

## Chapter VII

### RESERVATIONS TO TREATIES

#### A. Introduction

623. At its forty-fifth session, in 1993, the Commission decided to include in its agenda the topic entitled “The law and practice relating to reservations to treaties”.<sup>181</sup> The General Assembly, in paragraph 7 of its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission.

624. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.<sup>182</sup>

625. At its forty-seventh session, in 1995, the Commission received and considered the first report of the Special Rapporteur.<sup>183</sup>

626. Following the consideration of the report by the Commission, the Special Rapporteur summarized the conclusions he had drawn from the Commission’s discussion of the topic; they related to the title of the topic, which should read “Reservations to treaties”; the form the results of the study would take which should be a guide to practice in respect of reservations; the flexible way in which the Commission’s work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969 Vienna Convention, the Vienna Convention on Succession of States in Respect of Treaties (hereinafter “the 1978 Vienna Convention”) and the 1986 Vienna Convention.<sup>184</sup> In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolution 48/31, and in resolution 49/51 of 9 December 1994. As far as the Guide to Practice was concerned, it would take the form of draft guidelines with commentaries which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

627. Also at its forty-seventh session, the Commission, in accordance with its earlier practice,<sup>185</sup> authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of

multilateral conventions.<sup>186</sup> The questionnaire was sent to the addressees by the secretariat. In paragraph 4 of its resolution 50/45 of 11 December 1995, the General Assembly noted the Commission’s conclusions, inviting it to continue its work along the lines indicated in its report and also invited States to answer the questionnaire.<sup>187</sup>

628. At its forty-eighth session, in 1996, the Commission had before it the Special Rapporteur’s second report on the topic.<sup>188</sup> The Special Rapporteur had included in his second report a draft resolution on reservations to normative multilateral treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.<sup>189</sup> Owing to lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until its next session.<sup>190</sup>

629. At its forty-ninth session, in 1997, the Commission again had before it the second report of the Special Rapporteur on the topic.

630. Following the debate, the Commission adopted the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.<sup>191</sup>

631. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission’s preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

<sup>181</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 97, document A/48/10, para. 440.

<sup>182</sup> See *Yearbook . . . 1994*, vol. II (Part Two), p. 179, para. 381.

<sup>183</sup> *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/470.

<sup>184</sup> *Ibid.*, vol. II (Part Two), p. 108, document A/50/10, para. 487.

<sup>185</sup> See *Yearbook . . . 1983*, vol. II (Part Two), p. 83, para. 286.

<sup>186</sup> See *Yearbook . . . 1995*, vol. II (Part Two), p. 108, document A/50/10, para. 489.

<sup>187</sup> As at 27 July 2000, 33 States and 24 international organizations had answered the questionnaire.

<sup>188</sup> *Yearbook . . . 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478.

<sup>189</sup> *Ibid.*, vol. II (Part Two), p. 83, document A/51/10, para. 136 and footnote 238.

<sup>190</sup> For a summary of the discussions, *ibid.*, pp. 79 et seq., chap. VI, sect. B, in particular, para. 137.

<sup>191</sup> *Yearbook . . . 1997*, vol. II (Part Two), p. 56, para. 157.

632. At its fiftieth session, in 1998, the Commission had before it the Special Rapporteur's third report on the topic,<sup>192</sup> which dealt with the definition of reservations and interpretative declarations to treaties. At the same session, the Commission provisionally adopted six draft guidelines.<sup>193</sup>

633. At the fifty-first session, in 1999, the Commission again had before it the part of the Special Rapporteur's third report, which it had not had time to consider at its fiftieth session, and his fourth report.<sup>194</sup> Moreover, the bibliography on reservations to treaties, the first version of which the Special Rapporteur had submitted at the forty-eighth session as an annex to his second report, was revised and annexed to his fourth report. The fourth report also dealt with the definition of reservations and interpretative declarations.

634. On the recommendation of the Drafting Committee, the Commission adopted on first reading at the same session draft guidelines 1.1.5 [1.1.6]<sup>195</sup> (Statements purporting to limit the obligations of their author), 1.1.6 (Statements purporting to discharge an obligation by equivalent means), 1.2 (Definition of interpretative declarations), 1.2.1 [1.2.4] (Conditional interpretative declarations), 1.2.2 [1.2.1] (Interpretative declarations formulated jointly), 1.3 (Distinction between reservations and interpretative declarations), 1.3.1 (Method of implementation of the distinction between reservations and interpretative declarations), 1.3.2 [1.2.2] (Phrasing and name), 1.3.3 [1.2.3] (Formulation of a unilateral statement when a reservation is prohibited), 1.4 (Unilateral statements other than reservations and interpretative declarations), 1.4.1 [1.1.5] (Statements purporting to undertake unilateral commitments), 1.4.2 [1.1.6] (Unilateral statements purporting to add further elements to a treaty), 1.4.3 [1.1.7] (Statements of non-recognition), 1.4.4 [1.2.5] (General statements of policy), 1.4.5 [1.2.6] (Statements concerning modalities of implementation of a treaty at the internal level), 1.5.1 [1.1.9] ("Reservations" to bilateral treaties), 1.5.2 [1.2.7] (Interpretative declarations in respect of bilateral treaties) and 1.5.3 [1.2.8] (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party) and the commentaries thereto. Moreover, in the light of the consideration of interpretative declarations, it adopted a new version of draft guideline 1.1.1 [1.1.4] (Object of reservations), and of the draft guideline without a title or number (which has become draft guideline 1.6 (Scope of definitions)).<sup>196</sup>

<sup>192</sup> *Yearbook* . . . 1998, vol. II (Part One), document A/CN.4/491 and Add.1–6.

<sup>193</sup> *Ibid.*, vol. II (Part Two), p. 99, para. 540.

<sup>194</sup> *Yearbook* . . . 1999, vol. II (Part One), document A/CN.4/499 and A/CN.4/478/Rev.1.

<sup>195</sup> The numbering in square brackets corresponds to the original numbering of the draft guidelines proposed by the Special Rapporteur.

<sup>196</sup> For the text of the draft guidelines on reservations to treaties with commentaries thereto adopted by the Commission at its fifty-first session, see *Yearbook* . . . 1999, vol. II (Part Two), pp. 93 et seq., document A/54/10, sect. C.2.

## B. Consideration of the topic at the present session

### 1. PART I OF THE FIFTH REPORT

635. At the present session, the Commission had before it the Special Rapporteur's fifth report on the topic (A/CN.4/508 and Add.1–4) relating to alternatives to reservations and interpretative declarations and to the formulation, modification and withdrawal of reservations and interpretative declarations. The Commission considered Part I of the fifth report at its 2630th to 2633rd meetings, on 31 May and 2, 6 and 7 June 2000.

