3rd ed. Paris, Montchrestien, 1997.
- DEGAN, V. D.  
*L’interprétation des accords en droit international*. The Hague, Martinus Nijhoff, 1963. 176 p.
- DETTETTER, Ingrid  
*Essays on the Law of Treaties*. London, Sweet and Maxwell, 1967, 118 p.
- DÍEZ DE VELASCO VALLEJO, Manuel  
*Instituciones de derecho internacional público*. 8th ed. Madrid, Tecnos, 1988. Vol. 1.
- DUPUY, Pierre-Marie  
*Droit international public*. 2nd ed. Paris, Dalloz, 1993.
- EDWARDS JR., Richard W.  
 “Reservations to treaties”, *Michigan Journal of International Law*, vol. 10, No. 2, spring 1989, pp. 362–405.
- FISCHER, Georges  
 “Le canal de Panama: passé, présent, avenir”, *Annuaire français de droit international, 1977* (Paris), vol. XXIII, pp. 745–790.

- FLAUSS, Jean-François  
 “Les réserves aux résolutions des Nations Unies”, RGDIP, vol. LXXXV, No. 1, 1981, pp. 5–37.
- GAJA, Giorgio  
 “Unruly treaty reservations”, *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, vol. I. Milan, Giuffrè, 1987.
- GAMBLE JR., John King  
 “Reservations to multilateral treaties: a macroscopic view of State practice”, *American Journal of International Law* (Washington, D.C.), vol. 74, No. 2, April 1980, pp. 372–394.
- GENET, Raoul  
 “Les ‘réserves’ dans les traités”, *International Law Review*, vol. X, 1932.
- GORMLEY, W. Paul  
 “The modification of multilateral conventions by means of ‘negotiated reservations’ and other ‘alternatives’: a comparative study of the ILO and Council of Europe”, *Fordham Law Review* (New York), vol. XXXIX, 1970–1971, pp. 59–80 and 413–446.
- GREIG, D. W.  
 “Reservations: equity as a balancing factor?”, *Australian Year Book of International Law*, 1995, vol. 16, pp. 21–172.
- GROS ESPIELL, Héctor  
 “La signature du traité de Tlatelolco par la France et la Chine”, *Annuaire français de droit international*, 1973 (Paris), vol. XIX, pp. 131–146.
- HACKWORTH, Green Haywood  
*Digest of International Law*, vol. V. Washington, D.C., United States Government Printing Office, 1943.
- HENKIN, Louis  
 “The treaty makers and the law makers: the Niagara reservation”, *Columbia Law Review* (New York), vol. LVI, 1956, pp. 1151–1182.
- HOLLOWAY, Kaye  
*Modern Trends in Treaty Law: Constitutional Law, Reservations and the Three Modes of Legislation*. London, Stevens, 1967. 737 p.
- HORN, Frank  
*Reservations and Interpretative Declarations to Multilateral Treaties*. The Hague, T. M. C. Asser Instituut, 1988.
- HYDE, C. C.  
*International Law Chiefly as Interpreted and Applied by the United States*. 1922.
- HYLTON, Daniel N.  
 “Default breakdown: the Vienna Convention on the Law of Treaties’ inadequate framework on reservations”, *Vanderbilt Journal of Transnational Law*, vol. 27, No. 2, May 1994, pp. 419–451.
- IMBERT, Pierre-Henri  
*Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l’avis consultatif donné par la Cour internationale de Justice le 28 mai 1951*. Paris, Pedone, 1978. 503 p.
- JENNINGS, Sir Robert and Sir Arthur WATTS, eds.  
*Oppenheim’s International Law*, vol. I, *Peace*, parts 2–4. 9th ed. Harlow, Longman, 1992.
- JIMÉNEZ DE ARÉCHAGA, Eduardo  
*El derecho internacional contemporáneo*. Madrid, Tecnos, 1980.
- JOVANOVIĆ, Stevan  
*Restriction des compétences discrétionnaires des États en droit international*. Paris, Pedone, 1988. 240 p.
- KENNEDY, Kevin C.  
 “Conditional approval of treaties by the U. S. Senate”, *Loyola of Los Angeles International and Comparative Law Journal*, vol. 19, No. 1, October 1966, pp. 89–172.
- KISS, Alexandre-Charles  
*Répertoire de la pratique française en matière de droit international public*. Paris, CNRS, 1962. Vol. I. 657 p.
- LACHS, Manfred  
 “Recognition and modern methods of international cooperation”, *British Year Book of International Law*, 1959.
- LAUTERPACHT, H.  
*Recognition in International Law*. Cambridge, Cambridge University Press, 1947.
- “De l’interprétation des traités”, *Institute of International Law Yearbook*, 1950 (Basel), vol. 43, part I, pp. 366–434.
- “De l’interprétation des traités”, *Institute of International Law Yearbook*, 1952 (Basel), vol. 44, part I, pp. 197–223, and part II, pp. 359–406.
- LEICH, Marian Nash, ed.  
*Digest of United States Practice in International Law*. Washington, D.C., Office of the Legal Adviser, Department of State, 1980.
- MACDONALD, R. St. J.  
 “Reservations under the European Convention on Human Rights”, *Belgian Review of International Law* (Brussels), vol. XXI, No. 2, 1988, pp. 429–450.
- MALKIN, H. W.  
 “Reservations to multilateral conventions”, *British Year Book of International Law*, 1926, vol. 7, pp. 141–162.
- MARESCA, Adolfo  
*Il diritto dei trattati: la Convenzione codificatrice di Vienna del 23 Maggio 1969*. Milan, Giuffrè, 1971.
- MCDUGAL, Myres S., Harold D. LASWELL and James C. MILLER  
*The Interpretation of Agreements and World Public Order: Principles of Content and Procedure*. New Haven and London, Yale University Press, 1967. 410 p.
- MCRAE, D. M.  
 “The legal effect of interpretative declarations”, *British Year Book of International Law*, 1978, vol. 49, 1979, pp. 155–173.
- MIGLIORINO, Luigi  
 “Declarations and reservations to the 1971 Seabed Treaty”, *Italian Yearbook of International Law*, vol. VI, 1985.
- MILLER, David Hunter  
*Reservations to Treaties: Their Effect, and the Procedure in Regard Thereto*. Washington, D.C., 1919.
- NGUYEN QUOC, D., Patrick DAILLIER and Alain PELLET  
*Droit international public*. 5th ed. Paris, LGDJ, 1994.
- O’CONNELL, D. P.  
*International Law*. 2nd ed. London, Stevens, 1970. Vol. 1.
- OWEN, Marjorie  
 “Reservations to multilateral treaties”, *Yale Law Journal*, vol. XXXVIII, No. 8, June 1929, pp. 1086–1114.
- PELLET, Alain  
 “Article 53”, in François Luchaire and Gérard Conac, eds., *La Constitution de la République française*. 2nd ed. Paris, Economica, 1987, pp. 1005–1058.
- PICTET, Jean  
*Les Conventions de Genève du 12 août 1949: Commentaire*. Geneva, ICRC, 1952. Vol. 1.
- REUTER, Paul  
*Introduction to the Law of Treaties*. Translated by José Mico and Peter Hagggenmacher. 2nd. ed. London and New York, Kegan Paul International, 1995.
- ROSENNE, Shabtai  
 “The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David”, *Israel Yearbook on Human Rights*, vol. 5, 1975.

- ROUSSEAU, Charles  
*Principes généraux du droit international public*. Paris, Pedone, 1944. Vol. I.  
 “Chronique des faits internationaux”, RGDIP, vol. 67, 1963, pp. 874–929.  
*Droit international public*. Vol. I. *Introduction et Sources*. Paris, Sirey, 1970.
- RUDA, J. M.  
 “Reservations to treaties”, *Collected Courses of The Hague Academy of International Law, 1975–III*. Leyden, Sijthoff, 1977. Vol. 146, pp. 95–218.
- SAPIENZA, Rosario  
*Dichiarazioni interpretative unilaterali e trattati internazionali*. Milan, Giuffrè, 1996.
- SCELLE, Georges  
*Précis de droit des gens: principes et systématique*. Paris, Sirey, 1934. Part II. (Reissued in 1984 by CNRS, Paris.)
- SCHABAS, William  
 “Article 64”, in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert, eds., *La Convention européenne des droits de l’homme: commentaire article par article*. Paris, Economica, 1995. 942 p.
- SEIDL-HOHENVELDERN, Ignaz  
*Völkerrecht*. Cologne, Carl Heymanns, 1997.
- SHAW, Malcolm N.  
*International Law*. 4th ed. Cambridge, Cambridge University Press, 1997.
- SIMON, Denys  
*L’interprétation judiciaire des traités d’organisations internationales*. Paris, Pedone, 1981.
- SINCLAIR, Sir Ian  
*The Vienna Convention on the Law of Treaties*. 2nd ed. Manchester, Manchester University Press, 1984.
- STRUPP, Karl  
*Éléments du droit international public universel, européen et américain*. 2nd ed. Paris, Editions Internationales, 1930. Vol. I.
- SUCHARIPA-BEHRMANN, Lilly  
 “The legal effects of reservations to multilateral treaties”, *Austrian Review of International and European Law*, vol. 1, No. 1, 1996, pp. 67–88.
- SUR, Serge  
*L’interprétation en droit international public*. Paris, LGDJ, 1974. 449 p.
- SUY, Erik  
 “Droits des traités et droits de l’homme” (Treaty law and human rights), in Rudolf Bernhardt and others, eds., *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler*. Berlin, Springer, 1983. Vol. 81, pp. 935–947.
- SZAFARZ, Renata  
 “Reservations to multilateral treaties”, *Polish Yearbook of International Law*, vol. III, 1970.
- TOMUSCHAT, Christian  
 “Admissibility and legal effects of reservations to multilateral treaties: comments on arts. 16 and 17 of the ILC’s 1966 draft articles on the law of treaties”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27, 1967.
- UNITED NATIONS  
*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1997 (ST/LEG/SER.E/16)*. United Nations publication, Sales No. E.98.V.2.  
*Status of Multilateral Arms Regulation and Disarmament Agreements, 1996*. 5th ed. United Nations publication, Sales No. E.97.IX.3.
- VERDROSS, Alfred and Bruno SIMMA  
*Universelles Völkerrecht: Theorie und Praxis*. Berlin, Duncker & Humblot, 1984.
- VERHOEVEN, Joe  
*La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales*. Paris, Pedone, 1975.
- WHITEMAN, Marjorie M.  
*Digest of International Law*. Vol. 14. Washington, D.C., 1970.
- YASSEEN, Mustapha Kamil  
 “L’interprétation des traités d’après la Convention de Vienne sur le droit des traités”, *Collected Courses of The Hague Academy of International Law, 1976–III*. Leyden, Sijthoff, 1978. Vol. 151, pp. 1–114.

## Introduction

### A. The earlier work of the Commission on the topic

#### 1. FIRST REPORT ON RESERVATIONS TO TREATIES AND THE OUTCOME

##### (a) *The Special Rapporteur’s conclusions in 1995*

1. In 1993 the Commission decided to include in its agenda the topic “Reservations to treaties”.
2. The Special Rapporteur submitted his first report in 1995.<sup>1</sup> In that report, he summarized the Commission’s

<sup>1</sup> *Yearbook ... 1995*, vol. II (Part One), p. 121, document A/CN.4/470.

earlier work on reservations and its outcome, also setting out a brief list of the problems posed by the topic and making suggestions as to the scope and form of the Commission’s future work on the topic.

3. The Commission considered the report at its forty-seventh session in 1995. Summarizing the conclusions that he had drawn from the Commission’s consideration of the report, the Special Rapporteur stated as follows:

(b)<sup>2</sup> 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

<sup>2</sup> Subparagraph (a) concerned the amendment of the title of the topic; the original title was “The law and practice relating to reservations to treaties”.

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.<sup>3</sup>

4. These conclusions met with general approval both in the Sixth Committee and in the Commission itself and, although some Commission members expressed doubts as to one or another aspect of the approach taken, the approach was not called into question during consideration of the second report.<sup>4</sup> The Special Rapporteur views the conclusions as general guidelines to be used as a basis for consideration of the topic.

(b) *Questionnaires circulated to States and international organizations*

5. At its forty-seventh session, the Commission authorized the Special Rapporteur to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions.<sup>5</sup> In paragraph 5 of its resolution 50/45 of 11 December 1995, the General Assembly invited States and international organizations, particularly those which were depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur on the topic concerning reservations to treaties.

6. Accordingly, the Special Rapporteur drew up a detailed questionnaire that the Secretariat circulated to States Members of the United Nations and to the members of specialized agencies and the parties to the ICJ Statute.<sup>6</sup> So far, 32 States<sup>7</sup> have responded to the questionnaire, mostly confining themselves to answering the questions to which the Special Rapporteur had drawn special attention, relating more particularly to the issues dealt with in the second and third reports.<sup>8</sup> Most of the States concerned enclosed with their replies a wealth of very interesting documentation concerning their reservations practice.

7. In addition, the Special Rapporteur prepared a similar questionnaire that was circulated to international organizations that are depositaries of multilateral treaties. So far, 22 such organizations have responded to the questionnaire either completely or partially.<sup>9</sup>

8. The number of replies to the questionnaires,<sup>10</sup> which are long, detailed and technical—since it was only on the basis of such a text that a clear picture could be gained of the reservations practice of States and international organizations<sup>11</sup>—indicates that there is great interest in the topic and confirms that studying it meets a real need.

## 2. SECOND REPORT AND THE OUTCOME

### (a) *Consideration of the second report by the Commission*

9. The second report, which was submitted in 1996, consisted of two entirely different chapters.<sup>12</sup> In the first, the Special Rapporteur set out an “Overview of the study” and made a number of suggestions with respect to the future work of the Commission on the topic of reservations to treaties.<sup>13</sup> Chapter II, entitled “Unity or diversity of the legal regime for reservations to treaties”, was subtitled “Reservations to human rights treaties” and concluded that despite the great diversity of multilateral treaties, the reservations regime set out in articles 19 to 23 of the 1969 and 1986 Vienna Conventions was suitable for all treaties including human rights treaties, owing to its flexibility.

10. Furthermore, in view of the recent practice of human rights treaty monitoring bodies, the Special Rapporteur expressed the view that the Commission, as the United Nations body chiefly responsible for the progressive development and codification of international law, should state its views in that respect, and he annexed to his second report a draft resolution of the Commission on reservations to normative multilateral treaties including human rights treaties.<sup>14</sup>

11. The Special Rapporteur also annexed to his second report a bibliography concerning reservations to treaties.<sup>15</sup>

<sup>9</sup> BIS, Council of Europe, FAO Forum Secretariat, IAEA, ICAO, IFAD, ILO, IMO, IMF, ITU, LAIA, OSCE, UNESCO, UNIDO, UPU, WEU, WCO, WHO, WIPO, World Bank (IBRD, IDA, IFC, MIGA), WTO. The Special Rapporteur wishes to thank these organizations also; he hopes that organizations that have as yet not responded to the questionnaire will do so within the next few months. The questionnaire is reproduced in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annex III, p. 108.

<sup>10</sup> The percentages in question—17 per cent in the case of States (32 out of a total of 187 States that received questionnaires) and 38 per cent in the case of international organizations—may not seem very high, but they by far exceed the proportion normally found in connection with such exercises.

<sup>11</sup> The questionnaires are almost entirely factual. The aim is not to determine the “normative preferences” of States and international organizations but, rather, to attempt to establish, by means of their replies, what their actual practice is and in so doing identify difficulties they encounter.

<sup>12</sup> *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1.

<sup>13</sup> *Ibid.*, paras. 9–50.

<sup>14</sup> *Ibid.*, para. 260.

<sup>15</sup> *Ibid.* annex I, p. 87. The Special Rapporteur wishes to take this opportunity to thank Commission members who kindly provided him

<sup>3</sup> *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487.

<sup>4</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 52–53, paras. 116–123.

<sup>5</sup> *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489.

<sup>6</sup> *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annex II, p. 99.

<sup>7</sup> Argentina, Bolivia, Canada, Chile, Colombia, Croatia, Denmark, Ecuador, Estonia, Finland, France, Holy See, Germany, India, Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Monaco, Panama, Peru, Republic of Korea, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America. The Special Rapporteur wishes to express his gratitude to these States once again. He hopes that they will be able to supplement their replies and that other States will respond to the questionnaire in the near future.

<sup>8</sup> *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annex II, p. 99, para. 6 of the questionnaire's covering note.

12. Owing to lack of time, the Commission was unable to consider the second report in 1996, at its forty-eighth session; the Special Rapporteur briefly presented it at that session, and some members stated their reactions in a very preliminary fashion.<sup>16</sup> However, the report was discussed in depth at the Commission's forty-ninth session, in 1997.<sup>17</sup>

13. This discussion gave rise to an extensive exchange of views in the Commission, and it was thus possible to establish or reaffirm that there was broad agreement on the approach to be taken. In particular:

(a) Members agreed that in principle the Vienna regime should be preserved and that all that was needed was to remedy its ambiguities and fill the lacunae in it;

(b) While stressing that the undertaking was ambitious, most speakers reaffirmed their support for the decision taken in the previous quinquennium to prepare a guide to practice accompanied, if necessary, by model clauses.

14. With respect to the legal regime of reservations to normative treaties, including human rights treaties, the Commission referred the draft resolution proposed by the Special Rapporteur<sup>18</sup> to the Drafting Committee; on the basis of the Drafting Committee's report the Commission adopted not a resolution but the "Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties".<sup>19</sup>

(b) *Consultation of human rights bodies on the preliminary conclusions of the Commission*

15. 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 copies of the Preliminary Conclusions and of chapter V of the Commission's report on the work of its forty-ninth session to the chairpersons of human rights bodies with universal membership,<sup>20</sup> requesting them to communicate the documents in question to the members of their Committees and to inform him of any comments made. He also sent similar letters to the presiding officers of a number of regional bodies.<sup>21</sup>

16. The Special Rapporteur has so far received a response only from the Chairperson of the Human Rights

Committee, who in a letter dated 9 April 1998, informed him that the Committee welcomed the opportunity to comment on the Preliminary Conclusions on reservations to normative multilateral treaties, including human rights treaties, and that it intended to study them and respond in greater detail at a later stage; in the meantime, however, the Committee indicated, with respect to paragraph 12 of the Preliminary Conclusions, that:

[R]egional monitoring bodies are not the only intergovernmental institutions which participate in and contribute to the development of practices and rules. Universal monitoring bodies, such as the Human Rights Committee, play no less important a role in the process by which such practices and rules develop and are entitled, therefore, to participate in and contribute to it. In this context, it must be recognized that the proposition enunciated by the Commission in paragraph 10 of the Preliminary Conclusions is subject to modification as practices and rules developed by universal and regional monitoring bodies gain general acceptance.<sup>22</sup>

Furthermore, the Special Rapporteur has learned that a number of human rights bodies had been interested to take note of the communication in question and that they intended to respond to the Commission's Preliminary Conclusions. In addition, the chairpersons of bodies established pursuant to human rights instruments considered the issue at their meeting in February 1998.

(c) *Consideration of the report of the Commission by the Sixth Committee*

17. The great number of comments, mostly positive, made on the subject of the second report during the Sixth Committee debate in 1997 at the fifty-second session of the General Assembly is also indicative of the amount of interest there is in the topic of reservations to treaties: 50 delegations commented on the topic, often making detailed and well-argued remarks.<sup>23</sup>

18. The principle of the unity of the reservations regime, stated by the Commission in paragraphs 2 and 3 of its Preliminary Conclusions, met with wide approval.<sup>24</sup>

19. The discussions concerned above all the role of human rights bodies with respect to reservations, i.e. chiefly paragraphs 5 to 10 of the Preliminary Conclusions. As indicated in the topical summary prepared by the Secretariat,<sup>25</sup> there were two opposing positions. Some delegations thought that it was for States alone to decide on the admissibility of reservations and to determine the consequences of inadmissibility. A virtually equal number of delegations endorsed paragraphs 5 and 6 of the preliminary conclusions and expressed the view that the admissibility of reservations should be assessed jointly by

with titles of books and articles.

<sup>16</sup> See *Yearbook ... 1996*, vol. II (Part Two), pp. 79–83, paras. 108–139.

<sup>17</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 44–56, paras. 50–156.

<sup>18</sup> See paragraph 10 above.

<sup>19</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157.

<sup>20</sup> Letters were sent to the Chairpersons of the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, 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.

<sup>21</sup> 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.

<sup>22</sup> Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 40 (A/53/40)*, vol. I, annex IX.

<sup>23</sup> See *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 17th to 25th meetings (A/C.6/52/SR.17–25), and corrigendum.

<sup>24</sup> "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session" (A/CN.4/483), paras. 65–67; just two States (the Republic of Korea (A/C.6/52/SR.22, paras. 4–7) and, in a more qualified manner, Italy (A/C.6/52/SR.24, para. 82)) (see footnote 23 above) expressed the view that special regimes might be useful in certain cases; the model clauses that the Commission intends to adopt would no doubt meet that concern.

<sup>25</sup> A/CN.4/483, paras. 71–82 (see footnote 24 above).

monitoring bodies, where they existed, and States parties to the human rights conventions.

20. However, almost all delegations that expressed views “agreed with the Commission’s Preliminary Conclusion 10 that the rejection of a reservation as inadmissible conferred some responsibility on the reserving State to respond or to take action. Given the consensual nature of treaties, reservations were inseparable from the consent of the State to be bound by a treaty”;<sup>26</sup> only two States thought otherwise.<sup>27</sup> However, interesting suggestions were put forward *de lege ferenda* on this issue by a number of delegations, with the aim of establishing a dialogue between the reserving State and objecting States,<sup>28</sup> or between the reserving State and the monitoring body,<sup>29</sup> or of institutionalizing a centralized monitoring mechanism.<sup>30</sup>

21. With regard to form, in general, the Commission’s initiative of adopting preliminary conclusions and consulting interested human rights bodies was well received by the Sixth Committee. However, one delegation expressed the view that there was no reason to limit consultation in that manner and that all monitoring bodies established under multilateral conventions, whatever their purpose, should be consulted;<sup>31</sup> that concern is reflected in paragraph 4 of General Assembly resolution 52/156 of 15 December 1997, in which the Assembly:

*Takes note of the invitation by the International Law Commission to all treaty bodies set up by normative multilateral treaties that may wish to do so to provide, in writing, their comments and observations on the preliminary conclusions of the Commission on reservations to normative multilateral treaties, including human rights treaties ...*

However, the question remains as to exactly which bodies are to be consulted, apart from human rights bodies.

22. Furthermore, while some delegations in the Sixth Committee welcomed the Preliminary Conclusions, others believed that they had been adopted prematurely.<sup>32</sup> As the Special Rapporteur indicated when he addressed the Sixth Committee, speaking as the Special Rapporteur on reservations to treaties, that view appeared to be based on a misunderstanding:<sup>33</sup> the purpose of the text adopted by the Commission was to respond to recent initiatives on the part of a number of human rights bodies, and the text represented the provisional culmination of the discussion that took place in 1997 on the fundamental issue of

the unity or diversity of the reservations regime; to have waited until consideration of the topic had been completed would have meant that neither the Sixth Committee nor the Commission itself would have been able to participate in the discussion initiated by the human rights bodies and, in particular, by general comment No. 24 of the Human Rights Committee.<sup>34</sup> Furthermore, the preliminary nature of the Commission’s conclusions and its decision to consult interested human rights bodies would seem such as to allay the fears that were expressed (which were very much in the minority).

23. In any event, the Special Rapporteur considers that time should now be allowed to play its part: the Commission has taken a preliminary position and has consulted States<sup>35</sup> and the human rights bodies.<sup>36</sup> They must be given time to respond and it seems logical that the Commission should not revert to the topic until it has been apprised of their reactions and has completed its consideration of the most controversial questions left pending by the Vienna Conventions. The Special Rapporteur therefore proposes, in accordance with the work programme adopted at the forty-ninth session,<sup>37</sup> to submit draft definitive conclusions to the Commission in his fifth report, when consideration of the substantive questions relating to the regime of reservations to treaties has been completed.

24. The discussion in the Sixth Committee likewise gave the representatives of States an opportunity to confirm their agreement with the essential features of the general approach adopted by the Commission. A very great majority of delegations reiterated the support expressed in previous years for the preparation of a guide to practice,<sup>38</sup> and called on the Commission to respect the general framework of the Vienna Conventions,<sup>39</sup> the ambiguo-

<sup>34</sup> Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V.

<sup>35</sup> In paragraph 2 of its resolution 52/156, the General Assembly drew

“the attention of Governments to the importance for the International Law Commission of having their views on all the specific issues identified in chapter III of its report and in particular on:

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

Three Governments, those of Liechtenstein, Monaco and the Philippines, have already sent their comments to the Special Rapporteur, who is extremely grateful to them and sincerely hopes that their example will be followed by many other Governments. He intends to give a detailed account of the views communicated to him on this issue in his fifth report.

<sup>36</sup> In its aforementioned observations (see footnote 35 above), Liechtenstein expressed the hope that non-governmental organizations active in the field of human rights would likewise be invited to express their views. The Special Rapporteur would welcome any communication that these non-governmental organizations might wish to send him.

<sup>37</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 68, para. 221.

<sup>38</sup> A/CN.4/483, para. 90 (see footnote 24 above); only the Republic of Korea (A/C.6/52/SR.22, para. 4) expressed a preference for a legally binding instrument, while Canada (A/C.6/52/SR.21, para. 41) expressed reservations concerning the need for model clauses (see footnote 23 above).

<sup>39</sup> A/CN.4/483, paras. 61, 65 and 90–91 (see footnote 24 above). Only Sweden (speaking on behalf of the Nordic countries) (A/C.6/52/SR.21, paras. 8–9) and, more overtly, the Netherlands (ibid., para. 14)

<sup>26</sup> Ibid., para. 84.

<sup>27</sup> Costa Rica (A/C.6/52/SR.22, para. 19) and Greece (ibid., paras. 42–44); also see Sweden’s statement on behalf of the Nordic countries (A/C.6/52/SR.21, paras. 11–12) (footnote 23 above).

<sup>28</sup> Statements by the United Kingdom (A/C.6/52/SR.19, para. 46) and Austria (A/C.6/52/SR.21, para. 6) (see footnote 23 above).

<sup>29</sup> Statements by Liechtenstein (A/C.6/52/SR.22, para. 25) and Switzerland (ibid., para. 85) (see footnote 23 above).

<sup>30</sup> Statements by Germany (A/C.6/52/SR.21, para. 46) and Chile (A/C.6/52/SR.22, para. 36) (see footnote 23 above).

<sup>31</sup> Statement by Tunisia (A/C.6/52/SR.22, para. 32) (see footnote 23 above).

<sup>32</sup> Statements by Mexico (A/C.6/52/SR.17, para. 22), the Netherlands (A/C.6/52/SR.21, para. 15), Guatemala (ibid., para. 65), Tunisia (A/C.6/52/SR.22, para. 32), Greece (ibid., para. 48), Switzerland (ibid., para. 87) and Bangladesh (A/C.6/52/SR.25, para. 24) (see footnote 23 above).

<sup>33</sup> A/C.6/52/SR.24 (see footnote 23 above), para. 97.

ities and lacunae of which were nevertheless emphasized by many delegations.

25. In particular, the representatives of States requested the Commission to consider the following points:

(a) The precise definition of reservations, especially in comparison with interpretative declarations;

(b) The question of reservations to bilateral treaties;

(c) The legal regime of interpretative declarations;

(d) The precise scope of the concept of object and purpose of a treaty;

(e) The effects of an objection to a reservation;

(f) The problem of the validity of objections;

(g) The consequences of the impermissibility of a reservation; and

(h) The effects of reservations to provisions reproducing rules of *jus cogens*.

The Special Rapporteur proposes to take up each of these problems in due course (some of them during the course of 1998).

26. Generally speaking, the Special Rapporteur feels that the discussion in the Sixth Committee seems to confirm the validity of the general approach adopted by the Commission since 1995.

(d) *Action by other bodies*

27. Another sign of the international community's interest in the topic is the action taken by two bodies with which the Commission has a cooperative relationship: the Council of Europe and the Asian-African Legal Consultative Committee (AALCC).

28. With regard to the former, the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, at its 14th meeting, held on 9–10 September 1997, considered the preliminary conclusions adopted by the Commission and, more generally, the latter's work on the topic of reservations, and decided to establish the Group of Specialists on Reservations to International Treaties (DI-S-RIT), under the coordination of the representative of Austria, whose terms of reference were approved by the Committee of Ministers of the Council of Europe on 16 December 1997. The Group will be called upon to:

(a) Examine and propose ways and means and, possibly, guidelines to assist member States in developing their practice regarding their response to reservations and interpretative declarations actually or potentially inadmissible under international law; and

(b) Consider the possible role of the CAHDI as an observatory of reservations to multilateral treaties of significant importance to the international community raising issues as to their admissibility under international law, as well as of the reactions by Council of Europe member States Parties to these instruments.<sup>40</sup>

questioned the sacrosanct character of the Vienna regime (see footnote 23 above).

<sup>40</sup> See Council of Europe, Committee of Ministers, 612th meeting of the Ministers' Deputies, document CM(97)187, para. 15; and decision 612/10.2 (16 December 1997).

29. The Group held its first meeting in Paris on 26–27 February 1998 and on that occasion had an exchange of views with the Commission's Special Rapporteur. The conclusions drawn up by its presiding officer read as follows:

The Group shared the view of the ILC that the regime of the Vienna Convention is applicable to all treaties, including normative and human rights treaties, and that the regime should not be changed.

However, the Group considered that the question of the role of conventional bodies responsible for monitoring the application of treaties still required further examination. In addition, some delegations were unable to agree with preliminary conclusions 5 and following of the ILC concerning the articulation between the *lex lata* and *lex ferenda* provisions. On the whole however the Group agreed with the main thrust of the preliminary conclusions.<sup>41</sup>

30. AALCC held its thirty-seventh session in New Delhi from 13 to 18 April 1998, chaired by Mr. P. S. Rao. The Commission was represented at the session by Mr. Yamada. It should be noted that AALCC treated the question of reservations to treaties as a special topic and devoted particular attention to it.<sup>42</sup>

## B. General presentation of the third report

### 1. METHOD USED

31. Since there is a quasi-consensus, both in the Commission and among States, that the Vienna regime must be preserved, it would seem appropriate to base the work systematically on the provisions concerning reservations in the 1969, 1978 (to the limited extent to which they may be relevant to the general study of that regime) and 1986 Vienna Conventions.

32. The Special Rapporteur therefore proposes to base this report, and indeed the next three reports, on the following general outline:

(a) Each chapter will begin by recalling the relevant provisions of the three Vienna Conventions<sup>43</sup> and the *travaux préparatoires* leading to their adoption;

(b) Next, the Special Rapporteur will describe the practice of States and international organizations with regard to those provisions and any difficulties to which their application has given rise; in that context, the replies to questionnaires which he has received<sup>44</sup> will be particularly valuable;

(c) Simultaneously or in a separate section, as appropriate, he will describe the relevant judicial practice and the commentaries of jurists;

(d) On the basis of this information, he will propose a series of draft guidelines that will form the Guide to Prac-

<sup>41</sup> Council of Europe, Ad Hoc Committee of Legal Advisers on Public International Law, 15th meeting, document CAHDI (98) 9 Rev (Strasbourg, 3–4 March 1998).

<sup>42</sup> AALCC *Bulletin*, vol. 22, issue No. 1 (New Delhi, June 1998).

<sup>43</sup> In order to avoid any confusion, these provisions will be systematically printed in bold type.

<sup>44</sup> See paragraphs 5–8 above.

tice which the Commission intends to adopt,<sup>45</sup> together with preliminary commentaries specifying the scope he ascribes to them;<sup>46</sup>

(e) Where appropriate, the draft guidelines will be accompanied by model clauses which States could use when derogating from the Guide to Practice in special circumstances or specific fields.<sup>47</sup>

33. It goes without saying that it will be necessary to deviate from this outline on certain points. In particular, this will happen when the Vienna Conventions remain completely silent, for example in the case of interpretative declarations, to which the Conventions make absolutely no allusion. In such cases, the Special Rapporteur will revert to the usual methodology employed in preparing the Commission's draft articles, that is, he will base the work directly on international practice (see the second stage described above).

34. In other instances, however, the Vienna Conventions may provide sufficient guidelines for practice (for example, in the case of the "positive" definition of reservations<sup>48</sup>). The Special Rapporteur nevertheless feels that there would be no justification for excluding them from the study or even from the Guide to Practice under consideration. Silence on this point would make the draft incomplete and difficult to use, whereas its purpose is precisely to make available to "users"—legal services in ministries of foreign affairs and international organizations, ministries of justice, judges, lawyers, specialists in public or private international relations—a reference work that is as complete and comprehensive as possible.

35. The Special Rapporteur wishes to note, however, that despite his efforts to be as exhaustive, precise and rigorous as possible, he is well aware of the imperfections of his work. Since he has no assistance, his approach is necessarily empirical: there is a considerable amount of writing devoted to reservations,<sup>49</sup> practice takes many forms, and the replies to questionnaires already fill several volumes. A systematic analysis would necessitate the recruitment of a team of researchers and/or full-time work. Unfortunately, this is beyond the Special Rapporteur's means. He acknowledges, therefore, that he has often had to proceed by "taking soundings" and to trust his intuition. The Commission's methods of work nevertheless have the advantage of limiting the shortcomings of this method (or absence of method?): by reason of its consideration by the Commission, the individual study becomes a collective one. Furthermore, the reactions of Governments, both individually and collectively in the Sixth Committee, ensure that the work will be realistic and that, where necessary, the draft Guide to Practice can be brought into line with real needs.

<sup>45</sup> In order to avoid any confusion, these draft guidelines will be systematically printed in italics.

<sup>46</sup> The Special Rapporteur will not provide commentaries to the articles of the Vienna Conventions, except when he combines them in a "composite" article—on this point, see paragraph 40 below.

<sup>47</sup> In order to avoid any confusion, these model clauses will be systematically underlined.

<sup>48</sup> See paragraphs 78–82 below.

<sup>49</sup> See the non-exhaustive compilation in the aforementioned bibliography (footnote 15 above).

36. On the other hand, the Special Rapporteur wishes to respond in advance to possible future criticism regarding the somewhat lengthy nature of the following expositions, especially those concerning the presentation of the *travaux préparatoires* relating to the relevant provisions of the three Vienna Conventions. There are, indeed, grounds for questioning the need for such a detailed description. The Special Rapporteur feels, however, that the description will be useful for at least two reasons. First, and this holds true for all the draft articles prepared by the Commission, it constitutes the basis and justification of the normative provisions (contained in the draft Guide to Practice) that will be derived from it. Secondly—and this is particularly true in the case of the present draft—it would seem useful for practitioners, and especially Governments, to have at their disposal documentation which is exhaustive (or as exhaustive as possible) in order that they may decide whether, in a given case, it would be appropriate to act on the basis of the proposed guide.

37. Lastly, attention must be drawn to a difficulty peculiar to the present study: the topic under consideration relates to "reservations to treaties" in general. This subject has already been treated in three conventional instruments, and while there is no doubt that the 1969 Vienna Convention is the primary instrument of reference and the starting point for any reflection on the topic, it would be unwise to neglect the 1978 Vienna Convention or, above all, the 1986 Vienna Convention. In accordance with the procedure followed from the first report onward, which has not been questioned either in the Commission or in the Sixth Committee, the Special Rapporteur intends to study all three Conventions simultaneously and combine the results in a Guide to Practice which will be "consolidated", in that it will contain provisions relating to reservations to treaties to which States and international organizations are parties and set forth the rules applicable in the case of succession of States.<sup>50</sup>

38. This method has a definite advantage in that it makes it possible to verify the coherence of the existing conventional provisions, carry out useful cross-checks and "test" the solidity of the structure as a whole. Moreover, the rules set forth in one convention often elucidate or complement those contained in the others (as is shown, for example, in chapter I of this report, in connection with the definition of reservations). Furthermore, the *travaux préparatoires* of each Vienna Convention (especially those of 1969 and 1986) are likewise complementary and often clarify each other.

39. Of course, the requisite distinctions will be made whenever necessary. Generally speaking, that does not pose any major problems, since the 1978 and 1986 Vienna Conventions seem to be the consequences, prolongations and illustrations of provisions of the 1969 Vienna Convention relating to specific, quite clearly defined issues. In some cases, however, the exercise will inevitably lead to the cumulation of existing provisions and make it necessary to reflect on the way in which they combine and relate to each other.

<sup>50</sup> The fifth part of the "provisional general outline of the study" set forth in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 (see paragraph 42 below), para. 37: "V. Status of reservations, acceptances and objections in the case of succession of States".

40. In certain cases it will also lead to the adoption of “composite texts” combining elements from each of the Vienna Conventions or from two of them. The definition of reservations, as presented in chapter I of this report, exemplifies this method, which must be used if comprehensive codification is the objective:

(a) The definition of reservations to treaties between States is contained in article 2, paragraph 1 (d), of the 1969 Vienna Convention;

(b) If the aim is to define reservations to treaties “in general”, this definition must be completed by that contained in article 2, paragraph 1 (d), of the 1986 Vienna Convention;

(c) Moreover, when the 1969 Vienna Convention was adopted, the question of succession of States was deliberately ignored;<sup>51</sup> during the preparation of the 1978 Vienna Convention, however, it was noted that the phenomenon of State succession had an impact on the definition of reservations, at least as conceived by the drafters of the three Vienna Conventions.

In a case such as this, simply juxtaposing the existing texts in the Guide to Practice would create very great complications for users; the problem can only be dealt with properly in a composite text.<sup>52</sup>

41. It may be noted that this course would be consistent with the hopes, or rather the predictions, of Mr. Paul Reuter who, during the discussion of his third report, envisaged that “it might perhaps be decided some day to try to combine the two sets of articles” and that an effort would be made to solve the problems raised by “any adjustments which the existence of two conventions might necessitate”.<sup>53</sup> That is also one of the aims of the Guide to Practice, a fact which does not facilitate its preparation.

## 2. PLAN OF THE THIRD REPORT

42. In chapter I of his second report, the Special Rapporteur presented a “provisional general outline of the study” that he intended to carry out.<sup>54</sup>

43. Very few comments were made on this general outline during the consideration of the second report in 1997, at the forty-ninth session.<sup>55</sup> However, the work programme adopted by the Commission at that session endorsed the main contours of that outline,<sup>56</sup> leading the Special Rapporteur to believe that he might follow them in preparing

<sup>51</sup> See article 73 of the 1969 Vienna Convention.

<sup>52</sup> See paragraph 81 below.

<sup>53</sup> *Yearbook ... 1974*, vol. I, 1279th meeting, p. 162, para. 52. Mr. Reuter was referring here to the 1969 Vienna Convention and the draft articles on the law of treaties between States and international organizations or between international organizations.

<sup>54</sup> *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, paras. 37–50.

<sup>55</sup> *Yearbook ... 1997* (see footnote 4 above).

<sup>56</sup> *Ibid.*, p. 68, para. 221.

his future reports, including the third, but without regarding them as a rigid guide and adapting and clarifying them as appropriate.

44. That being so, and in accordance with the indications given in 1997 and in the work programme adopted by the Commission,<sup>57</sup> this report covers parts II and III of the provisional general outline, dealing respectively with the definition of reservations<sup>58</sup> and with the formulation and withdrawal of reservations, acceptances and objections.<sup>59</sup>

45. The Special Rapporteur nevertheless faced a problem concerning the legal regime of interpretative declarations. At the outset, he intended to treat this very important problem<sup>60</sup> as an element of part II, concerning the definition of reservations.<sup>61</sup> However, given the wealth of material it became clear that this solution was very unsatisfactory, especially since it would have been illogical to establish the legal regime of interpretative declarations before completing consideration of the legal regime of reservations. Thus, there were two options: a separate chapter could be devoted to the legal regime of interpretative declarations (which would have been placed right at the end of the study), or that regime could be considered in parallel with the regime of reservations, to which it would in a way constitute a counterpoise.

46. After some hesitation the Special Rapporteur chose the second alternative, and therefore plans 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. The two following chapters will illustrate this approach, since they deal simultaneously with the problems posed by the definition and formulation of reservations on the one hand and of interpretative declarations on the other.

<sup>57</sup> *Ibid.*

<sup>58</sup> The provisional outline contains the following headings: (a) positive definition; (b) distinction between reservations and other procedures aimed at modifying the application of treaties; (c) distinction between reservations and interpretative declarations; (d) the legal regime of interpretative declarations; (e) reservations to bilateral treaties (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, para. 37).

<sup>59</sup> Part III is subdivided into three sections:

A. *Formulation and withdrawal of reservations*: 1. Acceptable times for the formulation of a reservation; 2. Procedure regarding formulation of a reservation; 3. Withdrawal.

B. *Formulation of acceptances of reservations*: 1. Procedure regarding formulation of an acceptance; 2. Implicit acceptance; 3. Obligations of express acceptance.

C. *Formulation and withdrawal of objections to reservations*: 1. Procedure regarding formulation of an objection; 2. Withdrawal of an objection (*ibid.*).

<sup>60</sup> Several delegations drew attention to this problem during the discussion in the Sixth Committee (see A/CN.4/483, para. 91 (footnote 24 above)). See also the positions on this issue taken by several members of the Commission at the forty-ninth session (*Yearbook ... 1997*, vol. II (Part Two), p. 52, para. 113).

<sup>61</sup> See footnote 58 (d) above.

## CHAPTER I

## Definition of reservations to treaties (and of interpretative declarations)

47. The three Vienna Conventions on the law of treaties, each in its respective article 2, provide a “positive” definition of reservations which is generally accepted and does not, in itself, pose any real problems. However, given the silence of the Conventions with regard to the concept of “interpretative declarations”—an omission which is, *prima facie*, difficult to explain—it is necessary to consider this subject *ex nihilo* and to derive from practice, the writings of jurists and judicial decisions a definition permitting the clearest possible distinction between the two institutions.

48. Furthermore, as indicated in the brief commentary on the proposed provisional plan of the study contained in his second report,<sup>62</sup> the Special Rapporteur also intends, for the sake of convenience, to study in this chapter the question of reservations to bilateral treaties, whose nature has often been disputed.

49. Lastly, as likewise noted in the second report on reservations to treaties,<sup>63</sup> it “seems useful to link the consideration of this question 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”, and thus constitute alternatives to reservations which may be useful in certain cases.

#### A. Definition of reservations and of interpretative declarations

50. Each of the Vienna Conventions of 1969, 1978 and 1986 contains a definition of the term “reservation”. Taken together, these definitions make it possible to prepare a composite text which seems to constitute a satisfactory comprehensive definition. On the other hand, interpretative declarations were not defined in any of the Conventions, although such a course was sometimes envisaged during the *travaux préparatoires*.

51. Consequently, after the definitions of reservations embodied in the Vienna Conventions and the circumstances in which those definitions were adopted have been recalled (paras. 54–82), it will be necessary to examine the reactions to those definitions expressed in the writings of jurists and any difficulties that their implementation has caused in practice so that they may, if appropriate, be completed (paras. 83–117), before formulating a draft definition of interpretative declarations (paras. 118–413).

<sup>62</sup> *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, para. 40.

<sup>63</sup> *Ibid.*, para. 39.

#### THE DEFINITION OF RESERVATIONS IN THE VIENNA CONVENTIONS

##### (a) *Travaux préparatoires*

##### (i) *The 1969 Vienna Convention*

52. The definition of reservations did not give rise to lengthy discussion when the 1969 Vienna Convention was being drawn up.

53. The Commission’s first Special Rapporteur on the law of treaties, Mr. James L. Brierly, proposed a definition of reservations, very different from that finally adopted, since he regarded reservations as a purely contractual institution.<sup>64</sup> The second Special Rapporteur, Sir Hersch Lauterpacht,<sup>65</sup> proposed no definition.

54. However, Sir Gerald Fitzmaurice, in his first report, issued in 1956, provided a very precise definition which, with a number of drafting changes, is the direct source of the existing definition and is all the more valuable because the third Special Rapporteur on the law of treaties took care to define reservations in contrast to “mere declarations”. Article 13 (*I*), of the draft Code on the Law of Treaties which he prepared reads as follows:

A “reservation” is a unilateral statement appended to a signature, ratification, accession or acceptance, by which the State making it purports not to be bound by some particular substantive part or parts of the treaty, or reserves the right not to carry out, or to vary, the application of that part or parts; but it does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty.<sup>66</sup>

55. Believing this definition to be self-explanatory,<sup>67</sup> Sir Gerald Fitzmaurice provided no commentary to it. However, article 37, paragraph 1, of the draft Code stated:

Only those reservations which involve a derogation of some kind from the substantive provisions of the treaty concerned are properly to

<sup>64</sup> “That word [reservation] is used as meaning a special stipulation which has been agreed upon, between the parties to a treaty, limiting or varying the effect to the treaty as it applies between a particular party and all or some of the remaining parties” (*Yearbook ... 1950*, vol. II, document A/CN.4/23, pp. 238–239, para. 84). For the discussion on this point, see *Yearbook ... 1950*, vol. I, pp. 90–91. For a brief commentary on this definition, see paragraphs 106–111 below. The 1951 Brierly report on reservations to treaties proposes no definition but has an annex B entitled “Opinions of writers” which reproduces numerous definitions formulated by jurists (*Yearbook ... 1951*, vol. II, document A/CN.4/41, pp. 6–11). For a summary of this early work, see *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 127–129, paras. 12–22.

<sup>65</sup> See his first and second reports on the law of treaties (*Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 91–92 and 123–136, and *Yearbook ... 1954*, vol. II, document A/CN.4/87, pp. 131–133). See also *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 129–130, paras. 23–29.

<sup>66</sup> *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 110.

<sup>67</sup> *Ibid.*, p. 119, para. 23.

be regarded as such, and the term reservation herein is to be understood as limited in that sense.<sup>68</sup>

Commenting on that provision, the Special Rapporteur emphasized that “[a] reservation only counts as such if it purports to derogate from a substantive provision of the treaty”.<sup>69</sup>

56. The provisions concerning reservations proposed in the first report by Sir Gerald Fitzmaurice were not considered by the Commission, which did not revert to the question of reservations until 1962, when it examined the first report of Sir Humphrey Waldock.<sup>70</sup> In that report, the fourth Special Rapporteur proposed another definition of reservations, which was modelled very closely on that proposed by his predecessor and likewise defined interpretative declarations, at least *a contrario*:

“Reservation” means a unilateral statement whereby a State, when signing, ratifying, acceding to or accepting a treaty, specifies as a condition of its consent to be bound by the treaty a certain term which will vary the legal effect of the treaty in its application between that State and the other party or parties to the treaty. An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation.<sup>71</sup>

57. The Special Rapporteur provided no commentary to this draft definition, believing it to be self-explanatory,<sup>72</sup> and strangely enough the Commission did not consider it, because the Special Rapporteur had suggested that the definitions (which were then set forth in draft article 1) could be taken up as appropriate in the course of the discussion.<sup>73</sup>

58. The question of the definition of reservations, though never taken up per se, was touched upon several times during the long discussion of the legal regime of reservations which took place at the fourteenth session. Interesting comments were made on that occasion. Thus, Mr. Lachs, who considered that on the whole the proposed definition was sound, felt that “an essential feature of a reservation was its unilateral character”.<sup>74</sup> He particularly congratulated the Special Rapporteur on “the felicitous precision of the phrase ‘which will vary the legal effect of the treaty’. That sentence also covered the cases, which were not unknown, where a reservation, instead of

restricting, extended the obligations assumed by the party in question”.<sup>75</sup>

59. During the same discussion, Mr. Castrén expressed doubt as to the wisdom of retaining the second sentence of the definition proposed by Sir Humphrey Waldock; in his view, “the explanatory and other statements referred to were rare in practice; moreover, if they occurred, it was difficult to see which authority was to decide the nature of the statement”.<sup>76</sup> Although Mr. Tsuruoka urged that the distinction be maintained,<sup>77</sup> the allusion to explanatory statements disappeared as a result of circumstances which cannot be determined from a reading of the summary records.