636. At its 2632nd and 2633rd meetings, the Commission decided to refer to the Drafting Committee draft guidelines 1.1.8 (Reservations formulated under exclusionary clauses), 1.4.6 (Unilateral statements adopted under an optional clause), 1.4.7 (Restrictions contained in unilateral statements adopted under an optional clause), 1.4.8 (Unilateral statements providing for a choice between the provisions of a treaty), 1.7.1 (Alternatives to reservations), 1.7.2 (Different procedures permitting modification of the effects of the provisions of a treaty), 1.7.3 (Restrictive clauses), 1.7.4 (["Bilateralized reservations"] [Agreements between States having the same object as reservations]), and 1.7.5 (Alternatives to interpretative declarations).<sup>197</sup>

<sup>197</sup> The text of the draft guidelines as proposed by the Special Rapporteur in Part I of his fifth report reads as follows:

"1.1.8 *Reservations formulated under exclusionary clauses*

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

"1.4.6 *Unilateral statements adopted under an optional clause*

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

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

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

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

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

"1.7.1 *Alternatives to reservations*

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

"1.7.2 *Different procedures permitting modification of the effects of the provisions of a treaty*

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

637. At its 2640th meeting, on 14 July 2000, the Commission considered and adopted on first reading draft guidelines 1.1.8 (Reservations made under exclusionary clauses), 1.4.6 [1.4.6, 1.4.7] (Unilateral statements made under an optional clause), 1.4.7 [1.4.8] (Unilateral statements providing for a choice between the provisions of a treaty), 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] (Alternatives to reservations) and 1.7.2 [1.7.5] (Alternatives to interpretative declarations). The text of the draft guidelines with commentaries thereto is reproduced in section C.2 below.

## 2. PART II OF THE FIFTH REPORT

638. The Commission, due to the lack of time, deferred consideration of Part II of the fifth report of the Special Rapporteur, which was introduced by the Special Rapporteur at its 2651st meeting, on 3 August 2000, and a summary of which appears below.

639. The Special Rapporteur explained that Part I of the fifth report dealt with alternatives to reservations, i.e. different procedures for modifying or interpreting treaty obligations, whether of a conventional or of a unilateral nature, and relating to the chapter on definitions. The draft guidelines adopted by the Commission at the present session were thus the product of the discussions on legal procedures whose results were very close to

those of reservations, thereby supplementing the chapter on definitions.

640. Part II of the fifth report dealt with procedural matters regarding reservations and interpretative declarations, beginning with their formulation.

641. The Special Rapporteur recalled that the Commission had already discussed the moment when reservations and interpretative declarations are formulated when it had prepared the draft guidelines defining them, particularly draft guidelines 1.1 (Definition of reservations) and 1.1.2 (Instances in which reservations may be formulated), on account of the fact that the definition which is contained in the 1969 and 1986 Vienna Conventions and which these draft guidelines reproduce includes temporal elements, as well as draft guideline 1.2.1 (Conditional interpretative declarations), which, in that regard, brings the definition of conditional interpretative declarations into line with that of reservations. Those clarifications did not, however, entirely solve all of the problems relating to the moment at which a reservation (or interpretative declaration) can (or must) be formulated and the present part of the fifth report was thus devoted precisely to the questions left pending.

642. The Special Rapporteur first indicated the problems with which his report did not deal:

(a) Following his original outline,<sup>198</sup> his report dealt with the strictly procedural aspects of the formulation of reservations and interpretative declarations, and not, for example, with the consequences or effects of an incorrect procedure, which would be discussed during the consideration of the question of the permissibility of reservations;

(b) The report thus related only to the formulation of reservations (and interpretative declarations) and not to the issue of the correctness or incorrectness of such formulation.

643. With regard to the use of the terms “make” and “formulate” reservations, the Special Rapporteur explained that the former term referred to reservations which were sufficient in themselves, complete, as it were, and produced effects, while the latter applied to “proposed” reservations, i.e. reservations which did not meet all the conditions required to produce their full effects (whatever they might be). It was in this sense and not at all by chance that the two terms were used in the 1969 Vienna Convention (arts. 19–23), except, no doubt, in article 2, paragraph 1 (d), in which the word “make” was used erroneously.

644. Part II of the fifth report also dealt only with the moment of formulation and not with the moment at which a reservation could be modified. The Special Rapporteur was of the opinion that, since the modification of a reservation was in the majority of cases a diluted form of withdrawal, it should be considered at the same time as the withdrawal of reservations.

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

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

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

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

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

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

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

### “1.7.3 Restrictive clauses

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

### “1.7.4 [‘Bilateralized reservations’] [Agreements between States having the same object as reservations]

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

### “1.7.5 Alternatives to interpretative declarations

“In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, the contracting parties may have recourse to procedures other than interpretative declarations. They may include in the treaty express provisions whose purpose is to interpret the treaty or may conclude supplementary agreements to that end.”

<sup>198</sup> *Yearbook . . . 1996*, vol. II (Part Two), p. 80, document A/51/10, para. 114.

645. Turning to the draft guidelines proposed in Part II of his fifth report,<sup>199</sup> the Special Rapporteur began with

<sup>199</sup> The text of the draft guidelines as proposed by the Special Rapporteur in Part II of his fifth report reads as follows:

*“2.2.1 Reservations formulated when signing and formal confirmation”*

“If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

*“2.2.2 Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation”*

“If formulated when negotiating, adopting or authenticating the text of the treaty, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.

*“2.2.3 Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]”*

“A reservation formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.

*“2.2.4 Reservations formulated when signing for which the treaty makes express provision”*

“A reservation formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate a reservation at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

*“2.3.1 Reservations formulated late”*

“Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty unless the other contracting parties do not object to the late formulation of the reservation.

*“2.3.2 Acceptance of reservations formulated late”*

“Unless the treaty provides otherwise or the usual practice followed by the depositary differs, a reservation formulated late shall be deemed to have been accepted by a contracting party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

*“2.3.3 Objection to reservations formulated late”*

“If a contracting party to a treaty objects to a reservation formulated late, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being made.

*“2.3.4 Late exclusion or modification of the legal effects of a treaty by procedures other than reservations”*

“Unless otherwise provided in the treaty, a contracting party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

“(a) Interpretation of a reservation made earlier; or

“(b) A unilateral statement made under an optional clause.

*“2.4.3 Time at which an interpretative declaration may be formulated”*

“Without prejudice to the provisions of guidelines 1.2.1, 2.4.4, 2.4.7 and 2.4.8, an interpretative declaration may be formulated at any time, [unless otherwise provided by an express provision of the treaty] [the treaty states that it may be made only at specified times].

*“2.4.4 Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation”*

“If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, an

draft guideline 2.2.1, entitled “Reservations formulated when signing and formal confirmation”. This draft guideline is based on article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions; this reflects the “practical” nature of the Guide to Practice and is in keeping with the Commission’s decision not to amend the relevant provisions of the Conventions.<sup>200</sup>

646. The Special Rapporteur explained that, at the United Nations Conference on the Law of Treaties,<sup>201</sup> the principle of the formal confirmation of a reservation when expressing consent to be bound was more akin to the progressive development of international law, but, since then, had become a generally accepted rule reflecting the prevailing practice. It had both advantages and some disadvantages.

647. Among the former, he drew attention to the clarity, security and precision that the rule introduced in treaty relations. It did, however, involve a risk of discouraging States (and international organizations) from formulating reservations at the time of the adoption or signing of a treaty, thereby indicating quite early to the other (potential) parties the exact scope of the commitments they intended to assume.

648. In the light of these considerations, the Special Rapporteur had questioned whether it might not be a good idea to reformulate the text of article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions; ultimately, he decided to reproduce the text of the 1986 Vienna Convention (which, compared to the 1969 Vienna Convention, had the advantage of also covering international organiza-

act of formal confirmation, acceptance or approval, a conditional interpretative declaration must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the declaration shall be considered as having been made on the date of its confirmation.

*“2.4.5 Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]”*

“An interpretative declaration formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.

*“2.4.6 Interpretative declarations formulated when signing for which the treaty makes express provision”*

“An interpretative declaration formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate such a declaration at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

*“2.4.7 Interpretative declarations formulated late”*

“Where a treaty provides that an interpretative declaration can be made only at specified times, a State or an international organization may not formulate an interpretative declaration on that treaty at another time, unless the late formulation of the interpretative declaration does not elicit any objections from the other contracting parties.

*“2.4.8. Conditional interpretative declarations formulated late”*

“A State or an international organization may not formulate a conditional interpretative declaration on a treaty after expressing its consent to be bound by the treaty unless the late formulation of the declaration does not elicit any objections from the other contracting parties.”

<sup>200</sup> See footnote 184 above.

<sup>201</sup> See footnote 170 above.

tions) and to provide the necessary explanations in the following draft guidelines. The Special Rapporteur recalled that all matters relating to situations of State succession would be dealt with in a separate chapter of the Guide to Practice and that, consequently, they did not have to be mentioned in that draft guideline.

649. In order to supplement and further clarify the text of the 1969 and 1986 Vienna Conventions, the Special Rapporteur proposed draft guideline 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation). The Special Rapporteur recalled that this draft guideline basically reproduced what the Commission had had in mind in draft article 19 (which became article 23 of the 1969 Vienna Convention) and which had unfortunately and “mysteriously” disappeared during the United Nations Conference on the Law of Treaties. This draft guideline was all the more justified in that it reflected the prevailing practice by which statements of reservations were made at various stages in the conclusion of a treaty.

650. Draft guideline 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]) was a logical extension of the preceding draft guidelines and also had a place in the Guide to Practice because of the pedagogical and utilitarian nature of the Guide.<sup>202</sup>

651. Draft guideline 2.2.4 (Reservations formulated when signing for which the treaty makes express provision) also meets a logical need and reflects a common, if somewhat slightly uncertain, practice. If the treaty provides that a reservation may be made upon signing,<sup>203</sup> the reservation does not have to be confirmed at the time of the expression of consent to be bound, although, erring on the side of caution, many States have done so. The purpose of this draft guideline is precisely to dispel these uncertainties by reflecting the prevailing practice.

652. The Special Rapporteur then went on to discuss the important problem of late reservations, which are the subject of draft guideline 2.3.1 (Reservations formulated late).

653. In view of the fact that, unless the treaty provides otherwise, the last time at which reservations may be made is that of the expression of consent to be bound,<sup>204</sup> reservations formulated after that time are ordinarily inadmissible. The stringency of this principle is attested to by precedents, as shown by a number of cases decided by various international and even national courts.<sup>205</sup> States

should therefore not be able to get round the principle, whether by interpretation of a reservation made previously<sup>206</sup> or by restrictions or conditions contained in a statement made under an optional clause.<sup>207</sup> These consequences of the principle excluding late reservations are embodied in another draft guideline ((2.3.4) (Late exclusion or modification of the legal effects of a treaty by procedures other than reservations)).

654. However rigorous it may be, this principle is not absolute; it may be overridden by the unanimous (and even tacit) consent of the other parties to the treaty. In this regard, the Special Rapporteur referred, in paragraph 289 of his fifth report, to examples of treaties which provide for the possibility of reservations made after the expression of consent to be bound and on which he based the drafting of model clauses<sup>208</sup> accompanying draft guideline 2.3.1.

655. He also cited the practice of several depositaries, beginning with that of the Secretary-General of the United Nations (as well as other depositaries such as IMO, the Council of Europe and the World Customs Organization (Customs Cooperation Council)), which reflects the principle of the unanimity of the tacit consent of the other contracting parties to the formulation of late reservations (a requirement of express acceptance would have the result of completely paralysing the system of late reservations) and, consequently, the setting aside of the normal rule of inadmissibility, which is not of a peremptory nature. This flexible attitude of the depositaries has no doubt made it possible in some cases to prevent the outright denunciation of the treaty in question.

656. Towards the end of the 1970s, the Secretary-General of the United Nations inaugurated his current practice by giving the parties a 90-day period in which to object to a late reservation. Since the Secretary-General had extended that period to 12 months, the Special Rapporteur was proposing that the Commission should agree to that time limit (draft guideline 2.3.2 (Acceptance of reservations formulated late)), noting, however, that it might seem rather long because there would thus be uncertainty about the fate of the late reservation.

657. As a result of that practice, moreover, only a single objection to the formulation of a late reservation prevents

<sup>202</sup> The alternatives proposed in the title and in the text of this draft guideline were the result of the fact that the concept of “in simplified form” seems to be more commonly accepted in Roman than in common law legal systems.

<sup>203</sup> One of many examples is the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality.

<sup>204</sup> See *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports, 1988*, p. 69, at p. 85.

<sup>205</sup> Swiss Federal Supreme Court, *F. v. R. and State Council of the Canton of Thurgau*, decision of 17 December 1992, *Journal des Tribunaux*, 1995, p. 536.

<sup>206</sup> See *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Inter-American Court of Human Rights Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3.

<sup>207</sup> See the position taken by the European Commission of Human Rights in the *Chrysostomos* case (Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Applications Nos. 15299/89, 15300/89 and 15318/89, *Chrysostomos et al. v. Turkey*, vol. 68 (Strasbourg, 1993), p. 216) and the European Court of Human Rights in the *Loizidou* case (*Loizidou v. Turkey*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 310 (*Preliminary Objections*), *Judgment of 23 March 1995* (Council of Europe, Strasbourg, 1995) and *Judgment of 18 December 1996 (Merits)*, *Reports of Judgments and Decisions 1996-VI* (Council of Europe, Strasbourg, 1996)).

<sup>208</sup> In accordance with the views expressed by the Commission in 1995 (see footnote 184 above).

it from producing its effects, as reflected in draft guideline 2.3.3 (Objection to reservations formulated late). It had been suggested in the literature that objections to late reservations would have the same effect as objections to reservations formulated “on time” and that an objection would prevent the late reservation from producing its effects only as between the reserving State and the objecting State, but the Special Rapporteur did not share that view. Such an approach would lead to the negation of all the rules relating to time limits on reservations and would ultimately undermine the principle of *pacta sunt servanda*. It is also not in keeping with the practice followed by the Secretary-General, who considers that a single objection is enough to prevent the reservation from being made. This practice is reflected in draft guideline 2.3.3.

658. The Special Rapporteur pointed out that, in principle, unless the treaty provides otherwise,<sup>209</sup> interpretative declarations may be formulated at any time. This was, moreover, in keeping with the definition of interpretative declarations (draft guideline 1.2), which does not contain any time element, and was the subject of draft guideline 2.4.3 (Times at which an interpretative declaration may be formulated). Draft guidelines 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision) and 2.4.7 (Interpretative declarations formulated late) govern cases where the treaty itself contains a restrictive clause in this regard.

659. In view of the nature of conditional interpretative declarations, which makes them quite close to reservations,<sup>210</sup> the Special Rapporteur considered that the rules embodied in draft guidelines 2.3.1 to 2.3.3 in respect of reservations might be transposed to conditional interpretative declarations. Draft guideline 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation) and draft guideline 2.4.8 (Conditional interpretative declarations formulated late) followed on logically.

660. In concluding his introduction, the Special Rapporteur proposed that the 14 draft guidelines contained in Part II of the fifth report should be referred to the Drafting Committee.

661. Owing to the lack of time, the Commission was unable to consider either Part II of the fifth report or the draft guidelines and model clauses proposed therein. It decided to defer the discussion of Part II of the report until the following session.