60. In any event, the draft definition was referred to the Drafting Committee, which produced a text more elegant than that proposed by the Special Rapporteur; the second sentence of the latter text had been deleted without explanation. The new text read as follows:

“Reservation” means a unilateral statement made by a state, when signing, ratifying, acceding to, accepting or approving<sup>78</sup> a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that state.<sup>79</sup>

This text was adopted in the plenary meeting without discussion and without a vote.<sup>80</sup>

61. However, the slow evolution of the definition of reservations ultimately used in the 1969 Vienna Convention had not yet come to an end.<sup>81</sup> The definition still lacked precision on a point of some importance, which is covered in the final text: the irrelevance of phrasing or naming. This addition results from the mysterious transmutation effected by the Drafting Committee in 1965, at the seventeenth session. When introducing this clarification, Sir Humphrey Waldock noted that in adopting it, “[t]he Drafting Committee had sought to bring out that, however designated, any statement purporting to exclude or vary the legal effects of certain provisions of a treaty would

<sup>75</sup> Ibid. It is interesting to note that, during the consideration of the first report on reservations to treaties, Mr. Tomuschat likewise approached the question from this angle, but took a totally opposite position (see *Yearbook ... 1995*, vol. I, 2401st meeting, pp. 153–155; for the opposing view, see the position adopted by Mr. Bowett, *ibid.*, p. 155). In its comments on the draft articles adopted in first reading, Japan likewise considered “that the words ‘or vary’ should be replaced by the words ‘or restrict’ because, in its view, only a statement which restricts the legal effect of a provision properly falls within the meaning of the term ‘reservation’”. Sir Humphrey Waldock contested that view, arguing that “[a] unilateral statement in which a State purports to interpret a provision as conferring upon it a larger right than is apparently created by the language of the provision, or purports to impose a condition enlarging its rights, would seem to require to be treated as a ‘reservation’” (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 15).

<sup>76</sup> *Yearbook ... 1962*, vol. I, 652nd meeting, p. 148, para. 27.

<sup>77</sup> *Ibid.*, p. 151, para. 64.

<sup>78</sup> The word “approve” was added by the Drafting Committee, for the sake of consistency with what subsequently became article 11 of the 1969 Vienna Convention.

<sup>79</sup> *Yearbook ... 1962*, vol. I, 666th meeting, p. 239, para. 1 (f).

<sup>80</sup> *Ibid.*, p. 240, para. 9.

<sup>81</sup> In accordance with a suggestion by Israel, the English text (which read “... statement ... whereby it purports to exclude or vary the legal effect of some provisions”) was brought into line with the French and Spanish texts (“certaines dispositions”, “*algunas disposiciones*”) (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 15).

<sup>68</sup> *Ibid.*, p. 115.

<sup>69</sup> *Ibid.*, p. 126, para. 92 (b).

<sup>70</sup> See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 130, paras. 33 and 35.

<sup>71</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 31–32, article 1 (l).

<sup>72</sup> *Ibid.*, p. 34, para. (14).

<sup>73</sup> *Ibid.*, vol. I, 637th meeting, p. 47, para. 32. The same course was followed in 1965 during the second reading of the draft articles (*Yearbook ... 1965*, vol. I, 778th meeting, p. 17, para. 8).

<sup>74</sup> *Yearbook ... 1962*, vol. I, 651st meeting, p. 142, para. 49. Similar views were expressed by Mr. Rosenne, *ibid.*, p. 144, para. 78, and Mr. Tunkin, who agreed with the view that “a reservation was a kind of offer by the reserving State, which the other Parties, in the exercise of their sovereignty, were free to accept or to reject” (*ibid.*, 653rd meeting, p. 156, para. 25). Mr. Paredes did not quite agree with that view, because more than one State might make “identical reservations, jointly or separately” (*ibid.*, 651st meeting, p. 146, para. 87); the present Special Rapporteur feels that this circumstance (which may in fact arise) does not call in question the unilateral character of each of those identical reservations.

constitute a reservation".<sup>82</sup> This draft definition, like the others, was adopted unanimously.<sup>83</sup>

62. Thereafter, the text of the definition<sup>84</sup> was not amended. The commentary that the Commission included in its report to the General Assembly on the work of its eighteenth session (1966), which was used as a working document at the United Nations Conference on the Law of Treaties, is therefore extremely important. It is short but significant for, once again, the Commission tacitly contrasts the concept of a reservation with that of an interpretative declaration (even if the latter term is not actually used):

The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.<sup>85</sup>

63. In these circumstances it may seem strange that the Commission did not follow the original intention of its Special Rapporteur<sup>86</sup> and complete the definition of a reservation by defining an interpretative declaration. Sir Humphrey Waldock explained this apparent reversal in his observations and proposals relating to the observations of Japan and the United Kingdom, which were concerned because the draft did not mention "interpretative declarations".<sup>87</sup> His response deserves to be quoted at length:

The Japanese Government notes that not infrequently a difficulty arises in practice of determining whether a statement has the character of [a reservation] or of [an interpretative declaration]; and it suggests the insertion of a new provision ... to overcome the difficulty. This suggestion appears to the Special Rapporteur to overlook the fact that the term "reservation" is already defined in article 1, paragraph 1 (f), in terms which indicate that it is something other than a mere interpretative understanding of the provision to which it relates.<sup>88</sup>

This indicates yet again that the concepts of reservation and interpretative declaration can only be defined in relation to each other.

64. Sir Humphrey Waldock adds:

Statements of interpretation were not dealt with by the Commission in the present section [on reservations] for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear to fall under the articles [relating to interpretation].<sup>89</sup>

65. Either inadvertently or with the intention of avoiding further discussion of this difficult issue at a very late stage in the work, the Special Rapporteur did not tackle the problem of the definition and legal regime of inter-

pretative declarations in his sixth report. However, when commenting in that report on the observations of Governments, he did revert to questions linked to the interpretation of treaties. Furthermore, responding to a suggestion by the United States, he observed: "But it would seem clear on principle that a unilateral document cannot be regarded as part of the 'context' for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State's acceptance of the treaty is acquiesced in by the other parties." He emphasized that the "essential point" was "the need for express or implied assent".<sup>90</sup> In any case, the definition of interpretative declarations was not mentioned.

66. At the United Nations Conference on the Law of Treaties, six States submitted amendments to article 2, paragraph 1 (d), of the Commission's draft,<sup>91</sup> which were referred to the Drafting Committee. The Hungarian amendment was undoubtedly the broadest in scope.<sup>92</sup> Like Chile and China, Hungary wished to specify that a reservation could only be formulated with respect to a multilateral treaty, but above all, it wished it to be acknowledged that a reservation could be designed not only "to exclude or to vary the legal effect" of certain provisions of a treaty, but also to *interpret* that legal effect.<sup>93</sup>

67. If an amendment along these lines had been adopted, the concept of a reservation would have encompassed, and could not have been disassociated from, the concept of an interpretative declaration.<sup>94</sup> However, the Hungarian amendment, like the other amendments submitted, was not adopted. The Drafting Committee considered them all "superfluous",<sup>95</sup> and reproduced the text adopted by the

<sup>90</sup> *Yearbook ... 1966*, vol. II, p. 98, para. (16) of the commentary to articles 69–71.

<sup>91</sup> These countries were Chile, China, Hungary, Sweden, Viet Nam and the United States. See *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 its work at the first session of the Conference (A/CONF.39/14), p. 112, para. 35.

<sup>92</sup> *Ibid.*, para. 35 (vi) (e). See also the explanations given by the Hungarian representative, Mr. Haraszti, *ibid.*, *First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 4th meeting, p. 23, paras. 24–25.

<sup>93</sup> This wording is rather strange, for although the meaning of "interpreting a treaty" is clear (?), the idea of "interpreting its legal effect" is more obscure. (See in this connection the position of Austria, *ibid.*, 6th meeting, p. 33, para. 17.)

<sup>94</sup> "It was ... preferable to provide expressly that declarations as to interpretation were to be treated as reservations" (Mr. Haraszti, *ibid.*, 4th meeting, para. 25).

<sup>95</sup> *Ibid.*, *Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), 105th meeting, p. 346, para. 28. The Hungarian amendment nevertheless received a certain amount of support during the discussion in the Committee of the Whole (*ibid.*, *First Session, Vienna, 26 March–24 May 1968* (footnote 92 above), 5th meeting: Syria (para. 5), Greece (para. 16), Italy (para. 22), Czechoslovakia (para. 30), Lebanon (para. 43), Switzerland (para. 54), Bulgaria (para. 59), Argentina (para. 69), USSR (para. 86); 6th meeting: Mongolia (para. 2), Central African Republic (para. 22)). It is open to question, however, whether most of the speakers were not expressing support for the addition of the word "unilateral" rather than for the idea of treating interpretative declarations as reservations, which was opposed by the United Kingdom (5th meeting, para. 96), the United States (*ibid.*, para. 116), Ireland

<sup>82</sup> *Yearbook ... 1965*, vol. I, 820th meeting, p. 308, para. 20.

<sup>83</sup> *Ibid.*, para. 26.

<sup>84</sup> Reproduced in *Yearbook ... 1965*, vol. II, p. 160, and in *Yearbook ... 1966*, vol. II, p. 178.

<sup>85</sup> *Yearbook ... 1966*, vol. II, pp. 189–190, para. (11) of the commentary to article 2.

<sup>86</sup> See paragraph 53 above.

<sup>87</sup> See *Yearbook ... 1965*, vol. II, p. 47.

<sup>88</sup> *Ibid.*, p. 49, para. 1.

<sup>89</sup> *Ibid.*, para. 2; the Special Rapporteur added a number of very interesting comments concerning the legal regime of interpretative declarations, to which it will be helpful to revert at a later stage.

Commission.<sup>96</sup> That text was adopted by the Committee of the Whole without a vote,<sup>97</sup> and then by the Conference by 94 votes to none, with 3 abstentions.<sup>98</sup>

(ii) *The 1978 and 1986 Vienna Conventions*

68. The question of the definition of reservations gave rise to no substantive discussion during the preparation of the 1978 and 1986 Vienna Conventions. In both cases it was more or less taken for granted that the definition adopted in 1969 would be used again.

69. With regard to the 1978 Vienna Convention, Sir Humphrey Waldock, once again the Special Rapporteur, did not propose the inclusion of a definition of reservations in the draft articles and explained that “[p]ersonally, he thought that cross-reference to the 1969 Vienna Convention on the Law of Treaties would be convenient as it would avoid having to frame a set of provisions on *such difficult questions as reservations*”.\*<sup>99</sup> The principle of such a referral having been called in question, not without reason,<sup>100</sup> the Drafting Committee adopted a definition of reservations which was in turn adopted by the Commission as part of the draft articles on succession of States in respect of treaties on 5 July 1972<sup>101</sup> and remained unchanged thereafter. As noted in the report of the Commission on the work of its twenty-fourth session, that definition “reproduce[s] the wording ... of the Vienna Convention” of 1969.<sup>102</sup>

70. No Government commented on the definition<sup>103</sup> and it was reproduced without change in the Commission’s final report on the topic, with the same commentary as in 1972.<sup>104</sup>

71. No amendments were proposed to the text, which was adopted by the United Nations Conference on Succession of States in Respect of Treaties at the same time

(6th meeting, para. 18) and Sir Humphrey Waldock, Expert Consultant (ibid., para. 29).

<sup>96</sup> At least in the case of the French text; the English and Russian texts were changed so as to bring the order of the words “signing, ratifying, accepting or approving” into line with that used in article 16 (which became article 11) of the 1969 Vienna Convention, as had already been done in the other versions (105th meeting, para. 28) (footnote 95 above).

<sup>97</sup> See *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 its work at the second session of the Conference (A/CONF.39/15), pp. 235–236, paras. 25–26.

<sup>98</sup> Ibid. (footnote 95 above), 28th plenary meeting, p. 157, para. 48.

<sup>99</sup> *Yearbook ... 1972*, vol. I, 1158th meeting, p. 42, para. 9.

<sup>100</sup> For a forceful argument against referral, see, for example, the statement by Mr. Ushakov (*Yearbook ... 1974*, vol. I, 1272nd meeting, pp. 115–116, para. 31).

<sup>101</sup> *Yearbook ... 1972*, vol. I, 1196th meeting, p. 271, para. 33.

<sup>102</sup> Ibid. vol. II, document A/8710/Rev.1, p. 232, para. (8) of the commentary to draft article 2.

<sup>103</sup> See the first report on succession of States in respect of treaties by Sir Francis Vallat, *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, p. 32, para. 151.

<sup>104</sup> *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, p. 176, para. (11) of the commentary to draft article 2.

as the rest of article 2;<sup>105</sup> the question of the definition of reservations was not even mentioned.

72. With regard to the definition of reservations in article 2, paragraph 1 (d), of the 1986 Vienna Convention, the text originates in the proposal made by the Special Rapporteur, Mr. Reuter, in his third report, issued in 1974. That definition was based on the 1969 definition, the only difference being the addition of a reference to international organizations as well as States.

73. In his commentary, the Special Rapporteur observed:

There is apparently no theoretical or practical reason to depart from the definition of reservations given in the 1969 Convention. It will be noted, however, that the fact that international organizations are not parties to multilateral treaties would suffice to explain why the practice of reservations does not exist among international organizations.<sup>106</sup>

74. On that basis, the Commission provisionally adopted a text which reflects its perplexity since, rather than reproducing the somewhat cumbersome list of ways of expressing consent contained in the 1969 definition, it proposed to simplify that wording by saying only: “‘reservation’ means a unilateral statement, however phrased or named, made by a State or by an international organization when signing or consenting [*by any agreed means*]\* to be bound by a treaty ...”.<sup>107</sup>

75. According to the commentary, this change, based on an amendment by Poland and the United States at the United Nations Conference on the Law of Treaties,<sup>108</sup> which is the origin of the existing article 11 of the 1969 Convention (but which was not adopted in its original form)<sup>109</sup> has “the twofold advantage of being simpler than the corresponding provision of the Vienna Convention and of leaving in abeyance the question whether the terms ‘ratification’, ‘acceptance’, ‘approval’, and ‘accession’ could also be used in connexion with acts whereby an organization expressed its consent to be bound by a treaty”.<sup>110</sup>

76. However, after adopting new provisions<sup>111</sup> which established an “act of formal confirmation” for international organizations as equivalent to ratification for States, the Commission, at its thirty-third session, in 1981, “saw

<sup>105</sup> *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Resumed session, Vienna, 31 July–23 August 1978*, vol. II, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.79.V.9), 14th plenary meeting, p. 20, para. 9. See also 52nd meeting, p. 125, para. 73 (provisional adoption of the Commission’s draft and referral to the Drafting Committee, by 71 votes to 5 with 1 abstention), and 56th meeting, para. 36 (adoption by consensus on second reading).

<sup>106</sup> *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/279, p. 141.

<sup>107</sup> Ibid., document A/9610/Rev.1, p. 294.

<sup>108</sup> *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 91 above), p. 124, para. 104 (a).

<sup>109</sup> Ibid., paras. 106–108.

<sup>110</sup> *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, p. 295, para. (4) of the commentary to draft article 2. For the Commission’s discussion of this provision, see *Yearbook ... 1974*, vol. I, 1279th meeting, pp. 162–163, paras. 55–56, and p. 164, para. 72, and 1291st meeting, pp. 231–232, paras. 15–20.

<sup>111</sup> Articles 2, paragraphs 1 (b)–1 (b bis), and 11 (*Yearbook ... 1975*, vol. I, 1353rd meeting, paras. 2–8 and 59).

no reason that would justify the maintenance of the first reading text as opposed to returning to a text which could now more closely follow that of the corresponding definition given in the Vienna Convention".<sup>112</sup> It therefore reproduced the 1969 definition and added the act of formal confirmation to the list of circumstances in which a reservation could be made.<sup>113</sup> The Commission's final report on the draft, issued in 1982, reproduced the same text, accompanied by the same commentary.<sup>114</sup>

77. The Commission's text was adopted, without change or debate and by consensus, on 18 March 1986, by the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations,<sup>115</sup> no amendments were proposed.

(b) *Text of the definition*

78. Article 2, paragraph 1 (d), of the 1969 Vienna Convention reads as follows:

**"reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.**

79. This definition is reproduced without change in article 2, paragraph 1 (j), of the 1978 Vienna Convention, which nevertheless adds a reference to the various circumstances in which a reservation can be made by a State "when making a notification of succession to a treaty":

**"reservation" means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty,\* whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.**<sup>116</sup>

80. The 1969 definition was also the model for that given in article 2, paragraph 1 (d), of the 1986 Vienna Convention, which nevertheless, in accordance with its object, adapted the earlier definition to treaties concluded by international organizations:

**"reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization\* when signing, ratifying, formally confirming,\* accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization.\***<sup>117</sup>

<sup>112</sup> *Yearbook ... 1981*, vol. II (Part Two), p. 123, para. (14) of the commentary to draft article 2; for the Commission's discussion of this initiative, apparently taken by the Drafting Committee, see *Yearbook ... 1981*, vol. I, 1692nd meeting, p. 262, paras. 13–17.

<sup>113</sup> *Yearbook ... 1981*, vol. II (Part Two), p. 121.

<sup>114</sup> *Yearbook ... 1982*, vol. II (Part Two), pp. 19–20, paras. (12)–(14) of the commentary to draft article 2.

<sup>115</sup> *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations<sup>C</sup> or between International Organizations, Vienna, 18 February–21 March 1986*, 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), 5th plenary meeting, p. 11, para. 21.

<sup>116</sup> The words in italics indicate the addition made to the 1969 text.

<sup>117</sup> The words in italics indicate the additions made to the 1969 text.

81. These texts, based on the 1969 definition and adapted to the particular object of the other two Vienna Conventions, are not mutually contradictory but on the contrary usefully complement each other. The various elements of those texts can be combined to produce the following composite text:<sup>118</sup>

*"'Reservation' means a unilateral statement, however phrased or named, made by a State or by 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 organization."*

82. Each of the three Vienna Conventions states explicitly that the definitions are given "for the purposes of the present Convention".

## B. The definition of reservations tested in practice, judicial decisions and doctrine

83. This explanation obviously poses the question whether the composite definition given above can nevertheless be considered sufficiently general for the purposes of the Guide to Practice. It is generally acknowledged that this is not the case, for example, for the definition of treaties themselves, and that in particular, the limitation of treaties to international agreements concluded "in written form" is valid only for the purposes of the Vienna Conventions and does not call in question the inclusion of oral agreements in the general category of treaties.<sup>119</sup> It would seem, however, that the same does not apply in respect of the definition of reservations found in the Conventions. Although the definition is given for the purposes of implementing the Conventions themselves, it is considered sufficiently general to apply outside the Vienna Conventions regime.<sup>120</sup>

84. It does not seem essential, therefore, to maintain, for the purposes of the Guide to Practice the precautionary wording used by the drafters in entitling article 2 of the 1969, 1978 and 1986 Vienna Conventions "Use of terms" rather than, simply, "Definitions", so as to make it clear that this article is "intended only to state the meanings with which terms are used" in the Commission's draft articles in the first instance and subsequently in the definitive Conventions.<sup>121</sup>

<sup>118</sup> With reference to this idea, see paragraph 40 above.

<sup>119</sup> See article 3 of the 1969 and 1986 Vienna Conventions.

<sup>120</sup> See, for example, Ruda, "Reservations to treaties", p. 105; Gamble Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", pp. 374 and 394; Greig, "Reservations: equity as a balancing factor?", p. 26; and Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, p. 40.

<sup>121</sup> See *Yearbook ... 1966*, vol. II, p. 188, para. (1) of the commentary to article 2; see also the comments of Ruda and Horn (footnote 120 above).

85. The fact remains, however, that although the “Vienna definition”<sup>122</sup> may (and should) be considered generally valid in respect of reservations *to treaties*, it is obviously limited to that function. It might be advisable to remember that the technique of reservations is not limited to treaty law: it has become current in the context of adopting resolutions, whether in the form of recommendations or decisions, in some international organizations.<sup>123</sup>

86. Although within these limits the Vienna definition has undoubtedly become firmly established, it nevertheless raises difficult problems, due to what it says and also what it does not say. As one jurist has written, “This matter of a definition [of reservations], while relatively simple in the abstract, can be difficult in practice.”<sup>124</sup> Although very widely accepted, this definition is not precise enough to resolve all the doubts that may arise concerning the nature of certain unilateral instruments that sometimes accompany the expression by States (and, much more rarely, by international organizations), of their consent to be bound. In particular, it fails to eliminate serious difficulties concerning the distinction between reservations and interpretative declarations, which it does not define.<sup>125</sup>

#### 1. ESTABLISHMENT OF THE VIENNA DEFINITION

87. Despite some nuances and the expression of some regrets, the definition of reservations that can be deduced from the Vienna Conventions has generally won approval in the writings of jurists. That definition has clearly been accepted in judicial practice, despite the relative rarity of precedents, and seems to constitute a point of reference for States and international organizations in their practice with regard to reservations.

##### (a) *Qualified approval in the writings of jurists*

88. A definition of reservations is undoubtedly useful, although its usefulness has sometimes been called in question.<sup>126</sup> Such a definition makes it possible to draw a distinction between “true” reservations, which correspond to the definition given, and instruments which may appear to be reservations but in fact are not. Such a distinction is all the more essential because, first, the terminology used by States is extremely variable (not to say

<sup>122</sup> This expression means the composite text resulting from the “addition” of the 1969, 1978 and 1986 definitions (see paragraph 81 above).

<sup>123</sup> See Flauss, “Les réserves aux résolutions des Nations Unies”. States not only make “reservations” to resolutions adopted by international organizations, they also interpret them unilaterally by making formal statements for that purpose. See, for example, the concordant statements made by France, the United Kingdom and the United States on the occasion of the adoption on 25 May 1993 of Security Council resolution 827 (1993), establishing the International Tribunal for the Former Yugoslavia (S/PV.3217, pp. 10–19).

<sup>124</sup> Gamble Jr., *loc. cit.*, p. 373; see also, for example, Macdonald, “Reservations under the European Convention on Human Rights”, p. 434.

<sup>125</sup> Because of its importance, this particular problem is dealt with below in paragraphs 231–413.

<sup>126</sup> See the statement by the representative of Turkey, Mr. Kural, in the Sixth Committee of the General Assembly on 14 October 1950 (*Official Records of the General Assembly, Fifth Session, Sixth Committee*, 221st meeting, p. 55, para. 23).

capricious)<sup>127</sup> and secondly, because relatively precise consequences flow from this distinction: the entire reservations regime established in articles 19–23 of the 1969 and 1986 Vienna Conventions and article 20 of the 1978 Convention is affected.

89. It is therefore not surprising that efforts to define reservations were being made in the literature prior to the adoption of the 1969 Vienna Convention, and even before the preliminary work began. However, the adoption of that Convention put an end to the chaotic proliferation of doctrinal definitions, whose purpose thereafter was simply to complete or clarify the Vienna definition without calling it in question.

##### (i) *Summary overview of doctrinal definitions before 1969*

90. In the context of this report it is impossible to make an exhaustive survey of the doctrinal definitions which preceded the definition adopted in 1969: hardly any manual on public international law has ventured to undertake this task.<sup>128</sup> The definitions which are the most important will simply be recalled here, by reason of either the fame of their author and their influence, or their relative originality. They will be grouped according to their common features and the differences between them and the Vienna definition will be highlighted, so as to reveal any weak points they may have.

91. Horn, who has made a survey of this kind, draws a distinction between authors who have produced a “descriptive” definition, aimed at reflecting as comprehensively as possible the multiform practice of States, and those who have proposed a “stipulative” definition, aimed at channelling that practice.<sup>129</sup> In fact, this classification overlaps another, more directly operational for the purposes of this report, namely that which distinguishes between on the one hand, the writers who stress the form of reservations and view them primarily as instruments, and, on the other, those who emphasize the effect of reservations.

92. The most “formalistic” definition is probably that of Miller, author of one of the very first detailed studies on reservations, published in 1919:

[A] reservation to a treaty may be defined as a formal declaration relating to the terms of the treaty made by one of the contracting Powers and communicated to the other contracting Power or Powers at or prior to the delivery of the instrument of ratification of the declarant.<sup>130</sup>

This is a very “neutral” definition, which says nothing about the effects of reservations and therefore cannot be used to distinguish between reservations and interpretative statements.<sup>131</sup>

<sup>127</sup> See paragraphs 223–230 and 252–259, below.

<sup>128</sup> Horn has rightly pointed out that, strangely enough, no effort was made to define reservations during the first attempts to codify their legal regime within the League of Nations and the Pan American Union (*op. cit.*, p. 33).

<sup>129</sup> *Op. cit.*

<sup>130</sup> Miller, *Reservations to Treaties: Their Effect, and the Procedure in Regard Thereto*, p. 76.

<sup>131</sup> See paragraphs 231–413 below.

93. This formalistic definition has nevertheless remained largely isolated<sup>132</sup> and almost all the writers who have concerned themselves with reservations have combined the formal and substantive approaches, thus confirming that reservations can only be defined by combining their form and the effects they produce (or seek to produce), just as is done in the Vienna Conventions.

94. Thus, according to Anzilotti:

[T]he word reservation indicates a declaration of will by which the State, while accepting the treaty as a whole, excludes from its acceptance certain specific provisions by which it nevertheless refuses to be bound.<sup>133</sup>

To a large extent this concise definition prefigures the Vienna definition inasmuch as it contains both a formal element (the reservation is a declaration, unilateral in that it emanates from “the State”) and a substantive element (the State making the reservation is not bound by “specific provisions” of the treaty).

95. The same is true of the famous definition adopted at about the same time in the draft Convention on the Law of Treaties prepared by the Harvard Law School (the Harvard draft), which defines a reservation as follows:

[A] formal declaration by which a State, when signing, ratifying or acceding to a treaty, specifies as a condition of its willingness to become a party to the treaty certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States which may be parties to the treaty.<sup>134</sup>

Here again, the definition combines elements of form and of substance (concerning the effect of the reservation), and, like the Vienna definition, adds details concerning the time at which the declaration must be made in order to be termed a reservation.<sup>135</sup>

96. However, although in the period between the two world wars it was established that a reservation was a unilateral declaration<sup>136</sup> and that the time at which a declaration was made was relevant to its purposes, study of the doctrine of that period reveals wide disagreement among writers on the substantive aspect of the definition, that is, the anticipated effects of a declaration.

<sup>132</sup> Horn (op. cit., p. 33) places in the same category of definitions that formulated by Genet, author of another major work on reservations, published in 1932: “Reservations are declarations made prior to, concomitant with, or posterior to an international diplomatic instrument by one or all the signatory States which limit, to a greater or lesser degree, both qualitatively and quantitatively, but always in a clearly defined way, the accession of that State or States to the convention that has been or is to be concluded” (“Les ‘réserves’ dans les traités”, p. 103). This definition, which is very different from the Vienna definition, nevertheless introduces a “substantive” element that is absent from the one proposed by Miller.

<sup>133</sup> Anzilotti, *Cours de droit international*, p. 399.

<sup>134</sup> Research in International Law of the Harvard Law School, “Draft Convention on the Law of Treaties”, *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 29, No. 4 (October 1935), p. 843.

<sup>135</sup> This is also the case, for example, for Strupp’s definition in *Éléments du droit international public universel, européen et américain*, p. 286—this definition includes a definition of interpretative declarations.

<sup>136</sup> See, however, the curious position taken by Scelle, who defines a reservation as a “*treaty clause*” emanating from an initiative of one or several Governments that have signed or acceded to a treaty setting up a legal regime that derogates from the general treaty regime” (*Précis de droit des gens: principes et systématique*, p. 472).

97. If one leaves aside the distinction between writers who include under one and the same definition both reservations and unilateral declarations and writers who exclude unilateral declarations,<sup>137</sup> the main dispute concerns the issue of the “limiting” or “excluding” effect of reservations as compared with their “modifying” effect:

Writers who did mention only the ‘excluding’ or only the ‘limiting’ effect of reservations were [apart from Anzilotti, Strupp and the Harvard draft] Baldoni, Hudson, Pomme de Mirimonde, Accioly and Guggenheim. However, there were numerous writers that did admit the possibility of reservations having a ‘modifying’ effect on treaty norms. Holloway, Hyde, Kraus, Podestá Costa, Rousseau and Scheidtmann, to name just a few, advocated concepts that related to the ‘modifying’ effect of reservations, with or without referring to their ‘excluding’ effect’.<sup>138</sup>

98. The dispute is by no means insignificant, and to a large extent it is still continuing, even though the 1969 Vienna Convention deliberately aligns itself with the second doctrinal trend referred to by Horn.<sup>139</sup>

#### (ii) *Contemporary doctrinal positions on the Vienna definition*

99. Clearly, when the Commission set about defining the concept of a reservation, it was not venturing into a doctrinal *terra incognita*; the path was in fact well marked, since a broad consensus had developed by the end of the period between the two wars that the definition should include a formal (“procedural”) component and a substantive component, and, despite the dispute referred to above, the content of each of these components was quite narrowly circumscribed. This is perhaps why after 1969 commentaries on the Vienna definition were rather positive on the whole.

100. Imbert, who wrote one of the most incisive monographs on the subject of reservations, expresses the following view: “This definition appears very precise and complete. However, it is not entirely satisfactory; ... some of these terms are too general, whereas others are too restrictive.”<sup>140</sup> In particular, he criticizes the definition for including elements that concern not the definition of reservations but their validity, specifying that they concern only “certain provisions” of the treaty in question, whereas, in his view, the purpose of a reservation is necessarily to restrict the obligations flowing from a treaty (viewed as a whole).<sup>141</sup> Oddly enough, he does not level the same criticism at the time aspect of the Vienna definition,<sup>142</sup> which would also appear to be more relevant to a legal regime applicable to reservations than to a definition

<sup>137</sup> See paragraphs 231–413 below.

<sup>138</sup> Horn, op. cit., p. 34. Horn believes that Scelle, Khadjenouri and Kappeler can also be included in the second category. Exact references are provided (ibid., p. 390, footnotes 7, 8 and 9).

<sup>139</sup> Article 2, paragraph 1 (d): “... a unilateral statement ... whereby it purports to exclude or to modify the legal effect ...”; see paragraphs 144–222 below.

<sup>140</sup> Imbert, *Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l’avis consultatif donné par la Cour internationale de Justice le 28 mai 1951*, p. 9.

<sup>141</sup> Ibid., pp. 14–15; on this point, see also paragraphs 132–143 below.

<sup>142</sup> “... when signing, ratifying, accepting, approving or acceding to a treaty ...” (1969 and 1986 text) “... when making a notification of succession to a treaty ...” (1978 text); see also paragraphs 132–143 below.

of reservations; by contrast, he suggests that the definition should be expanded in order to emphasize that “it may be expressly provided that reservations shall be made at a time other than when a State signs a treaty or expresses its consent to be bound by it”.<sup>143</sup>

101. On the basis of these criticisms, Imbert proposes a more complete definition that he believes should make it possible to avoid any ambiguity:

A reservation is a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, or when making a notification of succession to a treaty, or at any other time stipulated by a treaty,\* whereby it purports to limit or restrict the content or scope of the obligations flowing from the treaty with respect to that State.<sup>\*144</sup>

102. Another eminent expert on reservations to treaties, Horn, partly endorsed these criticisms when he stated that “the expression ‘excludes the legal effect of certain provisions’ seems to lack the necessary precision”.<sup>145, 146</sup> The definition given by Whiteman, who replaces the word “exclude” with the word “limit” appears to be a response to the same concern.<sup>147</sup>

103. It is nonetheless striking that, to the Special Rapporteur’s knowledge, none of the writers who have examined the issue of reservations to treaties in particular calls the Vienna definition radically into question, and that they all, without exception, combine one or more formal elements (a declaration made at a given time) and a substantive element that concerns the effect of the declaration, a point on which the disagreements and hesitation are more pronounced.<sup>148</sup> Moreover, and above all, the great majority of contemporary writers adhere to the Vienna definition, which most of them simply reproduce.<sup>149</sup>

<sup>143</sup> Imbert, *op. cit.*, p. 12; see also pages 163–165.

<sup>144</sup> *Ibid.*, p. 18; the words in italics differ from the wording of the (consolidated) Vienna definition.

<sup>145</sup> Horn, *op. cit.*, p. 83.

<sup>146</sup> Gormley also opts for a much broader definition of reservations than the Vienna definition, since he includes “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”; however, this bias is attributable to the very purpose of the study in question, which concerns alternatives to reservations (“The modification of multilateral conventions by means of ‘negotiated reservations’ and other ‘alternatives’: a comparative study of the ILO and Council of Europe”, p. 64); on this point, see paragraphs 231–413 below.

<sup>147</sup> Whiteman, *Digest of International Law*, p. 137: “The term ‘reservation’... means a formal declaration by a State, when signing, ratifying, or adhering to a treaty, which modifies or limits the substantive effect of one or more of the treaty provisions as between the reserving State and other States party to the treaty”. Also see Szafarz, “Reservations to multilateral treaties”, p. 294.

<sup>148</sup> See in particular paragraphs 144–222 below.

<sup>149</sup> See, among many other examples: Bastid, *Les traités dans la vie internationale: conclusion et effets*, p. 71; Bowett, “Reservations to non-restricted multilateral treaties”, pp. 67–68; Nguyen Quoc, Daillier and Pellet, *Droit international public*, p. 177; Greig, *loc. cit.*, p. 26; Maresca, *Il diritto dei trattati: la Convenzione codificatrice di Vienna del 23 Maggio 1969*, pp. 287–288; Jennings and Watts, *Oppenheim’s International Law*, p. 1241; Reuter, *Introduction to the Law of Treaties*, pp. 77 and 114–120; Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 51–54; Sucharipa-Behrmann, “The legal effects of reservations to multilateral treaties”, p. 72; Brownlie, *Principles of Public International Law*, pp. 608–611; Carreau, *Droit international*, pp. 128–132; Combacau and Sur, *Droit international public*, pp. 131–135; Díez de Velasco Vallejo, *Instituciones de derecho internacional público*, pp. 119–125; Dupuy, *Droit international public*, pp. 194–

104. At the very least it can be said that, as indicated by Ruda, “notwithstanding the intention of the authors of the Convention, the doctrinal importance of Article 2, paragraph 1 (d), is undeniable”.<sup>150</sup> This is unquestionably a rare doctrinal quasi-consensus, which means that it can be concluded that “[i]t is reasonable to assume that although the Vienna Convention is not yet universally adhered to, it [the Vienna definition] represents the more consensual statement on the subject”.<sup>151</sup>

(b) *Establishment of the Vienna definition by means of practice and judicial decisions*

105. The Vienna definition has also been established implicitly through practice, and very explicitly through judicial decisions, and it is unquestionably an undeniable reference point in the area in question; it may thus be inferred without any great risk of committing an error that, although a process of trial and error may have preceded its adoption, the definition is of a customary nature.

(i) *Implicit establishment of the Vienna definition through practice*

106. It is hard to demonstrate on the basis of State practice that there is undeniable adherence to the Vienna definition, since States are rarely prompted to make explicit references to it.

107. It will be recalled, however, that despite a number of clashes, particularly concerning the amendment by Hungary, article 2 of the 1969 Vienna Convention was ultimately adopted without opposition,<sup>152</sup> and the definition laid down in paragraph 1 was not called in question in any way in either 1978 or 1986.<sup>153</sup>

108. It is also interesting to note that the restatement of the law applied by the United States in its foreign relations defines reservations on the basis of article 2, paragraph 1 (d), of the 1969 Vienna Convention, which it simply paraphrases, while omitting the phrase “however phrased or named”.<sup>154</sup> The very fact that this work takes care to emphasize that the United States Senate uses the word in a different sense<sup>155</sup> confirms that, in the view of the United States, the Vienna definition prevails at the international level.

109. Above all, it should be noted that when States “re-qualify” an interpretative declaration as a reservation<sup>156</sup> they sometimes explicitly invoke article 2 of the 1969 and

198; Jiménez de Aréchaga, *El derecho internacional contemporáneo*, pp. 50–55; O’Connell, *International Law*, pp. 229–241; Rousseau, *Droit international public*, pp. 119–126; Seidl-Hohenveldern, *Völkerrecht*, pp. 72–75; Shaw, *International Law*, pp. 641–649; Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis*, pp. 466–472.

<sup>150</sup> Ruda, *loc. cit.*, p. 105.

<sup>151</sup> Gamble Jr., *loc. cit.*, p. 374.

<sup>152</sup> See paragraph 67 above.

<sup>153</sup> See paragraphs 71 and 77 above.

<sup>154</sup> American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States*, (Washington, D.C.), vol. 1 (14 May 1986), p. 180, para. 313.

<sup>155</sup> *Ibid.*, p. 187, para. 314, comment b. The different meaning in question is unclear to a reader not familiar with United States practice.

<sup>156</sup> See paragraphs 231–413 below.

1986 Vienna Conventions. For example, Greece, when protesting against Turkey's "interpretative declarations" with respect to the European Convention on Human Rights, expressed the following view:

[A]ny unilateral declaration which limits a State's contractual obligations is incontestably, from the point of view of international law, a reservation. This question concerns one of the most established principles of international treaty law, which has been codified by the two Vienna Conventions—the Convention of 1969 on the law of treaties and the Convention of 1986 on the law of treaties between States and international organisations or between international organisations. Both Conventions provide in identical terms that the expression "reservation" means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State (Article 2 para. 1 (d)).<sup>157</sup>

110. Even when States do not make an explicit reference to the Vienna definition they are clearly using it as a basis, sometimes paraphrasing parts of it; for example, when expressing opposition to a United States "declaration" with respect to the 1966 International Covenant on Civil and Political Rights, Finland and Sweden recalled that "under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty".<sup>158</sup>

111. Moreover, in a number of contentious cases the States parties to the dispute in question have explicitly acknowledged that article 2, paragraph 1 (d), of the 1969 Vienna Convention "correctly defines a reservation". That was so where France and the United Kingdom were concerned in the *English Channel* case.<sup>159</sup> In addition, in the *Belilos v. Switzerland* case, which was submitted to the European Court of Human Rights, Switzerland invoked this same provision when it sought to establish that an interpretative declaration that it had itself formulated was in fact in the nature of a reservation.<sup>160</sup>

(ii) *Establishment of the Vienna definition by means of judicial decision*

112. The relevant judicial decision confirms that the Vienna definition is very widely accepted. Although ICJ has never taken up the issue of the definition of reservations, the Court of Arbitration set up in the above-mentioned *English Channel* case between France and the United Kingdom, and also the organs of the European Convention on Human Rights and the American Conven-

<sup>157</sup> Letter of 6 April 1987 from the Deputy Minister for Foreign Affairs of Greece to the Secretary-General of the United Nations, reproduced in 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, 1983), p. 231.

<sup>158</sup> Text of the Finnish objection (United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1997*, chap. IV.4, p. 133; the Swedish objection is very similarly worded (*ibid.*, p. 135).

<sup>159</sup> See the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 40, para. 55.

<sup>160</sup> European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132 (Registry of the Court, Council of Europe, Strasbourg, 1988), *judgment of 29 April 1988*, p. 21, para. 42.

tion on Human Rights, have, in the rare instances in which they have been called on to state a position, reached conclusions that could not possibly be clearer in that respect.

113. In the *English Channel* case, the United Kingdom claimed that the reservations made by France to article 6 of the Convention on the Continental Shelf were not true reservations in the sense in which that term is understood in international law.<sup>161</sup> In its decision of 30 June 1977, the Court of Arbitration noted that the two States agreed that article 2, paragraph 1 (d), of the 1969 Vienna Convention correctly defined a reservation<sup>162</sup> and, without directly stating a position on that point itself, it accordingly concluded that the contested reservation was indeed a reservation.<sup>163</sup>

114. The European Commission of Human Rights, in the *Temeltasch* case, relied on the definition set out in article 2, paragraph 1 (d), of the Vienna Convention when requalifying a Swiss interpretative declaration concerning the European Convention on Human Rights.<sup>164</sup>

115. The American Court of Human Rights, without explicitly referring to article 2, paragraph 1 (d), of the 1969 Vienna Convention (to which article 75 of the American Convention on Human Rights expressly refers with respect to the reservations regime) did, however, explicitly reflect some elements of the definition set out in the Vienna Convention, particularly where it recalls that "[r]eservations have the effect of excluding or modifying the provisions of a treaty".<sup>165</sup>

116. This very striking consistency of practice, judicial decision<sup>166</sup> and doctrine leave little doubt that the Vienna definition is now customary in nature, as expressly acknowledged by the European Commission of Human Rights in the *Temeltasch* case:

Since article 64 does not contain any definition of the expression "reservation", the Commission must analyse this concept, and also the concept of an "interpretative declaration", within their meaning under international law. In that connection, it will attach particular importance to the Vienna Convention on the Law of Treaties of 23 May 1969, which above all lays down rules existing under customary law and is essentially of a codifying nature.<sup>167</sup>

117. Moreover, this is the conclusion reached, whether implicitly<sup>168</sup> or explicitly,<sup>169</sup> by virtually all of the rel-

<sup>161</sup> Decision of 30 June 1977 (see footnote 159 above), p. 15; also see pages 39–40, para. 54.

<sup>162</sup> See paragraph 112 above.

<sup>163</sup> See footnote 159 above.

<sup>164</sup> Decision of 5 May 1982, Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application No. 9116/80, *Temeltasch v. Switzerland*, vol. 31 (Strasbourg, 1983) pp. 146–148, para. 69 (where article 2, para. 2 (d), is quoted in full) to para. 82. The Commission did not take such a position in the *Chrysostomos et al.* case (see footnote 157 above).

<sup>165</sup> *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: Judgments and Opinions*, No. 3, paras. 62 and 73.

<sup>166</sup> The States concerned by the above-mentioned decisions of the Franco-British Court of Arbitration and the European Commission of Human Rights were not bound by the 1969 Vienna Convention.

<sup>167</sup> Decision of 5 May 1982 (see footnote 164 above), para. 68.

<sup>168</sup> See footnotes 149–151 above.

<sup>169</sup> See, for example, Edwards Jr., "Reservations to treaties", pp. 369 and 372; and Greig, *loc. cit.*, p. 26.

evant doctrine. In any event, this confirms that there is no reason to reconsider the definition adopted in 1969 and confirmed and supplemented in 1978 and 1986. However, the mere fact that the Vienna definition is widely accepted as constituting law does not mean that its interpretation and application do not pose any problems, which prompts the question whether it would be appropriate to expand on a number of points in the Guide to Practice.

## 2. PERSISTENT PROBLEMS WITH DEFINITIONS

118. As has often been stressed, the definition of reservations contained in the three Vienna Conventions is analytical:

The Vienna Convention definition of reservation may be referred to the class of analytical definitions, because it breaks down the concept of reservation into various constituents. It strives to indicate the criteria that have to be present before we may denote a class of phenomena by a single term. As an analytical definition it would be considered to be an example of the classical *per genus proximum et differentiam specificam* definition. Reservations would belong to the class of unilateral statements made by states when signing, approving or acceding to a treaty (*genus proximum*). They are distinguished from other unilateral statements presented at these moments, by their quality of “excluding” or “modifying” the legal effects of certain provisions of the treaty in their application to that state (*differentia specifica*).<sup>170</sup>

119. In simpler terms, the Vienna definition uses both formal and procedural criteria (a unilateral statement which must be formulated at a particular time) and a substantive element (resulting from the effects intended by the State formulating it), whatever the wording adopted. Each of these elements of a definition gives rise to some problems, but they are not equally important.

### (a) “A unilateral statement ...”

120. The unilateral nature of reservations, as forcefully stated in the first few words of the Vienna definition, is not self-evident. Mr. Brierly, for example, took an entirely contractual approach to the concept of reservations:<sup>171</sup> according to the first Special Rapporteur of the Commission on the law of treaties, a reservation was indissociable from its acceptance and defined by the agreement reached on its content. In a more ambiguous way, Rousseau considers that a reservation is “a *unilateral* means of limiting the effects of the treaty ... Precisely on account of its legal nature—as a new offer of negotiations made to the other party or parties—it amounts to what is actually a treaty-based clause”.<sup>172</sup> This position, which has now been completely abandoned, makes the reservation part of the treaty itself and is incompatible with the legal regime of reservations provided for in the 1969 Vienna Convention, which does not make the validity of a reservation subject to its acceptance by the other parties.

121. Although a reservation is a unilateral act separate from the treaty, however, it is not an autonomous legal

act<sup>173</sup> in that, first of all, it produces its effects only in relation to the treaty to whose provisions it relates and to which its fate is entirely linked<sup>174</sup> and, secondly, its effects depend on the reaction (unilateral as well) or absence of reaction by the other States or international organizations which are parties. From this point of view, it is an “act-condition”, an element of a legal relationship that it is not sufficient in itself to create. “A reservation is a declaration which is external to the text of a treaty. It is unilateral at the time of its formulation; but it produces no legal effects unless it is accepted, in one way or another, by another State.”<sup>175</sup> “A reservation is a unilateral act at the time it is formulated, but seems to stop being one in its exercise.”<sup>176</sup> However, this takes us from the question of the definition of reservations to that of their legal regime.

122. It is no longer open to dispute at present that reservations are unilateral statements emanating either from a State or from an international organization, i.e. formal acts which are separate from the treaty itself and are not of a treaty-based nature. This is not without consequence.

123. The use of the word “*déclaration*” puts the emphasis on the formal nature of reservations.<sup>177</sup> Although this is not specifically stated in article 2 of the Vienna Conventions, moreover, it would be contrary to the very spirit of that institution for a reservation to be formulated orally: without taking the form of a treaty, the reservation is “grafted” onto the treaty, which is also, in principle, a formal act. It is, of course, generally agreed that purely “oral” treaties do exist,<sup>178</sup> but they can hardly be seen as anything more than bilateral or, in any event, synallagmatic and between a small number of States. As shown in the next section, however, unilateral statements intended to modify the effect of certain provisions of such a treaty cannot be characterized as “reservations” proper.