<sup>209</sup> See, for example, article 310 of the United Nations Convention on the Law of the Sea or article 43 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

<sup>210</sup> See paragraph (14) of the commentary to draft guideline 1.2.1 [1.2.4], *Yearbook* ... 1999, vol. II (Part Two), document A/54/10, p. 105.

## C. Text of the draft guidelines on reservations to treaties provisionally adopted by the Commission on first reading

### 1. TEXT OF THE DRAFT GUIDELINES

662. The text of the draft guidelines provisionally adopted by the Commission at its fiftieth,<sup>211</sup> fifty-first<sup>212</sup> and fifty-second sessions<sup>213</sup> is reproduced below. The numbers in square brackets refer to the numbering in the reports of the Special Rapporteur.

## RESERVATIONS TO TREATIES

### GUIDE TO PRACTICE

#### 1. 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 [1.1.4] Object of reservations

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

##### 1.1.2 Instances in which reservations may be formulated

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

##### 1.1.3 [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.

##### 1.1.4 [1.1.3] Reservations formulated when notifying territorial application

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

<sup>211</sup> For the commentary to guidelines 1.1, 1.1.2, 1.1.3 [1.1.8], 1.1.4 [1.1.3] and 1.1.7 [1.1.1], see *Yearbook* ... 1998, vol. II (Part Two), pp. 99–107.

<sup>212</sup> For the commentary to guidelines 1.1.1 [1.1.4], 1.1.5 [1.1.6], 1.1.6, 1.2, 1.2.1 [1.2.4], 1.2.2 [1.2.1], 1.3, 1.3.1, 1.3.2 [1.2.2], 1.3.3 [1.2.3], 1.4, 1.4.1 [1.1.5], 1.4.2 [1.1.6], 1.4.3 [1.1.7], 1.4.4 [1.2.5], 1.4.5 [1.2.6], 1.5, 1.5.1 [1.1.9], 1.5.2 [1.2.7], 1.5.3 [1.2.8] and 1.6, see *Yearbook* ... 1999, vol. II (Part Two), document A/54/10, pp. 93–126.

<sup>213</sup> For the commentary to guidelines 1.1.8, 1.4.6 [1.4.6, 1.4.7], 1.4.7 [1.4.8], 1.7, 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] and 1.7.2 [1.7.5], see section 2 below.

### 1.1.5 [1.1.6] *Statements purporting to limit the obligations of their author*

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

### 1.1.6 *Statements purporting to discharge an obligation by equivalent means*

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

### 1.1.7 [1.1.1] *Reservations formulated jointly*

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

### 1.1.8 *Reservations made under exclusionary clauses*

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

## 1.2 *Definition of interpretative declarations*

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

### 1.2.1 [1.2.4] *Conditional interpretative declarations*

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

### 1.2.2 [1.2.1] *Interpretative declarations formulated jointly*

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

## 1.3 *Distinction between reservations and interpretative declarations*

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

### 1.3.1 *Method of implementation of the distinction between reservations and interpretative declarations*

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

### 1.3.2 [1.2.2] *Phrasing and name*

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

### 1.3.3 [1.2.3] *Formulation of a unilateral statement when a reservation is prohibited*

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

## 1.4 *Unilateral statements other than reservations and interpretative declarations*

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

### 1.4.1 [1.1.5] *Statements purporting to undertake unilateral commitments*

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

### 1.4.2 [1.1.6] *Unilateral statements purporting to add further elements to a treaty*

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

### 1.4.3 [1.1.7] *Statements of non-recognition*

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

### 1.4.4 [1.2.5] *General statements of policy*

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

### 1.4.5 [1.2.6] *Statements concerning modalities of implementation of a treaty at the internal level*

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

### 1.4.6 [1.4.6, 1.4.7] *Unilateral statements made under an optional clause*

1. A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

### 1.4.7 [1.4.8] *Unilateral statements providing for a choice between the provisions of a treaty*

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

## 1.5 Unilateral statements in respect of bilateral treaties

## Commentary

### 1.5.1 [1.1.9] "Reservations" to bilateral treaties

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

### 1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

### 1.5.3 [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.

### 1.6 Scope of definitions

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

### 1.7 Alternatives to reservations and interpretative declarations

#### 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations

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

(a) The insertion in the treaty of restrictive clauses purporting to limit its scope or application;

(b) The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

#### 1.7.2 [1.7.5] Alternatives to interpretative declarations

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

(a) The insertion in the treaty of provisions purporting to interpret the same treaty;

(b) The conclusion of a supplementary agreement to the same end.

## 2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-SECOND SESSION

663. The text of the draft guidelines with commentaries thereto adopted by the Commission at its fifty-second session is reproduced below:

### 1.1.8 Reservations made under exclusionary clauses

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

(1) According to a widely accepted definition, an exclusionary or opting-[or contracting]-out clause is a treaty provision by which a State will be bound by rules contained in the treaty unless it expresses its intent not to be bound, within a certain period of time, by some of those provisions.<sup>214</sup>

(2) Such exclusionary (opting- or contracting-out) clauses are quite common. Examples can be found in the conventions adopted under the auspices of the Hague Conference on Private International Law,<sup>215</sup> the Council of Europe,<sup>216</sup> ILO<sup>217</sup> and in various other conventions. Among the latter, one may cite by way of example article 14, paragraph 1, of the International Convention for the Prevention of Pollution from Ships, 1973:

A State may at the time of signing, ratifying, accepting, approving or acceding to the present Convention declare that it does not accept any one or all of Annexes III, IV and V (hereinafter referred to as 'Optional Annexes') of the present Convention. Subject to the above, Parties to the Convention shall be bound by any Annex in its entirety.<sup>218</sup>

<sup>214</sup> See B. Simma, "From bilateralism to community interest in international law", *Collected Courses of the Hague Academy of International Law, 1994-VI* (The Hague, Martinus Nijhoff, 1997), vol. 250, p. 329; see also C. Tomuschat, "Obligations arising for States without or against their will", *ibid.*, 1993-IV (Dordrecht, Martinus Nijhoff, 1994), vol. 241, pp. 264 et seq.

<sup>215</sup> See the first paragraph of article 8 of the Convention relating to the settlement of the conflicts between the law of nationality and the law of domicile: "Each Contracting State, when signing or ratifying the present Convention or acceding thereto, may declare that it excludes the application of this Convention to disputes between laws relating to certain matters"; see also article 9 of the Convention concerning the recognition of the legal personality of foreign companies, associations and institutions.

<sup>216</sup> See article 34, paragraph 1, of the European Convention for the Peaceful Settlement of Disputes:

"On depositing its instrument of ratification, any one of the High Contracting Parties may declare that it will not be bound by:

"(a) Chapter III relating to arbitration; or

"(b) Chapters II and III relating to conciliation and arbitration";

see also article 7, paragraph 1, of the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality:

"Each Contracting Party shall apply the provisions of Chapters I and II. It is however understood that each Contracting Party may declare, at the time of ratification, acceptance or accession, that it will apply the provisions of Chapter II only. In this case the provisions of Chapter I shall not be applicable in relation to that Party";

and article 25, paragraph 1, of the European Convention on Nationality:

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

For other examples, see S. Spiliopoulou Åkermark, "Reservation clauses in treaties concluded within the Council of Europe", *International and Comparative Law Quarterly*, vol. 48, part 3 (July 1999), p. 479, at pp. 504-505.

<sup>217</sup> See article 2, paragraph 1, of ILO Convention (No. 63) concerning Statistics of Wages and Hours of Work in the Principal Mining and Manufacturing Industries, including Building and Construction, and in Agriculture: "Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude from its acceptance of the Convention: (a) any one of Parts II, III, or IV; or (b) Parts II and IV; or (c) Parts III and IV".