124. What is more, article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions takes care of the problem:

A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.<sup>179</sup>

125. A reservation is thus an *instrumentum* which is separate from that or those constituting the treaty, it being understood that there are other ways of achieving the same result as that sought by the treaty, either through the inclusion in the treaty itself of provisions varying its

<sup>173</sup> As to the distinction between autonomous unilateral acts and acts linked to a treaty-based or customary provision, see Nguyen Quoc, Daillier and Pellet, *op. cit.*, pp. 354–357.

<sup>174</sup> On this point, which was a matter of debate during the consideration of the *Nuclear Tests* case by ICJ (*Nuclear Tests (Australia v. France)*, *Judgment, I.C.J. Reports 1974*, pp. 347 and 350), see paragraphs 144–222 below.

<sup>175</sup> Sinclair, *op. cit.*, p. 51.

<sup>176</sup> Imbert, *op. cit.*, p. 11.

<sup>177</sup> In this regard, see Horn, *op. cit.*, p. 44, and Bishop Jr., “Reservations to treaties”, p. 251; the Harvard draft definition defined a reservation as a “*formal*” declaration” (see paragraph 95 above).

<sup>178</sup> See Reuter, *op. cit.*, p. 30; and Sinclair, *op. cit.*, p. 6.

<sup>179</sup> This provision will be discussed at length in the next report of the Special Rapporteur.

<sup>170</sup> Horn, *op. cit.*, pp. 40–41.

<sup>171</sup> See the text of the definition proposed in 1951 (footnote 64 above); along the same lines, see Anderson, “Reservations to multilateral conventions: a re-examination”, p. 453.

<sup>172</sup> Rousseau, *Principes généraux du droit international public*, pp. 290 and 296–297.

application, depending on the parties,<sup>180</sup> or through the conclusion of a later agreement between all or some of the parties.<sup>181</sup> In such cases, however, reference can no longer be made to reservations: these techniques are treaty-based, while reservations are by definition unilateral.<sup>182</sup>

126. This is certainly one of the key elements of the Vienna definition. “To some extent”, it makes the reserving State “the master of the legal regime that is to exist between it and the other States”.<sup>183</sup>

127. This point should be explained: the reservation is *always* unilateral in the sense that it has to reflect the intention of its author to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State, but this obviously does not prevent some contracting States or international organizations or some States or international organizations “entitled to become parties to the treaty”<sup>184</sup> from consulting one another to agree on the joint formulation of a reservation<sup>185</sup> (the same result is, moreover, achieved when, in expressing their consent to be bound, some States borrow the wording previously used by another reserving State): this was a common practice for the Eastern European countries until quite recently<sup>186</sup> and apparently still is, for the Nordic countries<sup>187</sup> and the States members of the European Union or of the Council of Europe.<sup>188</sup>

128. During the discussion of the draft which was to become article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, Mr. Paredes pointed out that a reservation could

<sup>180</sup> It is in this sense, which does not have much to do with the institution of reservations as we know it, that the following extract from the dissenting opinion of Judge Zoričić to the ICJ judgment in the *Ambatielos* case should probably be interpreted: “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” (*Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 76).

<sup>181</sup> These techniques are considered briefly below (paras. 144–222). For a study which (deliberately) adds to the confusion complained of here, see Gormley, *loc. cit.*, pp. 59–80 and 413–446.

<sup>182</sup> See Imbert, *op. cit.*, p. 10.

<sup>183</sup> Basdevant, “La rédaction et la conclusion des traités et des instruments diplomatiques autres que les traités”, p. 597.

<sup>184</sup> To borrow the term used in article 23 of the 1969 and 1986 Vienna Conventions.

<sup>185</sup> See Greig, *loc. cit.*, p. 26; and Horn, *op. cit.*, p. 44.

<sup>186</sup> See, for example, the reservations of Belarus, Bulgaria, Hungary, Mongolia, the German Democratic Republic, Romania, Czechoslovakia and the Soviet Union to section 30 of the Convention on the Privileges and Immunities of the United Nations; some of these reservations have been withdrawn since 1989 (United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. III.1, pp. 38–41).

<sup>187</sup> See, for example, the reservations of Finland and Sweden to articles 35 and 58 of the Vienna Convention on Consular Relations (United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. III.6, pp. 72–73) and those of Denmark, Finland, Iceland and Sweden to article 10 of the International Covenant on Civil and Political Rights (*ibid.*, chap. IV.4, pp. 124–129).

<sup>188</sup> See, for example, the reservations of Germany (No. 1), Austria (No. 5), Belgium (No. 5) and France (No. 6) to the International Covenant on Civil and Political Rights (*ibid.*, pp. 123–125) or the declarations by all the States members of the European Community *in that capacity* to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (*ibid.*, chap. XXVI.3, pp. 890–892).

be made jointly.<sup>189</sup> Nothing more came of this comment and, in practice, States so far do not seem to have resorted to joint reservations.<sup>190</sup> This possibility cannot, however, be ruled out: the Special Rapporteur is not aware of such instruments, but a few rare examples of joint objections can be cited. For example, the European Community and its nine member States (at that time) objected in the same instrument to the “declarations” made by Bulgaria and the German Democratic Republic in connection with article 52, paragraph 3, of the TIR Convention<sup>191</sup> giving customs and economic unions the possibility of becoming parties.<sup>192</sup> In addition, while joint reservations may not exist, there have been joint declarations.<sup>193</sup> The possibility that the problem may arise in future cannot be ruled out and it would probably be wise for the Commission to adopt a position on this point and suggest what approach should be taken in such a case.

129. It truly appears that there is nothing to be said about the joint formulation of a reservation by several States or international organizations: it is hard to see what would prevent them from getting together to do something that they can no doubt do separately and in the same terms. This flexibility is all the more necessary in that, as a result of the proliferation of common markets and customs and economic unions, it is quite likely that the above-mentioned precedent of the joint objection to the TIR Convention will be repeated in the case of reservations, since such organizations often share competence with their member States and it would be quite artificial to require those States to act separately from the union to which they belong. Theoretically, moreover, such a practice would certainly not be contrary to the spirit of the Vienna definition: a single act emanating from several States may be regarded as unilateral when its addressee or addressees are not parties to it.<sup>194</sup>

130. To remove any ambiguity and avoid possible problems in future, the Vienna definition should therefore be clarified as follows:

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*“1.1.1 The unilateral nature of reservations is not an obstacle to the joint formulation of a reservation by several States or international organizations.”*

131. The principle that a reservation is a unilateral statement thus does not seem to give rise to any major practical problems and, according to the Special Rapporteur, does not call for any explanations in the Guide to Practice, subject to the exclusion of similar institutions, as proposed in paragraphs 144–222 below.

<sup>189</sup> See footnote 74 above.

<sup>190</sup> Reservations formulated by an international organization are attributable to the organization and not to its members; they can therefore not be characterized as “joint” reservations.

<sup>191</sup> Customs Convention on the International Transport of Goods under Cover of TIR Carnets (with annexes).

<sup>192</sup> See United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. XI.A–16, p. 457.

<sup>193</sup> See paragraph 268 below.

<sup>194</sup> In this connection, see the first report of Mr. V. Rodríguez Cedeño on unilateral acts of States, reproduced in the present volume (A/CN.4/486, paras. 79 and 133).

- (b) "... made by a State or by 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 ..."

132. The idea of including limits *ratione temporis* to the possibility of formulating reservations in the definition itself of reservations is not self-evident and, in fact, such limits are more an element of their legal regime than a criterion *per se*: a priori,<sup>195</sup> a reservation formulated at a time other than that provided for in article 2, paragraph 1, of the Vienna Conventions is not lawful, but that does not affect the definition of reservations.

133. Moreover, the oldest definitions of reservations did not usually contain this element *ratione temporis*: neither those proposed by Miller or Genet nor that of Anzilotti<sup>196</sup> put a time limit on the possibility of formulating reservations. However illogical it may be, the idea of including such a limit in the definition of reservations nevertheless gradually came to prevail for practical reasons because, as far as the stability of legal relations is concerned, there would be enormous disadvantages to a system which would allow the parties to formulate a reservation at any time. The principle *pacta sunt servanda* itself would be called into question because by formulating a reservation, a party to a treaty could call its treaty obligations into question at any time.

134. It is true that this would not be the case if the possibility of formulating reservations was made available to the signatories or to potential parties (States or international organizations "entitled to become parties" to the treaty) at any time *before* the expression of their definitive consent to be bound by the treaty or even before the entry into force of the treaty. Such freedom would, however, definitely complicate the task of the depositary and the other parties, which have to receive notification of the text of the reservation and be able to react to it within a certain time limit.<sup>197</sup> "The necessity of limiting the presentation of reservations to certain fixed moments became generally recognized in order to facilitate the registration and communication of reservations."<sup>198</sup>

135. The restrictive list in the Vienna Conventions of the times when such formulation can take place has nevertheless been criticized. On the one hand, it was considered that the list was incomplete, especially as it did not initially take account of the possibility of formulating a reservation at the time of a succession of States;<sup>199</sup> the 1978 Vienna Convention filled this gap. On the other hand, many writers pointed out that, in some cases, reservations could validly take place at times other than those provided for in the Vienna definition.<sup>200</sup> This apparent gap is,

moreover, one of the strongest criticisms by Imbert. Noting that "it may be expressly provided that reservations will be formulated at a time other than when the State signs a treaty or establishes its consent to be bound by it",<sup>201</sup> he suggests that an explicit addition should be made to the Vienna definition to take account of this possibility and to make it clear that the formulation of the reservation may take place "at any other time provided for by the treaty".<sup>202</sup>

136. This addition seems unnecessary. It is of course quite correct that a treaty may provide for such a possibility, but, subject to what is stated on this problem in the next section of this chapter, what is involved is a conventional rule or *lex specialis* which derogates from the general principles embodied in the Vienna Conventions; these principles have a purely residual character of intention<sup>203</sup> and in no way form an obstacle to derogations of this kind.

137. The Guide to Practice in respect of reservations being drafted by the Commission is similar in nature, and it would not be advisable to recall under each of its headings that States and international organizations may derogate therefrom by including in the treaties which they conclude clauses on reservations subject to special rules.

138. On the other hand, it may be asked whether the actual principle of a restrictive list of the times when the formulation of a reservation may take place, as in article 2, paragraph 1, of the Vienna Conventions, is appropriate. This list does not cover all the means of expressing consent to be bound by a treaty, but the spirit of this provision is that the State may indeed formulate (or confirm) a reservation when it expresses such consent and this is the only time at which it may do so. It is therefore obvious that too much importance should not be attached to the letter of this list, failing as it does to correspond to the list in article 11 of the 1969 and 1986 Vienna Conventions,<sup>204</sup> which should have served as a model.

139. Moreover, the Commission and its Special Rapporteur had foreseen the problem during the discussion of the draft articles on the law of treaties between States and international organizations or between international organizations. Ultimately, however, since the Commission was anxious to keep as closely as possible to the 1969 text, it modelled its draft on that text and thereby rejected a helpful simplification.<sup>205</sup>

140. This problem, which so far does not appear to have given rise to any practical difficulty, but which might do

<sup>195</sup> See, however, paragraphs 135–136 below.

<sup>196</sup> See paragraphs 92–94 above.

<sup>197</sup> See article 23 of the 1969 and 1986 Vienna Conventions. The formal and temporal limits to the formulation of reservations will be the subject of the Special Rapporteur's next report.

<sup>198</sup> Horn, *op. cit.*, p. 35.

<sup>199</sup> See Szafarz, *loc. cit.*, p. 295.

<sup>200</sup> *Ibid.*; see also Gaja, "Unruly treaty reservations", pp. 310–313; Greig, *loc. cit.*, pp. 28–29; Horn, *op. cit.*, pp. 41–43; and Reuter, *op. cit.*, p. 77.

<sup>201</sup> Imbert, *op. cit.*, p. 12.

<sup>202</sup> *Ibid.*, p. 18; see the full text of the definition proposed by this writer (para. 101 above).

<sup>203</sup> See the second report on reservations to treaties (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1), paras. 133 and 163.

<sup>204</sup> Article 11 of the 1986 Vienna Convention:

"1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

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

<sup>205</sup> See paragraphs 74–76 above.

so (when reservations are formulated at the time of an exchange of letters, for example), certainly does not justify a proposal by the Commission that the Vienna Conventions should be amended. Nonetheless, it should probably be specified in the Guide to Practice that:

*“1.1.2. A reservation may be formulated by a State or an international organization when that State or that organization expresses its consent to be bound in accordance with article 11 of the 1969 and 1986 Conventions on the Law of Treaties.”*

141. In addition, one specific point needs to be flagged. It may happen that the territorial scope of a treaty will vary over time because the territory of a State changes or because a State decides to extend the application of the treaty to a territory which has been placed under its jurisdiction and to which the treaty did not formerly apply.<sup>206</sup> On that occasion, the State which is responsible for the international relations of the territory may notify the depositary of new reservations in respect of that territory in its notification of the extension of the territorial application of the treaty.

142. This has recently occurred at least twice:

(a) On 27 April 1993, Portugal notified the Secretary-General of its intention to extend to Macao the application of the two 1966 international covenants on human rights. This notification included reservations in respect of that territory;<sup>207</sup>

(b) Likewise, on 14 October 1996, the United Kingdom notified the Secretary-General of its intention to apply to Hong Kong the 1979 Convention on the Elimination of All Forms of Discrimination against Women, subject to a number of reservations.<sup>208</sup>

The other contracting parties to these instruments neither reacted nor objected to this procedure.

143. This practice inevitably has an impact on the actual definition of reservations because it incorporates clarifications relating to the time of their formulation. It therefore seems prudent to specify, as, incidentally, has been suggested by various writers on the subject,<sup>209</sup> that a unilateral statement made by a State at the time of a notification of territorial application constitutes a reservation if, in all other respects, it fulfils the conditions laid down by the Vienna definition. It goes without saying that a clarification of this kind is without prejudice to any problem relating to the permissibility of such reservations.

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*“1.1.3 A unilateral statement which is made by a State at the time of the notification of the territorial application of a treaty and by which that State purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the territory in question constitutes a reservation.”*

<sup>206</sup> On this point, see paragraphs 178 et seq. below.

<sup>207</sup> See United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. IV.3, p. 118, and p. 120, note 16.

<sup>208</sup> *Ibid.*, chap. IV.8, p. 186, note 11.

<sup>209</sup> See Szafarz, *loc. cit.*, p. 295.

(c) *“... 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 organization”*

144. It is undeniably the third component of the Vienna definition which has given rise to the greatest problems and the liveliest theoretical debates. While no one questions their principle and it is generally recognized that the function of reservations is to purport to produce legal effects, the definition of these effects and their scope are still a matter of controversy.

The *differentia specifica*<sup>210</sup> of the Vienna Convention definition intended to clarify the “essence” of the very criteria of reservations, in fact give birth to new problems that had not been conceived of originally. How do reservations relate to the treaty text, and how do they affect the treaty norms? How do reservations actually change the relations between the reserving state and the confronted states? These questions bring into focus the meaning of expressions used in the definition of “reservation” such as the “... legal effect of certain provisions”, “... in their application to the [*i.e.*, *the reserving*] state ...”, “excludes” and “modifies”. All these expressions which according to the requirements for the terms used in the definition, are supposed to be simple and clear, are in fact imprecise.<sup>211</sup>

145. Essentially, “a reservation is a particularity which a State wishes to introduce in relation to a treaty to which it nevertheless expresses its intention to be bound”;<sup>212</sup> and this “particularity” is expressed in legal terms: the reserving State is not in the same situation, in respect of the treaty, as the other contracting States, as a result of the modification of the legal effect of some of the provisions of the treaty.

146. It goes without saying, although it has rarely been pointed out,<sup>213</sup> that this criterion should be juxtaposed with article 21 of the 1969 and 1986 Vienna Conventions, which defines the legal effects of reservations.<sup>214</sup> Put another way, the formulation of a reservation purports to bring about the consequences which are described by that provision, on the subject of which it is not unimportant to note that, contrary to article 2, paragraph 1 (*d*):

(a) First, it makes no distinction between exclusion and modification (whereas the definition makes clear that the object of a reservation is to “exclude” or “modify”);

(b) Secondly, it appears to admit that modification affects the provisions of the treaty to which the reservation itself relates (whereas article 2, paragraph 1 (*d*), deals with the exclusion or modification of *the legal effect* of those provisions);

<sup>210</sup> On this concept, see paragraph 118 above.

<sup>211</sup> Horn, *op. cit.*, p. 45.

<sup>212</sup> Bastid, *op. cit.*, p. 71.

<sup>213</sup> See, however, Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali*, pp. 150–151.

<sup>214</sup> Article 21, paragraph 1, of the 1969 Vienna Convention states:

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

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

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

(c) Thirdly, however, both articles emphasize the fact that the reservation relates to *certain provisions* of the treaty and not to the treaty itself.

147. These clarifications should be borne in mind if an interpretation is required of the definition contained in article 2, paragraph 1, to which the “general rule of interpretation” embodied in article 31 of the 1969 Vienna Convention applies: article 21 is a component of the general context of which the terms to be interpreted form part.

(i) *Modification of the effect of the treaty or its provisions?*

148. Having made this point, the first issue to be considered is the effect of reservations on the treaty: do they modify<sup>215</sup> the treaty itself, its provisions or the obligations deriving from it? One writer who has raised this question, in a different form and with some vehemence, is Imbert. According to him, “it is precisely the link which the drafters of the Vienna Convention established between reservations and the provisions of a convention which seems to be most open to criticism because a reservation does not eliminate a *provision*, but an *obligation*”.<sup>216</sup>

149. The Special Rapporteur does not believe that this criticism is justified. First of all, it prejudices the answer to another basic question that relates to “extensive”<sup>217</sup> reservations. Secondly, it is contrary to the letter both of article 2, paragraph 1 (d), and article 21. Although the drafters of the Vienna Conventions were not always entirely consistent, they referred expressly in both cases to the *provisions*\* of the treaty rather than directly to the *obligations*\* deriving therefrom. There is good reason for this. Moreover by focusing on the “*legal effect*\* of certain provisions of the treaty”, the danger of taking an overly categorical stance on the thorny issue of “extensive” reservations is avoided, but the same result is achieved: a reservation modifies not the provision to which it relates, but its legal effect, which, in most cases, takes the form of an obligation.

150. In this respect, article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions is better drafted than article 21, paragraph 1. It is unclear how a reservation, which is an instrument *external* to the treaty, could modify a *provision of that treaty*. It might exclude or modify its application, i.e. its effect, but not the text itself, i.e. the provision.

151. However, Imbert raises another, perhaps more serious matter:

The words “certain provisions” strike me as not particularly apt, insofar as they do not paint a complete picture. Their use is prompted by the praiseworthy desire to rule out reservations which are too general and imprecise (comment by the Government of Israel on the Commission’s first draft, *Yearbook ... 1965*, vol. II, p. 15; statement by the representative of Chile at the first session of the Vienna Conference (A/CONF.39/11/C.1/SR.4, para. 5) and which ultimately result in the complete negation of the compulsory nature of the treaty (see the often

<sup>215</sup> For the purposes of this first part of the discussion, the word “modify” is interpreted in a broad and neutral sense and includes the idea of exclusion.

<sup>216</sup> Imbert, *op. cit.*, p. 15.

<sup>217</sup> See paragraphs 204 et seq. below.

cited reservation by the United States to the General Act of Algeciras of 7 April 1906<sup>218</sup>) It may be asked however, whether article 2 was the right place to bring up this matter, which actually relates to the validity of reservations. The fact that a statement entails improper consequences should not prevent it from being regarded as a reservation (this is, for example, the case with reservations by which States subordinate, in a general and indeterminate manner, the application of a treaty to respect for national legislation). Moreover, practice abounds in examples of reservations which are perfectly valid even though they do not relate to specific provisions; they exclude the application of the treaty as a whole in well defined cases.<sup>219</sup>

152. This is true. As other writers have indicated,<sup>220</sup> practice certainly departs from the letter of the Vienna definition in the sense that many reservations relate not to specific provisions of the treaty, but to the entire instrument itself. There are countless examples; a few will suffice to illustrate this trend:

(a) When ratifying the International Covenant on Civil and Political Rights, one of the reservations formulated by the United Kingdom was as follows:

The Government of the United Kingdom reserve the right to apply to members of and persons serving with the armed forces of the Crown and to persons lawfully detained in penal establishments of whatever character such laws and procedures as they may from time to time deem to be necessary for the preservation of service and custodial discipline and their acceptance of the provisions of the Covenant is subject to such restrictions as may for these purposes from time to time be authorised by law.<sup>221</sup>

(b) When ratifying the 1976 Convention on the prohibition of military or any other hostile use of environmental modification techniques, Austria formulated the following reservation:

Considering the obligations resulting from its status as a permanently neutral state, the Republic of Austria declares a reservation to the effect that its co-operation within the framework of this Convention cannot exceed the limits determined by the Status of permanent neutrality and membership with the United Nations.<sup>222</sup>

(c) When signing the Final Acts of the Regional Administrative Conference for the Planning of the Maritime Radionavigation Service (Radiobeacons) in the European Maritime Area in 1985, France reserved

its Government’s right to take whatever action it may consider necessary to ensure the protection and proper operation of its maritime radio-

<sup>218</sup> “... in acquiescing in the regulations and declarations of the conference, in becoming a signatory to the General Act of Algeciras and to the Additional Protocol, ... and in accepting the application of those regulations and declarations to American citizens and interests in Morocco, [the United States] does so without assuming obligation or responsibility for the enforcement thereof.” (General Act of the International Conference at Algeciras, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776–1909*, William M. Malloy, ed., vol. II (Washington, Government Printing Office, 1910), p. 2182).

<sup>219</sup> Imbert, *op. cit.*, pp. 14–15; the footnotes are reproduced only partially in brackets.

<sup>220</sup> See, for example, Szafarz, *loc. cit.*, p. 296. See, however, Hylton, “Default breakdown: the Vienna Convention on the Law of Treaties’ inadequate framework on reservations”, p. 422.

<sup>221</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. IV, 4, p. 130.

<sup>222</sup> *Ibid.*, chap. XXVI.1, p. 878. Along the same lines, see, for example, the similarly conceived reservations of Austria and Switzerland to the 1972 Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (Swiss reply to the questionnaire on reservations).

navigation service, which uses the phase measurement multifrequency system.<sup>223</sup>

(d) In its reply to the questionnaire on reservations, Argentina noted that it had formulated the following reservations when it ratified the 1982 International Telecommunication Convention:

The Delegation of the Argentine Republic reserves for its Government the right:

1. Not to accept any financial measure which may entail an increase in its contribution;

2. To take any such action as it may consider necessary to protect its telecommunication services should Member countries fail to observe the provisions of the International Telecommunication Convention (Nairobi, 1982)...<sup>224</sup>

None of the other contracting States or States entitled to become parties to these treaties raised any objection to these reservations.

153. There is no doubt that the practice of formulating “across-the-board” reservations relating not to specific provisions of the treaty, but to its provisions as a whole, is contrary to the letter of the Vienna definition. But the sheer number and consistency of such reservations, together with the lack of objections to them in principle, reflect a social need which it would be absurd to challenge in the name of abstract legal reasoning.<sup>225</sup> Moreover, the interpretation of legal norms cannot remain static. Article 31, paragraph 3, of the 1969 Vienna Convention itself invites the interpreter of a conventional rule to take account “together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”, and, as ICJ has clearly stated, a legal principle should be interpreted in the light of “the subsequent development of international law ...”<sup>226</sup>

154. In order to dispel ambiguity and avoid any controversy, it would therefore seem both reasonable and helpful in the Guide to Practice to use the broad interpretation which States actually give to the ostensibly restrictive wording of the Vienna definition on the anticipated effect of reservations. Needless to say, this kind of precise definition in no way prejudices the permissibility (or impermissibility) of reservations: whether they relate to certain provisions of a treaty or to the treaty as a whole, they are subject to the substantive rules on the validity (or permissibility) of reservations.<sup>227</sup>

<sup>223</sup> ITU, *Final Acts of the Regional Administrative Conference for the Planning of the Maritime Radionavigation Service (Radiobeacons) in the European Maritime Area* (Geneva, 1986), p. 32.

<sup>224</sup> United Nations, *Treaty Series*, vol. 1531, p. 436.

<sup>225</sup> It should also be stressed that, if the terms used in the Vienna definition were to be taken literally, it would be unnecessary to include a clause in certain treaties expressly prohibiting general reservations as is done in article 64, paragraph 1, of the European Convention on Human Rights. This relatively common practice continued after the adoption of the 1969 Vienna Convention.

<sup>226</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, I.C.J. Reports 1971, p. 31.

<sup>227</sup> This central question should constitute the subject of the fourth report on reservations to treaties. See also paragraphs 408–410 below and draft guideline 1.4 (para. 411).

155. In the light of these considerations, it is proposed that the Guide to Practice should state:

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

156. It would, however, appear self-evident that a reservation cannot produce effects outside the sphere of treaty relations established by a given treaty: as it is not an “autonomous” unilateral act, it is linked to the treaty in respect of which it is made.

157. This was indirectly questioned by France in connection with the *Nuclear Tests* case in 1974: in France’s view, the reservations it had linked to its statement of acceptance of the Court’s optional jurisdiction rebounded, as it were, on the General Act of Arbitration (Pacific Settlement of International Disputes), an earlier treaty also covering the judicial settlement of disputes.<sup>228</sup> In view of the reasoning adopted by the Court, it did not take a decision on this claim, but it was meticulously refuted in the joint dissenting opinion of four judges; after citing article 2, paragraph 1 (d) of the 1969 Vienna Convention *in extenso*, they add:

Thus, in principle, a reservation relates exclusively to a State’s expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations.<sup>229</sup>

158. In fact, this observation appears to be so clear and undeniable and is such an inevitable consequence of the general definition of reservations that it does not seem necessary to devote a paragraph of the Guide to Practice stating the obvious.

(ii) *Exclusion, modification or limitation of the legal effect of the provisions of a treaty?*

159. Basing itself on the definition given in article 2, paragraph 1 (d), of the 1969 Vienna Convention, the European Commission of Human Rights found, in the *Temeltasch* case,

This interpretation attaches decisive importance only to the material part of the definition, i.e. the exclusion or alteration of the legal effect of one or more specific provisions of the treaty in their application to the State making the reservation.<sup>230</sup>

160. This was also the position of the Court of Arbitration set up for the purpose of settling the Franco-British dispute over the delimitation of the continental shelf of the English Channel. But the Court, also taking article 2, paragraph 1 (d), as its basis, provided an important clarifi-

<sup>228</sup> See discussion of the French argument in the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock attached to the Judgment of 20 December 1974, *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 347.

<sup>229</sup> *Ibid.*, p. 350.

<sup>230</sup> Decision of 5 May 1982 (see footnote 164 above), p. 146, para. 71.

fication, perfectly in keeping with the letter of the text, which it merely paraphrased:

This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State.<sup>231</sup>

161. Beyond divergences over details (but not necessarily insignificant ones, as will be seen below), there is a broad consensus, in both the writings of jurists and legal decisions, to the effect that a reservation has been made when a unilateral statement “purports to derogate from a substantive provision of the treaty”.<sup>232</sup>

162. This broad consensus leaves aside the question of the strength of the “dispensatory” effect of the reservations. The Vienna definition provides the following clarification: in entering its reservation, the State “purports to exclude or to modify the legal effect [of certain provisions]<sup>233</sup> of the treaty in their application to that State”. But this “clarification” in turn raises a few difficult problems.

163. It does, however, highlight the fact that the reservation must be meant to have an effect on the application of the treaty itself. This excludes the following, in particular:

(a) Conditional ratifications, i.e. conditions placed by a State on the entry into force of a treaty in its application to that State, which, when fulfilled, cause the treaty to apply in its entirety;<sup>234</sup> and

(b) Interpretative declarations;<sup>235</sup> but also

(c) Statements, generally called “reservations” by their authors, which neither have nor purport to have an effect on the treaty or its provisions and cannot be qualified as interpretative declarations as they also do not interpret or purport to interpret the treaty, with which they simply have no direct relationship.

(iii) *Reservations relating to “non-recognition”*

164. The clearest examples of this type of statement are the “reservations relating to non-recognition”,<sup>236</sup> or, at least, some of them.

165. States very frequently link the expression of their consent to be bound to a statement in which they indicate that this expression of consent does not imply the recognition of one or more of the other contracting parties or, in a

<sup>231</sup> Decision of 30 June 1977 (see footnote 159 above), p. 40, para. 55.

<sup>232</sup> Council of Europe, Committee of Legal Advisers on Public International Law, “Issues concerning reservations (meeting in Vienna, 6 June 1995): summary and suggestions by the delegation of Austria” (CAHDI (95) 24), p. 4, para. 2.4.

<sup>233</sup> On the meaning of the square brackets, see draft guideline 1.1.4 of the Guide to Practice (para. 155 above).

<sup>234</sup> See Bishop Jr., *loc. cit.*, pp. 304–306; Horn, *op. cit.*, pp. 98–100; and the examples given.

<sup>235</sup> See paragraphs 231–413 below.

<sup>236</sup> Concerning which Verhoeven has rightly pointed out that they are in some respects very different from the reservations, in the strict sense of the term, found in the law of treaties (*La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales*, p. 431, footnote 284).

more limited way, of certain situations, generally territorial, relating to one or more of the other parties.

166. Horn categorically states that not all such statements are reservations, because of the practical problems that would entail, but he does feel that they exclude “the implementation of the whole norm system” provided for by the treaty.<sup>237</sup> Similarly, Whiteman, reflecting what appears to be the position of the majority of legal writers,<sup>238</sup> is of the view that “[i]t is questionable whether a statement on this subject, even when designated as a reservation, constitutes a reservation as generally understood since it does not purport, in the usual circumstances, to amend or modify any substantive provision of the treaty”.<sup>239</sup>

167. In the opinion of the Special Rapporteur, things are less simple. He is far from certain that the general category of “reservations relating to non-recognition” exists; it is a convenient heading, but one which covers some very diverse situations.

168. The following is one example: in accordance with the usual (but not constant) practice of the Arab States, Saudi Arabia made the following statement on signing the Agreement establishing the International Fund for Agricultural Development:

The participation of the Kingdom of Saudi Arabia in the Agreement shall in no way imply recognition of Israel and shall not lead to entry into dealings with Israel under this Agreement.<sup>240</sup>

169. This statement contrasts with that of the Syrian Arab Republic on the same occasion:

It is understood that the ratification of this Agreement by the Syrian Arab Republic does not mean in any way recognition of Israel by the Syrian Arab Republic.<sup>241</sup>

170. The statement by the Syrian Arab Republic corresponds to what might be considered a “precautionary step”: its author is anxious to point out that he does not recognize Israel and that the ratification of the constituent instrument of IFAD (on which both parties will sit) does not imply a change in attitude. This adds nothing to existing law, since it is generally accepted that participation in

<sup>237</sup> Horn, *op. cit.*, pp. 108–109.

<sup>238</sup> On this point, see in particular Bot, *Nonrecognition and Treaty Relations*, pp. 30–31, 132–139 and 252–254; Lachs, “Recognition and modern methods of international cooperation”, pp. 252–259; Lauterpacht, *Recognition in International Law*, pp. 369–374; and Verhoeven, *op. cit.*, pp. 428–448.

<sup>239</sup> Whiteman, *op. cit.*, p. 158.

<sup>240</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. X.8, p. 403; see also the statements of Iraq and Kuwait, couched in similar terms (*ibid.*).

<sup>241</sup> *Ibid.* See also the Syrian Arab Republic’s first, albeit slightly more ambiguous, statement, in respect of the Vienna Convention on Diplomatic Relations (*ibid.*, chap. III.3, p. 58): “The Syrian Arab Republic does not recognize Israel and will not enter into dealings with it.” The statement made by Argentina on acceding to the 1954 Convention relating to the Status of Stateless Persons is not in the least ambiguous: “The application of this Convention in territories whose sovereignty is the subject of discussion between two or more States, irrespective of whether they are parties to the Convention, cannot be construed as an alteration, renunciation or relinquishment of the position previously maintained by each of them.” (*Ibid.*, chap. V.3, p. 248.); this example is an interesting one for the issue is the recognition not of a State or Government, but of a situation (see also Spain’s statements concerning the 1958 Geneva Conventions on the Law of the Sea in respect of Gibraltar (*ibid.*, chaps. XXI.1, p. 783, XXI.2, p. 789, XXI.3, p. 793, and XXI.4, p. 796).

the same multilateral treaty does not signify mutual recognition, even implicit.<sup>242</sup> Even if that were not the case,<sup>243</sup> it would not mean that the statement was a reservation: the statement by the Syrian Arab Republic does not purport to have an effect on the treaty or its provisions.

171. This is in striking contrast to the statement by Saudi Arabia, which expressly excludes any treaty relations with Israel. In this case, it is indeed the application of the treaty that is excluded.<sup>244</sup> The same contrast is found, for example, between the reactions of Australia and Germany to the accession of certain States to the Geneva Conventions of 12 August 1949. While repeating its non-recognition of the German Democratic Republic, the Democratic People's Republic of Korea, the Democratic Republic of Viet Nam and the People's Republic of China, Australia nevertheless took "note of their acceptance of the provisions of the Conventions and their intention to apply them".<sup>245</sup> Germany, however, excludes any treaty relations with South Viet Nam.<sup>246</sup>

172. In this connection, it has been stated that such statements would still not be reservations, since "reservations imply a modification of the operation of obligations and rights *ratione materiae* but not *ratione personae* nor *ratione loci*".<sup>247</sup> This distinction, which is not based on the text of the Vienna definition, is quite artificial: the principle is that, when a State or an international organization becomes party to a treaty, that State or that international organization is linked by all of its provisions to all of the other parties; this is the very essence of the *pacta sunt servanda* principle. By refusing to enter into treaty relations with one of the States parties to the constituent instrument of IFAD, Saudi Arabia is indeed seeking to exclude or to modify the legal effect (of certain provisions) of the treaty in their application to it. This can give rise to serious practical difficulties, especially when the constituent instrument of an international organization is involved,<sup>248</sup> but there is no reason why such a statement should not be qualified as a reservation.

173. The same is true of the less typical reservation by which the United States maintains that its participation in the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs

<sup>242</sup> See Verhoeven, op. cit., pp. 429–431. Kuwait clearly reaffirms this in the statement it made on acceding to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid: "It is understood that the Accession of the State of Kuwait [to the International Convention] does not mean in any way recognition of Israel by the State of Kuwait." (United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. IV.7, p. 168.)

<sup>243</sup> That is, if participation in the same multilateral treaty did imply mutual recognition.

<sup>244</sup> And, for the reasons explained above, in paragraphs 31–40, a statement purporting to exclude the effects of a treaty as a whole is indeed a reservation.

<sup>245</sup> United Nations, *Treaty Series*, vol. 314, pp. 335–336.

<sup>246</sup> Ibid., vol. 954, p. 459: "[T]he Federal Government (of FRG) does not recognize the Provisional Revolutionary Government as being a body competent to represent a State and ... consequently, it is unable to consider the Provisional Revolutionary Government as a Party to the Geneva Conventions of 12 August 1949."

<sup>247</sup> Horn, op. cit., p. 109.

<sup>248</sup> Curiously, Israel objected to the statement by the Syrian Arab Republic (United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. X.8, p. 404, note 12), but does not appear to have reacted to the reservations of Iraq, Kuwait and Saudi Arabia.

does not involve any contractual obligation on the part of the United States of America to a country represented by a régime or entity which the Government of the United States of America does not recognise as the government of that country until such country has a government recognised by the Government of the United States of America.<sup>249</sup>

This is in contrast to Cameroon's statement concerning the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, which is also drafted in general terms, but which does not seek to produce effects on the relations established under the Treaty:

Under no circumstances could the signing by the Federal Republic of Cameroon have the effect of entailing recognition by Cameroon of Governments or regimes which, prior to such signing, had not yet been recognized by the Federal Republic of Cameroon according to the normal traditional procedures established by international law.<sup>250</sup>

174. The analysis proposed above follows from the Vienna definition, as interpreted by draft paragraph 1.1.4 of the Guide to Practice.<sup>251</sup> Nevertheless, it does not seem pointless to make it clear in the Guide that "reservations relating to non-recognition" are not always genuine reservations within the meaning of the law of treaties. To avoid any ambiguity, which is a potential source of difficulty, it would be desirable to specify that a statement of non-recognition is in fact a reservation if the author stipulates that it partly or wholly excludes the application of the treaty between the author and the State(s) it does not recognize, whereas, *a contrario*, a statement of non-recognition does not constitute a reservation if the State making it does not intend it to produce a legal effect in its treaty relations with the State(s) it does not recognize.

175. Two problems arise, however. First, statements of this type can be made at the time the author State expresses its consent to be bound<sup>252</sup> and, in that case, the *ratione temporis* criterion required under the Vienna definition for a reservation to exist<sup>253</sup> is fulfilled; there is then no difficulty in regarding such statements as genuine reservations. But such statements may also be made by States already bound by the treaty, in response to accession by another State party.<sup>254</sup> From a literal reading of article 2, paragraph 1 (d), of the 1969 Vienna Convention, it is not possible to talk here of reservations proper because they are made *after* the final expression of consent of the author to become a party. This would, however, be an extremely formalistic view: such statements are made under exactly the same terms and produce exactly the same effects as reservations relating to non-recognition made "within the time limit". It therefore seems justifiable to label them as reservations regardless of when they are made (here too, without in any way prejudging their validity).

<sup>249</sup> Ibid., chap. VI.8, p. 274. It may be noted that the issue here is non-recognition of a Government (the United States was referring to El Salvador) rather than of a State.

<sup>250</sup> Similarly, see the statement by Benin in connection with the same treaty (United Nations, *Status of Multilateral Arms Regulation and Disarmament Agreements*, p. 40) or the one by the Republic of Korea when it signed the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (ibid., p. 176).

<sup>251</sup> See paragraph 40 above.

<sup>252</sup> See paragraphs 165–170 above.

<sup>253</sup> See paragraphs 132–143 above.

<sup>254</sup> See the "declaration" made by Germany on 29 March 1974 concerning accession by the Provisional Revolutionary Government of the Republic of South Viet Nam to the Geneva Conventions of 12 August 1949 (footnote 246 above).

176. Secondly, it is not uncommon in the law of treaties,<sup>255</sup> including reservations,<sup>256</sup> for the basis to be not the expressly declared will but an implicit intention which is apparent from circumstances. In that case, it would be possible to admit that, in the event of silence in the statement or ambiguity regarding the legal effects it is designed to achieve, the author's intention can be inferred from the circumstances. In the opinion of the Special Rapporteur, it is preferable to dismiss such a solution. The practice regarding "reservations relating to non-recognition" is abundant and States seem to be quite careful in modulating their wording in terms of their aim. In any event, since the objective is to remove any ambiguity, it is definitely desirable for States<sup>257</sup> to specify their intention.

177. A provision of this kind, included in the Guide to Practice, could be such as to encourage them:

"1.1.7<sup>258</sup> A unilateral statement by which a State purports to exclude the application of a treaty between itself and one or more other States which it does not recognize constitutes a reservation, regardless of the date on which it is made."

(iv) *Reservations having territorial scope*

178. The question of reservations having territorial scope may be seen in rather similar terms. These are statements whereby a State excludes the application of a treaty which it signs,<sup>259</sup> or some of its provisions,<sup>260</sup> to one or

<sup>255</sup> See articles 12, paragraph 1 (c), 14, paragraph 1 (d), 40, paragraph 5, 29 and 45 (b) of the 1969 Vienna Convention.

<sup>256</sup> See article 20, paragraph 2, of the 1969 Vienna Convention.

<sup>257</sup> It appears to be a very marginal problem in the case of international organizations, but could nonetheless arise in the case of international integration organizations (European Union).

<sup>258</sup> For reasons of internal logic, it seemed preferable to include this paragraph, which deals with a particular category of (non-)reservations, at the end of the Guide to Practice on the definition of reservations.

<sup>259</sup> See, for an early example, the statement by Denmark when it ratified the 1930 Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes (United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. II.8, p. 964), and, for a more recent example, those by the United Kingdom excluding the application of the 1958 Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas and the Convention on Fishing and Conservation of the Living Resources of the High Seas, to the "States in the Persian Gulf" (ibid., chaps. XXI.1, p. 783; XXI.2, p. 789, and XXI.3, p. 793). As curiosities, see also reservations that the United Kingdom formulated when it acceded to many treaties further to the unlawful proclamation of independence of Southern Rhodesia between 1965 and 1980 (see the British reservations to the two International Covenants of 1966: "[T]he provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed by the Covenant in respect of that territory can be fully implemented." (Ibid., chaps. IV.3, p. 115, and IV.4, p. 130.); and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ibid., chap. IV.2, p. 101) or the total exclusion by the United States from all of its territory of transport governed by the 1970 Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ibid., *Treaty Series*, vol. 1299, p. 355). Objections were made to this reservation by France and Italy (ibid., vol. 1347, pp. 342 and 344).

<sup>260</sup> See, for example, the carefully limited reservations of the United Kingdom regarding the application to Fiji of the International Convention on the Elimination of All Forms of Racial Discrimination (United Nations, *Treaty Series*, vol. 677, p. 437; these reservations were confirmed by Fiji in its declaration of succession; ibid., vol. 854, pp. 223–224) and the many reservations included in the notification by

more territories under its jurisdiction because they form an integral part of its own territory, because they are Non-Self-Governing Territories or because it is competent in some other respect to act on behalf of that territory in its international relations.

179. In the past, such reservations consisted primarily of what were called "colonial reservations", i.e. declarations by which administering Powers made known their intention to apply or not to apply a treaty or certain of its provisions to their colonies or to certain of their colonies. Commenting in 1926 on the reservations of this type made by France and the United Kingdom to the 1912 International Opium Convention, Malkin expressed the view that "[t]hese two 'reservations' were really not reservations in the ordinary sense but were rather excluding declarations as regards colonies. In ordinary cases no question of the consent of the other signatories arises as regards such declarations".<sup>261</sup>

180. Whatever might have been the situation at the time, this conclusion is highly debatable today in the light of the Vienna definition: these are definitely reservations in the strict sense of the term; these unilateral statements, made by a State when expressing its formal consent to be bound, purport to exclude the legal effect of the treaty or of certain of its provisions in their application to that State.

181. Curiously, modern-day legal writers continue to express doubts in this connection. Horn, for example, is of the view that:

The question whether a statement bearing upon the implementation *ratione loci* of a treaty by excluding certain territories from the application of the treaty constitutes a reservation, cannot be answered without analyzing the object of the treaty and the effect of such a territorial statement upon its operation. Does the statement really change the legal effect of the treaty by bringing about an alteration in the treaty obligations and the corresponding rights? Do the confronted states have to face any encroachment on their legal position due to the territorial statement?<sup>262</sup>

182. This excellent specialist in reservations has given a complicated answer to these questions. According to him, such territorial statements would constitute genuine reservations only if the object of the treaty in question was effectively territorial (for example, the creation of a demilitarized zone) or if it contained an express provision that it applied to the entire territory of the States parties or to a part of the territory expressly covered by the treaty.<sup>263</sup> Actually, it is difficult to see the justification for such subtleties. Under the terms of article 29 of the 1969 Vienna Convention:

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Accordingly, only if the treaty itself *excluded* some territories from its scope and the territorial statement was confined to reproducing this provision could such a statement, devoid of any legal effect, be regarded as a reservation. In all other cases, the author of the territorial state-

Portugal of the application of the international human rights covenants to Macao (ibid., *Multilateral Treaties Deposited with the Secretary-General* ..., chap. IV.3, pp. 118 and 120, note 16).

<sup>261</sup> Malkin, "Reservations to multilateral conventions", p. 153.

<sup>262</sup> Horn, *op. cit.*, pp. 100–101.

<sup>263</sup> Ibid., p. 101.

ment does purport to exclude the legal effect of the treaty or some of its provisions (legal effect determined by the law of treaties),<sup>264</sup> in their application to that State, which brings us back to the Vienna definition.

183. It is true, however, that article 29 of the 1969 Vienna Convention leaves open the question of the definition of the territory of the State. Are Non-Self-Governing Territories (within the meaning of Chapter XI of the Charter of the United Nations) or territories which have broad internal autonomy, but do not themselves handle their international relations (for instance, the Faeroe Islands and Greenland in relation to Denmark), to be considered as forming part of the territory of the State for the purposes of the law of treaties? This report is not the appropriate place to try and answer this delicate question and, in all likelihood, there is no point in trying to do so in order to define reservations.<sup>265</sup> It is enough to consider that, if, under either its own provisions or under the principles of general international law, a treaty applies to a particular territory that the declaring State intends to exclude from the application of the treaty, the statement is indeed in the nature of a reservation, since it purports to prevent the treaty from producing its effects in respect of a territory to which it would normally be applicable. It goes without saying that here, too, this clarification, which relates purely to the definition of a reservation, does not prejudice the permissibility (or impermissibility) of such a reservation; it simply means that the rules applicable to reservations to treaties are applicable to such statements.

184. In addition, as in the case of reservations relating to non-recognition,<sup>266</sup> such statements can be made either when the State expresses its formal consent to be bound or, but only in the case of partial reservations,<sup>267</sup> relating to territory, when giving notification of the treaty's application to a territory.<sup>268</sup> This feature should be taken into account in the definition of this type of reservation.

185. In the opinion of the Special Rapporteur, these clarifications should appear in the Guide to Practice:

*"1.1.8 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, regardless of the date on which it is made."*

(v) *Other reservations purporting to exclude the legal effect of the provisions of the treaty*

186. Reservations relating to non-recognition (when they are genuine reservations) and reservations having territorial scope represent subcategories of reservations belonging to the more general category of reservations

<sup>264</sup> The same is obviously true when the possibility of such reservations is allowed for in the treaty itself (see the examples of such territorial reservations clauses in Imbert, op. cit., pp. 236–237).

<sup>265</sup> See, however, the way in which Imbert (ibid., p. 17) and Horn (op. cit., pp. 101–103) deal with the problem.

<sup>266</sup> See paragraph 164 above.

<sup>267</sup> It is obvious that a State would not be able to exclude a territory from the scope *ratione loci* of a treaty after the treaty has become applicable to the territory.

<sup>268</sup> See, for example, footnote 260 above.

purporting to *exclude* the legal effect of the treaty or of certain of its provisions.<sup>269</sup> In formulating a reservation of this kind, the State or the international organization intends to "neutralize" one or more provisions of the treaty. It maintains<sup>270</sup> the status quo ante.

187. This does not necessarily mean complete freedom to act. The parties may well be bound in another way, either by the existence of a customary rule on the same subject matter<sup>271</sup> or even because the same parties are bound by an earlier treaty to which a reservation signifies refusal of modification by the new treaty. When this is not the case, the State retains, in the field covered by the reservation, discretionary power, whereas it would have been bound by the implementation of the treaty.<sup>272</sup>

188. A traditional example of reservations intended to exclude the legal effect of certain provisions of the treaty in their application to the reserving State is to be found in the reservations to dispute settlement clauses, such as the reservations made by the Eastern European countries to article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which establishes the competence of ICJ to settle disputes relating to the interpretation and application of that Convention,<sup>273</sup> and to article XII authorizing the exclusion of Non-Self-Governing Territories from the scope of the Convention, which led to the request for the Court's advisory opinion of 28 May 1951.<sup>274</sup>

189. Reservations of this type, clearly excluding the application of one or more provisions<sup>275</sup> of the treaty, are extremely frequent. Their interpretation and applica-

<sup>269</sup> The effect of reservations relating to non-recognition is to render all of the treaty's provisions inoperative in relations between the reserving State and the non-recognized State; conversely, territorial reservations may be either general or specific.

<sup>270</sup> It maintains, but does not restore. The treaty has not entered into force for it, since the reservation is made at the time it expresses consent to be bound.

<sup>271</sup> "It will ... be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 96).

<sup>272</sup> On the conflict between these two notions in international law, see, above all, Jovanović, *Restriction des compétences discrétionnaires des États en droit international*.

<sup>273</sup> Most of these States have withdrawn the reservation, but Albania, Algeria, Bahrain, India, Malaysia, Morocco, the Philippines, Rwanda, Singapore, Spain, the United States, Venezuela, Viet Nam and Yemen still maintained it as at 31 December 1996 (see United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. IV.1, pp. 86–88).

<sup>274</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C.J. Reports 1951, p. 15.

<sup>275</sup> The provision in question may consist of one word; see, for example, Portugal's reservation to article 6 of the Agreement on the Status of the North Atlantic Treaty Organisation, national representatives and international staff ("The premises of the Organisation shall be inviolable. Its property and assets, wheresoever located and by whomsoever held, shall be immune from search, requisition, confiscation, *expropriation*\* or any other form of interference"). Portugal agreed to the article "[r]eserving the non-application of Article 6 in case of expropriation" (example cited by Imbert, op. cit., p. 234).

tion generally<sup>276</sup> do not give rise to particular problems, regardless of the reasons on which they were based.<sup>277</sup>

190. The reservation may also purport to exclude the legal effect of the treaty or some of its provisions either in certain circumstances or on certain categories of persons or activities.

191. One example of the first category of such “exclusion” reservations is to be found in the reservations by most States parties to the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, under the terms of which the instrument

will automatically cease to be binding on the Government (of the reserving State) in respect of any hostile State whose armed forces or allies fail to respect the prohibitions that form the subject of this Protocol.<sup>278</sup>

Similarly, it will be noted that the reservation made by France on 14 February 1939 to the 1928 General Act of Arbitration (Pacific Settlement of International Disputes) to the effect that “in future that accession shall not extend to disputes relating to any events that may occur in the course of a war in which the French Government is involved”.<sup>279</sup>

192. As an example of this latter kind of exclusion reservation, mention might be made of the reservation whereby Guatemala:

reserves its right:

(1) To consider that the provisions of the Convention [1954 Customs Convention on the Temporary Importation of Private Road Vehicles] apply solely to natural persons and not to legal persons and bodies corporate as provided in chapter I, article 1;<sup>280</sup>

and the reservation by which several countries exclude the application of certain provisions of the International Covenant on Civil and Political Rights to the military<sup>281</sup> or, for the exclusion of certain categories of activities, the reservation of Yugoslavia to the 1960 Convention relating to the unification of certain rules concerning collisions in inland navigation, whereby that country:

<sup>276</sup> See, however, in paragraphs 217 et seq. below, the discussions to which reservations of the kind made to article XII of the Convention on the Prevention and Punishment of the Crime of Genocide give rise.

<sup>277</sup> Imbert deals separately with exclusionary reservations based on a concern to ensure that the internal law of the reserving State prevails (op. cit., pp. 234–235). Regardless of the reason, if the State purely and simply rejects the application of a provision of the treaty, it is quite clearly an exclusionary reservation. The situation might well differ if the State does not exclude application of the provision(s) to which the reservation relates, but intends to limit their effect; in this case, it is more of a modifying reservation (see paragraph 195 below), but this distinction has no bearing on the *definition* of reservations.

<sup>278</sup> Imbert, op. cit., p. 236.

<sup>279</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. II.29, p. 1000. Similar reservations to the General Act were also made by Canada (ibid., p. 998), New Zealand (ibid., p. 999) and the United Kingdom (ibid., p. 997).

<sup>280</sup> Ibid., chap. XI.A–8, p. 439. See also in this respect the reservation by India (ibid.).

<sup>281</sup> See, in particular, the reservations by France (No. 3), the United Kingdom and Malta (No. 4), ibid., chap. IV.4, pp. 124, 126–127 and 130, respectively.

reserves the right to provide by law that the provisions of this Convention shall not apply on waterways reserved exclusively for its own shipping.<sup>282</sup>

(vi) *Reservations purporting to modify the legal effect of the provisions of the treaty*

193. Writers seem to attach great importance to the question whether a reservation excludes or modifies<sup>283</sup> the legal effect of the provisions of the treaty. These attempts at classification (which vary, moreover, from one writer to another) are nonetheless of limited interest for the purposes of a definition of reservations, for it matters little whether the unilateral statement excludes or modifies the effect of the provisions of the treaty. It must have an actual consequence for the application of the treaty.<sup>284</sup>

194. In support of this remark, it is enough to point out that “modifying reservations” are reservations which, without setting aside a provision of the treaty, have the effect of unilaterally modulating the treaty’s object or the terms and conditions of its application. This may relate to the actual substance of the obligations stemming from the treaty or to their binding force.

195. The first subcategory of these “modifying reservations” is by far the largest, on the understanding that, in this case, the modulation of the effect of the treaty may be the result:

(a) Either of the substitution by the reserving State of provisions of its internal law for provisions contained in the treaty, e.g.:

The Argentine Government states that the application of the second part of article 15 of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in article 18 of the Argentine National Constitution;<sup>285</sup>

(b) Or of the substitution of obligations stemming from other international instruments for provisions of the treaty to which the reservation is attached, e.g.:

Articles 19, 21 and 22 in conjunction with Article 2 (1) of the Covenant shall be applied within the scope of Article 16 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms;<sup>286</sup>

(c) Or again of a different formulation, devised for the occasion by the reserving State, regardless of any pre-existing rule, e.g.:

Article 14 (3) (d) of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing ...<sup>287</sup>

<sup>282</sup> Ibid., chap. XII.3, p. 635. See also the reservation of the Russian Federation to the 1974 Convention on a Code of Conduct for Liner Conferences (ibid., chap. XII.6, p. 644).

<sup>283</sup> See the lengthy development on the distinction by Horn, op. cit., pp. 80–87, and Imbert, op. cit., pp. 233–238, in the two most comprehensive monographs on reservations since 1969.

<sup>284</sup> See paragraphs 144–147 above.

<sup>285</sup> “Understanding” by Argentina concerning the International Covenant on Civil and Political Rights, United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. IV.4, p. 122.

<sup>286</sup> Reservation No. 1 by Germany to the same Covenant (ibid., p. 125).

<sup>287</sup> Reservation No. 2 by Germany (ibid.).

196. An effort may also be made to modify the effects of the treaty not by modulating the treaty's object or the terms and conditions of its application, but by modulating the binding force of some of its provisions. This is the case whenever the reserving State, while not rejecting the objective in question, "softens" the strictness of its obligations by means of a reservation:

In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively.<sup>288</sup>

The provisions of articles 17 and 18 are recognized as recommendations only.<sup>289</sup>

This amounts to a changeover from "hard" obligations to "soft" obligations or, if one prefers, from obligations of result to obligations of conduct.<sup>290, 291</sup>

197. Although, for the purposes of the definition of reservations, it is not important to determine whether unilateral statements by States or international organizations parties to the treaty exclude or modify the effect of the provisions of the treaty to which they relate, it is essential to make sure that they are designed to produce a genuine legal effect; otherwise they would not be reservations, but interpretative declarations.<sup>292</sup> Yet this is not always evident.

198. For example, in the *English Channel* case, the United Kingdom challenged the claim that France's third reservation to article 6 of the Convention on the Continental Shelf constituted a genuine reservation. It contended that it was in fact "an interpretative declaration—a mere advance notice by the French Government of the areas in which it considers special circumstances to exist".<sup>293</sup>

199. The reservation was worded as follows:

In the absence of a specific agreement, the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:

...

—if it lies in areas where, in the Government's opinion, there are "special circumstances" within the meaning of Article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.<sup>294</sup>

200. The Court rejected the British claim on this point. It noted that:

although the ... reservation doubtless has within it elements of interpretation, it also appears to constitute a specific condition imposed by the French Republic on its acceptance of the delimitation régime provided

<sup>288</sup> Reservation by Australia to article 10 (*ibid.*, p. 122).

<sup>289</sup> Reservation by Italy to the 1954 Convention relating to the Status of Stateless Persons (*ibid.*, chap. V.3, p. 250).

<sup>290</sup> The Special Rapporteur does not use these expressions in the sense in which they appear in articles 20 and 21 of the draft articles on State responsibility adopted by the Commission on first reading (see *Yearbook ... 1996*, vol. II (Part Two), p. 60) and which seems to him to be questionable in the extreme.

<sup>291</sup> On this point, see Horn, *op. cit.*, pp. 85–86. This writer includes reservations of this kind among "exclusionary" reservations.

<sup>292</sup> See paragraphs 231–413 below.

<sup>293</sup> Decision of 30 June 1977 (see footnote 161 above), p. 39, para. 54.

<sup>294</sup> *Ibid.*, p. 29, para. 33.

for in Article 6. This condition, according to its terms, appears to go beyond mere interpretation ...<sup>295</sup>

Then, recalling the Vienna definition and stressing the fact that the latter is not limited to the exclusion or modification of *the provisions* of the treaty, but also covers their *legal effect*,<sup>296</sup> the Court stated:

This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this "reservation" is to be considered a "reservation" rather than an "interpretative declaration".<sup>297</sup>

201. Although the problem does not seem to have been raised so far, the qualification of some declarations made by international organizations at the time of the expression of their consent to be bound by a treaty may also give rise to controversy, particularly in the case of reservations on the division of competence between an organization and its member States.<sup>298</sup> It is extremely difficult to determine whether or not such declarations constitute reservations within the meaning of the Vienna Conventions. It nonetheless seems difficult to suggest guidelines that would remove uncertainty in a case of this kind, for everything depends on circumstances and on the actual wording of the declaration.<sup>299</sup>

202. Without going into extensive detail and subject to the clarifications to be provided below with regard to the distinction between reservations and interpretative declarations, it does not appear possible to include further explanations in the Guide to Practice on the criteria contained in the Vienna definition.

#### (vii) *The problem of "extensive" reservations*

203. There is no doubt that the expression "to modify the legal effect of certain provisions of the treaty" refers

<sup>295</sup> *Ibid.*, p. 40, para. 55.

<sup>296</sup> See paragraph 160 above.

<sup>297</sup> Decision of 30 June 1977 (see footnote 161 above), p. 40, para. 55.

<sup>298</sup> See, for example, the declaration made by the European Community at the time of the signature of the United Nations Framework Convention on Climate Change (United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. XXVII.7, p. 933).

<sup>299</sup> The declaration by the European Community mentioned in footnote 298 above does not appear to be a reservation properly speaking. It indicates that "[t]he European Economic Community and its Member States declare, for the purposes of clarity, that the inclusion of the European Community as well as its Member States in the lists in the Annexes to the Convention is without prejudice to the division of competence and responsibilities between the Community and its Member States, which is to be declared in accordance with article 22 (3) of the Convention", the legal effect of which is therefore not modified. However, the declaration made by the Community when signing the Montreal Protocol on Substances that Deplete the Ozone Layer could be interpreted as a genuine reservation ("In the light of article 2.8 of the Protocol, the Community wishes to state that its signature takes place on the assumption that all its member states will take the necessary steps to adhere to the Convention and to conclude the Protocol", *ibid.*, chap. XXVII.2, p. 913). In substance, this is a "reservation under internal law", which is no different from those made by some federal States to preserve the competence of the Federation's member States (see the reservation of Switzerland to the European Convention on the Equivalence of Diplomas leading to Admission to Universities, which was included with that country's reply to the questionnaire: "The Swiss Federal Council declares that the competence of cantons in the field of education, as established by the Federal Constitution, as well as the autonomy of universities are reserved for the implementation of the Convention.") (United Nations, *Treaty Series*, vol. 1704, p. 276.)

to reservations which *limit* or *restrict* this effect and, at the same time, to the reserving State's obligations under the treaty "because 'restricting' is a way of 'modifying'".<sup>300</sup> And it is true, in this respect, that the amendments proposed during the United Nations Conference on the Law of Treaties<sup>301</sup> would not have added anything to the final text.<sup>302</sup>

204. If they had been adopted, however, they would have drawn attention to a serious ambiguity in the text as it stands. Theoretically, there are indeed three ways in which a State may seek to modify the legal effect of the provisions of a treaty by means of a unilateral statement:

(a) The State making the statement may seek to minimize its obligations under the provisions of the treaty (and this is the purpose of all the reservations cited as examples above);

(b) It may also accept additional obligations;

(c) Lastly, it may seek to strengthen the obligations of the other States parties.

205. The last two categories of reservations are at times lumped together under the term "extensive reservations". For example, Ruda defines "extensive reservations" as "declarations or statements purporting to enlarge the obligations included in the treaty", and he includes "unilateral declarations whereby the State assumes obligations, without receiving anything in exchange, because the negotiations for the adoption of the treaty have already been closed".<sup>303</sup>

206. In all likelihood, it is a mixture of this kind that lies at the root of the discussion between two members of the Commission on the subject of the definition of reservations. During the discussion of the first report on reservations to treaties, Mr. Tomuschat emphasized that "an important element was missing" from the Vienna definition "namely, that, by virtue of a reservation, a State party could only reduce the scope of its obligations towards other States parties and under no circumstances unilaterally increase rights not set forth in the treaty".<sup>304</sup> Mr. Bowett questioned that assertion and, referring to the 1977 arbitration in the *English Channel* case, pointed out that the French reservation in question,<sup>305</sup> "by allowing France not to apply the median line, but another boundary line based on the special circumstances, had in fact increased the rights of its author".<sup>306</sup>

207. This discussion seems to have been the result of a misunderstanding, which can be cleared up if care is taken to distinguish between the additional obligations which the author of the "reservation" wishes to assume and the *rights* that he is trying to acquire. This is the distinction

proposed by Horn between "commissive reservations", by which the State making the declaration undertakes more than the treaty requires, and "extensive reservations proper", whereby "a state will strive to impose wider obligations on the other parties assuming correspondingly wider rights for itself".<sup>307</sup>

(viii) *Statements designed to increase the obligations of their author*

208. Although, according to the same author, "it is highly unlikely that any state will declare its willingness to accept unilaterally obligations beyond the terms of the treaty",<sup>308</sup> such cases do arise. A famous example, which was given by Mr. Brierly in his first report on the law of treaties, is provided by the statement which South Africa made when it signed the General Agreement on Tariffs and Trade in 1948:

As the article reserved against stipulates that the agreement "shall not apply" as between parties which have not concluded tariff negotiations with each other and which do not consent to its application, the effect of the reservation is to enlarge rather than restrict the obligations of South Africa.<sup>309</sup>

Mr. Lachs also relied on that example in asserting the existence of reservations in cases "where a reservation, instead of restricting, extended the obligations assumed by the party in question".<sup>310</sup>

209. The statement by South Africa gave rise to considerable controversy:

(a) Mr. Brierly, in keeping with his general definition of reservations,<sup>311</sup> regarded it as a proposal of reservation, since it involved an offer made to the other parties which they had to accept for it to become a valid reservation;<sup>312</sup>

(b) Mr. Lachs regarded it purely and simply as an example of an extensive reservation;<sup>313</sup>

(c) Horn saw it as a mere declaration of intent without any legal significance,<sup>314</sup> and

(d) Imbert considered that "the statement of the South African Union could only have the effect of increasing the obligations of that State. *Accordingly*,\* it did not constitute a reservation, which would *necessarily*\* restrict the obligations under the treaty" because, as he stated categorically, "there are no 'extensive reservations'".<sup>315</sup>

210. The latter position appears justified, but for reasons that differ from those put forward by this author, which beg the question and do not find support in the Vienna definition.<sup>316</sup> If it is in fact right that one cannot speak of "commissive reservations" it is because this kind of state-

<sup>300</sup> Horn, *op. cit.*, p. 80.

<sup>301</sup> The amendments proposed by Sweden (add [a comma and] the word "limit" after the word "exclude") and Viet Nam (add a comma and the words "to restrict" after the word "exclude"), *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 91 above).

<sup>302</sup> See Horn, *op. cit.*, p. 80.

<sup>303</sup> Ruda, *loc. cit.*, p. 107.

<sup>304</sup> *Yearbook ... 1995*, vol. I, 2401st meeting, p. 154, para. 4.

<sup>305</sup> See paragraph 199 above.

<sup>306</sup> *Yearbook ... 1995*, vol. I, 2401st meeting, p. 155, para. 8.

<sup>307</sup> Horn, *op. cit.*, p. 90.

<sup>308</sup> *Ibid.*

<sup>309</sup> *Yearbook ... 1950*, vol. II, p. 239, para. 85.

<sup>310</sup> *Yearbook ... 1962*, vol. I, 651st meeting, p. 142, para. 49.

<sup>311</sup> See footnote 64 above.

<sup>312</sup> *Yearbook ... 1950*, vol. II, p. 239, para. 86.

<sup>313</sup> *Yearbook ... 1962*, vol. I, 651st meeting, p. 142, para. 49.

<sup>314</sup> Horn, *op. cit.*, p. 89.

<sup>315</sup> Imbert, *op. cit.*, p. 15.

<sup>316</sup> Which point, incidentally, is challenged by Imbert (see paragraphs 148–149 above).

ment cannot have the effect of modifying the legal effect of the treaty or of some of its provisions: they are undertakings which, though admittedly entered into at the time of expression of consent to be bound by the treaty, have no effect on that treaty. In other words, whereas reservations are “non-autonomous unilateral acts”,<sup>317</sup> such statements impose autonomous obligations on their authors and constitute unilateral legal acts which are subject to the legal rules applicable to that type of instrument,<sup>318</sup> and not to the regime of reservations.

211. Obviously, it does not follow from this finding that such statements cannot be made. In accordance with the well-known ICJ dictum:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations ... When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.<sup>319</sup>

But these statements are not reservations in that they are independent of the instrument constituted by the treaty, particularly because they can undoubtedly be formulated at any time.

212. This may be one of the reasons why these statements seem so unusual: as they are made outside the treaty context and they do not appear in collections of treaties or in the instruments that summarize treaty practice.<sup>320</sup> Nonetheless, it would probably be as well to explain in the Guide to Practice that they do not constitute reservations so as to dispel any ambiguity as to their legal regime.

*“1.1.5 A unilateral statement made by a State or an international organization by which that State or that organization undertakes commitments going beyond the obligations imposed on it by a treaty does not constitute a reservation [and is governed by the rules applicable to unilateral legal acts],<sup>321</sup> even if that statement is made at*

<sup>317</sup> See paragraph 121 above.

<sup>318</sup> In this connection, see Ruda, *loc. cit.*, p. 107.

<sup>319</sup> Judgment of 20 December 1974, *I.C.J. Reports 1974* (see footnote 228 above), p. 267.

<sup>320</sup> Despite his efforts, the Special Rapporteur has not found any clear examples of this type of statement. They must be distinguished from certain reservations whereby a State reserves the right to apply its national law with the explanation that it goes further than the obligations under the treaty. For example, when ratifying the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, Thailand pointed out that, as its “drugs law goes beyond the provisions of the Geneva Convention and the present Convention on certain points, the Thai Government reserves the right to apply its existing law” (United Nations, *Multilateral Treaties Deposited with the Secretary-General*, chap. VI.8, p. 275; in the same connection, see the declaration by Mexico (*ibid.*). This is a case of an explanation given to a “reservation under internal law” (see paragraphs 193–194), which, in any event, does not give rise to rights for the other States parties (see in this connection the explanations given by Horn (*op. cit.*, p. 89) on reservations comparable to the 1931 Convention).

<sup>321</sup> The Special Rapporteur is aware that the words in square brackets fall outside the actual context of the definitions that are the subject of this part of the Guide to Practice. Since, however, he will not have another opportunity to revert to statements of this kind (which, as they are not reservations, do not fall within the ambit of the topic), it seems to him that these words would probably be useful.

*the time the State or international organization expresses its consent to be bound by the treaty.”*

(ix) *Reservations designed to increase the rights of their author*

213. “Extensive reservations proper”, namely, statements whereby a State seeks to increase not its own obligations, but those of other States parties to the treaty to which they relate,<sup>322</sup> give rise to entirely different problems which are also a source of much confusion.

214. In this case, a distinction should be made between three kinds of statement which are related only in appearance:

(a) Statements which, because they are designed to exempt their author from certain obligations under the treaty, restrict, by correlation, the rights of the other contracting parties;

(b) Statements whereby a State (or as the case may be, an international organization) proclaims its own right to do or not to do something which is not provided for by the treaty;

(c) Statements designed to impose new obligations, not provided for by the treaty, on the other parties to it.

215. Only the last mentioned category of statement deserves the name “extensive reservations” *sensu stricto*. To the Special Rapporteur’s knowledge, there are no examples.<sup>323</sup> Imbert takes the contrary view: according to him, “practice provides numerous examples of such statements and, in particular, statements whereby some States do not accept the terms of the article indicating that the convention does not automatically apply to the colonial territories”. He considers, however, that they are not reservations, as they are designed to increase the obligations of the other contracting parties—a claim which, according to him, is “inadmissible; statements which could have such a result are in fact only statements of principle which are in no way binding on the other States parties”.<sup>324</sup>

216. Though appealing (since it appears to comply with the principle whereby a State cannot impose obligations on another State against its will), this position is not self-evident. In point of fact, every reservation is designed to increase the rights of the reserving party and, conversely, to limit those of the other contracting parties. As Mr. Bowett pointed out in 1995,<sup>325</sup> by reserving its right not to apply the principle of equidistance provided for in article 6 of the Convention on the Continental Shelf, France increased its rights and restricted those of the United Kingdom. It is probably not overstating the case to say that the many States which formulated a reservation to article XII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide<sup>326</sup> have in fact done the same thing: they challenge a right conferred by that Convention on the administering Powers and make it clear that they are not ready to enter into treaty relations with them if the exer-

<sup>322</sup> See paragraph 208 above.

<sup>323</sup> See, however, paragraph 220 below.

<sup>324</sup> Imbert, *op. cit.*, p. 16.

<sup>325</sup> See paragraph 206 above.

<sup>326</sup> See paragraph 188 above.

cise of that right is claimed, it being for them to raise an objection if they do not mean to forgo it. There is nothing particularly novel in this as compared with exclusionary reservations. If a State rejects a compulsory settlement clause, for example, article IX of the 1948 Convention (in other words, a right created in favour of the other parties to bring it before ICJ), it also restricts the rights of those other States. Contrary to Imbert's view,<sup>327</sup> there is no reason why they would not be required to make an objection to such statements, whether they relate to article IX or to article XII of the 1948 Convention. In both cases, that would seem necessary to preserve their rights under the treaty and, in the specific case, several administering Powers have done so.<sup>328</sup>

217. The same reasoning seems to hold true in the case of other reservations which are sometimes presented as "extensive reservations", such as, for example, the statement in which the German Democratic Republic indicated its intention to bear its share of the expenses of the Committee against Torture only so far as they arose from activities within its competence as recognized by the German Democratic Republic.<sup>329</sup> It is doubtful whether such a reservation is lawful,<sup>330</sup> but it is not because it would have the consequence of increasing the financial burden on the other parties that it should not be described as a reservation or that it would, by its nature, differ from the usual "modifying" reservations.

218. This seems to apply too in the case of another example of "extensive reservation" given by Szafarz: the "reservations formulated by Poland and other socialist countries" to article 9 of the Convention on the High Seas, under which "the rule expressed in Article 9 [relating to the immunity of State vessels] applies to all ships owned or operated by a State",<sup>331</sup> would constitute "extensive reservations" because "the reserving state simply widens its rights (and not its obligations), increasing by the same token the obligations of its partners".<sup>332</sup> Once again, there is in fact nothing special about this: such a reservation "operates" like any modifying reservation. The State which formulates it modulates the rule laid down in the treaty<sup>333</sup> as it sees fit and it is up to its partners to accept it or not.

219. In actual fact, reservations that impose obligations on other States parties to the treaty to which they relate are extremely common<sup>334</sup> and, while they often give rise to objections and are probably sometimes unlawful, they are still covered by the law applicable to reservations and are treated as such by the co-contracting States. The error

made by the authors who exclude "extensive reservations" from the general category of reservations stems from a mistaken basic assumption: they reason as though the treaty between the reserving State or international organization and its partners is necessarily in force, but that is not so. The reservation is *formulated* (or confirmed) at the time of expression of consent to be bound, but it produces its effects only after they have accepted it in one way or another.<sup>335</sup> Furthermore, it is self-evident that the State which formulates the reservations is bound to respect the rules of general international law. It may seek to divest one or more provisions in the treaty of effect, but, in so doing, it makes a renvoi to existing law "minus the treaty" (or "minus the relevant provisions"). In other words, it may seek to increase its rights *under the treaty* and/or to reduce those of its partners *under the treaty*, but it cannot "legislate" via reservations and the Vienna definition precludes this risk by stipulating that the author of the reservation must seek "to exclude or to modify the legal effect of certain provisions *of the treaty*"\* and not "of certain rules of general international law".

220. It is from that standpoint that doubts may arise whether another "reservation", about which much has been written,<sup>336</sup> has the nature of a genuine reservation, namely, the reservation of Israel to the provisions of the Geneva Conventions of 12 August 1949 on the Red Cross emblems to which they wanted to add the shield of David. This doubt stems from the fact that this "reservation" is not designed to exclude or modify the effect of provisions *of the treaties* in question (which in fact remain unchanged), but to add a provision *to* those treaties.

221. No firm conclusions concerning the definition of reservations can automatically be drawn from the foregoing. At the same time, given the importance of the discussions on the existence and nature of "extensive reservations", it would seem difficult to say nothing about the matter in the Guide to Practice.

222. The main elements that emerge from the brief study above are as follows:

(a) It is not unusual for a unilateral declaration to aim at minimizing the obligations incumbent on its author under the treaty and, conversely, to reduce the rights of the other parties to treaties;

(b) Such a declaration should in principle be regarded as a reservation;

(c) Unless, instead of seeking to exclude or modify the provisions of the treaty, it amounts to adding one or more provisions that do not appear in it.

On this basis, the Guide to Practice might provide:

*"1.1.6 A unilateral statement made by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a*

<sup>327</sup> Imbert, *op. cit.*, p. 16.

<sup>328</sup> See United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. IV.1, pp. 89–91.

<sup>329</sup> *Ibid.*, chap. IV.9, p. 200, note 5.

<sup>330</sup> Edwards Jr., *loc. cit.*, pp. 392–393.

<sup>331</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. XXI.2, p. 789.

<sup>332</sup> Szafarz, *loc. cit.*, pp. 295–296.

<sup>333</sup> See paragraph 194 above.

<sup>334</sup> See the examples given by Horn (*op. cit.*, pp. 94–95): reservations to the Vienna Convention on Diplomatic Relations which concerns certain immunities; reservations to the provisions of the Convention on the High Seas concerning the freedom to lay submarine cables and pipelines; and reservations to the Convention on the Territorial Sea and the Contiguous Zone relating to the right of innocent passage.

<sup>335</sup> See article 20 of the 1969 and 1986 Vienna Conventions; see also paragraph 121 above.

<sup>336</sup> Cf. Pictet, *Les Conventions de Genève du 12 août 1949: Commentaire*, pp. 330–341, and Horn, *op. cit.*, pp. 82–83 (who doubt whether it is a reservation), and Rosenne, "The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David", pp. 9–54, and Imbert, *op. cit.*, pp. 361–362 (who take the contrary view).

*treaty and by which its author intends to limit the obligations imposed on it by the treaty and the rights which the treaty creates for the other parties constitutes a reservation, unless it adds a new provision to the treaty.*"

(d) "... however phrased or named ..."

223. It is abundantly clear from the Vienna definition that the wording or name of a unilateral statement which is designed to exclude or modify the legal effect of the treaty in its application to its author constitutes a reservation. "Thus, the test is not the nomenclature but the effect the statement purports to have".<sup>337</sup> Any nominalism is precluded. A reservation can be called a "statement" by its author,<sup>338</sup> but it is still a reservation if it also meets the criteria laid down in the Vienna Conventions.

224. The problems raised by the differentiation between unilateral statements which constitute reservations and those which do not are the subject of more detailed consideration in paragraphs 231–413 below.

225. At this stage, it suffices to note that inter-State practice and jurisprudence refrain from any nominalism; they do not dwell on what to call the unilateral statements which States combine with their consent to be bound, but try to pinpoint the actual intentions as they emerge from the substance of the statement and even of the context in which it was made.

226. So far as jurisprudence is concerned, the most remarkable example of an interpretative declaration being reclassified as a reservation is probably provided by the judgement delivered by the European Court of Human Rights in the *Belilos v. Switzerland* case. Switzerland accompanied its instrument ratifying the European Convention on Human Rights by a unilateral declaration which it entitled "interpretative declaration".<sup>339</sup> It nonetheless considered that it was a genuine reservation:

Like the Commission and the Government, the Court recognises that it is necessary to ascertain the original intention of those who drafted the declaration.

...

In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content.<sup>340</sup>

<sup>337</sup> Bowett, loc. cit., p. 68; see also Jennings and Watts, op. cit., p. 1241: "... a State cannot, therefore, avoid its unilateral statement constituting a reservation just by calling it something else." Doctrine subsequent to 1969 is unanimous on the matter; before that, it was more divided (see Holloway, *Modern Trends in Treaty Law: Constitutional Law, Reservations and the Three Modes of Legislation*, p. 486).

<sup>338</sup> English is richer than French in this regard; see Gamble Jr., loc. cit., p. 374: "Thus, a reservation might be called a declaration, an understanding, a statement, or a reservation." The words "understanding" and "statement" have hardly any other translation in French than "*déclaration*". See also Sucharipa-Behrmann, whose enumeration is even richer: "The designation of the statement as reservation, declaration, interpretative declaration, understanding, proviso or otherwise is irrelevant" (loc. cit., p. 72).

<sup>339</sup> See paragraph 111 above.

<sup>340</sup> Judgment of 29 April 1988 (see footnote 160 above), pp. 23–24, paras. 48–49.

227. The European Commission of Human Rights followed the same approach five years earlier in the *Temeltasch* case. On the basis of article 2, paragraph 1 (d), of the 1969 Vienna Convention<sup>341</sup> and agreeing

on this point, with the majority of legal writers and considers that where a State makes a declaration, presenting it as a condition of its consent to be bound by the Convention and intending to exclude or alter the legal effect of some of its provisions, such a declaration, *whatever it is called*,\* must be assimilated to a reservation ...<sup>342</sup>

228. On the other hand, the Court of Arbitration appointed to settle the Franco-British dispute in the *English Channel* case concerning the delimitation of the continental shelf carefully considered the United Kingdom argument that the third French reservation to article 6 of the Convention on the Continental Shelf was in fact no more than a mere interpretative declaration.<sup>343</sup>

229. The practice of States follows the same lines; when reacting to certain unilateral statements presented as being purely interpretative, they do not hesitate to proceed to reclassify them as reservations and to object to them.<sup>344</sup> Finland was particularly punctilious in this regard in its objections to the "reservations, understandings and declarations made by the United States of America" to the International Covenant on Civil and Political Rights:

It is recalled that under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty.<sup>345</sup>

230. These few examples are amply sufficient to show that it is common in practice to undertake the reclassification for which the Vienna definition calls without any special difficulties arising with the definition of reservations themselves. It therefore does not seem to be necessary to amplify that definition in any way for the purpose of the Guide to Practice. On the other hand, it would probably be useful to try to draw normative conclusions from the foregoing review concerning the definition of what can be regarded as "the mirror image" of reservations, namely, interpretative declarations and, in that connection, to lay down criteria for the distinction.

<sup>341</sup> See paragraph 114 above.

<sup>342</sup> Decision of 5 May 1982 (see footnote 164 above), p. 147, para. 73.

<sup>343</sup> Decision of 30 June 1977 (see footnote 159 above). See paragraph 112 above.

<sup>344</sup> See, among the very numerous examples, the formula used by Japan, which stated that "it does not consider acceptable any unilateral statement in *whatever form*," made by a State upon signing, ratifying or acceding to the Convention on the Territorial Sea and the Contiguous Zone, which is intended to exclude or modify for such State legal effects of the provisions of the Convention" (United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. XXI.1, p. 784); the objections of Germany to "declarations to be qualified in substance as reservations" made by several States to the Convention on the High Seas (ibid., chap. XXI.2, p. 790); and the objections of a number of States to the (belated) "statements" by Egypt concerning the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (ibid., chap. XXVII.3, pp. 924–925).

<sup>345</sup> Ibid., chap. IV.4, p. 133; see also the objections of Sweden (ibid., p. 135).

### C. The distinction between reservations and interpretative declarations

#### 1. FREQUENCY OF INTERPRETATIVE DECLARATIONS

231. Notwithstanding the apparent silence of the 1969 and 1986 Vienna Conventions on this phenomenon, States have always felt that they could attach to their expression of consent to be bound by a multilateral treaty declarations whereby they indicate the spirit in which they agree to be bound; these declarations do not, however, seek to modify or exclude the legal effect of certain provisions of the treaty and thus do not constitute reservations.

232. The long-standing practice of such declarations has been in existence since multilateral treaties themselves first appeared. Generally speaking, it dates back to the Final Act of the Congress of Vienna in 1815, which brought together “in a general instrument” all treaties concluded in the wake of Napoleon’s defeat.<sup>346</sup> With this initial appearance of the multilateral format came both a reservation<sup>347</sup> and an interpretative declaration. The latter came from Great Britain, which, when the instruments of ratification were exchanged, declared that article VIII of the Treaty of Alliance concluded with Austria, Prussia and Russia, which invited France to join the Alliance, must be “understood as binding the Contracting Parties ... to a common effort against the power of Napoleon Buonaparte ..., but is not to be understood as binding His Britannic Majesty to prosecute the War, with a view of imposing upon France any particular Government”.<sup>348</sup>

233. This practice developed as the number of multilateral conventions on increasingly numerous, varied and sensitive topics grew.<sup>349</sup> Today it has become extremely common—one might almost say systematic, at least in certain areas such as human rights or disarmament.

234. The table below was compiled on the basis of replies from States to the questionnaire on reservations. It has absolutely no scientific value,<sup>350</sup> but it is interesting nonetheless in that it empirically establishes the extent of this phenomenon: interpretative declarations are as widely used as reservations.<sup>351</sup>

<i>States</i>	<i>Interpretative declarations</i>	<i>Reservations</i>
1. Argentina	19	13
2. Bolivia	10	2
3. Canada	23	–
4. Chile	10	7
5. Colombia	–	4
6. Croatia	3	1
7. Denmark	2	36
8. Ecuador	1	1
9. Estonia	5	10
10. Finland	5	28
11. France	46	24
12. Germany	11	–
13. Holy See	2	2
14. India	8	–
15. Israel	1	10
16. Japan	5	12
17. Kuwait	2	–
18. Malaysia	6	3
19. Mexico	25	19
20. Panama	1	–
21. Peru	1	9
22. Republic of Korea	5	14
23. San Marino	–	1
24. Slovakia	1	–
25. Slovenia	2	3
26. Spain	71	37
27. Sweden	7	22
28. Switzerland	16	48
29. United Kingdom	–	45
30. United States	28	–

<sup>346</sup> Bastid, *op. cit.*, p. 25.

<sup>347</sup> That of Sweden to the provisions relating to sovereignty over the Duchy and Principality of Lucca; see Bishop Jr., *loc. cit.*, pp. 261–262.

<sup>348</sup> *Ibid.* Bishop Jr. views this declaration as a reservation; it would seem more accurate to consider it an interpretative declaration (see, in this sense, Sapienza, who makes a careful analysis of the text of the declaration and its context, *op. cit.*, pp. 28–34).

<sup>349</sup> See Sapienza, *op. cit.*, pp. 8–19.

<sup>350</sup> It draws a comparison between the responses to question 3.1 (“Has the State attached any interpretative declarations to the expression of its consent to be bound by the multilateral treaties to which it is a party? (Please list the treaties and provide the text of the declarations)”) and 1.2 (a comparable question pertaining to reservations). Not all States that responded to the questionnaire answered these questions (in which case they were omitted from the list), and those that did answer them did not necessarily furnish an exhaustive list of their reservations and declarations; what is more, States did not always specify the criteria they used in making such a distinction. See *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annex II.

<sup>351</sup> None of the international organizations that responded to the questionnaire claimed to have made a reservation or a declaration to a treaty to which they were party. This finding is not terribly significant: those organizations having the possibility of becoming parties to multilateral treaties are essentially integration organizations, yet the

most important among them, the European Communities, did not, unfortunately, respond to the questionnaire at this time. In principle, the the European Communities do not appear to have attached any reservations to their consent to be bound by such treaties. They have, however, made interpretative declarations when signing or expressing their consent to be bound. See, for example, the declaration made to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context:

“It is understood, that the Community Member States, in their mutual relations, will apply the Convention in accordance with the Community’s internal rules, including those of the EURATOM Treaty, and without prejudice to appropriate amendments being made to those rules.

“The European Community considers that, if the information of the public of the Party of origin takes place when the environmental impact assessment documentation is available, the information of the affected Party by the Party of origin must be implemented simultaneously at the latest.

“The Community considers that the Convention implies that each Party must assure, on its territory, that the public is provided with the environmental impact assessment documentation, that it is informed and that its observations are collected.”

(United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. XXVII.4, p. 927)

## 2. USEFULNESS OF THE DISTINCTION

235. For a long time, then, the two types of unilateral declaration were not clearly distinguished in State practice or in doctrine. In the latter case, the dominant view grouped them together, and authors who made a distinction generally found themselves embarrassed by it.<sup>352</sup>

236. The preparatory work for the 1969 Vienna Convention<sup>353</sup> and the subsequent adoption of that instrument have hardly contributed to a uniform doctrinal approach,<sup>354</sup> the current state of which is summarized by Horn as follows:

To sum up, legal doctrine has not succeeded in doing away with the uncertainty from which the notion of interpretative declarations suffered throughout all the deliberations of the ILC and the Vienna Conference. Some writers, such as Sinclair, Elias and O'Connell contend for different reasons that interpretative declarations should not be identified with reservations. The concept of reservation and the concept of interpretative declaration were independent and non-overlapping. Others like Tomuschat demand that these declarations should be identified with reservations. The concept of interpretative declaration formed part of the broader concept of reservation. A third group chose a position between these two extremes by counting only interpretative declarations presented as an absolute condition for participation in the treaty as reservations. The concept of interpretative declaration and the concept of reservation were distinct but partly overlapping.<sup>355</sup>

237. It is true that the preparatory work for the 1969 Vienna Convention is unlikely to dispel any doubts that may be had with regard to their true legal nature: not only does the Convention not define them, but the positions taken during its elaboration probably help to make a controversial concept even more obscure. This was in fact the case, as the preparatory process drew to a close, with the positions taken by Sir Humphrey Waldock, Special Rapporteur, who, after rejecting a Japanese proposal which sought to define interpretative declarations positively on the pretext that the problem was one of interpretation, nevertheless maintained that such documents could not be considered contextually relevant for the purposes of interpreting a treaty.<sup>356</sup>

238. These uncertainties are not necessarily bad. After all, imprecision in the rule of law can be constructive and lead to fruitful developments by allowing practice to set the norm (or determine the absence thereof) based on needs and circumstances. In the view of the Special Rapporteur, however, this is not the case with the situation at hand: whatever its flaws or inadequacies, the regime of reservations set out in articles 19 to 23 of the Vienna Conventions is a relatively limiting *corpus juris*; it is therefore important for States and international organizations to know exactly the instruments to which it applies. This is true first of all for the State or international organization expressing its consent to be bound, which must choose between a genuine reservation or a "mere" interpretative declaration; it is true also for the depositary, who must

<sup>352</sup> See the survey of doctrine prior to 1969 made by Horn, *op. cit.*, p. 229; see also McRae, "The legal effect of interpretative declarations", p. 156; Sapienza, *op. cit.*, pp. 69–82 (prior to the Second World War) and pp. 117–122 (post-1945); and Sinclair, *op. cit.*, pp. 52–53.

<sup>353</sup> See paragraphs 52–67 above.

<sup>354</sup> See again the accounts by Horn, *op. cit.*, pp. 234–235, and Sapienza, *op. cit.*, pp. 203–207.

<sup>355</sup> Horn, *op. cit.*, p. 235.

<sup>356</sup> See paragraphs 62–64 above and paragraph 348 below.

communicate the reservation to the other States parties and to States entitled to become parties,<sup>357</sup> and it is equally true for the other States parties themselves, whose silence on a reservation has effects that are codified in the Conventions.<sup>358</sup> "However elusive the distinction may be in certain cases, the consequences of this distinction are important."<sup>359</sup>

239. It is true that this reasoning implies that the problem is partially solved in that it postulates that the regime applicable to interpretative declarations is distinct from the regime for reservations, an assumption which some authors contest.<sup>360</sup> The approach taken in the present report<sup>361</sup> is based on this assumption, the merits of which can only be determined to the extent that the legal regime of interpretative declarations is spelled out.

240. Suffice it at this stage to note that States (and, to a lesser degree, international organizations) make this distinction whenever they formulate unilateral declarations when signing multilateral treaties or expressing their consent to be bound and their partners do not treat all of them, at least not always, in the same manner, any more than does case law.<sup>362</sup>

241. Moreover, the question of a distinction between reservations and interpretative declarations is one of the questions on which the representatives of States in the Sixth Committee<sup>363</sup> and the members of the Commission<sup>364</sup> have focused most frequently in the debates on earlier reports on reservations to treaties. This would seem sufficient to establish that clarification of this distinction meets a genuine need.

242. However, this is a particularly difficult task, since the inconsistency of the terminology and the broad range of reasons that lead States to formulate interpretative declarations make the search for distinguishing criteria tricky, and applying such criteria is likewise not unproblematic.

(a) *The difficulty in distinguishing between reservations and interpretative declarations*

243. "The question of determining the nature of a statement is one of the very fundamental problems in reservation law."<sup>365</sup> Its solution is complicated by the variety of

<sup>357</sup> Article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions.

<sup>358</sup> Article 20.

<sup>359</sup> Bowett, *loc. cit.*, p. 69.

<sup>360</sup> See in particular Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties: comments on arts. 16 and 17 of the ILC's 1966 draft articles on the law of treaties", p. 465.

<sup>361</sup> See paragraphs 45–46 above.

<sup>362</sup> See paragraphs 160–161 above and 279–283 below.

<sup>363</sup> See in particular the statements made on this topic by Sweden, speaking on behalf of the Nordic countries, *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 21st meeting (A/C.6/52/SR.21), para. 13; South Africa, para. 57; and the Republic of Korea (*ibid.*, 22nd meeting (A/C.6/52/SR.22), para. 6).

<sup>364</sup> See in particular the statements by Mr. Tomuschat (*Yearbook ... 1995*, vol. I, 2401st meeting), Mr. Razafindralambo (*ibid.*, 2402nd meeting), Mr. Robinson (*ibid.*), Mr. He (*ibid.*, and *Yearbook ... 1997*, vol. I, 2500th meeting), Mr. Villagrán Kramer (*Yearbook ... 1995*, vol. I, 2403rd meeting), Mr. Elaraby (*ibid.*, 2404th meeting), Mr. Yamada (*ibid.*, 2407th meeting), Mr. Arangio-Ruiz (*ibid.*) and Mr. Addo (*Yearbook ... 1997*, vol. I, 2500th meeting).

<sup>365</sup> Horn, *op. cit.*, p. 336.

objectives pursued by the authors of such declarations and the imprecision of the terminology used.

(i) *Obstacles arising from the variety of reasons that lead States to make interpretative declarations*

244. Surely, if words have meaning, then the provisions of a treaty are to be interpreted, in principle, without—and this is the difference between interpretative declarations and reservations—modifying or excluding their legal effect. Over and above this, however, the reasons that lead States to use this process appear to be fairly varied, as demonstrated by the responses of States to the questionnaire on reservations to treaties.

245. In certain situations, it is clear that the executive power must reassure the national parliament as to the actual scope of a treaty by which the State is to be bound. Bishop Jr. considers that this was the case with the “reservation” of the United States to the Convention for the Pacific Settlement of Disputes concluded at the First Hague Peace Conference in 1899<sup>366</sup> and the British and American declarations on the subject of the 1928 Kellogg-Briand Pact for the renunciation of war as an instrument of national policy.<sup>367</sup> Likewise, when ratifying the 1929 International Convention for the Safety of Life at Sea, the United States attached understandings to its instrument, stipulating that:

These “understandings” were adopted by the Senate to meet objections which had been made to ratification of the Convention by the United States because of apprehension in some quarters that the Act of Congress approved March 4, 1915, known as the Seaman’s Act, might be affected thereby.<sup>368</sup>

246. Very often this concern relates to a desire to put forward an interpretation that is compatible with the provisions of internal legislation,<sup>369</sup> which is one of the most frequently cited reasons for such declarations.<sup>370</sup> This was the case, for example, with the declaration by Switzerland in respect of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,<sup>371</sup> or the famous declaration by France concerning article 27 of the International Covenant on Civil and Political Rights:

In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned.<sup>372</sup>

247. In other instances, declarations are intended to recall the existence of general principles of international law that the author State considers to be of special importance. For

<sup>366</sup> Bishop Jr., loc. cit., p. 256; this famous “reservation” interprets the Convention as being compatible with the Monroe Doctrine.

<sup>367</sup> Ibid., pp. 307 and 309.

<sup>368</sup> Ibid., p. 311.

<sup>369</sup> In its reply to the questionnaire on reservations, the Holy See indicated that the declarations it made were intended to spell out the effects of the treaty obligation in relation to the very nature of the Holy See (reply to question 3.4).

<sup>370</sup> In its response to question 3.4 of the questionnaire on reservations, Mexico said that in general, declarations were related to the internal application of the instruments in respect of which they were formulated, in the light of the provisions of national legislation. Kuwait’s response to question 3.4 was similar.

<sup>371</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. XVIII.7, p. 713.