<sup>218</sup> The provisions which follow are cited by way of example and in no way exhaust the list of exclusionary clauses of conventions adopted in these forums. For other examples, see, in general, P.-H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), pp. 171-172.



(3) The question whether or not statements made in application of such exclusionary clauses are reservations is controversial. The strongest argument to the contrary derives from the consistently strong opposition of ILO to such a classification, even though that organization regularly resorts to the opting-out procedure. In its reply to the Commission's questionnaire,<sup>219</sup> ILO wrote:

"It has been the consistent and long-established practice of the ILO not to accept for registration instruments of ratification of international labour Conventions when accompanied with reservations. As has been written, 'this basic proposition of refusing to recognize any reservations is as old as ILO itself' (see W. P. Gormley, 'The Modification of Multilateral Conventions by Means of Negotiated Reservations and Other Alternatives: A Comparative Study of the ILO and Council of Europe', 39 *Fordham Law Review*, 1970, at p. 65). The practice is not based on any explicit legal provision of the Constitution, the Conference Standing Orders, or the international labour Conventions, but finds its logical foundation in the specificity of labour Conventions and the tripartite structure of the Organization. Reference is usually made to two Memoranda as being the primary sources for such firm principle: first, the 1927 Memorandum submitted by the ILO Director to the Council of the League of Nations on the Admissibility of Reservations to General Conventions, and second, the 1951 Written Statement of the International Labour Organization in the context of the ICJ proceedings concerning the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

"In his Memorandum to the Committee of Experts for the Codification of International Law, the ILO Director General wrote with respect to labour Conventions:

'these agreements are not drawn up by the Contracting States in accordance with their own ideas: they are not the work of plenipotentiaries, but of a conference which has a peculiar legal character and includes non-Government representatives. Reservations would still be inadmissible, even if all the States interested accepted them; for the rights which the treaties have conferred on non-Governmental interests in regard to the adoption of international labour Conventions would be overruled if the consent of the Governments alone could suffice to modify the substance and detract from the effect of the conventions' (see League of Nations, *Official Journal*, 1927, at p. [882]).

"In the same vein, the ILO Memorandum, submitted to the ICJ in 1951, read in part:

'international labour conventions are adopted and enter into force by a procedure which differs in important respects from the procedure applicable to other international instruments. The special features of this procedure have always been regarded as

making international labour conventions intrinsically incapable of being ratified subject to any reservation. . . . It has been the consistent view of the International Labour Organization, since its establishment, that reservations are not admissible. This view is based upon and supported by the consistent practice of the International Labour Organization and by the practice of the League of Nations during the period from 1920–1946 when the League was responsible for the registration of ratifications of international labour conventions' (see *ICJ Pleadings*, 1951, at pp. 217, 227–228).

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

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

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

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

<sup>219</sup> See footnote 186 above.

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

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

‘Notwithstanding the prohibition of formulating reservations, ILO member States are entitled, and, at times, even required, to attach declarations—optional and compulsory accordingly. A compulsory declaration may define the scope of the obligations accepted or give other essential specifications. In some other cases a declaration is needed only where the ratifying State wishes to make use of permitted exclusions, exceptions or modifications. In sum, compulsory and optional declarations relate to limitations *authorized* by the Convention itself, and thus do not amount to reservations in the legal sense. As the Written Statement of the ILO in the *Genocide Case* read, ‘they are therefore a part of the terms of the convention as approved by the Conference when adopting the convention and both from a legal and from a practical point of view are in no way comparable to reservations’ (see *ICJ Pleadings, 1951*, at p. 234). Yet, for some, these flexibility devices have ‘for all practical purposes the same operational effect as reservations’ (see Gormley, *op. cit.*, *supra*, at p. 75).’<sup>220</sup>

(4) In the Commission’s view, this reasoning reflects a respectable tradition, but is somewhat less than convincing. In the first place, while international labour conventions are obviously adopted under very specific circumstances, they are nevertheless treaties between States, and the participation of non-governmental representatives in their adoption does not modify their legal nature. Secondly, the possibility that the International Labour Conference might revise a convention that proved to be inadequate proves nothing about the legal nature of unilateral statements made in application of an exclusionary clause: the revised convention could not be imposed against their will on States that had made such statements when becoming parties to the original convention, and it matters little in such cases whether or not those statements were reservations. Lastly, and most importantly, the position traditionally taken by ILO reflects a restrictive view of the concept of reservations which is not reflected in the 1969 and 1986 Vienna Conventions and the Guide to Practice.

(5) In fact, the 1969 and 1986 Vienna Conventions do not preclude the making of reservations, not on the basis of an authorization implicit in the general international

law of treaties, as codified in articles 19 to 23 of the Conventions, but on the basis of specific treaty provisions. This is quite clear from article 19, subparagraph (b), of the Conventions, which concerns treaties that provide ‘‘that only *specified*\* reservations ... may be made’’, or article 20, paragraph 1, which stipulates that ‘‘a reservation *expressly authorized*\* by a treaty does not require any subsequent acceptance’’.

(6) The fact that a unilateral statement purporting to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author<sup>221</sup> is specifically provided for by a treaty is not sufficient to characterize such a statement as either being or not being a reservation. This is precisely the object of ‘‘reservation clauses’’ that can be defined as ‘‘treaty provisions [... setting] limits within which States should<sup>222</sup> formulate reservations and even the content of such reservations’’.<sup>223</sup>

(7) In fact, exclusionary clauses are clearly related to reservation clauses, and the resulting unilateral statements are related to the ‘‘specified’’ reservations ‘‘expressly authorized’’ by a treaty, including international labour conventions.<sup>224</sup> They are indeed unilateral statements made at the time consent to be bound<sup>225</sup> is expressed and purporting to exclude the legal effect of certain provisions of the treaty as they apply to the State or the international organization making the statement, all of which corresponds exactly to the definition of reservations, and, at first glance at least, it would seem that they are not and need not be subject to a separate legal regime.

(8) Except for the absence of the word ‘‘reservations’’, there appears to be little difference between the exclusionary clauses mentioned in paragraph (2) above and what are indisputably reservation clauses, such as article 16 of the Convention on Celebration and Recognition of the Validity of Marriages,<sup>226</sup> article 33 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, concluded in the context of the Hague Conference on Private International Law,<sup>227</sup> and article 35, enti-

<sup>221</sup> See draft guidelines 1.1 and 1.1.1 [1.1.4].

<sup>222</sup> It would be more accurate to use the word ‘‘may’’.

<sup>223</sup> Imbert, *op. cit.* (see footnote 218 above), p. 12.

<sup>224</sup> At the same time, there is little doubt that a practice accepted as law has developed in the ILO. Under this practice, any unilateral statement seeking to limit the application of the provisions of international labour conventions that is not explicitly stipulated is inadmissible. This is also clearly the case with regard to the conventions adopted by the Hague Conference on Private International Law (see G. Droz, ‘‘Les réserves et les facultés dans les Conventions de La Haye de droit international privé’’, *Revue critique de droit international privé*, vol. 58, No. 3 (1969), pp. 388–392). However, this is an altogether different question from that of defining reservations.

<sup>225</sup> With regard to statements made in application of an exclusionary clause, but following its author’s expression of consent to be bound, see paragraph (18) of the commentary.