<sup>372</sup> Ibid., chap. IV.4, p. 124.

example, Sweden explained the declaration it made when signing the United Nations Convention on the Law of the Sea as being mainly of a security policy nature.<sup>373</sup> And this was probably the spirit of the declarations made by Belarus, the Russian Federation, Ukraine and Viet Nam in respect of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character: these four States felt it necessary to declare, in very similar terms, that

the principle of the absolute inviolability of the offices of delegations to international conferences is a rule of customary international law which must be observed by all States.<sup>374</sup>

248. An interpretative declaration can also be formulated with a view to recalling the position taken by a State during the negotiations which led to the adoption of the treaty. This was how Argentina partially explained the declarations it attached to its ratification of the United Nations Convention on the Law of the Sea and Mexico explained those which accompanied its signature of the Treaty on the Non-Proliferation of Nuclear Weapons, the Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof (Seabed Treaty), and the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction.<sup>375</sup> Likewise, the only interpretative declaration mentioned by Peru in response to the questionnaire on reservations (question 3.1) concerned the “Protocol of Cartagena de Indias” (Protocol of Amendment to the Charter of the Organization of American States) and consisted of a reaffirmation of the country’s position during the negotiations.<sup>376</sup>

249. Finally, it cannot be denied that some unilateral declarations are presented as “interpretative” with a view to getting around the prohibition or limitation on reservations stipulated in the treaty to which they apply, or as the result of the general rules applicable to reservations (particularly *ratione temporis*).<sup>377</sup>

<sup>373</sup> Reply to question 3.1 of the questionnaire on reservations; also comparable are Panama’s reply to question 3.4 on the subject of the declaration that country attached to its instrument of ratification of the “Protocol of Cartagena de Indias” (*Inter-American Treaties and Conventions: Signatures, Ratifications, and Deposits with Explanatory Notes*, Treaty Series No. 9 Rev. 1993, A-50, p. 3) and the declaration by Japan concerning the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. XXVII.3, p. 922).

<sup>374</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. III.11, pp. 81–82.

<sup>375</sup> Ibid., chap. XXI.6, pp. 801–802 (Argentina); *ibid.*, *Treaty Series*, vol. 729, p. 294, and vol. 1563, p. 442 (Mexico). Also in reply to question 3.4 of the questionnaire on reservations.

<sup>376</sup> *Inter-American Treaties and Conventions* ... (see footnote 373 above), p. 2. The declaration made at the time of signature, 5 December 1985, is clearer in this regard than that which accompanied the instrument of ratification, dated 18 September 1996.

<sup>377</sup> See the “declarations” made by Yugoslavia to the Seabed Treaty (United Nations, *Treaty Series*, vol. 955, p. 193) and Migliorino, “Declarations and reservations to the 1971 Seabed Treaty”, p. 111. In the past, some States also sought to bypass the requirement that reservations must be unanimously accepted; see Holloway, *op. cit.*, p. 486.

250. A number of commentators<sup>378</sup> have noted that some of the “interpretative declarations” attached by nuclear-weapon States to their ratification of the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), article 27 of which prohibits reservations but not interpretative declarations, and of the protocols to the Treaty, were actually reservations.<sup>379</sup> Similarly, the interpretative nature of some of the declarations made by States concerning the United Nations Convention on the Law of the Sea, articles 309 and 310 of which prohibit reservations but expressly permit declarations, provided that they “do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State”, was contested by other States parties.<sup>380</sup>

251. Furthermore, even when a reservation might be possible, it is clear that States often prefer to make use of so-called “interpretative” declarations, which ostensibly make their hesitation less obvious. Denmark noted in its reply to questions 3.1 to 3.13.2 of the questionnaire on reservations that there even seemed to be a tendency among States to cast their reservations in terms of interpretative statements either because the treaty did not allow for a reservation proper or because it looked “nicer” with an interpretative declaration than a real reservation.

(ii) *Obstacles arising from unclear terminology*

252. An important element of the definition of reservations has to do with its indifference to the terminology used by States or international organizations when they formulate them, a fact that the 1969 and 1986 Vienna Conventions highlight by defining a reservation as “a unilateral statement, *however phrased or named* \* ...”.<sup>381</sup>

253. This “negative precision” eschews any nominalism to focus attention on the actual content of declarations and on the effect they seek to produce, but—and here is the reverse side of the coin—this decision to give precedence to substance over form runs the risk, in the best of cases, of encouraging States not to pay attention to the name they give to their declarations, thereby sowing confusion or unfortunate ambiguity; in the worst cases, it allows them to play with names in the (often successful) hope of misleading their partners as to the real nature of their intentions. By giving the name of “declarations” to instruments that are obviously and unquestionably real reservations, they hope not to arouse the vigilance of the other States parties while attaining the same objectives; conversely, to give greater weight to declarations that clearly have no legal effect on the provisions of a treaty, they label them “reservations”, even though under the terms of the Vienna definition they are not.

<sup>378</sup> The Special Rapporteur does not intend, at least not at this stage, to give his views on the relative merits of these analyses or of the “requalifications” invoked by some co-contracting parties.

<sup>379</sup> See, for example, Gros Espiell, “La signature du traité de Tlatelolco par la France et la Chine”, and Boniface, *Les sources du droit du désarmement*, pp. 76–82.

<sup>380</sup> See in particular the many objections raised in connection with the declaration by the Philippines (United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. XXI.6, pp. 824–826).

<sup>381</sup> See paragraphs 223–230 above.

254. Regardless of the true objectives pursued by States, it must be admitted that the terminology in this area is marked by a high level of confusion. While in French one encounters few terms other than “réserves” and “déclarations”,<sup>382</sup> English terminology is much more varied, since certain English-speaking States, particularly the United States of America, use not only “reservation” and “(interpretative) declaration”, but also “statement”, “understanding”, “proviso”, “interpretation”, “explanation” and so forth.<sup>383</sup>

255. Instruments having the same objective can be called “reservations” by one State party and “interpretative declarations” by another. For example, France and Monaco have used identical terms to spell out the way in which they interpret article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, yet Monaco submitted this interpretation as a reservation, while France formally announced that its intention was merely to “record [its] interpretation” of that provision.<sup>384</sup> Suy gives the example of identically worded declarations by Italy and Trinidad and Tobago regarding article 15 of the International Covenant on Civil and Political Rights, but described as a declaration by the former and a reservation by the latter; “[at] the request of the Secretariat, the

<sup>382</sup> This would seem to hold true in general for all the romance languages: in Spanish, the distinction is made between “reserva” and “declaración (interpretativa)”, in Italian between “riserva” and “dichiarazione (interpretativa)”, in Portuguese between “reserva” and “declaração (interpretativa)”, and in Romanian between “rezervă” and “declarație (interpretativ)”. The same holds true for Arabic, German and Greek.

<sup>383</sup> See footnote 338 above. Whiteman describes United States practice this way:

“The term ‘understanding’ is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than a substantive reservation ...

“The terms ‘declaration’ and ‘statement’ are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty.”

(Op. cit., pp. 137–138); see also the letter dated 27 May 1980 from Arthur W. Rovine, Assistant Legal Adviser for Treaty Affairs, United States Department of State, to Ronald F. Stowe, Chairman, Committee on Aerospace Law, International Law Section, American Bar Association, reproduced in Leich, ed., *Digest of United States Practice in International Law*, pp. 397–398. These various names can have a legal impact on some domestic legislation; they seem not to in the area of international law, and it is not certain that the distinctions are categorical, even at the internal level. Thus during the debate in the United States Senate on the Convention on the Organisation for Economic Co-operation and Development, when the Chairman of the Committee on Foreign Relations asked what the difference was between declaration, understanding, and reservation, the Under-Secretary of State for Economic Affairs replied: “Actually the difference between a declaration and an understanding, I think, is very subtle, and I am not sure that it amounts to anything” (quoted by Whiteman, op. cit., p. 192). As the Special Rapporteur understands it, in Chinese, Russian and the Slavic languages in general, it is possible to draw distinctions between several types of “interpretative” declarations.

<sup>384</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. IV.2, pp. 97, 99 and 108, note 16. Poland and the Syrian Arab Republic have also declared in the same terms that they do not consider themselves bound by the provisions of article 1, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, but the former expressly called this statement a “reservation”, while the latter labelled it a “declaration” (ibid., chap. XVIII.7, p. 713).

Government of Trinidad and Tobago indicated that it was simply an interpretative declaration".<sup>385</sup>

256. Sometimes instruments having the same purpose are qualified as "reservations" by some States, "interpretations" by others and not qualified at all by still others.<sup>386</sup> In some cases, a State will employ various expressions that make it difficult to tell whether they are attempting to formulate reservations or interpretative declarations and whether they have different meanings or scope. France, for example, upon acceding to the International Covenant on Civil and Political Rights, used the following:

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

with all of these formulas appearing under the heading "Declarations and reservations".<sup>387</sup>

257. Thus the same words can, in the view of the very State employing them, cover a range of legal realities. In accepting the Convention on the Inter-Governmental Maritime Consultative Organization, Cambodia twice used the word "declares" to explain the scope of its acceptance. In response to a request for clarification from the United Kingdom, Cambodia explained that the first part of its declaration was "of a political nature" but that the second part was a reservation.<sup>388</sup>

258. It sometimes happens that, faced with an instrument entitled "declaration", the other parties to the treaty view it in different ways and treat it either as such or as a "reservation", or, conversely, that objections to a "reservation" refer to it as a "declaration". For example, while several of the "Eastern bloc" countries identified their statements of opposition to article 11 of the Vienna Convention on Diplomatic Relations (which deals with the size of missions) as "reservations", the countries that objected to those statements sometimes called them "reservations" (Germany and the United Republic of Tanzania) and sometimes "declarations" (Australia, Belgium, Canada, Denmark, France, the Netherlands, New Zealand, Thailand and the United Kingdom).<sup>389</sup>

259. At the limit of this terminological confusion, there are even occasions when States make interpretative declarations by means of a specific reference to the provisions of a convention on reservations. Such was the case of a "declaration" made by Malta with regard to article 10 of the European Convention on Human Rights which referred to article 64 of that instrument.<sup>390</sup>

<sup>385</sup> "Droit des traités et droits de l'homme" (Treaty law and human rights), p. 945.

<sup>386</sup> See in this connection the comments by Horn (op. cit., p. 294) on the subject of declarations made in respect of the International Covenant on Civil and Political Rights.

<sup>387</sup> Example cited by Sapienza, op. cit., pp. 154–155. Full text in United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. IV.4, p. 124.

<sup>388</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. XII.1, pp. 612 and. 631, note 10.

<sup>389</sup> Ibid., chap. III.3, pp. 58–63.

<sup>390</sup> Example cited by Schabas, "Article 64", p. 926.

### (b) *The definition of interpretative declarations*

260. It goes without saying that the elements listed above are not in themselves likely to facilitate the search for an indispensable criterion for distinguishing between reservations and interpretative declarations. It should be possible to seek one empirically, however, by starting, as is generally done,<sup>391</sup> with the definition of reservations in order to extract, by means of comparison, the definition of interpretative declarations. At the same time this also makes it possible to distinguish both interpretative declarations and reservations from other unilateral declarations that fall into neither of these categories.

#### (i) *Interpretative declarations in the light of the definition of reservations*

261. It appears prima facie that the four constituent elements of the definition of reservations<sup>392</sup> "discriminate" unequally, given that two of them, the character of a unilateral declaration and the indifference to nominalism, are surely to be found in the definition of interpretative declarations. This is less clear where the criterion of *ratione temporis* is concerned, since excluding it from the definition of interpretative declarations would in any case not be sufficient to justify a regime other than the regime of reservations. It is therefore the teleological element, the aim of the author, that would at first glance seem to be the determining one.

262. For the sake of convenience, it might be useful to distinguish between those elements of the definition that are common to both institutions and the teleological element, which involves the criterion of distinction itself, and to consider separately the question, of secondary importance but controversial, as to when an interpretative declaration may be made.

#### a. Elements common to the definitions of reservations and interpretative declarations

263. These common elements are: first, that both are unilateral declarations made by States or international organizations; and, secondly, that their name or phrasing is irrelevant to their definition.

#### "A unilateral declaration ..."

264. "As concerns the outer requisites and their formal appearance, interpretative declarations may not be distinguished from reservations. Both are unilaterally initi-

<sup>391</sup> See Sapienza, op. cit., p. 142. Horn points out that there are two possible approaches: "It appears that writers mean different things when they talk about interpretative declarations. Some have meant the term 'interpretative declaration' as used on various occasions by states, others have had an objective concept of interpretative declaration in mind" (op. cit., p. 236). The attempt made in this report represents an intermediate approach: it begins with the twofold postulate according to which: (a) reservations and interpretative declarations are distinct legal realities, as empirical observation of State practice shows (and this is related to the first of the approaches identified by Horn); and (b) interpretative declarations are intended ... to interpret the provisions of a treaty and not to exclude or modify their legal effect in their application to the State formulating them (this relates to the second approach, which is more "normative" than "descriptive").

<sup>392</sup> See paragraphs 78–82 above.

ated, cast in writing and presented at clearly identifiable moments.”<sup>393</sup>

265. There would seem to be little point in dwelling on the first aspect: an interpretative declaration is just as much a unilateral declaration as is a reservation. It is in fact this common point that lies at the origin of the whole problem of distinguishing between them: they present themselves in the same manner; nothing distinguishes them as to form.

### Joint formulation of an interpretative declaration

266. At most it must be noted that, as with reservations, this unilateral character poses no obstacle to their joint formulation by several States and/or international organizations. And while draft guideline 1.1.1, which recognizes this possibility vis-à-vis reservations, is not, to the best of the Special Rapporteur’s knowledge, based on any precedent,<sup>394</sup> the same cannot be said with regard to interpretative declarations.

267. Indeed, as in the case of reservations, it is not uncommon for several States to consult with each other before formulating identical or quite similar declarations. This was the case, for example, with several interpretative declarations formulated by the “Eastern bloc” countries prior to 1990,<sup>395</sup> with those made by the Nordic countries in respect of several conventions,<sup>396</sup> or with the declarations made by 13 States members of the European Community when signing the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, and confirmed upon ratification, which stated:

As a Member State of the European Community, [each State] will implement the provisions of the Convention on the Prohibition of Chemical Weapons, in accordance with its obligations arising from the rules of the Treaties establishing the European Communities to the extent that such rules are applicable.<sup>397</sup>

268. At the same time, and contrary to what has occurred thus far in the area of reservations, there have also been truly joint declarations, formulated in a single instrument, by “the European Community and its Member States” or by the latter alone. This occurred in the case of:

(a) Examination of the possibility of accepting annex C.1 of the 1976 Protocol to the Agreement on the

<sup>393</sup> Horn, *op. cit.*, p. 236.

<sup>394</sup> See paragraph 128 above.

<sup>395</sup> See, for example, the declarations by Belarus, Bulgaria, Hungary, Mongolia, Romania, the Russian Federation and Ukraine concerning articles 48 and 50 of the Vienna Convention on Diplomatic Relations (Cuba formulated an express reservation; the wording of Viet Nam’s declaration is ambiguous) (United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. III.3, pp. 55–58) or those of Albania, Belarus, Bulgaria, Hungary, Poland, Romania, the Russian Federation and Ukraine concerning article VII of the 1953 Convention on the Political Rights of Women (*ibid.*, chap. XVI.1, pp. 682–684).

<sup>396</sup> See, for example, the declarations by Denmark, Finland, Iceland, Norway and Sweden concerning article 22 of the 1963 Vienna Convention on Consular Relations (*ibid.*, chap. III.6, pp. 72–74).

<sup>397</sup> *Ibid.*, chap. XXVI.3, pp. 890–892.

Importation of Educational, Scientific and Cultural Materials of 22 November 1950,<sup>398</sup>

(b) Implementation of the 1992 United Nations Framework Convention on Climate Change;<sup>399</sup>

(c) Implementation of the 1992 Convention on biological diversity;<sup>400</sup>

(d) Implementation of the 1995 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.<sup>401</sup>

269. There are real precedents which justify a fortiori the adoption of a draft guideline on interpretative declarations similar to draft guideline 1.1.1 on reservations:

“1.2.1 *The unilateral nature of interpretative declarations is not an obstacle to the joint formulation of an interpretative declaration by several States or international organizations.*”

270. As is the case with reservations, it must be understood, first, that such a formulation cannot limit the discretionary competence of each of the “joint declarants” to withdraw, or even modify,<sup>402</sup> the declaration as it affects that party and, secondly, that this draft guideline does not prejudice the permissibility or validity of the declarations in question any more than does any other draft guideline in this part of the Guide to Practice.

### The question of verbal interpretative declarations

271. As indicated above,<sup>403</sup> a reservation is conceivable only if it is formulated in writing. This is not necessarily so for interpretative declarations.

272. The reasons why reservations must necessarily be in written form are the following:

(a) Article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions requires it;

(b) It is made indispensable by the very definition of reservations and by their legal regime; seeking to exclude or modify the legal effects of the provisions of a treaty in their application to the State formulating them, they must be subject to objections and may not enter into force unless accepted by the other contracting parties in one way or another.

273. These reasons do not apply to interpretative declarations to the same extent:

(a) Their legal regime is not set out in the Vienna Conventions;

<sup>398</sup> *Ibid.*, chap. XIV.5, p. 667.

<sup>399</sup> *Ibid.*, chap. XXVII.7, p. 933.

<sup>400</sup> *Ibid.*, chap. XXVII.8, p. 938.

<sup>401</sup> *Ibid.*, chap. XXI.7, pp. 839–840.

<sup>402</sup> On this point, see paragraph 336 below.

<sup>403</sup> Paragraphs 123–124.

(b) As will be established,<sup>404</sup> they do not necessarily elicit reactions from the other contracting parties;

(c) Since they are related to the rules governing the interpretation of treaties, they call, at least in some cases, for a more flexible, less formalistic legal regime than that applicable to reservations.

274. It therefore seems a priori that there is nothing to prevent the verbal formulation of interpretative declarations. Yet for the sake of symmetry, since the definition of reservations does not expressly mention their written form, the Special Rapporteur will refrain from proposing at the current stage a draft guideline along these lines. He will do so when he takes up, in his next report, the question of the formulation of reservations and interpretative declarations.

### “... however phrased or named ...”

275. The second point that reservations and interpretative declarations have in common has to do with the non-relevance of the name or designation given to them by the author.<sup>405</sup>

276. This is contested by some authors who believe that it is appropriate to take States at their word and to consider as interpretative declarations those unilateral declarations which have been so titled or worded by their authors.<sup>406</sup> This position has the dual merit of simplicity (an interpretative declaration is whatever States declare is one) and of conferring “morality” on the practice followed in the matter by preventing States from “playing around” with the names they give to the declarations they make with a view to sidestepping the rules governing reservations or misleading their partners.<sup>407</sup>

277. However, this position runs up against two nullifying objections:

(a) First, it is incompatible with the Vienna definition itself: if a unilateral declaration can be a reservation “however phrased or named”, this of necessity means that simple “declarations” (even those expressly qualified as interpretative by their author) may constitute true reservations, but it also and necessarily implies that terminology is not an absolute criterion that can be used in defining interpretative declarations;

(b) Secondly, it runs counter to the practice of States, jurisprudence and the position of most doctrine.

278. Virtually all authors who have recently dealt with the delicate distinction between reservations and interpretative declarations cite numerous examples of unilateral declarations presented as interpretative declarations by

the States formulating them which they themselves consider to be reservations or vice versa.<sup>408</sup> For example:

(a) Bowett considers that the reservation by the Soviet Union to the Vienna Convention on Diplomatic Relations with regard to mission size “was not a true reservation”, but was simply an interpretation;<sup>409</sup>

(b) Horn devotes an entire chapter of his important work<sup>410</sup> to a consideration of “doubtful statements”; these include the declaration by the Sudan concerning article 38 of the same Convention,<sup>411</sup> those made by several States to the 1951 Convention relating to the Status of Refugees,<sup>412</sup> that of Italy concerning article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone,<sup>413</sup> all of which he considers to be true reservations even though the States in question presented them as interpretative declarations;

(c) McRae considers that Canada’s “reservation” to articles 23 and 24 of the Convention relating to the Status of Refugees is in reality a simple interpretative declaration;<sup>414</sup>

(d) Migliorino endeavours to demonstrate that several “interpretative declarations” formulated when signing or ratifying the 1971 Seabed Treaty were in reality reservations, while the “reservational” nature of some unilateral declarations presented as such is doubtful;<sup>415</sup>

(e) Sapienza also provides a goodly number of examples of cases he considers dubious, including the declarations by France concerning the International Covenant on Civil and Political Rights, the Agreement governing the activities of States on the moon and other celestial bodies, the Convention on prohibitions or restrictions on the use of certain conventional weapons, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child; the declaration by Italy concerning the International Covenant on Civil and Political Rights; those of the United Kingdom concerning the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child; the declarations by the Netherlands concerning the Convention relating to the Status of Refugees, the Convention against torture and other cruel, inhuman or degrading treatment or punishment and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and the declarations by Germany concerning the Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Civil and Political Rights.<sup>416</sup>

<sup>408</sup> The Special Rapporteur wishes to recall (see footnote 378 above) that it is not his intention to discuss these analyses himself or to contest them; the following examples are simply intended to show that the prevailing doctrine does not attach critical significance to the terminology used by States.

<sup>409</sup> Bowett, *loc. cit.*, p. 68.

<sup>410</sup> *Op. cit.*, pp. 278–324.

<sup>411</sup> *Ibid.*, p. 279.

<sup>412</sup> *Ibid.*, p. 300.

<sup>413</sup> *Ibid.*, pp. 312–313.

<sup>414</sup> McRae, *loc. cit.*, p. 162, footnote 1.

<sup>415</sup> Migliorino, *loc. cit.*, pp. 106–123.

<sup>416</sup> Sapienza, *op. cit.*, pp. 154–176.

<sup>404</sup> See footnote 451 and paragraph 337 below.

<sup>405</sup> For a discussion of this element of the definition of reservations, see paragraphs 163–166 above.

<sup>406</sup> See, for example, the analysis of the declaration made by France when signing the Treaty of Tlatelolco in 1973 and the analysis thereof by Gros Espiell, *loc. cit.*, p. 141. However, the author also bases himself on other parameters. This was also the position taken by Japan in 1964 in its observations on the draft articles on the law of treaties adopted by the Commission on first reading (see paragraph 346 below).

<sup>407</sup> See paragraphs 249–251 above.

279. In making such reclassifications, the authors generally have little difficulty in basing themselves on the practice of the States themselves, who, faced with unilateral declarations presented by their authors as being interpretative, do not hesitate to raise objections to them because they expressly consider them to be reservations.<sup>417</sup>

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

(a) The objection of the Netherlands to Algeria's interpretative declaration concerning paragraphs 3 and 4 of article 13 of the International Covenant on Economic, Social and Cultural Rights:

In the opinion of the Government of the Kingdom of the Netherlands, the interpretative declaration ... must be regarded as a reservation to the Covenant. From the text and history of the Covenant it follows that the reservation with respect to article 13, paragraphs 3 and 4 made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government of the Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it;<sup>418</sup>

(b) The reactions of many States to the declaration by the Philippines in respect of the United Nations Convention on the Law of the Sea:

The Byelorussian Soviet Socialist Republic considers that the statement which was made by the Government of the Philippines upon signing the United Nations Convention on the Law of the Sea and confirmed subsequently upon ratification of that Convention in essence contains reservations and exceptions to the said Convention, contrary to the provisions of article 309 thereof;<sup>419</sup>

(c) The objection of Mexico, which considered that:

the third declaration submitted by the Government of the United States of America ... constitutes a unilateral claim to justification, not envisaged in the Convention, for denying legal assistance to a State that requests it, which runs counter to the purposes of the Convention;<sup>420</sup>

(d) The reaction of Germany to a declaration by which Tunisia indicated that it would not adopt, in implementation of the Convention on the Rights of the Child, "any legislative or statutory decision that conflicts with the Tunisian Constitution":

The Federal Republic of Germany considers the first of the declarations deposited by the Republic of Tunisia to be a reservation. It restricts the application of the first sentence of article 4 ...<sup>421</sup>

281. It also happens that "reacting" States contemplate both solutions and express their reactions in accordance with whether the text is a reservation or an interpretative declaration, again regardless of the term used by the author to designate it. Germany, the United Kingdom and the United States reacted to an interpretative declaration by Yugoslavia concerning the 1971 Seabed Treaty by considering it first as an actual interpretative declaration (which they rejected) and then as a reservation (which they considered to be late and inconsistent with the object

and purpose of the treaty).<sup>422</sup> In the same spirit, Germany and the Netherlands objected to declarations made by the countries of Eastern Europe with regard to "the definition of piracy as given in the Convention *in so far as the said declarations are to be qualified as reservations*"<sup>423</sup> Likewise, several States questioned the real nature of the (late) "declarations" by Egypt concerning the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal.<sup>424</sup>

282. Judges and arbitrators are no more reluctant to question the real nature of unilateral declarations formulated by States in respect of a treaty and, where necessary, to reclassify them.<sup>425</sup>

283. In its decision in the case of *T. K. v. France*, the Human Rights Committee, basing itself on article 2, paragraph 1 (d), of the 1969 Vienna Convention, decided that a communication concerning France's failure to respect article 27 of the International Covenant on Civil and Political Rights was inadmissible because France, on acceding to the Covenant, had declared that "in the light of article 2 of the Constitution of the French Republic, ... article 27 is not applicable so far as the Republic is concerned". The Committee observed

in this respect that it is not the formal designation but the effect the statement purports to have that determines its nature.<sup>426</sup>

284. In an individual opinion which she attached to the decision, Mrs. Higgins criticized this position, pointing out that, in her view,

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

An examination of the notification of 4 January 1982 shows that the Government of the Republic of France was engaged in two tasks: listing certain reservations and entering certain interpretative declarations. Thus in relation to articles 4 (1), 9, 14 and 19, it uses the phrase "enters a reservation". In other paragraphs it declares how terms of the Covenant are in its view to be understood in relation to the French Constitution, French legislation or obligations under the European Convention on Human Rights. To note, by reference to article 2 (1) (d) of the Vienna Convention, that it does not matter how a reservation is phrased or named, cannot serve to turn these interpretative declarations into reservations. Their content is clearly that of declarations. Further, the French notification shows that deliberately different language was selected to serve different legal purposes. There is no reason to suppose that the contrasting use, in different paragraphs, of the phrase "reservation" and "declaration" was not entirely deliberate, with its legal consequence well understood by the Government of the Republic.<sup>427</sup>

<sup>422</sup> Example cited by Migliorino, loc. cit., p. 110.

<sup>423</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. XXI.2, pp. 790-791.

<sup>424</sup> See in particular the reaction of Finland: "Without taking any stand to the content of the declarations, which appear to be reservations in nature ..." (ibid., chap. XXVII.3, p. 925).

<sup>425</sup> On this point, see paragraphs 226-228 above.

<sup>426</sup> Human Rights Committee, Communication No. 220/1987, decision of 8 November 1989, *T. K. v. France* (Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), vol. II, annex X, p. 123, para. 8.6). See also, to the same effect, the decisions *M.K. v. France* of the same day (Communication No. 222/1987) (ibid., pp. 127-133), *S.G. v. France* of 1 November 1991 (Communication No. 347/1949), *G.B. v. France* of 1 November 1991 (Communication No. 348/1989) and *R.L.M. v. France* of 6 April 1992 (Communication No. 363/1989) (ibid., *Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex X, pp. 346-371).

<sup>427</sup> Ibid., *Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. II, annex X, appendix II, p. 125.

<sup>417</sup> See footnotes 378 and 408 above.

<sup>418</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. IV.3, p. 117.

<sup>419</sup> Ibid., chap. XXI.6, p. 824; see also the reactions, in the same terms or in the same spirit, of Australia, Bulgaria, the Russian Federation and Ukraine (ibid., pp. 824-826).

<sup>420</sup> Ibid., chap. VI.19, p. 314.

<sup>421</sup> Ibid., chap. IV.11, pp. 218 and 221.

285. There is, of course, no need to take a position on the substance of the specific problem on which the Human Rights Committee was to decide. Two points, however, must be raised with regard to Mrs. Higgins's opinion:

(a) On the one hand, although she reached a different conclusion from the majority in the case at hand, she did not contest the fact that, where necessary, a declaration presented as being interpretative could be considered to be a reservation;

(b) On the other hand, and it is here that she distinguishes herself from the majority, she nevertheless attaches great significance to the nomenclature used by the "declaring" Government, particularly as the Government had, in this case, formulated both reservations and interpretative declarations.<sup>428</sup>

286. This problem was in fact posed in the same terms in the *Belilos v. Switzerland* case:<sup>429</sup> Switzerland had also formulated both reservations and interpretative declarations, and the European Commission of Human Rights proved to be more sensitive to this aspect of the question than the Committee had been in *T. K. v. France*: it maintained that

if a State made both reservations and interpretative declarations at the same time, the latter could only exceptionally be equated with the former.<sup>430</sup>

287. The European Court of Human Rights proved to be less categorical, but somewhat embarrassed:

(a) First, it concurred with Mrs. Higgins's reasoning, pointing out that it "cannot see how" the lack of terminological uniformity "could in itself justify describing the declaration in issue as a reservation";<sup>431</sup>

(b) Secondly, basing itself on the *travaux préparatoires* for the adoption of Switzerland's instrument of ratification, it noted that the "declaration" appeared to qualify "Switzerland's consent to be bound by the Convention";<sup>432</sup>

(c) Thirdly, it observed that one of the things that made it difficult to reach a decision in the case was the fact that "the Swiss Government have made both 'reservations' and 'interpretative declarations' in the same instrument of ratification", although the Court did not draw any particular conclusion from that observation;<sup>433</sup>

(d) Lastly, it did not formally reclassify the disputed interpretative declaration as a reservation, but merely stated that it intended to "examine the validity of the interpretative declaration in question, as in the case of a reservation".<sup>434</sup>

<sup>428</sup> Curiously, the French declaration on article 27 is drafted in such a way that it appears to interpret the French Constitution more than the Covenant.

<sup>429</sup> See paragraph 226 above.

<sup>430</sup> See the judgement of the Court in this case, European Court of Human Rights (footnote 160 above), para. 41.

<sup>431</sup> *Ibid.*, p. 23, para. 46.

<sup>432</sup> *Ibid.*, p. 24, para. 48.

<sup>433</sup> *Ibid.*, para. 49.

<sup>434</sup> *Ibid.* Reading the Judgment one gets the distinct impression that this was the outcome sought by the Court and which guided its thinking. See, in particular, the commentary of Bourguignon, "The *Belilos* case: new light on reservations to multilateral treaties"; Cameron and Horn,

288. In its decision in the *Temeltasch* case, handed down six years later, the European Commission of Human Rights did not hesitate to reclassify an interpretative declaration as a reservation.<sup>435</sup>

289. From these observations the following conclusions may be drawn: if the phrasing and name of a unilateral declaration are not part of the definition of an interpretative declaration any more than they are of the definition of a reservation, they nevertheless constitute an element that must be taken into consideration and which can be viewed as having particular (although not necessarily vital) significance when a State formulates both reservations and interpretative declarations in respect of a single treaty at the same time.

290. This observation is consistent with the more general doctrinal position that:

[T]here is a potential for inequity in this aspect ["however phrased or named"] of the definition. Under the Vienna Convention, the disadvantages of determining that a statement is a reservation are ... imposed upon the other parties to the treaty ... It would be unfortunate in such circumstances if the words "however phrased or named" were given an overriding effect. In exceptional circumstances it might be possible for a party to rely upon an estoppel against a State which attempts to argue that its statement is a reservation ... While this is a matter of interpretation rather than the application of equitable principles, it is in keeping with notions of fairness and good faith which underlie the treaty relations of States.<sup>436</sup>

291. Without reopening the debate on the principle posed by the 1969 Vienna Convention with regard to the definition of reservations, a principle which ought to extend to the definition of interpretative declarations,<sup>437</sup> it would seem legitimate, then, to spell out in the Guide to Practice the extent to which it is possible to remain indifferent to the nominalism implied by the expression "however phrased or named". This could be achieved by admitting that there is a presumption, not indisputable, attached to the name a declaring State gives to its declaration. The Commission might also stipulate that when a State formulates reservations and interpretative declarations at the same time, this presumption, while still disputable, is reinforced.

#### *Guide to Practice:*

"1.2.2 *It is not the phrasing or name of a unilateral declaration that determines its legal nature but the legal effect it seeks to produce. However, the phrasing or name given to the declaration by the State or international organization formulating it provides an indication of the desired objective. This is the case in particular when a State or an international organization formulates several unilateral declarations in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.*"

"Reservations to the European Convention on Human Rights: the *Belilos* case", pp. 69–86; Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme (à propos de l'arrêt *Belilos* du 29 avril 1988)", pp. 301–305; and Macdonald, *loc. cit.*, pp. 438–442.

<sup>435</sup> Decision of 5 May 1982 (see footnote 164 above), pp. 146–148, paras. 68–82.

<sup>436</sup> Greig, *loc. cit.*, pp. 27–28; see also page 34.

<sup>437</sup> See paragraphs 343–357 below.

292. Similarly, it is possible that the treaty in respect of which the declaration is being made may itself provide an indication, or at least a presumption, of the legal nature of the declaration. This is the case in particular when a treaty prohibits reservations of a general nature<sup>438</sup> or to certain of its provisions.<sup>439</sup>

293. In such situations, declarations made in respect of provisions to which any reservation is prohibited must be considered to constitute interpretative declarations.

This would comply with the presumption that a State would intend to perform an act permitted, rather than one prohibited, by a treaty and protect that State from the possibility that the impermissible reservation would have the effect of invalidating the entire act of acceptance of the treaty to which the declaration was attached.<sup>440</sup>

294. It goes without saying, however, that such a presumption is not indisputable either, and that if the declaration is really intended to exclude or modify the legal effect of the provisions of the treaty and not simply to interpret them, then it must be considered to be an impermissible reservation and treated as such.

#### *Guide to Practice:*

*“1.2.3 When a treaty prohibits reservations to all or some of its provisions, a unilateral declaration formulated in respect thereof by a State or an international organization shall be considered to constitute an interpretative declaration and not a reservation. If, however, the declaration seeks to exclude or modify the legal effect of certain provisions of the treaty in their application to its author, the declaration must be considered an impermissible reservation.”*

- b. The teleological factor, a criterion for distinguishing between interpretative declarations and reservations

295. All interpretative declarations seek to interpret the provisions of a treaty. However, while the State or international organization formulating them may, in some cases, limit itself to proposing an interpretation, in others it may seek to impose that interpretation on the other contracting parties or, in any case, make it a condition for being bound, so that a distinction must be drawn between two very different types of interpretative declarations. In other words, while all interpretative declarations are intended to clarify the meaning and the purpose of the provisions of the treaty in question, some have another function in that they condition acceptance of the treaty by the State or international organization formulating them.

#### **Clarifying the meaning and scope of the provisions of a treaty, an element common to the definition of all interpretative declarations**

<sup>438</sup> As, for example, in the case of article 309 of the United Nations Convention on the Law of the Sea.

<sup>439</sup> As, for example, in the case of article 12 of the Convention on the Continental Shelf, which deals with reservations to articles 1–3. See the decision of 30 June 1977 (footnote 159 above), pp. 32–33, paras. 38–39; see also the individual opinion of Herbert W. Briggs, *ibid.*, pp. 123–124.

<sup>440</sup> Greig, *loc. cit.*, p. 25.

296. Like reservations, interpretative declarations, no matter how phrased or designated, are unilateral declarations. However, they are not to be confused with them: unlike reservations, they seek neither to exclude nor to modify the legal effect of the treaty in respect of which they are made; in this respect they differ greatly from reservations, as Fitzmaurice noted as early as 1962.<sup>441</sup> As their name indicates, they are intended to interpret.

297. This can and must constitute the central element of their definition, yet it poses difficult problems nonetheless, the first of which is determining what is meant by “interpretation”. This is a highly complex concept, the elucidation of which would far exceed the scope of the present report.<sup>442</sup> In truth, it is probably not useful for the purpose of defining interpretative declarations. Suffice it to say, in a phrase often recalled by ICJ, that the expression “to construe” (*interprétation* in French) must be understood as meaning to give a precise definition of the meaning and scope of a binding legal instrument,<sup>443</sup> in this case a treaty. What is essential is that interpreting is not revising.<sup>444</sup> While reservations ultimately modify, if not the text of the treaty, at least its legal effect,<sup>445</sup> interpretative declarations are in principle limited to clarifying the meaning and the scope of the treaty as the author State or international organization perceives them.

298. But this raises further difficult problems, of which two are:

(a) First, the interpretation covered by the declaration is not imposed as such on the other contracting parties; accordingly, the definition as outlined thus far necessarily leads to the question of the scope of interpretative declarations;

(b) Secondly, it must be acknowledged that this scope is not unequivocal: if the definition adopted is to be “operational” and lead usefully to the application of coherent legal rules separate from those applicable to reservations, a distinction must be made between two categories of interpretative declarations, still in terms of the authors’ desired objective.

299. It is not insignificant that the rules relating to reservations and those relating to the interpretation of treaties appear in different parts of the 1969 and 1986 Vienna Conventions: the former are included in part II, which deals with the conclusion and entry into force of treaties,

<sup>441</sup> See paragraph 56 above.

<sup>442</sup> Regarding the concept of interpretation, see in particular the reports by Lauterpacht, “De l’interprétation des traités”; Degan, *L’interprétation des accords en droit international*; McDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure*; Sur, *L’interprétation en droit international public*; Yasseen, “L’interprétation des traités d’après la Convention de Vienne sur le droit des traités”; and Bos, “Theory and practice of treaty interpretation”.

<sup>443</sup> See *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 10; see also *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case*, Judgment, I.C.J. Reports 1950, p. 402.

<sup>444</sup> See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion*, I.C.J. Reports 1950, p. 229; and *Rights of Nationals of the United States of America in Morocco*, Judgment, I.C.J. Reports 1952, p. 196.

<sup>445</sup> See paragraphs 144–222 above.

while the latter are to be found in part III, together with those dealing with observance and application of treaties.

300. In fact, there is no gap between the formation and the application of international law<sup>446</sup> or between interpretation and application: “The implementation of rules implies that they have already been interpreted. Implementation may be explicit or implicit, in which case it may become confused with measures of application.”<sup>447</sup> Some have even gone so far as to affirm that “the rule of law, from the moment of its creation to the moments of its application to individual cases, is a matter of application”.<sup>448</sup>

301. Thus interpretative declarations formulated unilaterally by States or international organizations with regard to the meaning or the scope of the provisions of a treaty can only be one of many elements used in interpreting them. They coexist with other interpretations—contemporaneous, previous or subsequent—that may originate with other contracting parties or third organizations that are entitled to give an interpretation that is authentic and can be imposed on the parties.

302. This also means that the “interpretation of the terms of a treaty ... could not be considered as a question essentially within the domestic jurisdiction of a State”<sup>449</sup> and that consequently each State or international organization that formulates such a declaration may choose to submit another interpretation which, in certain cases, may be imposed on all the parties to a treaty or among those who disagree as to the meaning and scope of its provisions, as in cases of arbitration or determination of jurisdiction.

303. In fact, it cannot be concluded that a unilateral interpretative declaration is devoid of any legal effect. This problem will be considered in greater detail when the Special Rapporteur takes up the important question of the legal effect of reservations, and thus of interpretative declarations, in a later report.

304. In the meantime, it is to be noted that an interpretative declaration, according to the overview presented by Simon,

is likely first of all to produce legal effects in respect of the formulating State by virtue of the principle of good faith, or indeed by the application of the rules of estoppel. Thus ICJ, in the *International Status of South West Africa* case, stated:

“Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable

<sup>446</sup> “We know that, fundamentally, the act of implementing norms is not in international law organically distinct from their formation. In other words, States [and international organizations] whose international obligations constitute the source of the elements of law formation, are also responsible for their implementation” (Combacau and Sur, *op. cit.*, p. 163).

<sup>447</sup> *Ibid.*

<sup>448</sup> Arnaud, “Le médium et le savant: signification politique de l’interprétation juridique”, p. 165 (quoted by Simon in *L’interprétation judiciaire des traités d’organisations internationales*, p. 7).

<sup>449</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 70; see also *Nationality Decrees Issued in Tunisia and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, pp. 29–30.

probative value when they contain recognition by a party of its own obligations under an instrument.”<sup>450</sup>

Secondly, the unilateral interpretation by one of the parties to the treaty may be accepted, explicitly or tacitly, by all of the other contracting parties, thereby becoming an authentic interpretation of the treaty. Thirdly, the unilateral interpretation of one part of the treaty may be accepted, explicitly or tacitly, by some of the other contracting parties, thereby becoming a plurilateral interpretation that may have certain legal effects *inter partes*.<sup>451</sup>

305. From this standpoint, interpretative declarations can be seen as “offers” of interpretation, governed by the fundamental principle of good faith, but lacking any inherent authentic or binding character. Their authors may, however, endeavour to broaden their scope, so that they come closer to being a reservation without actually becoming one.

### “Mere” and “conditional” interpretative declarations

306. This is what happens when a State or international organization does not limit itself to proposing an interpretation in advance, but makes its interpretation a condition of its consent to be bound by the treaty.

307. The distinction between these two types of interpretative declaration was clearly and authoritatively drawn by McRae in an important article published in 1978. Exploring the effect of interpretative declarations, he noted that:

two situations have to be considered. The first is where a State attaches to its instrument of acceptance a statement that simply purports to offer an interpretation of the treaty, or part of it. This may be called a “mere interpretative declaration”.<sup>\*</sup> The second situation is where a State makes its ratification or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty. This may be called a “qualified interpretative declaration”. In the first situation the State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected ... If, on the other hand, the declaring State wishes to assert its interpretation regardless of what a subsequent tribunal might conclude, that is, the State when making the declaration has ruled out the possibility of a subsequent inconsistent interpretation of the treaty, a different result should follow. This is a “qualified interpretative declaration”. The State is making its acceptance of the treaty subject to or conditional upon acquiescence in its interpretation.

<sup>\*</sup> They are referred to as “mere declaratory statements” by Detter, *Essays on the Law of Treaties* (1967), pp. 51–52.<sup>452</sup>

308. This makes for a good point of departure, with two small provisos:

(a) First, in order to make the distinction, the author probably places too much emphasis on the prospect of a future intervention by a judge or arbitrator;<sup>453</sup>

(b) Secondly, the expression “qualified”<sup>\*</sup> interpretative declarations” has little meaning, at least in French and Spanish, and it would probably be better to stress, in their

<sup>450</sup> *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 135–136.

<sup>451</sup> Simon, *op. cit.*, pp. 22–23, footnotes omitted. It will be noted that the legal effects of unilateral interpretations depend less systematically on the reaction of the other parties than do reservations.

<sup>452</sup> McRae, *loc. cit.*, pp. 160–161.

<sup>453</sup> See paragraph 324 below.

name itself, the criterion that distinguishes them from “mere” interpretative declarations, namely their conditional nature, i.e. the fact that the State subordinates its consent to be bound to the interpretation it puts forward. The term that will be used here, then, is “conditional interpretative declaration”, as opposed to “mere interpretative declarations”.

309. Far from being purely doctrinal or academic in character, this distinction, which has been used by a number of authors,<sup>454</sup> corresponds to an undeniable practical reality.

310. It is not uncommon for a State, when formulating a declaration, to state expressly that its interpretation constitutes the *sine qua non* to which its consent to be bound is subordinate. For example, France attached to its signature<sup>455</sup> of Additional Protocol II of the Treaty of Tlatelolco a four-point interpretative declaration, stipulating:

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

The conditional nature of the French declaration here is indisputable.

311. Although it is drafted less categorically, the same can surely be said of the “understanding” recorded by the Islamic Republic of Iran in connection with the United Nations Convention on the Law of the Sea:

The main objective [of the Islamic Republic of Iran] for submitting these declarations is the avoidance of eventual future interpretation of the following articles in a manner incompatible with the original intention and previous positions or in disharmony with national laws and regulations ...<sup>456</sup>

312. In other cases, the conditional nature of the declaration can be deduced from its drafting. For example, its categorical wording leaves little doubt that the interpretative declaration made by Israel upon signing the 1979 International Convention against the taking of hostages should be considered a conditional interpretative declaration:

It is the understanding of Israel that the Convention implements the principle that hostage taking is prohibited in all circumstances and that any person committing such an act shall be either prosecuted or extradited pursuant to article 8 of this Convention or the relevant provisions of the Geneva Conventions of 1949 or their additional Protocols, without any exception whatsoever.<sup>457</sup>

313. The same holds true for the interpretative declaration made by Turkey in respect of the Convention on the prohibition of military or any other hostile use of environmental modification techniques:

In the opinion of the Turkish Government the terms “widespread”, “long lasting” and “severe effects” contained in the Convention need to be clearly defined. So long as this clarification is not made the Govern-

<sup>454</sup> For examples, see Cameron and Horn, *loc. cit.*, p. 77, and Sapienza, *op. cit.*, pp. 205–206.

<sup>455</sup> See United Nations, *Treaties Series*, vol. 936, p. 419. The declaration was confirmed upon ratification on 22 March 1974.

<sup>456</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. XXI.6, p. 811.

<sup>457</sup> *Ibid.*, chap. XVIII.5, p. 705.

ment of Turkey will be compelled to interpret itself the terms in question and consequently it reserves the right to do so as and when required.<sup>458</sup>

314. Conversely, a declaration such as the one made by the United States when signing the 1988 Protocol to the 1979 Convention on long-range transboundary air pollution concerning the control of emissions of nitrogen oxides or their transboundary fluxes is clearly a mere interpretative declaration:

The Government of the United States of America understands that nations will have the flexibility to meet the overall requirements of the protocol through the most effective means.<sup>459</sup>

315. It is in fact only rarely that the conditional nature of an interpretative declaration is so clearly apparent from the wording used. Most often, the declaring State or international organization simply says that it “understands that ...”, “considers that ...” (“*considère que ...*”,<sup>460</sup> “*es-time que ...*”<sup>461</sup>) or “declares that ...”,<sup>462</sup> or that it “interprets” a particular provision in a particular way,<sup>463</sup> or that, “according to its interpretation” or its “understanding”, a particular provision has a certain meaning<sup>464</sup> or that it “understands that ...”.<sup>465</sup> In such situations the distinction between “mere” and “conditional” interpretative declarations poses problems similar to those posed by the distinction between reservations and interpretative declarations, and these problems must be solved in accordance with the same principles.<sup>466</sup>

316. Moreover, it is not uncommon for the true nature of interpretative declarations to become clear when they are contested by the other parties to the treaty. This is demonstrated by some famous examples.

<sup>458</sup> *Ibid.*, chap. XXVII.1, p. 878.

<sup>459</sup> *Ibid.*, p. 903.

<sup>460</sup> For examples (of which there are a great many), see the declaration made by Brazil when signing the United Nations Convention on the Law of the Sea (*ibid.*, chap. XXI.6, p. 804), the second declaration made by the European Community when signing the Convention on Environmental Impact Assessment in a Transboundary Context (*ibid.*, chap. XXVII.4, p. 927), or those made by Bulgaria to the Vienna Convention on Consular Relations (*ibid.*, chap. III.6, p. 71) or to the Convention on a Code of Conduct for Liner Conferences (*ibid.*, chap. XII.6, p. 641).

<sup>461</sup> See—again, out of many examples—the declarations made by Finland concerning the Convention on a Code of Conduct for Liner Conferences (*ibid.*, chap. XII.6, p. 642).

<sup>462</sup> See the second and third declarations made by France concerning the International Covenant on Economic, Social and Cultural Rights (*ibid.*, chap. IV.3, p. 112) or that made by the United Kingdom when signing the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (*ibid.*, chap. XXVII.3, p. 923).

<sup>463</sup> See—again, from a wealth of examples—the declarations made by Algeria and Belgium in respect of the International Covenant on Economic, Social and Cultural Rights (*ibid.*, chap. IV.3, pp. 111–112), the declaration by Ireland in respect of article 31 of the Convention relating to the Status of Stateless Persons (*ibid.*, chap. V.3, p. 250) or the first declaration made by France when signing the Convention on biological diversity (*ibid.*, chap. XXVII.8, p. 938).

<sup>464</sup> See the declarations by the Netherlands concerning the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (*ibid.*, chap. XXVI.2, p. 885) or those made by Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu in respect of the United Nations Framework Convention on Climate Change (*ibid.*, chap. XXVII.7, pp. 933–934).

<sup>465</sup> See the declarations made by Brazil when ratifying the United Nations Convention on the Law of the Sea (*ibid.*, chap. XXI.6, p. 804).

<sup>466</sup> See paragraphs 378–406 below.

317. The first example concerns the declaration that India attached to its instrument of ratification of the constituent instrument of IMCO.<sup>467</sup> In its response to the questionnaire on reservations to treaties, the country summarized the episode as follows:<sup>468</sup>

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

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

In a resolution adopted on 1 March 1960, the Council of the Inter-Governmental Maritime Consultative Organization, taking note of the statement made on behalf of India referred to in the foregoing resolution and noting, therefore, that the declaration of India has no legal effect with regard to the interpretation of the Convention “considers India to be a member of the Organization”.

318. Cambodia also made an ambiguous declaration with regard to the same convention establishing IMCO.<sup>469</sup> Several Governments stated that they assumed that it was a declaration of policy and did not constitute a reservation; and that it had no legal effect with regard to the interpretation of the Convention. Accordingly,

In a communication addressed to the Secretary-General on 31 January 1962, the Government of Cambodia stated that “... the Royal Government agrees that the first part of the declaration which it made at the time of the acceptance of the Convention is of a political nature. It therefore has no legal effect regarding the interpretation of the Convention. The statements contained in the third paragraph of the declaration, on the other hand, constitute a reservation to the Convention by the Royal Government of Cambodia”.<sup>470</sup>

319. In the view of the Special Rapporteur, it is far from obvious that a mere interpretative declaration can be assimilated to a purely political declaration and be void of any legal effect.<sup>471</sup> Yet these precedents confirm that there

<sup>467</sup> The text of the declaration appears in United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. XII.1, p. 613.

<sup>468</sup> With regard to this episode, see in particular: McRae, loc. cit., pp. 163–165; Horn, op. cit., pp. 301; and Sapienza, op. cit., pp. 108–113.

<sup>469</sup> For text, see United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. XII.1, pp. 612–613. Regarding this episode see in particular McRae, loc. cit., pp. 165–166, and Sapienza, op. cit., pp. 177–178.

<sup>470</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General* ..., chap. XII.1, p. 631, note 10. See also footnote 388 above.

<sup>471</sup> It is interesting that Indonesia, which made a declaration comparable to the one made by India and encountered similar reactions, also admitted that its declaration constituted an interpretation of article 1 (b), but added that it could not accept the assumption made by the Governments that had raised an objection “that this declaration has no legal effect with regard to the interpretation of the Convention” (ibid., note 12); this position appears to have legal merit. The legal effects

is a discrepancy between some declarations, in which the State or international organization formulating them does no more than explain its interpretation of the treaty, and others in which the authors seek to impose their interpretation on the other contracting parties.

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

The significance of the former lies in the effect it may have in subsequent proceedings to interpret the treaty, and this significance will vary according to whether the declaration has been accepted, ignored or objected to by other contracting parties. The latter type of interpretative declaration, on the other hand, must be assimilated to a reservation, for by asserting that its interpretation overrides any contrary interpretation the declarant has purported to exclude or to modify the terms of the treaty.<sup>472</sup>

321. The Special Rapporteur does not think that this last formula is quite accurate: even when it is conditional, an interpretative declaration does not constitute a reservation in that it does not try “to exclude or to modify the legal effect of certain provisions of the treaty in their application” to the State or organization formulating it, but to impose a specific interpretation on those provisions. Even if the distinction is not always obvious, there is a tremendous difference between application and interpretation. “The mere fact that a ratification is conditional does not necessarily mean that the condition needs to be treated as a reservation.”<sup>473</sup>

322. This is in fact the direction taken in jurisprudence:

(a) In the *Belilos v. Switzerland* case, the European Court of Human Rights considered the validity of Switzerland’s interpretative declaration from the standpoint of the rules applicable to reservations, yet without assimilating one to the other;<sup>474</sup>

(b) Likewise, in a text that is admittedly a bit obscure, the Court that settled the dispute between France and the United Kingdom concerning the continental shelf in the *English Channel* case analysed the third reservation by France concerning article 6 of the Convention on the Continental Shelf “as a specific condition imposed by the French Republic on its acceptance of the delimitation régime provided for in Article 6”, adding: “This

of interpretative declarations, along with those of reservations, will be considered in greater detail in a later report.

<sup>472</sup> McRae, loc. cit., p. 172.

<sup>473</sup> Greig, loc. cit., p. 31.

<sup>474</sup> See paragraph 287 above. In the *Temeltasch* case, the European Commission of Human Rights was more cautious: completely (and intentionally) adhering to McRae’s position, it “assimilated” the notions of conditional interpretative declarations and reservations (footnote 164 above), pp. 130–131, paras. 72–73.

condition, according to its terms, appears to go beyond mere interpretation.<sup>475</sup> This would seem to establish *a contrario* that it could have been a conditional interpretative declaration and not a reservation in the strict sense of the term.

323. The fact remains that, even if it cannot be entirely “assimilated” to a reservation, a conditional interpretative declaration does come quite close, as Reuter has written: “Reservations essentially spell out a condition: the State consents to be bound provided certain legal effects of the treaty do not apply to it, either by exclusion or modification of a rule or by its interpretation or application.”<sup>476</sup>

324. Nor does the Special Rapporteur agree with those criticisms levelled by Horn at the distinction proposed by McRae. Horn affirms that “[t]he character of a declaration as an absolute condition for participation in a treaty does not automatically turn it into an ‘excluding’ or ‘modifying’ device”;<sup>477</sup> however, this clearly shows that their conditional character brings interpretative declarations quite close to reservations without assimilating them thereto, and thus it is incorrect to say that “[t]he ‘excluding’ or ‘modifying’ effect can only be asserted at the very moment one of the many possible interpretations is finally authoritatively established as the only right and valid one”.<sup>478</sup> An authentic or jurisdictional interpretation that is contrary to one put forward by the declarant will establish that the latter’s interpretation was not the “right” one, but it will not make the interpretative declaration into a reservation. All one can conclude is that interpreting declarations in different ways will create complex problems if the initial interpretative declaration was conditional, and these difficulties should be taken into consideration when the Commission considers the legal rules applicable to conditional interpretative declarations.

325. Likewise, it is doubtless excessive to maintain that the distinction between mere and conditional interpretative declarations “puts other States in a very difficult if not impossible position”.<sup>479</sup> They may in fact react differently to different declarations, so that it may be necessary to spell out as clearly as possible both the criteria for making the distinction and the legal regime applicable to both. However, it cannot be concluded that, just because it may be difficult to make the distinction in some cases, the distinction does not exist.

326. The present report, which is devoted exclusively to defining reservations and, by way of contrast, interpretative declarations, is not the place in which to dwell at length on the consequences of the distinction between the two types of interpretative declaration. However, it now

<sup>475</sup> Decision of 30 June 1977 (see footnote 159 above), p. 40, para. 55.

<sup>476</sup> Reuter, *op. cit.*, pp. 77–78. The inherent conditional character of reservations is stressed in numerous doctrinal definitions, including that of the Harvard Law School (see paragraph 95 above); see also Horn, *op. cit.*, p. 35, and the examples cited). The definition proposed by Sir Humphrey Waldock in 1962 also specifically included conditionality as an element in the definition of reservations; it was subsequently abandoned in circumstances that are not clear (see paragraphs 56–60 above).

<sup>477</sup> Horn, *op. cit.*, p. 239.

<sup>478</sup> *Ibid.*

<sup>479</sup> Sinclair, *op. cit.*, p. 53.

seems fairly obvious that the legal regime of conditional interpretative declarations would be infinitely closer to that of reservations than would the rules applicable to mere interpretative declarations, which essentially fall under the “general rule of interpretation” codified in article 31 of the 1969 and 1986 Vienna Conventions. In the case of conditional interpretative declarations, strict rules, particularly as regards time limits, must be followed in order to prevent, insofar as possible, disputes among the parties as to the reality and scope of their commitment under the treaty. Such precautions are less indispensable in the case of mere interpretative declarations.

327. In view of the foreseeable consequences of the distinction and its practical importance, it should be included in the Guide to Practice. However, bearing in mind the striking degree to which reservations overlap with conditional interpretative declarations, it would be preferable, before suggesting a definition for the latter, to explore the appropriateness of including in the definition of conditional interpretative declarations the *ratione temporis* element, which is an integral part of the definition of reservations.

#### c. The temporal element of the definition

328. One of the major elements of the definition of reservations concerns the moment at which a unilateral declaration must be formulated in order to qualify as a reservation. While this stipulation would seem to have more to do with the legal regime of reservations than with their actual definition, practical considerations aimed at preventing abuses have resulted in its becoming an element of the definition.<sup>480</sup> These considerations do not carry the same weight in the case of interpretative declarations, at least those that the declarant formulates without making the proposed interpretation a condition for participation in the treaty.

329. Although it is not possible to discuss the legal regime applicable to interpretative declarations in detail, it bears repeating that such declarations<sup>481</sup> are governed by the rules of interpretation of treaties, which themselves are placed in the Vienna Conventions close, and rightly so, to the rules governing the application of treaties. Thus, even if an instrument made by a party “in connection with the conclusion of the treaty” can, under certain conditions, be considered for the purposes of interpreting the treaty to be part of the “context”, as expressly provided in article 31, paragraph 2 (b), of the 1969 and 1986 Vienna Conventions, this does not imply any exclusivity *ratione temporis*. Moreover, paragraph 3 of article 31 expressly invites the interpreter to take “into account, together with the context”, any subsequent agreement between the parties and any subsequent practice followed.

330. Such subsequent agreements or practices may be supported by interpretative declarations that may be formulated at any time in the life of the treaty: at its conclusion, at the time a State or international organization expresses its final consent to be bound, or at the time of

<sup>480</sup> See paragraphs 132–143 above.

<sup>481</sup> See paragraphs 299 et seq. above.

application of the treaty.<sup>482</sup> If the interpretation proposed by the declarant is accepted, expressly or implicitly, by the other contracting parties, the interpretative declaration constitutes an element of a subsequent agreement or practice.

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

during the negotiations; or at the time of signature, ratification, etc., or afterwards in the course of the “subsequent practice”.<sup>483</sup>

332. Independently of these general considerations, to confine the formulation of interpretative declarations to a limited period of time, as the definition of reservations does, would have the serious drawback of being inconsistent with practice, even if—it goes without saying—it is quite often at the moment they express their consent to be bound that States and international organizations do formulate such declarations.

333. It is indeed striking to note that States tend to get around the *ratione temporis* limitation of the right to formulate reservations by submitting them, occasionally out of time, as interpretative declarations. This was the case, for example, of the “declaration” made by Yugoslavia in respect of the 1971 Seabed Treaty<sup>484</sup> or of the declaration made by Egypt regarding the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal.<sup>485</sup> In these two cases, the “declarations” elicited protests on the part of the other contracting parties, who were motivated by the fact that the declarations were actually reservations and, in the second case, the fact that article 26 of the Basel Convention (which prohibits reservations) authorizes States to formulate declarations, within certain limits, only “when signing, ratifying, accepting, approving, formally confirming or acceding to this Convention”.

334. It can be concluded *a contrario* that if true interpretative declarations had been involved (and if the Basel Convention had not set any time limits), the declarations could have been formulated at a time other than the moment of signature or consent to be bound.

335. This is in fact quite normal in practice. It should be pointed out, as Greig does, that when they formulate objections to reservations or react to interpretative declarations formulated by other contracting parties, States or international organizations often go on to propose their

own interpretation of the treaty’s provisions.<sup>486</sup> There is no *prima facie* reason not to consider such “counter-proposals” as veritable interpretative declarations, at least when they seek to clarify the meaning and scope of the treaty in the eyes of the declarant; however, they are by definition formulated after the time at which formulation of a reservation is possible.

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

337. This silence should not lead to the conclusion, however, that an interpretative declaration may in all cases be formulated at any time:

(a) For one thing, this might be formally prohibited by the treaty itself;<sup>487</sup>

(b) Furthermore, it would seem to be out of the question that a State or international organization could formulate a *conditional* interpretative declaration at any time in the life of the treaty: such laxity would cast an unacceptable doubt on the reality and scope of the treaty obligations; and

(c) Lastly, even mere interpretative declarations can be invoked and modified at any time only to the extent that they have not been expressly accepted by the other parties to the treaty or that an estoppel has not been raised against them.

338. These are questions that will have to be clarified in chapter II of the Guide to Practice, on the formulation of reservations and interpretative declarations. At the very most, one can imagine including in the definition of conditional interpretative declarations an express mention of the *ratione temporis* limitation on their formulation. This is justified for reasons comparable to those that have made such a clarification necessary in the area of reservations: by definition such declarations constitute conditions on the declarant’s participation in the treaty and are thus, like reservations themselves, closely linked to the entry into force of the treaty.

339. For these reasons it would seem useful to reintroduce the *ratione temporis* element into the definition of conditional interpretative declarations, since it is one of the distinguishing features of reservations, even though it does not belong in the definition of interpretative declarations in general.

#### Guide to Practice:

“1.2.4 A unilateral declaration formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to

<sup>482</sup> This last possibility was recognized by ICJ in its advisory opinion of 11 July 1950 concerning the international status of South West Africa: “Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument” (see footnote 450 above); in fact, the Court based itself on declarations made by South Africa in 1946 and 1947 on the interpretation of its mandate over South-West Africa, an agreement that had been concluded in 1920.

<sup>483</sup> *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 49.

<sup>484</sup> See footnote 377 above.

<sup>485</sup> See United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. XXVII.3, note 5, p. 924.

<sup>486</sup> Greig, *loc. cit.*, pp. 24 and 42–45. See the example cited by this author (p. 43) of the reactions of the Netherlands to the reservations of Bahrain and Qatar to article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations, and the “counter-interpretation” of articles I and II of the Treaty on the Non-Proliferation of Nuclear Weapons made by the United States in reaction to point 8 of the declaration by Italy concerning that Treaty (United Nations, *Treaty Series*, vol. 1018, pp. 416–418).

<sup>487</sup> See paragraph 333 above.

a treaty, or by a State when making notification of succession to a treaty, whereby the State or international organization subordinates 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 [which has legal consequences distinct from those deriving from simple interpretative declarations]."<sup>488</sup>

(ii) *The proposed definition and its consequences*

340. The definition of interpretative declarations does not appear in any of the provisions of the 1969, 1978 and 1986 Vienna Conventions. However, it would seem possible to elicit it by systematically contrasting it with the definition of reservations, as has been done above. In addition, the definition used for interpretative declarations leads one to exclude from this category of unilateral declarations instruments that are sometimes and erroneously included.

a. *The proposed definition*

341. Although the Commission ultimately decided that there was no point in including a definition of interpretative declarations in its 1966 draft articles on the law of treaties,<sup>489</sup> the Commission did discuss this idea several times during its preparation of the text.

342. While the first two Special Rapporteurs, Mr. James Brierly and Sir Hersch Lauterpacht, neglected to define interpretative declarations, Sir Gerald Fitzmaurice did: in his very first report, in 1956, he defined interpretative declarations negatively by contrasting them with reservations, specifying that the term "reservation"

does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty.<sup>490</sup>

343. This was a "negative", or "reverse" definition, however, which made it clear that reservations and interpretative declarations were separate legal instruments but did not positively define what was meant by the term "interpretative declaration". Moreover, the wording used *in fine*, which, one assumes, was probably intended to cover what this report refers to as "conditional interpretative declarations", lacked precision, to say the least.

344. This second flaw was partially corrected by Sir Humphrey Waldock, who, in his first report, submitted in 1962, removed some of the ambiguity that marked the final part of the definition proposed by his predecessor, but again put forward an entirely negative definition:

An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation.<sup>491</sup>

<sup>488</sup> The Special Rapporteur agrees that the phrase in square brackets goes beyond the strict framework of definitions which are the subject of this report; however, he feels that this information may be useful in justifying the emphasis placed on this distinction.

<sup>489</sup> See paragraphs 63–65 above.

<sup>490</sup> See footnote 66 above.

<sup>491</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 31–32.

345. This process makes it clear what an interpretative declaration is not; it is of little use in defining what it is, a question in which the Commission subsequently lost interest.<sup>492</sup>

346. It was this omission that Japan tried to fill when it noted, in its comments on the draft adopted by the Commission on first reading, that "not infrequently a difficulty arises in practice of determining whether a statement is in the nature of a reservation or of an interpretative declaration", and suggested "that a new provision should be inserted ... in order to overcome this difficulty".<sup>493</sup> However, the suggestion of Japan did nothing more than call for the addition of a paragraph to draft article 18 (subsequently article 19):

A reservation, in order to qualify as such under the provisions of the present articles, must be formulated in writing, and expressly stated as a reservation.<sup>494</sup>

347. Here again, the definition of interpretative declarations was not a "positive" one, and the proposed addition had more to do with the legal regime of reservations than with their definition. Moreover, this proposal was incompatible with the definition of reservations that was ultimately selected, which rejected nominalism entirely.

348. Curiously, very few authors have hazarded any doctrinal definitions of interpretative declarations since the adoption of the 1969 Vienna Convention.

349. Horn considers that "[a]n interpretative declaration is an interpretation, which is distinguished from other interpretations by its form and by the moment it is presented".<sup>495</sup> However, while this author devotes a long chapter to an attempt at "clarifying the concept of interpretative declaration",<sup>496</sup> he does not propose any definition in the true sense of the word. What is more, his underlying assumptions would seem debatable: from the foregoing, it appears that neither the form of these declarations nor the moment at which they are formulated can characterize them or distinguish them from reservations.

350. The definition of the term "understanding" given by Whiteman<sup>497</sup> is more directly usable in that she considers interpretative declarations both as they relate to reservations (an understanding "is not intended to modify or limit any of the provisions of the treaty" and, positively, "is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than as a substantive reservation"). As for the terms "declaration" and "statement", they "are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or

<sup>492</sup> See paragraphs 59 et seq. above. The commentary on draft article 2, paragraph 1 (d), however, stipulates that a declaration that is merely a "clarification of the State's position" does not "amount to a reservation" (*Yearbook ... 1966*, vol. II, p. 190).

<sup>493</sup> *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, pp. 46–47.

<sup>494</sup> Comments transmitted in a note verbale dated 4 February 1964 (A/CN.4/175), p. 78; see also pages 70–71.

<sup>495</sup> Horn, *op. cit.*, p. 237.

<sup>496</sup> *Ibid.*, chap. 25, pp. 236–277.

<sup>497</sup> See footnote 383 above.

obligations stipulated in the treaty”.<sup>498</sup> Although there is no need to distinguish between these three terms, which, generally speaking, have no equivalent in languages other than English,<sup>499</sup> these definitions have the merit of highlighting certain indisputable characteristics of interpretative declarations:

(a) They seek to clarify or explain, not to modify or exclude;

(b) These clarifications or explanations are placed on record.

351. Finally, in his recent book on interpretative declarations, Sapienza bases himself on the following definition of interpretative declarations: they are the

unilateral declarations through which States, at the moment they express their commitment to be bound by the provisions of a multilateral treaty (and occasionally even at the time of signature, although that does not constitute a true expression of obligation, strictly speaking), clarify, to a certain extent, their point of view with regard to the interpretation of a provision of the treaty itself or to associated problems or to the application of the treaty.<sup>500</sup>

352. Despite the excessive shades of meaning and ambiguity that surround some definitions (and the Special Rapporteur’s disagreement insofar as the moment of the formulation of interpretative declarations is concerned), this one combines, in broad outline, the conclusions reached through the most systematic comparison possible of interpretative declarations with reservations.

353. It seems clear to the Special Rapporteur from the foregoing that, like a reservation, an interpretative declaration:

(a) Is a unilateral declaration made by a State or an international organization;

(b) However phrased or named, but which is distinguished by the fact that, if it is not conditional,<sup>501</sup> it can be formulated at any time; and

(c) Purports not to exclude or modify the legal effect of certain provisions of the treaty (or the treaty in its entirety<sup>502</sup>) in its application to that State or that international organization, but to clarify the meaning or scope attributed by the declarant to those provisions.

354. These are the elements that the Special Rapporteur believes ought to be included in the definition of interpretative declarations in the Guide to Practice:

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

<sup>498</sup> Whiteman, *op. cit.*, pp. 137–138.

<sup>499</sup> See footnotes 382–383 above.

<sup>500</sup> Sapienza, *op. cit.*, p. 1.

<sup>501</sup> With regard to this (important) exception, see draft guideline 1.2.4 above (para. 339).

<sup>502</sup> Regarding this point, see draft guideline 1.1.4 above (para. 155).

355. It goes without saying that, here again, this definition in no way prejudices the validity or the effect of such declarations. Moreover, this definition has, in the eyes of the Special Rapporteur, the dual advantage of making it possible to distinguish clearly between reservations and interpretative declarations, while being sufficiently general to encompass different categories of interpretative declarations; in particular, it encompasses both conditional and mere interpretative declarations, the distinction between which is covered in draft guideline 1.2.4.

b. The distinction between interpretative declarations and other unilateral declarations made in respect of a treaty

356. Another advantage of the proposed definition lies in the fact that it also makes it possible to distinguish between interpretative declarations and other unilateral declarations formulated by a State or an international organization, possibly at the time of the declarant’s expression of consent to be bound by the treaty, but which are neither interpretative declarations nor reservations and most likely have little to do with the law of treaties.

357. The extreme diversity of unilateral declarations made by a State “concerning” a treaty has already been stressed in this report: some of them are reservations in the sense of the Vienna definition as draft guidelines 1.1.1 to 1.1.8 of the Guide to Practice endeavour to reflect it, while others are in fact intended to clarify the meaning or scope of the treaty in question and merit the name “*interpretative* declarations”; still others, however, lack any clear character and cannot be placed in either of the above categories.

358. Some of these atypical declarations have already been considered above. Examples include:

(a) A unilateral declaration that is used by its author to make commitments that go beyond the obligations imposed by the treaty in respect of which the declaration is made;<sup>503</sup>

(b) A declaration that can be construed as an offer to add a new provision to the treaty;<sup>504</sup>

(c) A “declaration of non-recognition”, when the declaring State does not intend to prevent application of the treaty in its relations with the unrecognized entity.<sup>505</sup>

359. However, this list is far from being exhaustive: the signing of a treaty by a State or an international organization or the expression of its consent to be bound can be, and frequently is, the occasion for declarations of all sorts that do not seek to exclude or modify the legal effect of the provisions of the treaty or to interpret them.

360. This is the case when a State expresses, in one of these situations, its opinion, positive or negative, with regard to the treaty, and even sets forth improvements that it feels ought to be made as well as ways of making them.

<sup>503</sup> See paragraphs 207–211 above and draft guideline 1.1.5 (para. 212).

<sup>504</sup> See paragraphs 219–221 above and draft guideline 1.1.6 *in fine* (para. 222).

<sup>505</sup> See paragraphs 164–177 and, *a contrario*, draft guideline 1.1.7 (para. 177).

Declarations by several States regarding the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects afford some notable examples:

(a) 1. The Government of the People's Republic of China has decided to sign the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects adopted at the United Nations Conference held in Geneva on 10 October 1980.

2. The Government of the People's Republic of China deems that the basic spirit of the Convention reflects the reasonable demand and good intention of numerous countries and peoples of the world regarding prohibitions or restrictions on the use of certain conventional weapons which are excessively injurious or have indiscriminate effects. This basic spirit conforms to China's consistent position and serves the interest of opposing aggression and maintaining peace.

3. However, it should be pointed out that the Convention fails to provide for supervision or verification of any violation of its clauses, thus weakening its binding force. The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices fails to lay down strict restrictions on the use of such weapons by the aggressor on the territory of his victim and to provide adequately for the right of a state victim of an aggression to defend itself by all necessary means. The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons does not stipulate restrictions on the use of such weapons against combat personnel. Furthermore, the Chinese texts of the Convention and Protocol are not accurate or satisfactory enough. It is the hope of the Chinese Government that these inadequacies can be remedied in due course;<sup>506</sup>

(b) After signing the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, the French Government, as it has already had occasion to state

—through its representative to the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons in Geneva, during the discussion of the proposal concerning verification arrangements submitted by the delegation of the Federal Republic of Germany and of which the French Government became a sponsor, and at the final meeting on 10 October 1980;

—on 20 November 1980 through the representative of the Netherlands, speaking on behalf of the nine States members of the European Community in the First Committee of the thirty-fifth session of the United Nations General Assembly;

Regrets that thus far it has not been possible for the States which participated in the negotiation of the Convention to reach agreement on the provisions concerning the verification of facts which might be alleged and which might constitute violations of the undertakings subscribed to.

It therefore reserves the right to submit, possibly in association with other States, proposals aimed at filling that gap at the first conference to be held pursuant to article 8 of the Convention and to utilize, as appropriate, procedures that would make it possible to bring before the international community facts and information which, if verified, could constitute violations of the provisions of the Convention and the Protocols annexed thereto.<sup>507</sup>

361. These are simple observations regarding the treaty which reaffirm or supplement some of the positions taken during its negotiation, but which have no effect on its application.<sup>508</sup>

<sup>506</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. XXVI.2, p. 883; see also the declarations made by the United States (*ibid.*, p. 886) and Romania (*ibid.*, p. 885).

<sup>507</sup> *Ibid.*, pp. 883–884; see also the declaration made by Italy (*ibid.*, pp. 884–885).

<sup>508</sup> See also, for example, the long declaration made by the Holy See in 1985 when ratifying the two 1977 Protocols Additional to the Geneva Conventions of 12 August 1949, United Nations, *Treaty Series*, vol.

362. This is also the case when a State makes a declaration in which it calls on all or some other States to become parties to a treaty<sup>509</sup> or to implement it effectively.<sup>510</sup>

363. The same is true when a State takes the opportunity afforded by its signature of a treaty or its expression of consent to be bound by it to recall certain aspects of its policy with regard to the subject area of the treaty, as China did when it signed the Comprehensive Nuclear-Test-Ban Treaty:

1. China has all along stood for the complete prohibition and thorough destruction of nuclear weapons and the realization of a nuclear-weapon-free world.<sup>511</sup>

Similarly, when it became a party to the Convention on the Rights of the Child, the Holy See (among others) made the following declaration:

By acceding to the Convention on the Rights of the Child, the Holy See intends to give renewed expression to its constant concern for the well-being of children and families.<sup>512</sup>

364. In the same spirit, Migliorino notes that some declarations made in the instruments of ratification of the 1971 Seabed Treaty, notably those of Canada and India, concerning types of weapons other than nuclear weapons, do not purport to modify the rights and obligations ensuing from the Treaty or to interpret it; "Their main purpose is to avoid that the Treaty prejudice the position of States making the declaration with respect to certain issues of the law of the sea on which States have different positions and views."<sup>513</sup>

365. What these diverse declarations have in common is that the treaty in respect of which they are made is simply a pretext, and they bear no legal relationship to it: they could have been made under any circumstances, they

1419, pp. 394–396 (text also attached to the reply from the Holy See to the questionnaire on reservations to treaties).

<sup>509</sup> See the declaration by the United States concerning the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects: "The United States Government welcomes the adoption of this Convention, and hopes that all States will give the most serious consideration to ratification or accession" (United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. XXVI.2, p. 886), or the one by Japan concerning the Treaty on the Non-Proliferation of Nuclear Weapons: "The Government of Japan hopes that as many States as possible, whether possessing a nuclear explosive capability or not, will become parties to this Treaty in order to make it truly effective. In particular, it strongly hopes that the Republic of France and the People's Republic of China, which possess nuclear weapons but are not parties to this Treaty, will accede thereto" (*ibid.*, *Treaty Series*, vol. 1035, pp. 342–343).

<sup>510</sup> See the declaration by China concerning the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction: "III. States Parties that have abandoned chemical weapons on the territories of other States parties should implement in earnest the relevant provisions of the Convention and undertake the obligation to destroy the abandoned chemical weapons" (United Nations, *Multilateral Treaties Deposited with the Secretary-General ...*, chap. XXVI.3, p. 891).

<sup>511</sup> *Ibid.*, chap. XXVI.4, p. 895.

<sup>512</sup> *Ibid.*, chap. IV.11, p. 214; see also the aforementioned declaration by the Holy See (footnote 508) on the subject of the Protocols Additional to the Geneva Conventions of 12 August 1949: "Lastly, on this occasion the Holy See reaffirms its deep conviction regarding the fundamentally inhuman nature of war."

<sup>513</sup> Migliorino, *loc. cit.*, p. 107; see also pages 115–119.

have no effect on its implementation, nor do they seek to do so.

366. They are thus neither reservations nor interpretative declarations. What is more, they are not even governed by the law of treaties, which in turn offers no help in assessing their validity (which is dependent on other rules of international law, both general and specialized) or in determining the legal regime applicable to them.

367. The Special Rapporteur believes that it would be useful to spell this out in order to avoid any confusion. That is the intention of the following draft guideline:

*Guide to Practice:*

*“1.2.5 A unilateral statement made by a State or by an international organization whereby that State or that organization expresses its views on the treaty or on the subject area covered by the treaty without purporting to exclude or to modify the legal effect of its provisions, or to interpret it, constitutes neither a reservation nor an interpretative declaration [and is not subject to application of the law of treaties].”*

368. A somewhat different situation from those described above concerns what one might call “informative declarations”, whereby the formulating State informs its partners, for example, of the internal authorities that will be responsible for implementing the treaty.

369. Horn, who calls these “declarations of domestic relevance”, provides a series of examples concerning United States practice, placing them in three categories: “Statements initiated by the Senate may authorize the President to issue more concrete instructions for the implementation of the treaty obligations on the internal level, or by means of agreements of a specific kind with the other parties, or they may let certain measures of implementation pend later authorization by Congress.”<sup>514</sup>

370. Authorization to ratify the IAEA statute was given by the United States Senate,

subject to the interpretation and understanding, which is hereby made a part and condition of the resolution of ratification, that (1) any amendment to the Statute shall be submitted to the Senate for its advice and consent, as in the case of the Statute itself, and (2) the United States will not remain a member of the Agency in the event of an amendment to the Statute being adopted to which the Senate by a formal vote shall refuse its advice and consent.<sup>515</sup>

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

The Government of the United States of America considers that the above statement of interpretation and understanding pertains solely to United States constitutional procedures and is of a purely domestic character.<sup>516</sup>

<sup>514</sup> Horn, op. cit., p. 104.

<sup>515</sup> Text in Whiteman, op. cit., p. 191; see also (p. 192) the “interpretation and explanation” attached to the instrument of ratification of the Convention on the Organisation for Economic Co-operation and Development.

<sup>516</sup> Ibid., pp. 191–192.

372. Occasionally, however, the distinction between an “informative” declaration and an interpretative declaration may be unclear, as Sweden notes in its reply to the questionnaire on reservations:<sup>517</sup> “It should be noted that some of the declarations referred to include purely informative as well as interpretative elements. Only the latter are being dealt with here, although the distinction may sometimes be vague.” By way of example, Sweden, explaining the reasons for the declaration attached to its instrument of ratification of the 1980 European Outline Convention on transfrontier co-operation between territorial communities or authorities, stated that the reason for the declaration was not only to provide information on Swedish authorities and bodies which would fall within the scope of the Convention, but also to convey that its application would be confined to those indicated; e.g. to exclude other bodies such as parishes which under Swedish law are local public entities.

373. Here it can probably be said that this is really a reservation by means of which the author seeks to exclude the application of the treaty to certain types of institution to which it might otherwise apply. At the very least, it might be a true interpretative declaration explaining how Sweden understands the treaty. But this is not the case with purely informative declarations, which, like those of the United States cited earlier,<sup>518</sup> cannot have any international effect and concern only relations between Congress and the President.

374. The problem arose in connection with a declaration of this type made by the United States in respect of the Treaty Relating to the Uses of the Waters of the Niagara River concluded with Canada.<sup>519</sup> The Senate would only authorize ratification through a “reservation” that specifically identified the competent national authorities for the United States side;<sup>520</sup> this reservation was transmitted to Canada, which accepted it, stating that it did so “because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada’s rights or obligations under the Treaty”.<sup>521</sup> Following an internal dispute, the District of Columbia Court of Appeal ruled, in a judgement dated 20 June 1957, that the “reservation” had not modified the treaty in any way, and that since it related only to the expression of purely domestic concerns, it did not constitute a true reservation in the sense of international law.<sup>522</sup> This reasoning is further upheld<sup>523</sup> by the fact that the declaration did not purport to produce any effect at the international level.

<sup>517</sup> Reply to question 3.1.

<sup>518</sup> Paragraphs 369–371.

<sup>519</sup> Signed in Washington on 27 February 1950 (United Nations, *Treaty Series*, vol. 132, p. 223).

<sup>520</sup> This famous declaration is known as the “Niagara reservation”; see Henkin, “The treaty makers and the law makers: the Niagara reservation”.

<sup>521</sup> Quoted by Whiteman, op. cit., p. 168.

<sup>522</sup> *Power Authority of the State of New York v. Federal Power Commission*, 247 F.2d 538–544 (D.C. Cir., 1957); for a fuller account of the case, see Whiteman, op. cit., pp. 166–169; Bishop Jr., loc. cit., pp. 317–322; and Horn, op. cit., pp. 105–106.

<sup>523</sup> The fact that the “Niagara reservation” was formulated in the context of a bilateral treaty does not weaken this reasoning; quite the contrary: while a “reservation” to a bilateral treaty can be viewed as an offer to renegotiate (see chapter II below), which, in this case, Canada

(Continued on next page.)

375. For the same reasons it would be difficult to call this declaration an “interpretative declaration”: it does not interpret one or more of the provisions of the treaty but is directed only at the internal modalities of its implementation. It can also be seen from United States practice that “informative declarations” are not systematically attached to the instrument by which the country expresses its consent to be bound by a treaty;<sup>524</sup> this clearly demonstrates that they are exclusively domestic in scope.

376. Accordingly, it would seem valid to say that “informative” declarations, which simply give indications of the manner in which the State or international organization plans to implement the treaty at the internal level, are not interpretative declarations, even though, unlike the declarations mentioned above,<sup>525</sup> they are directly linked to the treaty.

377. For this reason, it appears that they ought to be covered by a separate provision of the Guide to Practice:

“1.2.6 *A unilateral declaration formulated by a State or an international organization in which the State or international organization indicates the manner in which it intends to discharge its obligations at the internal level but which does not affect the rights and obligations of the other contracting parties is neither a reservation nor an interpretative declaration.*”

### 3. PUTTING THE DISTINCTION INTO ACTION

378. It is apparent from the foregoing that interpretative declarations are distinguished from reservations principally by the objective which the State or international organization sets when making them: by formulating a reservation, the authors seek to exclude or modify the legal effect of some of the provisions of a treaty (or the treaty in its entirety) as they apply to them; by making an interpretative declaration, they seek to clarify the meaning and the scope they attribute to the treaty or to certain of its provisions.

379. As to the equally important distinction between mere interpretative declarations and conditional interpretative declarations, it, too, is based on the declarant’s intentions: in both cases, the author seeks to interpret the treaty, but in the first, the interpretation in question is not made a condition for participation in the treaty, whereas in the second, it is inseparable from the expression of the declarant’s consent to be bound.

380. These distinctions are fairly clear as to their principle, yet they are not easily put into practice, particularly since States and international organizations seldom explain their intentions, even taking pains at times to disguise them, and since the terminology used does not constitute an adequate criterion for distinguishing them. The objective of this section is to provide some information

regarding the substantive rules<sup>526</sup> that should be applied in order to distinguish between reservations and interpretative declarations and, within the latter category, between mere interpretative declarations and conditional interpretative declarations.

#### (a) *Stating the problem—the “double test”*

381. It has been written that, “[i]n the relations of men and nations it always seems rational to look at the substance rather than the form in appraising communications. But, a substance test throws a burden on those at the receiving end (or tribunals that may decide disputes) to recognize a statement for what it is rather than for what it is titled”.<sup>527</sup>

382. It is necessary first of all to agree on the nature of this “material test”. In fact, it is a double test, one that is both subjective (what did the declarant *want* to say?) and objective (what did he *do*?)

383. Notwithstanding what has occasionally been written, these two questions are alternatives: the first helps determine whether an interpretative declaration is conditional or not, and the second distinguishes interpretative declarations from reservations.

384. In reality, the second question tends to overshadow the first insofar as the distinction between reservations and interpretative declarations is concerned. While article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions defines the term “reservation” as a unilateral declaration by means of which a State or an international organization “*purports*\* to exclude or to modify the legal effect of certain provisions of the treaty”, the actual criterion has its basis in the effective result of the declaration: if implementing of the declaration results in a modification or exclusion of the legal effect of the treaty or certain of its provisions (as would happen if the rules of the law of treaties were applied normally in the absence of a declaration), then the statement is a reservation, “however phrased or named”; if the declaration simply clarifies the meaning or scope that its author attributes to the treaty or to certain of its provisions, it is an interpretative declaration. If it does none of this, then it is a unilateral declaration that is made “in connection with the treaty” but has no connection to the law of treaties nor, in the view of the Special Rapporteur, to the topic under consideration.<sup>528</sup>

385. There exist in jurisprudence some formulas which imply that the objective test should be combined with the subjective test in order to determine whether a text is a reservation or an interpretative declaration. For example, in the *Belilos v. Switzerland* case, “[l]ike the Commission and the Government, the Court recognises that it is necessary to ascertain *the original intention*\* of those

(Footnote 523 continued.)

accepted, it is quite significant that the Court of Appeals held that it had no international scope. It would in fact be difficult to see how Canada could have “objected” to a declaration that did not concern it.

<sup>524</sup> See Miller, *op. cit.*, pp. 170–171; and Whiteman, *op. cit.*, pp. 186 et seq.

<sup>525</sup> Paragraphs 362–369.

<sup>526</sup> The rules of procedure concerning the formulation of reservations, interpretative declarations, acceptances and objections will be the subject of a detailed study and draft guidelines in the Special Rapporteur’s next report.

<sup>527</sup> Edwards Jr., *loc. cit.*, pp. 368–369; see also Greig, *loc. cit.* (para. 290 above).

<sup>528</sup> See in particular draft guidelines 1.1.5, 1.2.5 and 1.2.6 (paras. 212, 367 and 377 respectively).

who drafted the declaration".<sup>529</sup> Likewise, in the *English Channel* case, the Franco-British Court of Arbitration held that, in order to determine the nature of the reservations and declarations made by France regarding the Convention on the Continental Shelf, "[t]he question [was] one of *the respective intentions*"\* of the French Republic and the United Kingdom in regard to their legal relations under the Convention ...".<sup>530</sup>

386. The problem is poorly stated: certainly, the declarant's intention is important (does he seek to exclude or to modify the legal effect of the provisions of the treaty?). But to answer this question, it is necessary, and sufficient, to note what the consequence of implementing the declaration would be. The two tests thus overlap, and the answer to the second question makes it possible to answer the first at the same time. This was in fact the reasoning followed both by the European Court of Human Rights and the Court of Arbitration in the *English Channel* case.

387. Some authors think it useful to complicate the first problem further by pointing out that if a State has given, when expressing its consent to be bound, an interpretation that subsequently proves to be erroneous because it is rejected by a judge or arbitrator or body competent to issue an authoritative interpretation, the nature of the interpretative declaration is retroactively modified: "The statement's nature as a reservation is established at the same time the propagated interpretation is established as the incorrect one."<sup>531</sup>

388. To the Special Rapporteur, this is just another artificial complication: it is true that if an authentic or authoritative interpretation comes to light after the declarant has put forward his own interpretation, that interpretation is called into question, but this in no way modifies the *nature* of the original unilateral interpretation: it stands. The interpretation is revealed to be erroneous, and the question arises as to what *effects* it then has. The problem of definition is solved, to be replaced by the problem of the regime of mere or conditional interpretative declarations.<sup>532</sup>

389. On the other hand, the answer to the first question (what was the declarant's intention?) is crucial in distinguishing conditional interpretative declarations from mere interpretative declarations. In other words, does the interpretation put forward by the State or international organization constitute a condition for its participation in the treaty or not? If not, the declaration is a mere interpretative declaration; if so, it is a conditional interpretative declaration.

390. Thus there is not really any "double test", but rather a succession of questions. Faced with a unilateral declaration by a State or an international organization on the subject of a treaty, the following questions must be asked in succession: does the declaration have the effect of excluding or modifying the legal effect of the provisions of a treaty? If the answer to this (objective) question is

<sup>529</sup> European Court of Human Rights (see footnote 160 above), p. 23, para. 48.

<sup>530</sup> Decision of 30 June 1977 (see footnote 159 above), p. 28, para. 30.

<sup>531</sup> Horn, *op. cit.*, p. 326.

<sup>532</sup> See also paragraph 324 above.

affirmative, there is no need to go any further: the declaration is a reservation; it is only when the answer is negative and the effect of the declaration is in fact only a clarification of the meaning or scope of the treaty that a second (subjective) question needs to be asked: does the proposed interpretation constitute, for the declarant, a condition of his participation in the treaty?

391. The Special Rapporteur does not think it necessary to devote a specific guideline in the Guide to Practice to setting out the manner in which the problem is stated. This would seem to him to be sufficiently evident from the definition of reservations and interpretative declarations on the one hand and that of conditional interpretative declarations on the other. Nevertheless, should the Commission decide otherwise, "cautionary" guidelines drafted as follows might be contemplated:

[*Guide to Practice*:

"1.3.0 *The classification of a unilateral declaration as a reservation depends solely on the determination as to whether it purports to exclude or to modify the legal effect of the provisions of the treaty in their application to the State or international organization that formulated it.*

"1.3.0 bis *The classification of a unilateral declaration as an interpretative declaration depends solely on the determination as to whether it purports to clarify the meaning or the scope that the declarant attributes to the treaty or to certain of its provisions.*

"1.3.0 ter *The classification of an interpretative declaration as a conditional interpretative declaration depends solely on the determination as to whether the declarant intended to subordinate its consent to be bound by the treaty to the interpretation that is the subject of the declaration.*" ]

#### (b) *The prescribed methodology*

392. Admittedly, the problem at hand and the test to solve it have no effect on the methodology used. In all cases, a unilateral declaration should be interpreted in terms of the circumstances of the situation; "[e]ach case must be considered on its own merits",<sup>533</sup> starting with the principle of the indifference of nominalism raised by the Vienna definition.

393. However, as established above, to make these determinations, there are valid reasons for preferring certain methods or indications of interpretation:

(a) As stipulated in draft guideline 1.2.2, the phrasing or name used by the declarant gives an indication of his intention which cannot be overlooked;

(b) This is particularly true when the State or international organization makes several separate declarations and takes care to title them differently (draft guideline 1.2.2);

<sup>533</sup> Memorandum issued in 1950 by the United States Department of State to the Department of Labor, quoted by Bishop Jr., *loc. cit.*, p. 304; see also Jennings and Watts, *op. cit.*, p. 1242: "Whether these [statements] constitute reservations is a question which can only be answered on the merits of each particular instance."

(c) Or, when called upon to explain his position further, the declarant clarifies his intention;<sup>534</sup> and

(d) Bearing in mind the general presumption that States will behave in conformity with international law,<sup>535</sup> the State (or international organization) must, as stipulated in draft guideline 1.2.3, be assumed to have intended to make an interpretative declaration and not a reservation if the treaty in respect of which the declaration is made prohibits reservations.

394. Nevertheless, there are often cases in which these indications are absent, since States and international organizations often do not give names to the unilateral declarations they formulate and the treaty may not contain a reservations clause. In any case, none of these presumptions is indisputable.

395. These presumptions should then be confirmed, or their absence offset, by turning to the normal rules of interpretation in international law. “Discerning the real substance of the often complex statements made by States upon ratification of, or accession to, a multilateral treaty is a matter of construction and must be solved through the ordinary rules of interpretation.”<sup>536</sup>

396. More precisely, there is justification for turning to the rules of interpretation of treaties. Whether the unilateral declarations are reservations or interpretative declarations, they are clearly legal instruments distinct from the treaty with which they are associated,<sup>537</sup> but unlike general policy declarations<sup>538</sup> or purely “informative” declarations,<sup>539</sup> they are inextricably linked with the treaty whose meaning they seek to interpret or of whose provisions they purport to exclude or modify the legal effect.

397. This was clearly highlighted by the Inter-American Court of Human Rights in its advisory opinion of 8 September 1983 concerning the death penalty:

Reservations have the effect of excluding or modifying the provisions of a treaty and they become an integral part thereof as between the reserving State and any other States for whom they are in force. Therefore, ... it must be concluded that any meaningful interpretation of a treaty calls for an interpretation of any reservation made thereto. Reservations must of necessity therefore also be interpreted by reference to relevant principles of general international law and the special rules set out in the Convention itself.<sup>540</sup>

398. No doubt the Inter-American Court had in mind the rules applicable to the interpretation of reservations, but, *mutatis mutandis*, this reasoning can be applied to cases where the thing that is to be determined is not the meaning

of a reservation but, backing up a step, the legal nature of a unilateral declaration linked to a treaty. In practice this is often how judges and arbitrators proceed when confronted with a problem of this type.