<sup>226</sup> ‘‘A Contracting State may reserve the right to exclude the application of Chapter I’’ (art. 28 provides for the possibility of ‘‘reservations’’).

<sup>227</sup> ‘‘A State may, at the time of signature, ratification or accession, exclude, in whole or in part, the application of the provisions of paragraph 2 of article 4 and of Chapter II. No other reservation shall be permitted.’’

<sup>220</sup> Reply to the questionnaire, pp. 3–5.

tled “Reservations”, of the Convention on Civil Liability for Damages Resulting from Activities Dangerous to the Environment.<sup>228</sup> It is thus apparent that, in both their form and their effects,<sup>229</sup> the statements made when expressing consent to be bound under exclusionary clauses are in every way comparable to reservations when provision is made for the latter, with restrictions, by reservation clauses.<sup>230</sup>

(9) Some members of the Commission questioned whether the fact that a State party cannot object to a statement made under such an exclusionary clause does not rule out the classification of such a statement as a reservation. This is no doubt true of every reservation formulated under a reservation clause: once a reservation is expressly provided for in a treaty, the contracting States know what to expect; they have accepted in advance the reservation or reservations concerned in the treaty itself. It thus appears that the rules in article 20 of the 1969 and 1986 Vienna Conventions, on both acceptance of reservations and objections to them, do not apply to reservations expressly provided for, including opting-out clauses or exclusionary provisions.<sup>231</sup> This is, moreover, not a problem of definition, but one of legal regime.

(10) Other members asked whether the classification of statements made under an opting-out clause as reservations was compatible with article 19, subparagraph (b), of the 1969 and 1986 Vienna Conventions, according to which a reservation cannot be formulated if the treaty provides that “only specified reservations, which do not include the reservation in question, may be made”. However, article 19, subparagraph (b), does not say that all other reservations are prohibited if some are expressly provided for; it does say that other reservations are prohibited if the treaty provides that only specified reservations may be made.

(11) In reality, exclusionary clauses take the form of “negotiated reservations”, as the term is currently (and erroneously) accepted in the context of the Hague Conference on Private International Law and further developed in the context of the Council of Europe.<sup>232</sup> “Strictly speaking, this means that it is the *reservation*—and not only the right to make one—that is the subject of the

negotiations.”<sup>233</sup> These, then, are not “reservations” at all in the proper sense of the term, but *reservation clauses* that impose limits and are precisely defined when the treaty is negotiated.

(12) It is true that, in some conventions (at least those of the Council of Europe), exclusionary *and* reservation clauses are present at the same time.<sup>234</sup> This is probably more a reflection of terminological vagueness, than of a deliberate distinction.<sup>235</sup> It is striking that, in its reply to the questionnaire, ILO should mention among the problems encountered in the areas of reservations those relating to article 34 of the European Convention for the peaceful settlement of disputes, since the word “reservation” does not even appear in this standard exclusionary clause.<sup>236</sup>

(13) The case covered in draft guideline 1.1.8 is the same as that dealt with in article 17, paragraph 1, of the 1969 and 1986 Vienna Conventions:

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

(14) This provision, which was adopted without change at the first session of the United Nations Conference on the Law of Treaties,<sup>237</sup> is contained in part II, section 1 (Conclusion of treaties), and creates a link with articles 19 to 23 dealing specifically with reservations. The Commission explained this provision as follows:

Some treaties expressly authorize States to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, acceptance, approval or accession is admissible. But in the absence of such a provision, the established rule is that the ratification, accession etc. must relate to the treaty as a whole. Although it may be admissible to formulate reservations to selected provisions of the treaty under the rule stated in article 16 [19 in the text of the Convention], it is inadmissible to subscribe only to selected parts of the treaty. Accordingly, paragraph 1 of the article lays down that, without prejudice to the provisions of articles 16 to 20 [19 to 23] regarding reservations to multilateral treaties, an expression of consent by a State to be bound by part of a treaty is effective only if the treaty or the other contracting States authorize such a partial consent.<sup>238</sup>

<sup>228</sup> “Any Signatory may declare, at the time of signature or when depositing its instrument of ratification, acceptance or approval, that it reserves the right: . . . (c) not to apply Article 18”.

<sup>229</sup> See W. P. Gormley, “The modification of multilateral conventions by means of ‘negotiated reservations’ and other ‘alternatives’: A comparative study of the ILO and Council of Europe—Part One”, *Fordham Law Review*, 1970–1971, vol. 39, p. 59, at pp. 75–76.

<sup>230</sup> See Imbert, *op. cit.* (footnote 218 above), p. 169, and Spiliopoulou Åkermark, *loc. cit.* (footnote 216 above), pp. 505–506.

<sup>231</sup> Conversely, States may “object” to some statements (for example, statements of non-recognition), but that does not make such statements reservations.

<sup>232</sup> See Droz, *loc. cit.* (footnote 224 above), pp. 385–388; H. Golsong, “Le développement du droit international régional”, *Société française pour le droit international*, X<sup>e</sup> Colloque, Bordeaux I, *Régionalisme et universalisme dans le droit international contemporain*, 1976 (Paris, Pedone, 1977), p. 221, at p. 228; and Spiliopoulou Åkermark, *loc. cit.* (footnote 216 above), pp. 489–490.

<sup>233</sup> Imbert, *op. cit.* (see footnote 218 above), p. 196. The term is used in the Council of Europe in a broader sense, seeking to cover the “*procedure*” intended to enumerate either in the body of the Convention itself or in an annex the limits of the options available to States in formulating a reservation” (Golsong, *loc. cit.* (footnote 232 above), p. 228; see also Spiliopoulou Åkermark, *loc. cit.* (footnote 216 above), p. 498 and pp. 489–490).

<sup>234</sup> See articles 7 (footnote 216 above) and 8 of the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, and the examples given by Spiliopoulou Åkermark, *ibid.*, p. 506, note 121.

<sup>235</sup> Moreover, the fact that certain multilateral conventions prohibit any reservations while allowing some statements which may be equated with exclusionary clauses (see article 124 of the Rome Statute of the International Criminal Court) is not in itself decisive; it too is no doubt more the result of terminological vagueness than of an intentional choice aimed at achieving specific legal effects.

<sup>236</sup> See footnote 216 above.

<sup>237</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (footnote 170 above), report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, pp. 129–130, paras. 156–157.

<sup>238</sup> See paragraph (2) of the commentary to article 14 (*Yearbook . . . 1966*, vol. II, document A/6309/Rev.1, pp. 201–202).

(15) The expression “without prejudice to articles 19 to 23” in article 17 of the 1969 and 1986 Vienna Conventions implies that, in some cases, options amount to reservations.<sup>239</sup> Conversely, it would appear that this provision is drafted so as not to imply that all clauses that offer parties a choice between various provisions of a treaty *are* reservations.

(16) This is certainly true of statements made under an optional clause or a clause providing for a choice between the provisions of a treaty, as indicated in guidelines 1.4.6 [1.4.6, 1.4.7] and 1.4.7 [1.4.8]. But it might also be asked whether it is not also true of certain statements made under certain exclusionary clauses, which, while having the same or similar effects as reservations, are not reservations in the strict sense of the term, as defined in the 1969 and 1986 Vienna Conventions and the Guide to Practice.