399. In all cases of which the Special Rapporteur is aware, the “general rule of interpretation” set out in article 31 of the 1969 Vienna Convention<sup>541</sup> has been implemented as a matter of priority; where necessary, this rule has been supplemented by recourse to the “supplementary means of interpretation” contemplated in article 32.<sup>542</sup> In its 1983 opinion, the Inter-American Court of Human Rights explained itself in the following terms:

It follows that a reservation [but this holds true in general for any unilateral declaration that relates to the provisions of a treaty] must be interpreted by examining its text in accordance with the ordinary meaning which must be attributed to the terms in which it has been formulated within the general context of the treaty of which the reservation forms an integral part.<sup>543</sup> This approach must be followed except when the resultant interpretation would leave the meaning ambiguous or obscure or would lead to a result which is manifestly absurd or unreasonable. 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, approving or acceding to a treaty. (Vienna Convention, Art. 19.) Thus, without excluding the possibility that supplementary means of interpretation might, in exceptional circumstances, be resorted to, the interpretation of reservations must be guided by the primacy of the text. A different approach would make it extremely difficult for

<sup>541</sup> Article 31:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

“2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

“(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

“(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

“3. There shall be taken into account, together with the context:

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

“(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

“(c) any relevant rules of international law applicable in the relations between the parties.

“4. A special meaning shall be given to a term if it is established that the parties so intended.”

<sup>542</sup> Article 32:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

“(a) leaves the meaning ambiguous or obscure; or

“(b) leads to a result which is manifestly absurd or unreasonable.”

<sup>543</sup> The Special Rapporteur has some hesitation with regard to this wording: a reservation (or a declaration) is an integral part of the State's expression to be bound, but not, strictly speaking, of the treaty itself.

<sup>534</sup> See paragraphs 257 and 316–318 above.

<sup>535</sup> “There is well-established general principle of law that bad faith is not presumed” (*Lake Lanoux* case (France/Spain), award of 16 November 1957; original French text in UNRIIAA, vol. XII (Sales No. 63.V.3), p. 305; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook ... 1974*, vol. II (Part Two), document A/5409, pp. 194–199, paras. 1055–1068. See also Nguyen Quoc, Daillier and Pellet, op. cit., pp. 416–417; and Horn, op. cit., p. 326.

<sup>536</sup> Coccia, “Reservations to multilateral treaties on human rights”, p. 10.

<sup>537</sup> See paragraphs 120–126 above.

<sup>538</sup> See draft guideline 1.2.5 (para. 367).

<sup>539</sup> See draft guideline 1.2.6 (para. 377).

<sup>540</sup> Advisory Opinion OC–3/83 (see footnote 165 above), p. 84, para. 62.

other States Parties to understand the precise meaning of the reservation.<sup>544</sup>

400. Even though doctrine has barely contemplated the problem from this standpoint,<sup>545</sup> jurisprudence is unanimous in considering that priority must be given to the actual text of the declaration:

(a) This condition [imposed by the third reservation of France to article 6 of the Convention on the Continental Shelf], *according to its terms*,\* appears to go beyond mere interpretation; ... the Court ... accordingly, concludes that this “reservation” is to be considered a “reservation” rather than an “interpretative declaration”;<sup>546</sup>

(b) In the instant case, the Commission will interpret the intention of the respondent Government by taking account both of *the actual terms of the above-mentioned interpretative declaration*\* and the travaux préparatoires which preceded Switzerland’s ratification of the [European] Convention [on Human Rights].

The Commission considers that *the terms used*, ... taken by themselves,\* already show an intention by the Government to prevent ...

...

*In the light of the terms used*\* in Switzerland’s interpretative declaration ... and the above-mentioned travaux préparatoires taken as a whole, the Commission accepts the respondent Government’s submission that it intended to give this interpretative declaration the effect of a formal reservation;<sup>547</sup>

(c) “In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine *the substantive content*\*”;<sup>548</sup>

(d) If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration. In the present case, the statement entered by the French Government upon accession to the [International] Covenant [on Civil and Political Rights] is clear: it seeks to exclude the application of article 27 to France and emphasizes this exclusion semantically with the words “is not applicable”.<sup>549</sup>

401. Stranger still, bodies that have had to rule on problems of this type have, in order to bolster their arguments, at times “jumped” directly from the terms of the declaration to be interpreted to the *travaux préparatoires*, barely touching on its context (even though it is specifically mentioned in the general rule of interpretation in article 31 of the 1969 Vienna Convention, while recourse to the *travaux préparatoires* is only one of the “supplementary means of interpretation” discussed in article 32).

402. In the *Belilos v. Switzerland* case, the European Court of Human Rights, after admitting that “the wording of the original French text” of the Swiss declaration, “though not altogether clear, can be understood as consti-

<sup>544</sup> Advisory Opinion OC-3/83 (see footnote 165 above), pp. 84–85, paras. 63–64.

<sup>545</sup> See, however, Horn, *op. cit.*, pp. 263–272, and, for a clearer and more concise account, Greig, *loc. cit.*, p. 26.

<sup>546</sup> Decision of 30 June 1977 (see footnote 159 above).

<sup>547</sup> *Temeltasch* case (see footnote 164 above), pp. 147–148, paras. 74–75 and 82.

<sup>548</sup> European Court of Human Rights (see footnote 160 above), p. 24, para. 49. In the same case, the Commission reached a different conclusion, also basing itself “both on the wording of the declaration and on the preparatory work” (*ibid.*, p. 21, para. 41); the European Commission of Human Rights, more clearly than the Court, gave priority to the terms used in the Swiss declaration (*ibid.*, annex, p. 38, para. 93); see the commentary by Cameron and Horn, *loc. cit.*, pp. 71–74.

<sup>549</sup> Human Rights Committee (see footnote 426 above).

tuting a reservation”,<sup>550</sup> “[I]ike the Commission and the Government, ... recognises that it is necessary to ascertain the original intention of those who drafted the declaration” and, in order to do so, takes into account “the preparatory work done on the declaration”,<sup>551</sup> as the Commission had done in the same case and in the *Temeltasch* case.<sup>552</sup>

403. It is true that this relatively intensive recourse to the preparatory work has been carried out by bodies established in connection with the European Convention on Human Rights; neither the Franco-British Court of Arbitration in the *English Channel* case<sup>553</sup> nor the Human Rights Committee in the case of *T. K. v. France*<sup>554</sup> makes the slightest mention of it.

404. Such caution is justified. As has been noted, “[s]ince a reservation is a unilateral act by the party making it, evidence from that party’s internal sources regarding the preparation of the reservation is admissible to show its intention in making the reservation”.<sup>555</sup> Still, in the everyday life of the law, it would appear difficult to recommend that *travaux préparatoires* be consulted regularly in order to determine the nature of a unilateral declaration relating to a treaty: they are not always made public,<sup>556</sup> and in any case it would be difficult to require foreign Governments to do so.

405. On the other hand, in view of these precedents, it would not be reasonable to exclude any recourse to the *travaux préparatoires*.

406. The balance between these contradictory considerations is, frankly speaking, adequately struck in articles 31 and 32 of the 1969 Vienna Convention, which give preference to the “general rule of interpretation” based on interpreting the treaty in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, without excluding, where necessary, recourse to “supplementary means of interpretation”. In the view of the Special Rapporteur, these rules can and should be applied not only when interpreting reservations and interpretative declarations, but also when determining their nature.

#### *Guide to Practice:*

“1.3.1 *To determine the legal nature of a unilateral declaration formulated by a State or an international organization in respect of a treaty, it is appropriate to apply the general rule of interpretation of treaties set out in article 31 of the Vienna Convention on the Law of Treaties.*

<sup>550</sup> European Court of Human Rights (see footnote 160 above), p. 22, para. 44.

<sup>551</sup> *Ibid.*, p. 23, para. 48.

<sup>552</sup> Decision of 5 May 1982 (see footnote 164 above), pp. 147–148, paras. 76–80.

<sup>553</sup> See footnote 159 above.

<sup>554</sup> See footnote 426 above.

<sup>555</sup> Jennings and Watts, *op. cit.*, p. 1242. The authors cite as proof the ICJ judgment in the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1978*, p. 3, in particular, p. 32).

<sup>556</sup> In the *Belilos v. Switzerland* case (footnote 160 above), the representative of the Swiss Government referred to the internal debates within the Government but took cover behind their confidential nature (see Cameron and Horn, *loc. cit.*, p. 84).

*Recourse may be had to the supplementary means of interpretation contemplated in article 32 of the Convention in order to confirm the determination made in accordance with the preceding paragraph, or to remove any remaining doubts or ambiguities.*"

#### 4. CONCLUSION

407. The function of the draft guidelines proposed in this chapter must be appreciated for what it is: an effort to limit uncertainties by helping decision makers determine the nature of unilateral declarations they intend to formulate in respect of a treaty and, above all, characterize certain declarations made by other States or international organizations with a view to reacting to them appropriately.

408. One point must be stressed: it is only definitions that are at issue here, and this marks the dual limit of this exercise. First, they do not in any way prejudge the validity of the unilateral declarations they describe; and, secondly, these definitions are of necessity general frameworks, and it would be naive to hope that they are sufficient in themselves to eliminate any classification problems in the future.

409. The first point needs little explanation. Defining is not regulating. "*Énonciation des qualités essentielles d'un objet*"<sup>557</sup> (A statement of the essential qualities of an object), a definition has as its sole function the placing of an individual declaration in a general category. This classification, however, in no way prejudges the validity of the declarations it describes: a reservation may be permissible or impermissible, but it is still a reservation if it corresponds to the chosen definition, and the same holds true for interpretative declarations.

410. Going even further, it could be said that accurately determining the nature of a declaration is the indispensable prerequisite for the application of a particular legal

<sup>557</sup> *Grand Larousse encyclopédique*.

regime, and precedes the determination of its permissibility. It is only after a particular instrument has been defined as a reservation that it can be decided whether or not it is permissible and to determine its legal scope, and the same is true for interpretative declarations.

411. In order to avoid any ambiguity, it might be useful to spell this out in the Guide to Practice:

*"1.4 Defining a unilateral declaration as a reservation or an interpretative declaration is without prejudice to its permissibility under the rules relating to reservations and interpretative declarations, whose implementation they condition."*

412. Regardless of how carefully reservations are defined and distinguished from interpretative declarations and other types of declaration made in respect of treaties, some uncertainty will always persist. It is inherent in any attempt at interpretation.

While analyzing the definition of reservation one must bear in mind certain natural limits of the practical usefulness of all definitions and descriptions accepted in this regard. It must be remembered that neither the description contained in the Vienna Convention nor the definition itself, be it formulated with utmost care, can prevent difficulties that might appear in practice while evaluating the character of certain declarations. The difficulties have their source in the subjectivism of evaluations. The situation is made worse by the fact that such declarations are frequently formulated in a vague or even ambiguous manner. Such situations are especially probable in cases of interpretative declarations of all kinds.<sup>558</sup>

413. To counter this drawback, the only solution is not, obviously, to refine the definitions further but for States and international organizations to endeavour to "play fair" and formulate declarations whose content is clear, spelling out their nature with precision. One should not harbour too many illusions in this regard: while ambiguities may be unwitting in some cases, they are all too often deliberate and correspond to political objectives from which no guide to practice will ever be able to dissuade decision makers.

<sup>558</sup> Szafarz, loc. cit., p. 297.

## CHAPTER II

### "Reservations" and interpretative declarations in respect of bilateral treaties

414. Although it appears simple, the question of reservations to bilateral treaties is one of those that elicits the most questions and controversies, either because such reservations are considered impossible, are likely to create major problems, or because emphasis is placed on the special regime applicable to them.

415. Since the Special Rapporteur's first report<sup>559</sup> was considered in 1995, members of the Commission have taken somewhat divergent positions with regard to the importance, or even the existence, of reservations to bilateral treaties. While some members felt that such reserva-

tions were a particularly important aspect of the topic,<sup>560</sup> others felt that they could be summarized briefly, or even ignored altogether,<sup>561</sup> largely because they were not really

<sup>560</sup> Mr. Lukashuk (*Yearbook ... 1995*, vol. I, 2402nd meeting, pp. 159–160; *Yearbook ... 1996*, vol. I, 2460th meeting, p. 200; and *Yearbook ... 1997*, vol. I, 2487th meeting, p. 91); Mr. He (*Yearbook ... 1997*, vol. I, 2500th meeting, p. 184); Mr. Brownlie (*ibid.*, p. 187) and Mr. Goco (*ibid.*, 2502th meeting, pp. 198–199); see also some of the positions taken by States in the Sixth Committee ("Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session" (A/CN.4/483), p. 12, paras. 90–93).

<sup>561</sup> Mr. Rosenstock (*Yearbook ... 1995*, vol. I, 2401st meeting, pp. 153–154), Mr. Rao (*ibid.*, p. 155), Mr. Ferrari Bravo (*Yearbook ... 1997*, vol. I, 2500th meeting, pp. 184–185).

<sup>559</sup> See footnote 1 above.

reservations<sup>562</sup> or because they were governed by a logic quite different from that underlying multilateral treaties.<sup>563</sup>

416. Although the Special Rapporteur has said that he leans more towards the second viewpoint, he has agreed to prepare a study without any preconceived notions on the subject.<sup>564</sup> That is the purpose of this chapter.

417. It does in fact seem appropriate to him to link the question of reservations to bilateral treaties with the question of the definition of reservations, since the principal point of disagreement concerns the determination of whether what some States and authors term “reservations” to bilateral treaties are in fact reservations. Accordingly, he will endeavour to answer this question by looking at the practice of States in this area and the way the question is dealt with by doctrine in the provisions of the 1969 and 1986 Vienna Conventions and their *travaux préparatoires*. This analysis will be supplemented by a look at the specific problems posed by the formulation of interpretative declarations in respect of bilateral treaties.

### A. “Reservations” to bilateral treaties

418. A review of the text and the *travaux préparatoires* of the three Vienna Conventions of 1969, 1978 and 1986 in this area results in ambiguous conclusions insofar as the possibility of attaching “reservations” to bilateral treaties is concerned. However, with this study it is possible to formulate draft guidelines which the Special Rapporteur believes would, if adopted, resolve the persistent ambiguities in this area.

#### 1. THE DIFFICULTY IN INTERPRETING THE SILENCE OF THE VIENNA CONVENTIONS ON RESERVATIONS TO BILATERAL TREATIES

419. The 1969 and 1986 Vienna Conventions say nothing about interpretative declarations made in respect of bilateral treaties, which is logical, since they do not take up the question of interpretative declarations. What is more surprising is that they are equally silent on the subject of reservations to bilateral treaties: neither article 2, paragraph 1 (*d*), which defines reservations, nor articles 19 to 23, which set out their legal regime, raise or exclude the possibility of such reservations. Nowhere does the word “bilateral” appear.<sup>565</sup> And the 1978 Vienna Convention

<sup>562</sup> Mr. Tomuschat (*Yearbook ... 1995*, vol. I, 2401st meeting, pp. 154–155) and Mr. Yamada (*ibid.*, 2407th meeting, pp. 190–192). One member of the Sixth Committee also felt that “considering reservations to bilateral agreements would be equivalent to renegotiating those instruments” (“Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session” (A/CN.4/472/Add.1, p. 43, para. 168).

<sup>563</sup> Mr. de Saram (*Yearbook ... 1995*, vol. I, 2404th meeting, p. 166) and Mr. Crawford (*Yearbook ... 1997*, vol. I, 2500th meeting, p. 187).

<sup>564</sup> See statements made on 6 July 1995 (*Yearbook ... 1995*, vol. I, 2412th meeting, pp. 222–223); 3 June 1997 (*Yearbook ... 1997*, vol. I, 2487th meeting, pp. 87–90); and 27 June 1997 (*ibid.*, 2501st meeting, p. 190).

<sup>565</sup> This is also a dominant feature of the two Vienna Conventions as a whole: the word “bilateral” appears only once, in article 60, paragraph 1, concerning the termination or suspension of the operation of a treaty as a consequence of its breach (this peculiar feature was noted by Mr. Crawford during the discussion in the Commission in 1997

explicitly contemplates only reservations to multilateral treaties.

#### (a) *The 1969 Vienna Convention*

420. At best, it can be said that articles 20, paragraph 1, and 21, paragraph 2, are directed at “the other contracting States [and contracting organizations]” or “the other parties to the treaty”,<sup>566</sup> both in the plural, and that article 20, paragraph 2, deals separately with treaties in whose negotiation a limited number of States or international organizations have participated, which is exactly what happens when a treaty involves only two parties. However, this argument does not in itself provide sufficient justification to say that the Vienna Conventions acknowledge the existence of reservations to bilateral treaties: the phrase “limited number of ... negotiating States” may mean “two or more States”, but it can also be interpreted as indicating only those multilateral treaties that bind a small number of States.<sup>567</sup>

421. At first glance, the *travaux préparatoires* for this provision would seem to suggest that it does not concern bilateral treaties. While at the outset of its work on reservations the Commission was divided only with regard to reservations to multilateral treaties,<sup>568</sup> in 1956 Sir Gerald Fitzmaurice stressed, in his initial report, the particular features of the regime of reservations to treaties with limited participation, a category in which he expressly included bilateral agreements.<sup>569</sup> Likewise, in his first report, in 1962, Sir Humphrey Waldock did not exclude the case of reservations to bilateral treaties, but treated it separately.<sup>570</sup>

on reservations to treaties (*Yearbook ... 1997*, vol. I, 2500th meeting, p. 187)).

<sup>566</sup> See in this connection a remark by Mr. Calle y Calle during the preparation of the draft articles on treaties concluded between States and international organizations or between two or more international organizations (*Yearbook ... 1981*, vol. I, 1650th meeting, p. 43, para. 22).

<sup>567</sup> During the debate on this provision, Mr. Verdross said that “[t]he distinction between an ordinary *multilateral*” treaty and a *multilateral*” treaty concluded between a restricted group of states was not clear, since no numerical criterion was laid down by which to determine what constituted a ‘restricted’ group” (*Yearbook ... 1962*, vol. I, 663rd meeting, p. 226, para. 64); similarly: Mr. Tunkin (*ibid.*, p. 227, para. 81, and 664th meeting, p. 232, para. 34).

<sup>568</sup> As early as its second session, in 1950, the Commission stated that “the application ... in detail” of the principle that a reservation could become effective only with the consent of the parties “to the great variety of situations which may arise in the making of *multilateral*” treaties was felt to require further consideration” (*Yearbook ... 1950*, vol. II, document A/1316, p. 381, para. 164). The study requested of the Commission in General Assembly resolution 478 (V) of 16 November 1950 was supposed to (and did) focus exclusively on “the question of reservations to multilateral conventions”.

<sup>569</sup> See draft article 38 (Reservations to bilateral treaties and other treaties with limited participation) which he proposed: “In the case of bilateral treaties, or plurilateral treaties made between a limited number of States for purposes specially interesting those States, no reservations may be made, unless the treaty in terms so permits, or all the other negotiating States expressly so agree” (*Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115).

<sup>570</sup> See draft article 18, paragraph 4 (*a*): “In the case of a bilateral treaty, the consent of the other negotiating State to the reservation shall automatically establish the reservation as a term of the treaty between the two States” (*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 61).

422. However, this reference to bilateral treaties disappeared from the draft text after Sir Humphrey Waldock's proposals were considered by the Drafting Committee in the same year.<sup>571</sup> The summary records of the discussion do not explain why this happened, but the explanation is most likely given in the introductory paragraph to the commentary on draft articles 16 and 17 (future articles 19 and 20 of the 1969 Vienna Convention) contained in the Commission's 1962 report and included in its final report in 1966:

A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement either adopting or rejecting the reservation the treaty will be concluded; if not, it will fall to the ground.<sup>572</sup>

423. In a case that clearly illustrates this, the United States suggested, in its observations on the draft adopted on first reading, that the relevant section should be entitled "Reservations to multilateral treaties", to which the Special Rapporteur replied:

The articles [in this section] are directed to reservations to multilateral treaties, while the notion of a reservation to a bilateral treaty is legally somewhat meaningless. In law, a reservation to a bilateral treaty appears purely and simply as a counter-offer and, if it is not accepted, there can be no treaty. However, in order to remove the slightest possible risk of misunderstanding, it is proposed that the title to the section should explicitly confine its contents to reservations to *multilateral* treaties.<sup>573</sup>

While some members of the Commission expressed doubts,<sup>574</sup> the proposal was adopted by the Commission.<sup>575</sup>

424. Thus when it adopted the draft article (art. 17, para. 2) which was the source of current article 20, paragraph 2, the text was contained in part II, section 2, entitled "Reservations to *multilateral*\* treaties".<sup>576</sup> In fact, all that can be concluded from this is that, in the eyes of the Commission, the rules it had adopted were not applicable to reservations to bilateral treaties, and it was pointless to adopt any rules adapted to cover such reservations, since they posed no problem. And yet the Commission also seemed to be acknowledging that reservations could be made to bilateral treaties.

425. However, even this general, subtle conclusion is cast into doubt by the positions taken during the United Nations Conference on the Law of Treaties and the decision of that Conference to revert to the heading "Reservations" for part II, section 2, of the 1969 Vienna Convention.

<sup>571</sup> See draft article 18 *bis* proposed by the Drafting Committee (*Yearbook ... 1962*, vol. 1, 663rd meeting, p. 225, para. 61).

<sup>572</sup> *Yearbook ... 1962*, vol. II, document A/5209, pp. 180–181, and *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 203. In his first report, Sir Humphrey Waldock simply said: "Reservations to bilateral treaties present no problem" (*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 62; but see paragraph 423 below).

<sup>573</sup> *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 45.

<sup>574</sup> See in particular the comments by Mr. Ruda, who said that he "preferred the title 'Reservations' because some of the provisions of the 1962 articles 18 to 22 ... could apply both to bilateral and to multilateral treaties" (*Yearbook ... 1965*, vol. I, 797th meeting, p. 154, para. 66).

<sup>575</sup> See *Yearbook ... 1965*, vol. II, document A/6009, p. 161.

<sup>576</sup> *Ibid.*, and *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 202.

426. To begin with, it will be noted that France and Tunisia had submitted a joint amendment which reintroduced an explicit reference to reservations to bilateral treaties and sought to stipulate, in article 17, paragraph 2 (subsequently article 20, paragraph 2, of the 1969 Vienna Convention), that

A reservation to a *bilateral treaty*\* or to a restricted multilateral treaty requires acceptance by all the contracting States.<sup>577</sup>

Introducing this amendment, the representative of Tunisia said that the text as drafted by the Commission might lead erroneously to an excessively restrictive interpretation of the article "as allegedly covering only multilateral treaties, to the exclusion of bilateral treaties".<sup>578</sup> The amendment was sent to the Drafting Committee<sup>579</sup> and dropped by the sponsors.<sup>580</sup>

427. However, a proposal by Hungary to delete the reference to multilateral treaties from the title of the section on reservations<sup>581</sup> was sent by the Committee of the Whole to the Drafting Committee,<sup>582</sup> which adopted it<sup>583</sup> and whose decision was recorded at the plenary meeting on 29 April 1969, after Mr. Yasseen, Chairman of the Drafting Committee, explained that the Committee had endeavoured not to prejudge the issue of the possible wording of reservations to bilateral treaties:

In the title of Section 2, the Drafting Committee had adopted an amendment by Hungary (A/CONF.39/C.1/L.137) to delete the words "to multilateral treaties" after the word "reservations", since the adjective "multilateral" did not modify the noun "treaty" in the definition of a reservation given in article 2, paragraph 1 (*d*); that did not, of course, prejudice the question of reservations to bilateral treaties.<sup>584</sup>

428. However, the day after this decision was taken, the question occasioned an interesting exchange of views between the President of the Conference, Mr. Roberto Ago, and the Chairman of the Drafting Committee:

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

<sup>577</sup> *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* (footnote 91 above), report of the Committee of the Whole on its work at the second session of the Conference (A/CONF.39/15), p. 239, para. 53 (*b*).

<sup>578</sup> *Ibid.*, *First session, Vienna, 26 March–24 May 1968* (footnote 92 above), 21st meeting, p. 111, para. 44.

<sup>579</sup> *Ibid.*, 25th meeting, pp. 135–136, paras. 32 and 41.

<sup>580</sup> *Ibid.*, *Second session, Vienna, 9 April–22 May 1969* (footnote 95 above), 84th meeting, p. 213, para. 3; France explained that decision by the fact that "it would be for the States concerned to include in their treaties provisions allowing for the special nature of restricted multilateral treaties", although no mention was made of bilateral treaties.

<sup>581</sup> *Ibid.*, *First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969* (footnote 91 above), document A/CONF.39/C.1/L.137; see also similar amendments submitted by China (A/CONF.39/C.1/L.13) and Chile (A/CONF.39/C.1/L.22).

<sup>582</sup> *Ibid.* (footnote 92 above), 20th meeting, p. 106, para. 56.

<sup>583</sup> *Ibid.*, 28th meeting, p. 146, para. 2 (Drafting Committee's decision on the titles of parts, sections and articles of the Convention and statement by the Chairman of the Drafting Committee).

<sup>584</sup> *Ibid.*, *Second session* (see footnote 95 above), 10th plenary meeting, p. 28, para. 23.

Committee would do well to revert to the title proposed by the International Law Commission.

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

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

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

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

24. The PRESIDENT said that, independently of the principle involved, the procedures laid down in the articles on reservations that the Conference had considered were not applicable to bilateral treaties.<sup>585</sup>

429. Apparently, the Conference did not return to this question.

430. Commenting on this exchange of views, Ruda endorsed the statement by Mr. Ago: "This statement was not challenged and the Convention has no provisions regarding reservations to bilateral treaties."<sup>586</sup> Conversely, Szafarz believes that "[o]ne may conclude from the amendments tabled at the conference and discussion that: a) the above description [in article 2, paragraph 1 (d), of the 1969 Vienna Convention] does not exclude the possibility of its application also to bilateral treaties".<sup>587</sup> Edwards Jr. is more circumspect: basing himself on practice and on the ambiguity of the *travaux préparatoires*, he maintains that the latter "actually leaves the matter ambiguous given the statement of the President of the Vienna Conference. Further examination of the *travaux* does not resolve the matter but instead suggests that action was taken at the Conference, without strenuous objection, but with differing views on whether there would be any impact on bilateral treaties".<sup>588</sup> This was, in fact, the relatively inconclusive conclusion to be drawn from the *travaux préparatoires*.

#### (b) *The 1986 Vienna Convention*

431. The question was hardly discussed during the preparation of the 1986 Vienna Convention. Right at the outset the Special Rapporteur, Mr. Reuter, said "treaties concluded by international organizations are almost always bilateral treaties, for which reservations may come into play in theory but are of no interest in practice".<sup>589</sup>

<sup>585</sup> Ibid., 11th plenary meeting, p. 37.

<sup>586</sup> Ruda, loc. cit., p. 110.

<sup>587</sup> Szafarz, loc. cit., p. 294.

<sup>588</sup> Edwards Jr., loc. cit., p. 404.

<sup>589</sup> *Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 36; see also *Yearbook... 1975*, vol. I, 1348th meeting, p. 238, para. 40, and *Yearbook... 1981*, vol. I, 1648th meeting, p. 29, para. 28. Reuter took the same position in his book (op. cit., p. 78): "[W]hile they are technically possible in bilateral treaties, reservations in that case have no practical meaning nor any genuine function to fulfil since they in fact amount to reopening negotiations which have just ended."

432. Moreover, while the Commission had initially considered devoting specific provisions to reservations made to treaties concluded between several international organizations, it was thought that "the opportunity for an international organization to formulate a reservation, even at the stage of formal confirmation, would afford the States members of that organization useful safeguards with respect to undertakings signed too hastily".<sup>590</sup> On that occasion the Commission noted:

This remark carried so much weight that it was argued that the system of reservations established by article 19 should be extended to the case of treaties between two international organizations. That raised the question whether the mechanism of reservations can operate generally in the case of bilateral treaties. Although the text of the Vienna Convention does not formally preclude this possibility,<sup>591</sup> the Commission's commentaries of 1966 leave no doubt that it regarded reservations to bilateral treaties as going beyond the technical mechanism of reservations and leading to a proposal to reopen negotiations.<sup>592</sup> The Commission did not wish to start a debate on this question, although most of its members considered that the régime of reservations could not be extended to bilateral treaties without distorting the notion of a "reservation". Considered as a whole, however, the texts of draft articles 19 and 19 *bis* in fact relate to multilateral treaties.<sup>593</sup>

433. Ultimately, these articles were not retained in the final draft adopted by the Commission, which went back to the system used in the 1969 Vienna Convention.<sup>594</sup> It was this text which, with a slight modification, was adopted by the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations in 1986, and the question of reservations to bilateral treaties was apparently not taken up again.<sup>595</sup> The Commission thus reverted to the 1969 text (with the necessary additions to deal with the topic under consideration) and to the ambiguities which persist in that text.

#### (c) *The 1978 Vienna Convention*

434. It appears that the question of reservations to bilateral treaties in the case of a succession of States was not raised during the discussion in the Commission or at the United Nations Conference on Succession of States in Respect of Treaties of 1978. However, the 1978 Vienna Convention tends to confirm the general impression gathered from a review of the 1969 and 1986 Vienna Conven-

<sup>590</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 106, para. (2) of the commentary to draft article 19.

<sup>591</sup> The commentary refers the reader to the statement by the Chairman of the Drafting Committee of the United Nations Conference on the Law of Treaties, cited in paragraph 427 above.

<sup>592</sup> The commentary refers the reader to the commentary made in 1966 (see footnote 572 above).

<sup>593</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 106, para. (3) of the commentary to draft article 19; the discussion referred to in the commentary took place at the 1649th–1651st meetings (*Yearbook ... 1981*, vol. I); see in particular the statements by Mr Ushakov, p. 38, Mr. Reuter, pp. 40 and 44, Sir Francis Vallat, p. 42, Messrs Riphagen, Calle y Calle, Tabibi and Njenga, pp. 42–43; see also the statement by the Chairman of the Drafting Committee, Mr. Díaz González (ibid., 1692nd meeting), pp. 262–263; *Yearbook ... 1981*, vol. II (Part Two), pp. 137–138, and *Yearbook ... 1982*, vol. II (Part Two), p. 34: "[I]t was pointed out that there had been examples in practice of reservations to bilateral treaties, that the question was the subject of dispute, and that the Vienna Convention was cautiously worded and took no stand on the matter."

<sup>594</sup> *Yearbook ... 1982*, vol. II (Part Two), p. 34.

<sup>595</sup> See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 139–140, paras. 87–88.

tions that the legal regime of reservations provided for in those Conventions (to which article 20, paragraph 3, of the 1978 Vienna Convention refers) is applicable solely to multilateral treaties and not to bilateral treaties.<sup>596</sup> Indeed, article 20, the only provision of that instrument to deal with reservations, is included in section 2 of part III,<sup>597</sup> which deals with multilateral treaties,<sup>598</sup> and expressly stipulates that it is applicable “[w]hen a newly independent State establishes its status as a party or as a contracting State to a *multilateral* treaty by a notification of succession”.

435. Here again, however, the only conclusion that can be drawn is that the Vienna regime is not applicable to reservations to bilateral treaties, including in cases of succession of States. This does not mean, however, that the concept of “reservations” to bilateral treaties is inconceivable or non-existent.

## 2. THE PRACTICE OF STATES WITH REGARD TO RESERVATIONS TO BILATERAL TREATIES

436. If, as the responses to the questionnaire on reservations to treaties indicate, international organizations do not appear to attach “reservations” to their signature or act of formal confirmation of bilateral treaties to which they are parties,<sup>599</sup> this is not the case with States, some of which do not hesitate to make unilateral statements which they call “reservations” in respect of bilateral treaties, while others claim to be opposed to them.

437. A review of State practice in the area of reservations to bilateral treaties is hardly more conclusive than a review of the provisions of the 1969, 1978 and 1986 Vienna Conventions in the light of their *travaux préparatoires*: such practice exists, but it is unclear whether it can be interpreted as confirming the existence of reservations to bilateral treaties as a specific institution. This is a practice which has been in existence for a long time and is geographically circumscribed.

438. The oldest example of a “reservation” to a bilateral treaty goes back to the resolution of 24 June 1795, in which the United States Senate authorized ratification of the “treaty of amity, commerce and navigation between the United States of America and Great Britain” (Jay Treaty) of 19 November 1794, “on condition that there be added to the said treaty an article, whereby it shall be agreed to suspend the operation of so much of the 12th article as respects the trade which his said majesty thereby consents may be carried on, between the United States and his islands in the West Indies, in the manner, and on the terms and conditions therein specified”.<sup>600</sup> The Senate consequently asked the President to renegotiate the

Treaty with the British Government, which accepted the amendment—a word which was actually in use at the time and which remained so for many years.<sup>601</sup>

439. The search for the partner State’s consent is, moreover, a constant in United States practice in this area. As the Department of State noted in its instructions to the United States Ambassador in Madrid following Spain’s refusal to accept an “amendment” to a 1904 extradition treaty which the Senate had adopted: “The action of the Senate consists in advising an amendment which, if accepted by the other party, is consented to in advance. In other words, the Senate advises that the President negotiate with the foreign government with a view to obtaining its acceptance of the advised amendment.”<sup>602</sup> Such consent is usually given, but this is not always the case.

440. For example, Napoleon accepted a modification made by the United States Senate to the Convention of Peace, Commerce and Navigation of 1800 between France and the United States, but then attached his own condition to it, which the Senate accepted.<sup>603</sup> An even more complicated case concerns ratification of the Convention of Friendship, Commerce and Extradition between the United States and Switzerland of 25 November 1850, which was the subject of a request for amendments, first by the United States Senate, then by Switzerland, and then again by the Senate, all of which were adopted and the instruments of ratification, which had been amended three times, were exchanged five years after the date of signature.<sup>604</sup>

441. In other cases, the partner of the United States has refused the amendment requested by the Senate, and the treaty has not entered into force. For example, the United Kingdom rejected amendments to an 1803 convention concerning the border between Canada and the United States and an 1824 convention for suppression of the African slave trade which the United States Senate had requested.<sup>605</sup> Another famous rejection of the United States Senate’s demands, again by the British Government, involves the treaty of 20 December 1900 dealing with the Panama Canal, which was consequently renegotiated and led to the signing of a new agreement, the Hay-Pauncefote Treaty of 18 November 1901.<sup>606</sup>

442. Despite these “failures”, the practice of reservations by the United States to bilateral treaties is firmly established, and the United States often subordinates its ratification of a bilateral treaty to acceptance by the other party of the changes sought by the Senate.<sup>607</sup>

the Treaty of Commerce with France of 6 February 1778 (ibid., footnote 13).

<sup>596</sup> Ibid., p. 261. Concerning the terminology used in United States domestic practice, see also footnote 655 below.

<sup>602</sup> Quoted by Hackworth, op. cit., p. 115.

<sup>603</sup> Owen, “Reservations to multilateral treaties”, pp. 1090–1091, and Bishop Jr., loc. cit., pp. 267–268.

<sup>604</sup> Bishop Jr., loc. cit., p. 269.

<sup>605</sup> Ibid., p. 266.

<sup>606</sup> Hackworth, op. cit., pp. 113–114.

<sup>607</sup> See the many examples cited by Hackworth, op. cit., pp. 112–130; Kennedy, “Conditional approval of treaties by the U.S. Senate”, pp. 100–122; and Whiteman, op. cit., pp. 159–164.

<sup>596</sup> See on this subject the observations of Mr. Mikulka during the debate on the Special Rapporteur’s first report (*Yearbook ... 1995*, vol. I, 2406th meeting, pp. 186–188).

<sup>597</sup> Which concerns only “newly independent States”.

<sup>598</sup> Chapter II deals with bilateral treaties.

<sup>599</sup> FAO, however, notes that, when presented with or presenting a “standard” agreement, amendments are sought and made as needed, rather than making reservations.

<sup>600</sup> Quoted by Bishop Jr., loc. cit., pp. 260–261; Bishop even cites a precedent that goes back to the Articles of Confederation: in 1778, the United States Congress demanded and obtained renegotiation of

443. In 1929, Owen estimated that somewhere between 66 and 87 bilateral treaties had been subject to a “reservation” by the United States after the Senate had imposed a condition on their ratification.<sup>608</sup> More recently, Kennedy compiled detailed statistics covering the period from 1795 to 1990. These data show that the United States Senate made its advice and consent to ratify conditional for 115 bilateral treaties during that period, a figure that includes interpretative declarations, which account for 15 per cent on average of all bilateral treaties to which the United States has become a party in just under two centuries.<sup>609</sup> The same statistics show that this practice of “amendments” or “reservations” involves all categories of agreement and is particularly frequent in the area of extradition, friendship, commerce and navigation treaties, and even peace treaties.<sup>610</sup>

444. In its response to the questionnaire on reservations, the United States confirmed that this practice remains important where the country’s bilateral treaties are concerned. The United States attached to its response a list of 13 bilateral treaties that were accepted with reservations between 1975 and 1985.<sup>611</sup> Such was the case, for example, of the Panama Canal Treaties<sup>612,613</sup> the Special Agreement under which Canada and the United States agreed to submit their dispute on the delimitation of maritime zones in the Gulf of Maine area to ICJ,<sup>614</sup> and the Supplementary Extradition Treaty between the United States of America and with the United Kingdom of 25 June 1985.<sup>615</sup>

445. It is striking to note, however, that only the United States gave an affirmative answer to question 1.4 of the questionnaire.<sup>616</sup> All other States that answered this question did so in the negative.<sup>617</sup> Some of them simply said that they did not formulate reservations to bilateral treaties, but others went on to provide some interesting details.

<sup>608</sup> Owen, loc. cit., p. 1091.

<sup>609</sup> Kennedy, loc. cit., p. 98.

<sup>610</sup> Ibid., pp. 99–103 and 112–116.

<sup>611</sup> The Special Rapporteur is not sure whether this means that the United States has not formulated any reservations to a bilateral treaty since 1985. Kennedy, who seems to have made a complete inventory in studying this practice (loc. cit.), offers no examples later than that date.

<sup>612</sup> The United States Senate resolution of 16 March 1976 stipulates that ratification of the second treaty is subject to two “amendments”, two “conditions”, four “reservations” and five “understandings”.

<sup>613</sup> Treaty concerning the permanent neutrality and operation of the Panama Canal (with annexes) and Panama Canal Treaty (with annex, agreed minute, related letter, and reservations and understandings made by the United States (Washington, D.C., 7 September 1977), United Nations, *Treaty Series*, respectively vol. 1161, p. 177, and vol. 1280, p. 3. Concerning the ratification of these two treaties, see in particular Fischer, “Le canal de Panama: passé, présent, avenir”, and Edwards Jr., loc. cit., pp. 378–381.

<sup>614</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246.

<sup>615</sup> The United States Senate resolution of 17 July 1986 requesting these changes called them “amendments”.

<sup>616</sup> The question read: “Has the State formulated reservations to bilateral treaties?” (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annex II).

<sup>617</sup> The following States answered in the negative: Bolivia, Canada, Chile, Croatia, Denmark, Finland, France, Germany, Holy See, India, Israel, Italy, Japan, Kuwait, Mexico, Monaco, Panama, Peru, Republic of Korea, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland.

446. Spain, for example, said that it had not formulated any reservations to bilateral treaties, as no provision was made in Spanish law for that practice. This would seem to imply that Spain does not rule out this possibility in international law.

447. Germany proved to be more sceptical on this point, saying that it had not formulated reservations to bilateral treaties. It shared the commonly held view that a State seeking to attach a reservation to a bilateral treaty would in effect refuse acceptance of that treaty as drafted. That would constitute an offer for a differently formulated treaty incorporating the content of the reservation and would thus result in the reopening of negotiations. The replies from Italy and the United Kingdom were very similar.

448. However, the United Kingdom added that it did not itself seek to make reservations a condition of acceptance of a bilateral treaty. If Parliament were (exceptionally) to refuse to enact the legislation necessary to enable the United Kingdom to give effect to a bilateral treaty, the United Kingdom authorities would normally seek to renegotiate the treaty in an endeavour to overcome the difficulties.

449. The fact remains that the response to the questionnaire was far from universal, and examples of “reservations” to bilateral treaties from States other than the United States can in fact be found. These include, first of all, the counter-proposals made by some States in response to the reservations of the United States; early examples have been cited above,<sup>618</sup> and there are others. Japan, for example, did not agree to ratification of the Treaty of Friendship, Commerce and Navigation of 2 April 1953 with the United States except by means of a “reciprocal” reservation.<sup>619</sup> Sometimes the initiative seems to have been taken first by the partner country of the United States. Owen cites the example of an 1857 treaty with New Granada [Colombia], which proposed “modifications” that were accepted by the United States.<sup>620</sup> Similarly, Portugal, Costa Rica and Romania expressed their desire that extradition treaties concluded with the United States in 1908, 1922 and 1924 respectively should not be applicable if the person to be extradited would be subject to the death penalty in the United States; the United States accepted this condition.<sup>621</sup> In 1926 El Salvador ratified a commercial treaty with the United States subject to a number of reservations, most of which were withdrawn at the request of the latter; it nevertheless accepted two of them, which it considered minor. These are reflected in a protocol issued in connection with the exchange of ratifications, although they are described there as “understandings”.<sup>622</sup>

450. It is interesting to note that this practice, even when not employed by the United States, is limited to relations with that country. Yet it is difficult to draw any firm conclusions from this observation. For one thing, the fact that the Special Rapporteur is unable to provide any examples other than the ones relating to the United States may be

<sup>618</sup> Paragraph 440 above.

<sup>619</sup> See Whiteman, op. cit., p. 161.

<sup>620</sup> Owen, loc. cit., p. 1093.

<sup>621</sup> Hackworth, op. cit., pp. 126–127 and 129–130.

<sup>622</sup> Ibid., pp. 127–128, and Bishop Jr., loc. cit., p. 269. For another example concerning a “reservation” rejected by the United States, see paragraph 454 below.

explained by the exceptional wealth of documentation pertaining to that country, whereas the practice may exist elsewhere and its existence go unknown for want of readily accessible publications or commentary. Conversely, it is quite striking that the constitutional justifications for this practice cited by the United States can be found elsewhere, and yet they have not led other States in similar constitutional situations to formulate reservations to their bilateral treaties.

451. In the United States, the Senate's power to make the President's ratification of both multilateral and bilateral treaties subject to certain reservations is generally deduced from article II, section 2, clause 2, of the Constitution, which stipulates: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur ..."<sup>623</sup> In truth, however, all democratic countries, whether theirs is a parliamentary, presidential or assembly form of government, appear to find themselves in this situation, and yet this does not lead them to formulate reservations to the bilateral treaties they conclude.

452. Imbert does not share this point of view, believing that a distinction should be made between parliamentary and presidential forms of government. In presidential regimes, he maintains, "as, for example, in the United States, the role of elected assemblies is obviously much more important. Indeed, the United States Senate is not only a legislative assembly. It is also an indispensable collaborator. When it reviews a treaty, it tends to act as an adviser to the Government: it considers the prospect of amending the treaty to be entirely natural".<sup>624</sup> This may explain the respective "state of mind" of parliamentary and executive authorities in each case, but in strictly legal terms, nothing prevents a parliament whose authorization is a requirement for ratification from conditioning such ratification by formulating a reservation.

453. The three most recent constitutions of the French Republic have made ratification of many categories of treaty by the President of the Republic subject to parliamentary authorization:<sup>625</sup> thus France finds itself, *mutatis mutandis*, in the same situation as the United States, and while France may formulate reservations to multilateral treaties at the request of its parliament,<sup>626</sup> it appears never to have done so in the case of bilateral treaties.

454. Nevertheless, the case of France reveals at least one instance in which a parliament has sought to make legislative authority to ratify subject to the formulation of a reservation. During the debate on the Washington Agree-

<sup>623</sup> See, for example, Henkin, *loc. cit.*, p. 1176; Bishop Jr., *loc. cit.*, pp. 268–269; and Whiteman, *op. cit.*, p. 138.

<sup>624</sup> Imbert, *op. cit.*, p. 395.

<sup>625</sup> Article 8 of the Constitutional Act of 16 July 1875, article 27 of the 1946 Constitution and article 53 of the 1958 Constitution; for commentary on this provision, see Pellet, "Article 53", pp. 1005–1058, especially pp. 1039–1042 and 1047–1051.

<sup>626</sup> See the examples given by Pellet, *loc. cit.*, pp. 1041 and 1048, and Imbert, *op. cit.*, pp. 394–395; in the latter case, the examples also cover Belgian and Italian practice. Imbert notes that in a parliamentary regime, assemblies "may authorize ratification by proposing reservations. However, this option is not exercised frequently, either because of practical difficulties (such as, for example, the need to reopen negotiations), or simply because it is regarded with much suspicion" (p. 394).

ment of 29 April 1929 for the reimbursement of French debts to the United States (once again, the same country), the Finance Committee of the Chambre des députés proposed a text incorporating reservations into the authorization act (which would have compelled the President of the Republic to formulate them upon depositing the instrument of ratification). This project was abandoned at the request of the Minister for Foreign Affairs and the Minister of Finance for reasons of expediency<sup>627</sup> although not for legal reasons. It should also be noted that, given the parliament's hesitation in this case, the executive power took the initiative of requesting the inclusion of a safeguard clause making the repayment subject to payment of reparations by Germany. This was what the United States would have called a "reservation" in its own practice, and it refused to accept it.<sup>628</sup>

455. From this review, admittedly incomplete, the following conclusions may be drawn:

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

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

### 3. THE LEGAL NATURE OF "RESERVATIONS" TO BILATERAL TREATIES

456. It must nevertheless be questioned whether these "reservations" are true ones in other words, whether they correspond to the Vienna definition.<sup>629</sup> Once again, it is easiest to hold the different elements of that definition up to the practice of reservations to bilateral treaties. It will then be seen that, despite some obvious points in common with reservations to multilateral treaties, "reservations" to bilateral treaties are different in one key respect: their intended and their actual effects.

457. From practice, as described above, it appears that reservations to bilateral treaties are formulated unilaterally by States (and, a priori, nothing prevents an international organization from doing the same) once the negotiations have ended, and they bear different names that may reflect real differences in domestic law, but not in international law. From these different standpoints, they meet the first three criteria set out in the Vienna definition:

1.1 "Reservation" means a unilateral statement, however phrased or named, made by a State or by 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 ...

(para. 512 below)

<sup>627</sup> Regarding this episode, see Kiss, *Répertoire de la pratique française en matière de droit international public*, pp. 284–285.

<sup>628</sup> Rousseau, *Droit international public*, pp. 122–123.

<sup>629</sup> See paragraph 81 above.

(a) *The moment when “reservations” to bilateral treaties are formulated*

458. Admittedly, this definition cannot be used as it stands: reservations to bilateral treaties are consistent with this first part of the Vienna definition, but some of the details contained in that definition have no logical application to them. This is particularly evident as regards the moment when a reservation to a bilateral treaty may be made.

459. In the first place, it is inconceivable that a reservation to a bilateral treaty be formulated at the time of signature. Of course, it may happen that the negotiator only places his signature at the bottom of the treaty “subject to” subsequent confirmation, and he may on that occasion indicate the points on which the State he represents has concerns. Technically speaking, however, this does not correspond to a reservation but to an institution apart from the law of treaties: that of signature *ad referendum*, by which the signatory accepts the text of a treaty only on condition that his signature be confirmed by the appropriate authority; if this is done, the treaty is considered to have been signed from the outset;<sup>630</sup> if it is not done, the treaty becomes void or is renegotiated.

460. Secondly, it goes without saying that it is impossible to accede to a bilateral treaty. Although the Vienna Conventions do not define it<sup>631</sup> accession may be considered to be the act by which a State or an international organization that has not participated in the negotiation of the treaty, or in any case signed its text, expresses its final consent to be bound. This is only conceivable in the case of multilateral treaties; bilateral treaties cannot be negotiated and signed by a single State!

461. Thirdly, and lastly, article 20 of the 1978 Vienna Convention does not contemplate the possibility of a newly independent State formulating a reservation when notifying a succession except in the case of multilateral treaties; however part III, section 3, of that Convention makes no such provision in the case of bilateral treaties.<sup>632</sup> This is normal, since the principle here is one of rupture: the treaty remains in force only if the two States expressly or implicitly so agree.<sup>633</sup> Thus it is highly questionable whether a newly independent State can formulate a “reservation” to a bilateral treaty on such an occasion: the unilateral statement that it might make to exclude or modify the legal effect of certain provisions of the treaty would have an effect only if the other party accepted it in other words, if the treaty was ultimately amended.

462. This last observation, however, does not apply to any “reservations” that a predecessor State may formulate upon notification of its succession. This is the fundamental character of all “reservations” to bilateral treaties, regardless of when they are formulated, and which distinguishes them from reservations to multilateral treaties as they are defined by the three Vienna Conventions.

<sup>630</sup> See article 12, paragraph 2 (b), of the 1969 and 1986 Vienna Conventions.

<sup>631</sup> The “definition” set out in article 2, paragraph 1 (b), of the 1969 Vienna Convention and article 2, paragraph 1 (b *ter*), of the 1986 Vienna Convention is entirely tautological and useless.

<sup>632</sup> See paragraph 434 above.

<sup>633</sup> See articles 24 and 28.

(b) *“Reservations” to bilateral treaties do not purport “to exclude or to modify the legal effect of certain provisions of the treaty in their application” to their author*

463. The definition of reservations set out in the Vienna Conventions was carefully weighed; each word is significant and, notwithstanding the criticisms that have been levelled at it, it appropriately describes the phenomenon of reservations, even if it leaves some uncertainties which the Guide to Practice seeks to dispel.

464. One of the fundamental elements of this definition is the teleological element, the objective pursued by the State or international organization making the reservation. By its unilateral statement, the author “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization” (art. 2 (d) of the 1986 Vienna Convention). This wording is not entirely applicable to reservations to bilateral treaties, or at least if it is, it is misleading, for it overlooks one of their principle characteristics.

465. There is no doubt that with a “reservation”, one of the contracting parties to a bilateral treaty intends to modify the legal effect of the provisions of the original treaty. But while a reservation does not affect the provisions of the instrument in the case of a multilateral treaty, a “reservation” to a bilateral treaty seeks to modify it: if the reservation produces the effects sought by its author, it is not the “legal effect” of the provisions in question that will be modified or excluded “*in their application*”\* to the author; it is the provisions themselves that will be modified. A reservation to a multilateral treaty has a subjective effect: if it is accepted, the legal effect of the provisions in question is modified vis-à-vis the State or the international organization that formulated it. A reservation to a bilateral treaty has an objective effect: if it is accepted by the other State, it is the treaty itself that is amended.

466. It is important to state this clearly: a reservation to a multilateral treaty produces effects only if it is accepted, in one way or another, expressly or implicitly, by at least one of the other contracting States or international organizations.<sup>634</sup> The same is true for a reservation to a bilateral treaty: the co-contracting State or international organization must accept the “reservation”, or else the treaty will not enter into force. Thus the difference does not have to do with the need for acceptance, which is present in both cases, in order for the reservation to produce its effects, but with the consequences of acceptance:

(a) In the case of a multilateral treaty, an objection does not prevent the instrument from entering into force,<sup>635</sup> even, at times, between the objecting State or international

<sup>634</sup> Article 20 of the 1969 and 1986 Vienna Conventions states that a reservation can have been accepted in advance by all the signatory States and be expressly authorized by the treaty (para. 1), or it can be expressly accepted (paras. 2–4), or it can be “considered to have been accepted” if no objection is raised within 12 months (para. 5).

<sup>635</sup> Subject to the separate question of determining whether an objection can have an effect on the number of States required for entry into force of the treaty; this problem will be considered in the report on the effects of reservations.

al organization and the author of the reservation,<sup>636</sup> and its provisions remain intact;

(b) In the case of a bilateral treaty, the absence of acceptance by the co-contracting State or international organization prevents the entry into force of the treaty; acceptance involves its modification.

(c) “Reservations” to bilateral treaties are proposals to amend

467. “Reservations” to bilateral treaties, then, do not produce an effect if they are not accepted, and it is hardly conceivable that this fundamental point not be mentioned in their definition: while a reservation to a multilateral treaty paralyzes, to the extent indicated by its author, the treaty’s legal effect, a reservation to a bilateral treaty is, in reality, nothing more than a proposal to amend the treaty or an offer to renegotiate it.

468. This analysis corresponds to the prevailing views in doctrine. Some authors have concluded that a reservation to a bilateral treaty is purely and simply inconceivable. According to Rousseau:

*Bilateral treaties ... are true synallagmatic conventions which impose specific obligations on the contracting parties and in which the signing by one of the parties is the natural complement to the signing by the other co-contractor.*<sup>637</sup> Consequently, a ratification with reservations attached is inconceivable, since it can only be interpreted ... as a refusal to ratify accompanied by a new offer to negotiate. It has no value unless the other co-contractor expressly accepts it ....<sup>638</sup>

469. The need for acceptance of any “reservation” to a bilateral treaty is virtually unanimously endorsed in doctrine and consistent with the teachings of practice. Owen, after citing a great many examples of such reservations and the results thereof, concluded in 1929: “From these examples, it seems reasonably clear that neither party has doubted the right of the other to introduce reservations at the time of ratification: the only restriction upon this liberty is that the other signatory shall consent to such reservations”.<sup>639</sup>

470. This is also consistent with the position taken back in 1919 by Miller, long an officer with the United States Department of State and Legal Adviser to the United States delegation to the 1919 Paris Peace Conference:

One conclusion supported by *all* of the foregoing precedents is that the declaration, whether in the nature of an explanation, an understanding, an interpretation, or reservation of any kind, *must be agreed to by the other Party to the treaty*. In default of such acceptance, the treaty fails ...

Accordingly, in a treaty between two Powers only, the difference between a reservation of any nature and an amendment, is purely one of form. In an agreement between two Powers there can be only *one* contract. The whole contract is to be sought in all the papers, and whether an explanation or interpretation or any other kind of a declaration relating to the terms of the treaty is found in the treaty as signed or in

<sup>636</sup> See article 20, paragraph 4 (b), of the 1969 and 1986 Vienna Conventions.

<sup>637</sup> Scelle concedes that a bilateral treaty may have the character of a “treaty-law”, which leads him to acknowledge the possibility of reservations to such treaties, although he excludes them in the case of “treaty-contracts” (op. cit., p. 474).

<sup>638</sup> Rousseau, *Droit international public*, p. 122; similarly, Maresca, op. cit., pp. 281–282.

<sup>639</sup> Owen, loc. cit., pp. 1093–1094.

the instruments of ratification is wholly immaterial. There are only two contracting Parties and each has contracted only with the other and each has accepted an identic[al] instrument of ratification from the other, which together with the signed treaty constitute one agreement.<sup>640</sup>

471. This is also the view of Bishop Jr. (who quotes Miller):<sup>641</sup> “Bilateral treaties invited the analogy of ordinary bilateral contract doctrines of offer and acceptance, with a reservation being treated as a counter-offer which must be accepted by the other party if it were to be any contract between the parties.”<sup>642</sup>

472. This idea of a “counter-offer”<sup>643</sup> does in fact highlight the contractual nature of the phenomenon of reservations to bilateral treaties: whereas reservations to multilateral treaties do not lend themselves to a contractual approach,<sup>644</sup> reservations to bilateral treaties demand such an approach. The “reservation” only has meaning, only produces an effect, only exists if the “counter-proposal” which it constitutes is accepted by the other State.<sup>645</sup>

473. Thus, as is clear from practice, a “reservation” to a bilateral treaty is actually a request to renegotiate the treaty.<sup>646</sup> If this request is refused, either the State that made the proposal abandons it and the treaty enters into force as signed, or else the treaty itself is simply abandoned. If, on the other hand, the other State agrees to the request, it can do so quite simply and the treaty enters into force with the modification desired by the State that formulated the proposal or it can in turn put forward a “counter-counter-proposal”,<sup>647</sup> and the final text will be the one produced by the new negotiations between the two States.

474. There has been some question as to whether acceptance of the new offer constituted by the “reservation” must be express or may be tacit.<sup>648</sup> In practice, it seems that it is always express,<sup>649</sup> the United States in particular includes both its own reservations and their acceptance by the other State in its instruments of ratification.<sup>650</sup> This is also consistent with a theoretical requirement: acceptance of a “reservation” to a bilateral treaty ultimately leads in

<sup>640</sup> Miller, op. cit., pp. 76–77.

<sup>641</sup> Bishop Jr., loc. cit., p. 271, footnote 14.

<sup>642</sup> Ibid., p. 267. See also page 269.

<sup>643</sup> Owen (loc. cit., p. 1091) traces this idea of a “counter-offer” back to Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, para. 519. The expression also appears in *Restatement of the Law Third: The Foreign Relations Law of the United States* (footnote 154 above); see also the position of Mr. Ago and Mr. Yasseen (para. 428 above), and that of Reuter (footnote 589 above).

<sup>644</sup> See paragraphs 120–126 above.

<sup>645</sup> In support of this contractual analysis, apart from Bishop Jr. (footnote 641 above), see in particular Henkin, loc. cit., pp. 1164–1169, and Horn, op. cit., p. 23.

<sup>646</sup> This is in fact apparent from the Commission’s commentary, cited in paragraph 422 above. See also footnote 563 above and the replies of Germany, Italy and the United Kingdom to the questionnaire on reservations to treaties, cited in paragraphs 447–448 above. See also Jennings and Watts, op. cit., p. 1242, and Sinclair, op. cit., p. 54.

<sup>647</sup> See paragraph 440 above.

<sup>648</sup> See Horn, op. cit., pp. 4 and 126.

<sup>649</sup> See Whiteman, op. cit., p. 138.

<sup>650</sup> See, however, the somewhat strange case cited by Owen (loc. cit., p. 1093) of the Treaty of Commerce between the United States and Germany of 19 March 1925, to which the United States Senate made “reservations” that were accepted by Germany “notwithstanding serious fundamental objections”.

reality to amendment of the treaty; otherwise a State cannot be presumed to be bound by it.

475. Here, too, the problem is stated differently for reservations to multilateral treaties, which do not entail modification of the treaty; the treaty's application is simply "neutralized" in the relations between the author of the reservation and the party or parties that accept it. In the case of "reservations" to a bilateral treaty, the treaty itself is modified to the advantage of the author of the reservation and to the detriment of the other party. Here one does not go back to general international law or to international law "minus the treaty";<sup>651</sup> rather, new treaty obligations<sup>652</sup> are created. A treaty cannot be concluded implicitly, which means that the rules set out in paragraphs 2 and 5 of article 20 of the 1969 and 1986 Vienna Conventions cannot and must not be extended to bilateral treaties.

476. In fact, saying that acceptance of a "reservation" to a bilateral treaty is equivalent to amending the treaty does not make the reservation an amendment: it is simply a unilateral proposal to amend, prior to the treaty's entry into force, while the amendment itself is conventional in nature, is the result of an agreement between the parties<sup>653</sup> and is incorporated into the negotiated text, even if it can be contained in one or more separate instruments.

477. At the international level, the distinction between "reservations" and "amendments" in the domestic practice of the United States is devoid of meaning: regardless of the term used or of the fact that Congress imposes conditions under different names, they are always just offers to amend the treaty.

478. According to Edwards Jr., "[r]eservations and treaty amendments are not the same things. An amendment may lessen or expand obligations under a treaty, while a reservation normally seeks to reduce the burdens imposed by a treaty on the reserving party".<sup>654</sup> While this may be the case domestically, it is certainly not the case at the international level: in both cases, the Senate makes its consent to modify the treaty conditional. The same holds true for all conditions it places thereon, with the exception of interpretative declarations, which raise problems that differ in some aspects.<sup>655</sup>

<sup>651</sup> See paragraph 219 above.

<sup>652</sup> See the draft article proposed by Sir Humphrey Waldock in 1962 (footnote 571 above).

<sup>653</sup> See article 39 of the 1969 and 1986 Vienna Conventions.

<sup>654</sup> Edwards Jr., *loc. cit.*, p. 380.

<sup>655</sup> See paragraphs 483–510 below. Kennedy has identified 12 different categories of conditions set by the United States Senate for ratification of treaties (bilateral and multilateral), but notes that four of these account for 90 per cent of all cases: "understandings", "reservations", "amendments" and "declarations". However, the relative share of each varies over time, as the following table shows:

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

(Kennedy, *loc. cit.*, p. 100)

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

The action of the Senate when it undertakes to make so-called "reservations" to a treaty is evidently the same in effect as when it makes so-called "amendments", whenever such reservations and amendments in any substantial way affect the terms of the treaty. The so-called reservations which the Senate has been making from time to time are really not reservations as that term has generally been understood in international practice up to recent times.<sup>656</sup>

480. Thus, while this is not a conclusive argument, it is interesting to note that neither the United States members of the Commission during the preparation of the draft articles on the law of treaties, nor the United States delegates to the United Nations conferences which adopted the 1969, 1978 and 1986 Vienna Conventions stressed, or apparently even mentioned, "reservations" to bilateral treaties during the debate on reservations. This would seem to reflect their awareness that this institution, the permissibility of which under international law can hardly be contested,<sup>657</sup> was based on a different logic and could not be assimilated to what are called "reservations" in international law. These texts are in fact "conditional ratifications"; they also exist in respect of multilateral treaties,<sup>658</sup> which are governed by a legal regime that is very different from the regime of reservations in the sense of the Vienna Conventions.

481. This, then, is the conclusion which the Special Rapporteur proposes that the Commission draw from the foregoing analysis:

(a) It may happen that a State or an international organization formulates, after signing a bilateral treaty but prior to the treaty's entry into force, a unilateral statement by which it purports to obtain from the other contracting party a modification of the provisions of the treaty, to which it subordinates the expression of its consent to be bound;

(b) Whatever it is called, and even if it is called a "reservation", such a statement does not constitute a reservation in the sense of the Vienna Conventions or, more broadly, the law of treaties; it is thus not subject to the legal regime applicable to reservations to treaties;

(c) The statement constitutes an offer to renegotiate the treaty and, if this offer is accepted by the other party, it becomes an amendment to the treaty, whose new text is binding on both parties once they have expressed their final consent to be bound in accordance with the modalities stipulated in the law of treaties.

482. In this spirit, the Commission might wish to adopt the following draft guideline:

*Guide to Practice:*

*"1.1.9 A unilateral statement formulated by a State or by an international organization after signing a bilateral treaty but prior to its entry into force, by which that State or that organization purports to obtain from the other*

<sup>656</sup> Quoted by Hackworth, *op. cit.*, p. 112; along the same lines, see the position of Miller (para. 470 above).

<sup>657</sup> See paragraph 455 above.

<sup>658</sup> See paragraph 164 above.

party a modification of the provisions of the treaty to which it subordinates the expression of its final consent to be bound by the treaty, does not constitute a reservation, however phrased or named.

“The express acceptance of the contents of this statement by the other party results in an amendment to the treaty whose new text is binding on both parties once they have expressed their final consent to be bound.”

## B. Interpretative declarations made in respect of bilateral treaties

483. The silence of the Vienna Conventions extends *a fortiori* to interpretative declarations made in respect of bilateral treaties: the Conventions do not mention interpretative declarations in general<sup>659</sup> and are quite cautious insofar as the rules applicable to bilateral treaties are concerned.<sup>660</sup>

484. In fact, such interpretative declarations do not pose any real problems vis-à-vis those made in respect of multilateral treaties, although it seems that they are invariably conditional.<sup>661</sup> This is the only outstanding feature that can be observed from a review of relatively extensive practice.

### 1. THE PRACTICE OF INTERPRETATIVE DECLARATIONS MADE IN RESPECT OF BILATERAL TREATIES

485. Apparently more recent than the practice of reservations to bilateral treaties, the practice of interpretative declarations to such treaties is less geographically limited and does not seem to give rise to objections where principles are concerned.

486. The oldest example cited by Kennedy, author of an exhaustive survey of conditional approvals of treaties (in general) by the United States Senate, dates back to the “understandings” which the United States set as a condition for its acceptance of the Treaty of Peace, Amity, Commerce and Navigation with Korea in 1883.<sup>662</sup> Earlier examples can be found: Bishop Jr. notes a declaration attached by Spain to its instrument of ratification of the Treaty of Friendship, Cession of the Floridas, and Boundaries, signed in Washington on 22 February 1819, by which it ceded Florida,<sup>663</sup> and Rousseau mentions “the approval [sic] by the [French] Parliament of the Franco-Tunisian Convention of 8 June 1878, voted with an interpretative reservation to article 2, paragraph 3, concerning the regulation of loans issued by Tunisia”.<sup>664</sup>

<sup>659</sup> See paragraphs 342–349 above.

<sup>660</sup> See footnote 565 above.

<sup>661</sup> See paragraphs 306–327 above and draft guideline 1.2.4 (para. 339 below).

<sup>662</sup> Kennedy, *op. cit.*, p. 118.

<sup>663</sup> Bishop Jr., *loc. cit.*, p. 316; and *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776–1909*, William M. Malloy, ed. (Washington, Government Printing Office, 1910), vol. II, p. 1651.

<sup>664</sup> Rousseau, *Droit international public*, p. 120.

487. The situation at present, as reflected in the replies to the questionnaires on reservations, is as follows:

(a) Of 22 States that answered question 3.3,<sup>665</sup> four said that they had formulated interpretative declarations in respect of bilateral treaties;

(b) One international organization, ILO, wrote that it had done so in one situation, while noting that the statement was in reality a corrigendum, made in order not to delay signature.<sup>666</sup>

488. These results may seem “meagre”; they are significant nevertheless:

(a) While only the United States claimed to make “reservations” to bilateral treaties,<sup>667</sup> it is joined here by Panama, Slovakia and the United Kingdom<sup>668</sup> and by one international organization;<sup>669</sup>

(b) While several States criticized the very principle of “reservations” to bilateral treaties,<sup>670</sup> none of them showed any hesitation concerning the formulation of interpretative declarations in respect of such treaties;

(c) Furthermore, the replies to the questionnaires, interesting though they might be, provide an incomplete picture of the situation: many States and international organizations, unfortunately, have not yet replied, and the information requested relates only to the past 20 years.

489. It thus appears that the practice of interpretative declarations to bilateral treaties is well established and fairly general. Here again, the United States is one of the “main sources” of the practice.<sup>671</sup> In just the period

<sup>665</sup> “Has the State attached any interpretative declarations to the expression of its consent to be bound by bilateral treaties?” (see footnote 616 above).

<sup>666</sup> See the letter from the ILO Director-General to the Minister of Public Service, Labour and Social Welfare of Zimbabwe which accompanied signature of the Agreement concerning the establishment of a sub-regional office at Harare, signed at Geneva on 8 February 1990 (United Nations, *Treaty Series*, vol. 1563, p. 267):

“This letter is to confirm the following understandings of the International Labour Organization: that ‘employed in the service of the Harare Office’ [in article 4, paragraph (e), of the Agreement] is understood within the meaning of Article 4, paragraph 1, and that ‘the right to transfer out of the Republic of Zimbabwe, without any restriction or limitation, provided that the officials concerned can show good cause for their lawful possession of such funds’ means ‘the right to transfer the same out of the Republic of Zimbabwe, without any restriction or limitation, provided that the officials concerned can show good cause for the lawful possession thereof.’

“The Office further understands the word ‘telephone’ in Article 9, paragraph 1 of the Agreement, to mean ‘telecommunications.’”

(*Ibid.*, vol. 1762, p. 252)

<sup>667</sup> See paragraph 445 above.

<sup>668</sup> However, the example cited by the United Kingdom concerns its own interpretation of the understandings in the United States instrument of ratification of the Treaty concerning the Cayman Islands relating to mutual legal assistance in criminal matters, signed at Grand Cayman on 3 July 1986 (United Nations, *Treaty Series*, vol. 1648, p. 179); see paragraphs 489 and 494 below.

<sup>669</sup> In addition, Sweden said that it might have happened, although very rarely, that Sweden had made interpretative declarations, properly speaking, with regard to bilateral treaties, and that declarations of a purely informative nature of course existed.

<sup>670</sup> See paragraphs 447–448 above.

<sup>671</sup> See, however, the observation in paragraph 450 above concerning reservations to bilateral treaties, which is applicable to interpretative declarations.

covered by that country's response to the questionnaire (1975–1995), it mentions 28 bilateral treaties to which it attached interpretative declarations upon expressing its consent to be bound. These include:

(a) The two aforementioned treaties concerning the Panama Canal,<sup>672</sup> which, at the request of the United States Senate, were both made subject to “reservations” (called “amendments”, “conditions” and “reservations”) and interpretations (“understandings”) that were included in the instruments of ratification together with an interpretative declaration by Panama;<sup>673</sup>

(b) The 1977 Agreement on the implementation of IAEA safeguards, which constitutes a bilateral treaty between a State and an international organization;<sup>674</sup>

(c) The 1980 and 1989 conventions on fiscal matters with the Federal Republic of Germany,<sup>675</sup> which gave rise, in the case of the former, to a “memorandum of understanding” followed by a request for explanations by Germany regarding the scope of the understanding to which the Senate had subordinated its consent and, in the case of the second, an exchange of interpretative notes, apparently originated by Germany;

(d) The 1985 Treaty on Mutual Legal Assistance in Criminal Matters with Canada, to which the United States attached an interpretative declaration; Canada stated that it considered that the declaration did not in any way alter the obligations of the United States under that Treaty;<sup>676</sup>

(e) The 1986 Treaty concerning the Cayman Islands relating to mutual legal assistance in criminal matters between the United States and the United Kingdom;<sup>677</sup>

<sup>672</sup> See paragraph 444 and footnote 613 above.

<sup>673</sup> In its reply to the questionnaire, Panama did not mention that example, but in the Understandings and declarations made upon ratification by the Government of Panama in the Treaty concerning the permanent neutrality and operation of the Panama Canal (footnote 613 above), it states: “It is also the understanding of the Republic of Panama” (p. 201); see also paragraph 491 below.

<sup>674</sup> Agreement between the United States of America and the International Atomic Energy Agency for the application of safeguards in the United States of America (Vienna, 18 November 1977), United Nations, *Treaty Series*, vol. 1261, p. 371.

<sup>675</sup> Convention between the United States of America and the Federal Republic of Germany for the avoidance of double taxation with respect to taxes on estates, inheritances, and gifts (Bonn, 3 December 1980), United Nations, *Treaty Series*, vol. 2120, p. 283; and Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital and to certain other taxes (with protocol and exchange of notes and with related note dated 3 November 1989) (Bonn, 29 August 1989), *ibid.*, vol. 1708, p. 3.

<sup>676</sup> Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters (Quebec City, 18 March 1985), ILM, vol. XXIV, No. 4 (July 1985), p. 1092. Similarly, see the reaction of Thailand to the United States “understandings” concerning the Treaty on mutual assistance in criminal matters, with attachments (Bangkok, 19 March 1986), *Treaties and Other International Acts Series*, and the reaction of Mexico to the statement by the United States concerning the Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance (Mexico City, 9 December 1987), ILM, vol. XXVII, No. 2 (March 1988), p. 447.

<sup>677</sup> See footnote 668 above and the reaction of the United Kingdom to the interpretative declaration made by the United States (para. 494 below).

(f) The 1993 Convention with Slovakia, on avoidance of double taxation and prevention of tax evasion,<sup>678</sup> which was also the subject of an “understanding” on the part of the Senate. Slovakia noted that the understanding had been prompted by an inadvertent error in the drafting of the English-language text of the treaty and had the effect of correcting the English-language text to bring it into conformity with the Slovak-language text.

490. The extent and consistency of the practice of interpretative declarations in respect of bilateral treaties leaves little doubt as to how this institution is viewed in international law: it is clearly a “general practice accepted as law”.

491. United States practice alone is particularly extensive and clear, and goes well beyond the period covered by the country's reply to the questionnaires on reservations;<sup>679</sup> moreover, far from diminishing, as seems to be the case with “reservations”,<sup>680</sup> this practice appears to be becoming entrenched and growing stronger.<sup>681</sup> Secondly, and without prejudice to the ambiguous position of the United Kingdom quoted below,<sup>682</sup> the partners of the United States have occasionally contested that country's interpretations, but not its right to formulate them. Thirdly, these States have occasionally made their own interpretative declarations, concerning the very provisions interpreted by the United States and others as well (as, for example, Panama's “reservations” to the aforementioned 1977 Panama Canal Treaty, which the United States considered as being “in fact understandings that did not change the United States interpretation”).<sup>683</sup> Lastly, even though it happens less frequently, a sizeable number of States besides the United States have taken the initiative of attaching interpretative declarations to the expression of their consent to be bound, in treaties with the United States and with other States.

492. A list of examples, while admittedly not exhaustive, would include:

(a) Interpretative declarations made by Spain and France to treaties going back to 1819 and 1878, respectively;<sup>684</sup>

(b) The “explanations” which the Dominican Republic attached at the request of its parliament to its approval of a customs convention with the United States in 1907;<sup>685</sup>

(c) An exchange of notes (done at signature) between the United States and the United Kingdom at the initiative of the latter, interpreting the 1908 convention for arbitration between the two countries;<sup>686</sup>

<sup>678</sup> Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital (Bratislava, 8 October 1993), United States Department of State, *Treaties and Other International Acts Series*.

<sup>679</sup> See in particular the many examples cited by Hackworth, *loc. cit.*, pp. 116–124, and by Whiteman, *op. cit.*, pp. 164–170.

<sup>680</sup> See paragraph 444 above.

<sup>681</sup> See footnote 655 above.

<sup>682</sup> See paragraph 494 below.

<sup>683</sup> *Restatement of the Law Third: The Foreign Relations Law of the United States* (footnote 154 above), p. 189, para. 314.

<sup>684</sup> See paragraph 486 above.

<sup>685</sup> Quoted by Hackworth, *op. cit.*, pp. 124–125.

<sup>686</sup> *Ibid.*, pp. 151–152.

(d) The “interpretative preamble” adopted by the German Parliament in respect of the treaty concerning Franco-German cooperation of 22 January 1963;<sup>687</sup>

(e) The interpretative declarations made by the Panamanian Parliament, conditioning the country’s ratification of two treaties, one concluded with Colombia in 1979 and the other with the United States in 1982, which are cited in Panama’s reply to the questionnaire on reservations;

(f) Slovakia’s interpretative declaration, likewise mentioned in its reply, which it intended to attach to its instrument of ratification of the Treaty on good-neighbourliness and friendly cooperation concluded with Hungary on 19 March 1995.

## 2. FEATURES OF INTERPRETATIVE DECLARATIONS MADE IN RESPECT OF BILATERAL TREATIES

493. The first conclusion that can be drawn from this brief outline of State practice with regard to interpretative declarations is that it is not contested in principle.

494. The United Kingdom did, however, note, with regard to the declarations which the United States included with its instrument of ratification of the Treaty concerning the Cayman Islands relating to mutual legal assistance in criminal matters between the United States and the United Kingdom.<sup>688</sup>

With reference to the understandings included in the United States instrument of ratification, Her Majesty’s Government wish formally to endorse the remarks by the leader of the British delegation at the discussions in Washington on 31 October–3 November 1989. They regard it as unacceptable for one party to seek to introduce new understandings after negotiation and signature of a bilateral treaty.

So far as this particular case is concerned, Her Majesty’s Government, while reserving entirely their rights under the treaty, note that during the debate in the Senate on 24 October 1989, an “understanding” was described as “an interpretive statement for the purpose of clarifying or elaborating rather than changing an obligation under the agreement”. Her Majesty’s Government do not accept that unilateral “understandings” are capable of modifying the terms of a treaty and have proceeded with ratification on the assumption that the United States will not seek to assert that the present “understandings” modify the obligations of the United States under the treaty.

Her Majesty’s Government reserve the right to revert separately on the general issue of the attachment of understandings and reservations to bilateral and multilateral treaties.

495. Within this ambiguous statement of position one can read a condemnation of interpretative declarations made after a bilateral treaty is signed. However, the statement must also be interpreted in the light of the replies from the United Kingdom to the questionnaire on reservations, which indicate that while the country categorically rejects the possibility of making reservations to bilateral treaties,<sup>689</sup> it answered “yes” to the question on interpretative declarations.<sup>690</sup> It would therefore seem that what the United Kingdom is rejecting here is the possibility of modifying a bilateral treaty under the guise of inter-

pretation (by means of “understandings” which are really “reservations”).

496. This does not pose any particular problem, but here one again encounters the general problem of distinguishing between reservations and interpretative declarations considered earlier;<sup>691</sup> however, the fact that a treaty is bilateral in nature in no way modifies the conclusions reached in that exercise. In particular, there is no doubt that a unilateral statement presented as an interpretative declaration must be considered to be a “reservation”<sup>692</sup> if it actually results in a modification of one or more provisions of the treaty.<sup>693</sup>

497. Speaking more broadly, whereas the word “reservation” certainly does not have the same meaning when it is applied to a unilateral statement made in respect of a bilateral treaty as it does when it concerns a multilateral instrument, the same is not true in the case of interpretative declarations: in both cases, they are unilateral statements, “however phrased or named, made by a State or by an international organization, whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions”.<sup>694</sup> Thus, it may be said that the draft guidelines concerning the definition of interpretative declarations<sup>695</sup> are applicable to declarations which interpret bilateral as well as multilateral treaties.

498. Since the definition is the same, the consequences are also identical. More specifically:

(a) The nature of a unilateral statement made in respect of a bilateral treaty depends not on its phrasing or name, but on its effect;<sup>696</sup>

(b) In the event that it is difficult to determine this nature, the same rules are applicable;<sup>697</sup>

(c) A general statement of policy made by a State or an international organization when signing or expressing its final consent to be bound by a bilateral treaty does not constitute an interpretative declaration;<sup>698</sup>

(d) Likewise, an “informative declaration”, whereby the author provides the other party with indications of

<sup>691</sup> See chapter I, particularly paras. 252–259 and 275–294.

<sup>692</sup> “Reservation” in a very specific sense, since bilateral treaties are involved; the term should really be “proposal to amend” (see paragraphs 467–482 above).

<sup>693</sup> See the “understanding” in respect of the treaty of 9 January 1909 with Panama in which the United States Senate refused to submit to arbitration questions affecting the country’s vital interests when the treaty made no provision for such an exception. The “Solicitor for the Department of State expressed the view that the resolution was in effect an amendment of the treaty” (Hackworth, *op. cit.*, p. 116).

<sup>694</sup> Draft guideline 1.2 (para. 354 above).

<sup>695</sup> In particular, draft guideline 1.2, which defines interpretative declarations (*ibid.*).

<sup>696</sup> See draft guideline 1.2.2 (para. 291 above).

<sup>697</sup> See draft guideline 1.3.1 (para. 406 above).

<sup>698</sup> See draft guideline 1.2.5 (para. 367 above). The declaration adopted on 26 March 1996 by the Slovak National Council for attachment to Slovakia’s instrument of ratification of the 1995 Treaty on good-neighbourliness and friendly cooperation with Hungary (see paragraph 492 above) is partly of this nature.

<sup>687</sup> Rousseau, “Chronique des faits internationaux”, pp. 875–878 and *Droit international public*, p. 120.

<sup>688</sup> See paragraph 489 above.

<sup>689</sup> See paragraphs 447–448 above.

<sup>690</sup> See paragraph 488 above.

the manner in which it intends to implement the treaty domestically is not an interpretative declaration.<sup>699</sup>

499. Declarations of this type are in fact quite common, at least in the practice of the United States, where bilateral treaties are concerned. The many examples include:

(a) The declaration by the United States Senate regarding the commercial treaty signed with Korea on 22 May 1882;<sup>700</sup>

(b) The United States “understandings” with regard to the treaties on friendly relations concluded in 1921 with Austria, Germany and Hungary;<sup>701</sup>

(c) The famous “Niagara reservation”<sup>702</sup> which the United States formulated in respect of the Treaty Relating to the Uses of the Waters of the Niagara River:

The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress.<sup>703</sup>

500. In this last case, Canada said that it accepted “the above-mentioned reservation because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada’s rights or obligations under the Treaty”.<sup>704</sup> And, in the wake of an internal dispute in the United States, the Court of Appeals for the District of Columbia held that the problem was a purely domestic one which did not affect the treaty relations between the parties:

The reservation, therefore, made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent. It was not a counter-offer requiring Canadian acceptance before the treaty could become effective. That Canada did “accept” the reservation does not change its character. The Canadian acceptance, moreover, was not so much an acceptance as a disclaimer of interest.<sup>705</sup>

<sup>699</sup> See draft guideline 1.2.6 (para. 377 above).

<sup>700</sup> Treaty of Peace, Amity, Commerce and Navigation (Chosen, 22 May 1882), *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776–1909* (footnote 663 above), p. 334. See also Bishop Jr., loc. cit., p. 312.

<sup>701</sup> 1921 Treaty Establishing Friendly Relations between the United States and Austria; Treaty Restoring Friendly Relations with Germany; and Treaty Establishing Friendly Relations with Hungary, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1910–1923* (Washington, Government Printing Office, 1923), vol. III, pp. 2493, 2596 and 2693, respectively. See also Bishop Jr., loc. cit., pp. 312–313, and Hackworth, op. cit., pp. 120–121. Concerning the treaty with Austria, the United States Secretary of State told the Austrian Chancellor: “The terms of the Resolution with respect to participation of the United States in any agency or commission under the treaty of course relate merely to matters of domestic policy and procedure which are of no concern to the Austrian Government” (ibid., p. 120).

<sup>702</sup> See paragraph 374 above and the doctrinal commentary quoted in footnote 523.

<sup>703</sup> Quoted by Bishop Jr., loc. cit., p. 318. See also footnote 519 above.

<sup>704</sup> Ibid., p. 319. Compare this with the reaction cited earlier (para. 494) of the United Kingdom to the United States declaration on the 1986 Treaty concerning the Cayman Islands.

<sup>705</sup> Ibid., p. 321, *Power Authority of the State of New York v. Federal Power Commission*, 247 F.(2d) 538 (1957), opinion delivered by Circuit Judge Bazelon.

501. In this case, the uselessness of the other party’s acceptance of a declaration is explained by the fact that the statement was not really a reservation or an interpretative declaration.<sup>706</sup> It may be wondered, however, what happens when the statement is a genuine interpretative declaration.

502. Here again, the main source of information available to the Special Rapporteur relates to the practice of the United States, which tends to indicate that “in the case of a bilateral treaty it is the invariable practice, prior to the making of arrangements for the exchange of ratifications and sometimes even prior to ratification of the treaty, for the government making the statement or declaration to notify the other government thereof in order that the latter may have an opportunity to accept, reject, or otherwise express its views with respect thereto”.<sup>707</sup>

503. And once the declaration has been approved, it becomes an integral part of the treaty:

[W]here one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument ... and the treaty is afterwards ratified by the other party with the declaration attached to it, and their ratifications duly exchanged—the declaration thus annexed is part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged.<sup>708</sup>

504. It is difficult to argue with this reasoning, but it leads to two complementary questions:

(a) Must interpretative declarations which are made in respect of bilateral treaties, just like “reservations” to such treaties,<sup>709</sup> necessarily be accepted by the other party?

(b) If the answer to the first question is no, does the existence of an acceptance modify the legal nature of the interpretative declaration?

505. The answer to the first question is difficult. In practice, it seems that all interpretative declarations made by States prior to ratification of a bilateral treaty<sup>710</sup> have been accepted by the other contracting State.<sup>711</sup> However, this does not imply that their acceptance is required.<sup>712</sup>

506. In reality, this does not seem to be the case: in (virtually?) all cases, interpretative declarations made in respect of bilateral treaties have been accepted because

<sup>706</sup> See paragraphs 376–377 above.

<sup>707</sup> Whiteman, op. cit., pp. 188–189.

<sup>708</sup> Judgement of the United States Supreme Court concerning the Spanish declaration made in respect of the treaty of 22 February 1819 (see paragraph 486 above), *Doe v. Braden*, 16 How. 635, 656 (U.S. 1853), cited by Bishop Jr., loc. cit., p. 316.

<sup>709</sup> See paragraphs 463–485 above.

<sup>710</sup> For examples of interpretative declarations made when signing a bilateral treaty, see Hackworth, op. cit., pp. 150–151, and Rousseau, *Droit international public*, p. 120.

<sup>711</sup> See, however, the “serious fundamental objections” of Germany to the “reservations and understandings” of the United States concerning the 1925 Treaty of Commerce between the United States and Germany, mentioned in footnote 650 above.

<sup>712</sup> And the documentation available to the Special Rapporteur may well be incomplete.

the formulating State<sup>713</sup> requested it, but one can easily imagine that it might not make such a request. Indeed, the logic which leads one to distinguish between interpretative declarations which are conditional and those which are not<sup>714</sup> would seem to be easily transposed to the case of bilateral treaties: everything depends on the author's intention. It may be the condition *sine qua non* of the author's consent to the treaty, in which case it is a conditional interpretative declaration, identical in nature to those made in respect of multilateral treaties and consistent with the definition proposed in draft guideline 1.2.4 (para. 512 below). But it may also be simply intended to inform the partner of the meaning and scope which the author attributes to the provisions of the treaty without, however, seeking to impose that interpretation on him, and in this case it is a "mere interpretative declaration", which, like those made in respect of multilateral treaties,<sup>715</sup> may actually be made at any time.

507. The fact remains that, when an interpretative declaration made in respect of a bilateral treaty is accepted by the other party,<sup>716</sup> it becomes an integral part of the treaty and constitutes the authentic interpretation thereof. As PCIJ noted, "the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it".<sup>717</sup> Yet in the case of a bilateral treaty this power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of a treaty, regardless of its form,<sup>718</sup> exactly as "reservations" to bilateral treaties do once they have been accepted by the co-contracting State or international organization.<sup>719</sup> It becomes an agreement collateral to the treaty which forms part of its context in the sense of article 31, paragraphs 2 and 3 (a), of the 1969 and 1986 Vienna Conventions; as such, it must be taken into consideration in interpreting the treaty.<sup>720</sup> And this analysis is consistent

<sup>713</sup> ILO did not specify whether or not that was the case with its interpretation of the 1990 Agreement with Zimbabwe (see footnote 666 above).

<sup>714</sup> See paragraphs 306–327 above.

<sup>715</sup> See paragraphs 306–341 above.

<sup>716</sup> And one can imagine that this would be the case even when an interpretative declaration is not conditional.

<sup>717</sup> *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8, p. 37.*

<sup>718</sup> Exchange of letters, protocol, simple verbal agreement, etc.

<sup>719</sup> See paragraph 475 above and draft guideline 1.1.9, second paragraph (para. 489).

<sup>720</sup> Article 31 reads:

"2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

"(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

with that of the United States Supreme Court in the *Doe v. Braden* case.<sup>721</sup>

508. While the Special Rapporteur is aware that considering this phenomenon in the first part of the Guide to Practice exceeds the scope of that part, which is devoted to the definition, and not the legal regime, of reservations and interpretative declarations,<sup>722</sup> he suggests to the Commission that it be mentioned in a draft guideline. The Special Rapporteur does not in fact intend to return to the highly specific question of "reservations" and interpretative declarations in respect of bilateral treaties. If the Commission endorses this intention, there may not be another occasion on which to include such a reference.<sup>723</sup>

509. Bearing this in mind, it is suggested that the Commission adopt the following draft guideline:

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

510. In the meantime, it would seem unnecessary to adopt specific draft guidelines on interpretative declarations in respect of bilateral treaties, since these are governed by the same rules and the same criteria as interpretative declarations in respect of multilateral treaties.<sup>724</sup> The only exceptions are draft guidelines 1.2.1, on the joint formulation of interpretative declarations, and 1.2.3, on the formulation of an interpretative declaration when reservations are prohibited by the treaty, rules which cannot, obviously, be transposed to the case of bilateral treaties. It would therefore seem to suffice to state in the Guide to Practice:

*"1.2.7 Guidelines 1.2, 1.2.2, 1.2.4, 1.2.5 and 1.2.6 are applicable to unilateral statements made in respect of bilateral treaties."*

"(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

"3. There shall be taken into account, together with the context:

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

<sup>721</sup> See paragraph 503 above.

<sup>722</sup> See draft guideline 1.4 (para. 411 above).

<sup>723</sup> If necessary, the draft guideline could later be moved to a part of the Guide to Practice that would seem more appropriate.

<sup>724</sup> See in particular paragraphs 497–498 and 506 above.

## CHAPTER III

## Alternatives to reservations

511. In view of the length of the present report, the Special Rapporteur finds himself compelled to postpone this chapter to his fourth report. In it he proposes to present a brief account of the various procedures other than reservations by which States and international organizations may achieve the same objective as those pursued when making reservations, namely exclusion or modification of the legal effect of certain provisions of a treaty in their application to one or more of the parties to the treaty.

512. The following recapitulates the draft guidelines proposed by the Special Rapporteur in the context of the Guide to Practice in respect of reservations. The titles of the individual guidelines are proposed on a provisional basis.

## GUIDE TO PRACTICE

## I. DEFINITIONS

## 1.1 Definition of reservations

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

## 1.1.1 Joint formulation of a reservation

*The unilateral nature of reservations is not an obstacle to the joint formulation of a reservation by several States or international organizations.*

## 1.1.2 Moment when a reservation is formulated

*A reservation may be formulated by a State or an international organization when that State or that organization expresses its consent to be bound in accordance with article 11 of the 1969 and 1986 Vienna Conventions on the Law of Treaties.*

## 1.1.3 Reservations formulated when notifying territorial application

*A unilateral statement which is made by a State at the time of the notification of the territorial application of a treaty and by which that State purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the territory in question constitutes a reservation.*

## 1.1.4 Object of reservations

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

## 1.1.5 Statements designed to increase the obligations of their author

*A unilateral statement made by a State or an international organization by which that State or that organization undertakes commitments going beyond the obligations imposed on it by a treaty does not constitute a reservation [and is governed by the rules applicable to unilateral legal acts], even if such a statement is made at the time of the expression by that State or that organization of its consent to be bound by the treaty.*

## 1.1.6 Statements designed to limit the obligations of their author

*A unilateral statement made 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 and by which its author intends to limit the obligations imposed on it by the treaty and the rights which the treaty creates for the other parties constitutes a reservation, unless it adds a new provision to the treaty.*

## 1.1.7 Reservations relating to non-recognition

*A unilateral statement by which a State purports to exclude the application of a treaty between itself and one or more other States which it does not recognize constitutes a reservation, regardless of the date on which it is made.*

## 1.1.8 Reservations having territorial scope

*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, regardless of the date on which it is made.*

## 1.1.9 “Reservations” to bilateral treaties

*A unilateral statement formulated by a State or an international organization after 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 in respect of which it is subordinating the expression of its final consent to be bound, does not constitute a reservation, however phrased or named.*

*The express acceptance of the content of that statement by the other party takes the form of an amendment to the treaty, and both parties are bound by the new text once they have expressed their final consent to be bound.*

## 1.2 Definition of interpretative declarations

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

### 1.2.1 Joint formulation of interpretative declarations

*The unilateral nature of interpretative declarations is not an obstacle to the joint formulation of an interpretative declaration by several States or international organizations.*

### 1.2.2 Phrasing and name

*It is not the phrasing or name of a unilateral declaration that determines its legal nature but the legal effect it seeks to produce. However, the phrasing or name given to the declaration by the State or international organization formulating it provides an indication of the desired objective. This is the case in particular when a State or an international organization formulates several unilateral declarations in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.*

### 1.2.3 Formulation of an interpretative declaration when a reservation is prohibited

*When a treaty prohibits reservations to all or some of its provisions, a unilateral declaration formulated in respect thereof by a State or an international organization shall be considered to constitute an interpretative declaration and not a reservation. If, however, the declaration seeks to exclude or modify the legal effect of certain provisions of the treaty in their application to its author, the declaration must be considered an impermissible reservation.*

### 1.2.4 Conditional interpretative declarations

*A unilateral declaration 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 subordinates 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 [which has legal consequences distinct from those deriving from simple interpretative declarations].*

### 1.2.5 General declarations of policy

*A unilateral statement made by a State or by an international organization whereby that State or that organization expresses its views on the treaty or on the subject area covered by the treaty without purporting to exclude or to modify the legal effect of its provisions, or to interpret it, constitutes neither a reservation nor an interpretative declaration [and is not subject to application of the law of treaties].*

### 1.2.6 Informative declarations

*A unilateral declaration formulated by a State or an international organization in which the State or international organization indicates the manner in which it intends to discharge its obligations at the internal level but which does not affect the rights and obligations of the other contracting parties is neither a reservation nor an interpretative declaration.*

### 1.2.7 Interpretative declarations in respect of bilateral treaties

*Guidelines 1.2, 1.2.2, 1.2.4, 1.2.5 and 1.2.6 are applicable to unilateral declarations made in respect of bilateral treaties.*

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

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

## 1.3 Distinction between reservations and interpretative declarations

### [1.3.0 Criterion of reservations

*The classification of a unilateral declaration as a reservation depends solely on the determination as to whether it purports to exclude or to modify the legal effect of the provisions of the treaty in their application to the State or international organization that formulated it.]*

### [1.3.0 bis Criterion of interpretative declarations

*The classification of a unilateral declaration as an interpretative declaration depends solely on the determination as to whether it purports to clarify the meaning or the scope that the declarant attributes to the treaty or to certain of its provisions.]*

### [1.3.0 ter Criterion of conditional interpretative declarations

*The classification of an interpretative declaration as a conditional interpretative declaration depends solely on the determination as to whether the declarant intended to subordinate its consent to be bound by the treaty to the interpretation that is the subject of the declaration.]*

### 1.3.1 Method of distinguishing between reservations and interpretative declarations

*To determine the legal nature of a unilateral declaration formulated by a State or an international organization in respect of a treaty, it is appropriate to apply the general rule of interpretation of treaties set out in article 31 of the Vienna Convention on the Law of Treaties.*

*Recourse may be had to the supplementary means of interpretation contemplated in article 32 of the Convention in order to confirm the determination made in accordance with the preceding paragraph, or to remove any remaining doubts or ambiguities.*

## 1.4 Scope of definitions

*Defining a unilateral declaration as a reservation or an interpretative declaration is without prejudice to its permissibility under the rules relating to reservations and interpretative declarations, whose implementation they condition.*