(17) It so happens that some treaties allow the parties to exclude, by means of a unilateral statement, the legal effect of certain of the treaty provisions in their application to the author of the statement, not (or not only) at the time of expression of consent to be bound, but after the treaty enters into force for them. For example: article 82 of ILO Convention (No. 102) concerning Minimum Standards of Social Security authorizes a member State that has ratified the Convention to denounce, 10 years after the entry into force of the Convention, either the entire Convention or one or more of Parts II to X; article 22 of the Convention on the Recognition of Divorces and Legal Separations authorizes contracting States, “*from time to time,\** [to] declare that certain categories of persons having their nationality need not be considered their nationals for the purposes of this Convention”,<sup>240</sup> article 30 of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons stipulates that:

A State Party to this Convention may denounce it, *or only Chapter III of the Convention,\** by a notification in writing addressed to the depositary;

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

(18) Unilateral statements made under provisions of this type are certainly not reservations.<sup>241</sup> In this respect, the fact that they are formulated (or may be formulated) at a time other than the time of consent to be bound is perhaps not in itself absolutely decisive insofar as nothing prevents negotiators from departing from the provisions of the 1969 and 1986 Vienna Conventions, which are merely residual in nature. Nevertheless, statements made

under these exclusionary clauses after the entry into force of the treaty are very different from reservations in that they do not place conditions on the accession of the State or the international organization which makes them. Reservations are an element of the conclusion and entry into force of a treaty, as is demonstrated by the inclusion of articles 19 to 23 in part II (Conclusion and entry into force of treaties) of the Conventions. They are partial acceptances of the provisions of the treaty to which they relate; and that is why it seems logical to consider statements made at the time of expressing consent to be bound as being reservations. On the other hand, statements made after the treaty has been in force for a certain period of time in respect of their author are partial denunciations which, in their spirit, are much more closely related to part V (Invalidity, termination and suspension of the operation of treaties) of the Conventions. They may also be linked to article 44, paragraph 1, which does not exclude the right of a party to withdraw partially from a treaty if the treaty so provides.

(19) Such statements are expressly excluded from the scope of draft guideline 1.1.8 by the words “when that State or organization expresses its consent to be bound”, which draw on draft guideline 1.1.2 relating to instances in which reservations may be formulated.

#### 1.4.6 [1.4.6, 1.4.7] *Unilateral statements made under an optional clause*

**1. A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.**

**2. A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.**

#### *Commentary*

(1) Draft guideline 1.4.6 [1.4.6, 1.4.7] deals jointly with unilateral statements made under an optional clause in a treaty and with the restrictions or conditions that frequently accompany such statements and are commonly characterized as “reservations”, although this procedure differs in many respects from reservations as defined by the 1969, 1978 and 1986 Vienna Conventions and by the Guide to Practice.

(2) The unilateral statements referred to in the first paragraph of draft guideline 1.4.6 [1.4.6, 1.4.7] may seem similar to those mentioned in draft guideline 1.1.8, i.e. those made under an exclusionary clause. In both cases, the treaty expressly provides for such statements, which the parties are free to make in order to modify the obligations imposed on them by the treaty. However, they are also very different in nature: while statements made under an exclusionary clause (or an opting-out or contracting-out clause) purport to exclude or modify the legal effect of certain provisions of the treaty as they apply to the parties who have made them and must therefore be viewed as genuine reservations, those made

<sup>239</sup> See Spiliopoulou Åkermark, *loc. cit.* (footnote 216 above), p. 506.

<sup>240</sup> Concerning the circumstances under which this provision was adopted, see Droz, *loc. cit.* (footnote 224 above), pp. 414–415. This, typically, is a “negotiated reservation” in the sense referred to in paragraph (11) of the commentary.

<sup>241</sup> Significantly, article 22 of the Convention on the Recognition of Divorces and Legal Separations is omitted from the list of reservation clauses given in article 25 of the Convention.

under optional clauses have the effect of increasing the declarant's obligations beyond what is normally expected of the parties under the treaty and do not affect its entry into force in their case.

(3) The purpose of optional clauses or opting-in (or contracting-in) clauses, which may be defined as provisions stipulating that the parties to a treaty may accept obligations which, in the absence of explicit acceptance, would not be automatically applicable to them, is not to reduce, but to increase, the obligations arising from the treaty for the author of the unilateral statement.<sup>242</sup>

(4) The most famous optional clause is certainly Article 36, paragraph 2, of the Statute of ICJ,<sup>243</sup> but there are many others; such clauses are either drawn up on the same model and result in the acceptance of the competence of a certain mode of settlement of disputes or of monitoring by an organ created by the treaty, as envisaged in article 41, paragraph 1, of the International Covenant on Civil and Political Rights,<sup>244</sup> or are exclusively prescriptive in nature, as in the case, for example, of article 25 of the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.<sup>245</sup>

<sup>242</sup> According to M. Virally, these are clauses "to which the parties accede only through special acceptance as distinct from accession to the treaty as a whole" ("Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", Université catholique de Louvain, quatrième colloque du Département des droits de l'homme, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme* (Brussels, Bruylant, 1982), p. 13).

<sup>243</sup> "The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

"a. the interpretation of a treaty;

"b. any question of international law;

"c. the existence of any fact which, if established, would constitute a breach of an international obligation;

"d. the nature or extent of the reparation to be made for the breach of an international obligation."

<sup>244</sup> "A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant"; see also the former articles 25 (Acceptance of the right to address individual petitions to the Commission) and 46 (Acceptance of inter-State declarations) of the European Convention on Human Rights (these articles have been modified, to provide for automatic compulsory jurisdiction, by articles 33 and 34 of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby) or article 45, paragraph 1, of the American Convention on Human Rights: "Pact of San José, Costa Rica": "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

<sup>245</sup> "Any Contracting State may, at any time, declare that the provisions of this Convention will be extended, in relation to other States making a declaration under this Article, to an official deed 'acte authentique' drawn up by or before an authority or public official and directly enforceable in the State of origin insofar as these provisions can be applied to such deeds." See also article 16 and the second paragraph of article 17 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, or article 15 of the Convention on the Service Abroad of Judicial and Extrajudicial

(5) Despite some academic opinions to the contrary,<sup>246</sup> in reality, statements made under such clauses have little in common, at the technical level, with reservations, apart from the important fact that they both purport to modify the application of the effects of the treaty and it is quite clear that "opt-out clauses seem to be much closer to reservations than opt-in clauses".<sup>247</sup> Indeed, not only can (a) statements made under optional clauses be formulated, in most cases, at any time, but also; (b) optional clauses "start from a presumption that parties are not bound by anything other than what they have explicitly chosen";<sup>248</sup> while exclusionary clauses, like the mechanism for reservations, start from the opposite assumption; and (c) statements made under optional clauses purport not to "exclude or to modify the legal effect of certain provisions of [a] treaty in their application" to their author<sup>249</sup> or to limit the obligations imposed on [the author] by the treaty,<sup>250</sup> but, instead, to increase them, while the mere entry into force of the treaty for the author does not have this effect.

(6) Here again, to a certain degree, the complex problems of "extensive reservations"<sup>251</sup> arise. However, draft guideline 1.4.1 [1.1.5] adopted by the Commission at its fifty-first session states that:

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

(7) The only difference between the statements envisaged in draft guideline 1.4.1 [1.1.5] and those in draft guideline 1.4.6 [1.4.6, 1.4.7] is that the former are formulated on the sole initiative of the author, while the latter are made under a treaty.

(8) Given the great differences between them, a confusion between reservations and statements made under an optional clause need hardly be feared, so that the Commission wondered whether it was necessary to include a guideline in the Guide to Practice in order to distinguish between them. A majority of members considered the inclusion of such a distinction useful: even if statements

Documents in Civil or Commercial Matters, or article 4, paragraphs 2 and 4, of ILO Convention (No. 118) concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (see also the examples given in the "Written statement of the International Labour Organization", memorandum by ILO (*I.C.J., Pleadings, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, p. 216 at p. 232) (*Advisory Opinion, I.C.J. Reports 1951*, p. 15), or again article 4, paragraph 2 (g), of the United Nations Framework Convention on Climate Change).

<sup>246</sup> See Gormley, loc. cit. (footnote 229 above), pp. 68 and 75; and "The modification of multilateral conventions by means of 'negotiated reservations' and other 'alternatives': A comparative study of the ILO and Council of Europe-Part Two", *Fordham Law Review*, 1970-1971, vol. 39, p. 413, at p. 450.

<sup>247</sup> Spiliopoulou Åkermark, loc. cit. (see footnote 216 above), pp. 479-514, especially p. 505.

<sup>248</sup> Ibid.

<sup>249</sup> See draft guideline 1.1.

<sup>250</sup> See draft guideline 1.1.5 [1.1.6].

<sup>251</sup> See the commentaries to draft guidelines 1.1.5 [1.1.6], 1.4.1 [1.1.5] and 1.4.2 [1.1.6] (footnote 212 above).

based on optional clauses are obviously technically very different from reservations, with which statements made under exclusionary clauses may (and should) be equated, such statements are nevertheless the counterpart of statements made under exclusionary clauses and their general objective is too similar for them to be ignored, particularly since they are often presented jointly.<sup>252</sup>

(9) If the treaty so provides or, given the silence of the treaty, if it is not contrary to the object and purpose of the provision in question,<sup>253</sup> there is nothing to prevent such a statement, in turn, from being accompanied by restrictions aimed at limiting the legal effect of the obligation thereby accepted. This is the case with the reservations frequently made by States when they accept the jurisdiction of ICJ under Article 36, paragraph 2, of its Statute.<sup>254</sup>

(10) While no purpose would be served by deciding whether a distinction needs to be drawn between “reservations” and “conditions”,<sup>255</sup> it is sufficient to state that:

There is a characteristic difference between these reservations and the type of reservation to multilateral treaties encountered in the law of treaties. . . . Since the whole transaction of accepting the compulsory jurisdiction is *ex definitione* unilateral and individualized and devoid of any multilateral element or element of negotiation, the function of reservations in a declaration cannot be to exclude or vary the legal effect of some existing provision in relation to the State making the declaration. Their function, together with that of the declaration itself, is to define the terms on which that State unilaterally accepts the compulsory jurisdiction—to indicate the disputes which are included within that acceptance, in the language of the *Right of Passage (Merits)* case.<sup>256</sup>

(11) These observations are consistent with the jurisprudence of ICJ and, in particular, its judgment in the *Fisheries Jurisdiction* case (*Spain v. Canada*):

Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the

<sup>252</sup> Virally includes them under the same heading, “optional clauses” (loc. cit. (footnote 242 above), pp. 13–14).

<sup>253</sup> In the *Loizidou v. Turkey* case (see footnote 207 above), the European Court of Human Rights held that “having regard to the object and purpose of the [European] Convention [on Human Rights]”, the consequences of restrictions on its competence “for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for. However, no such provision exists in either article 25 or article 46” (on these provisions, see footnote 244 above) (*Preliminary Objections*), p. 139, para. 75).

<sup>254</sup> Although the Statute is silent on the possibility of optional declarations under Article 36, paragraph 2, being accompanied by reservations other than the condition of reciprocity, this power, which is well established in practice and was confirmed by Committee IV/1 of Commission IV of the United Nations Conference on International Organization, (see IV/7, p. 39), is quite clear. See S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, vol. II, *Jurisdiction* (The Hague, Martinus Nijhoff, 1997), pp. 767–769; see also the dissenting opinion of Judge Bedjaoui in the *Fisheries Jurisdiction* case (*Spain v. Canada*) (*Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, at p. 533, para. 42) and the judgment in the *Aerial Incident of 10 August 1999* case (*Pakistan v. India*) (*Jurisdiction, Judgment, I.C.J. Reports 2000*, p. 12, at pp. 29–30, paras. 37–38).

<sup>255</sup> Rosenne makes a distinction between these two concepts (ibid., pp. 768–769).

<sup>256</sup> Ibid., p. 769. For the passage in question from the judgment, see case concerning the *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6, at p. 34.

parameters of the State’s acceptance of the compulsory jurisdiction of the Court. . . . All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court’s jurisdiction are to be interpreted as a unity.<sup>257</sup>

(12) The same goes for the reservations which States attach to statements made under other optional clauses, such as those resulting from acceptance of the jurisdiction of ICJ under article 17 of the General Act of Arbitration, in respect of which the Court has stressed “the close and necessary link that always exists between a jurisdictional clause and reservations to it”.<sup>258</sup>

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

(14) In view of the great theoretical and practical importance of the distinction,<sup>259</sup> it seems necessary to supplement draft guideline 1.4.6 [1.4.6, 1.4.7] by specifying that the conditions and restrictions which accompany statements made under an optional clause do not constitute reservations within the meaning of the Guide to Practice any more than such statements themselves do.

#### 1.4.7 [1.4.8] *Unilateral statements providing for a choice between the provisions of a treaty*

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

#### *Commentary*

(1) Draft guideline 1.4.7 [1.4.8] is part of a whole which also includes draft guidelines 1.1.8 and 1.4.6 [1.4.6, 1.4.7] and their common feature is that they relate to unilateral statements made under express provisions of a treaty enabling the parties to modify their obligations under the treaty, either by limiting those obligations on the basis of an exclusionary clause (draft guideline 1.1.8) or by accepting particular obligations under an optional clause (draft guideline 1.4.6 [1.4.6, 1.4.7]). However, draft guideline 1.4.7 [1.4.8] relates to the separate case in which the treaty requires States to choose between certain of its provisions, on the understanding, as shown by the examples given below, that the expression “two or more provisions of the treaty” is taken to cover not only articles and paragraphs,

<sup>257</sup> *Fisheries Jurisdiction* case (footnote 254 above), p. 453, para. 44; see also p. 454, para. 47: “Therefore, declarations and reservations are to be read as a whole”.

<sup>258</sup> *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 33, para. 79.

<sup>259</sup> Particularly as regards interpretation; see the judgment of ICJ in the *Fisheries Jurisdiction* case (footnote 254 above), paras. 42–56.

but also chapters, sections and parts of a treaty, and even annexes forming an integral part of that treaty.

(2) This case is expressly dealt with in article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions. While paragraph 1 concerns the partial exclusion of the provisions of a treaty under an exclusionary clause, paragraph 2 relates to the intellectually different case in which the treaty contains a clause allowing a choice between several of its provisions:

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

(3) The commentary to this provision, reproduced without change by the United Nations Conference on the Law of Treaties,<sup>260</sup> is concise, but sufficiently clear about the case covered:

Paragraph 2 takes account of a practice which is not very common but which is sometimes found, for example, in the General Act for the Pacific Settlement of International Disputes and in some international labour conventions. The treaty offers each State a choice between differing provisions of the treaty.<sup>261</sup>

(4) As has been noted,<sup>262</sup> however, it is not accurate (or, at all events, not very accurate) to say that such a practice is, today, not very common. It is actually fairly widespread, at least in the apparently rather vague sense given to it by the Commission at its eighteenth session, but this includes two different hypotheses which do not fully overlap.

(5) The first is illustrated, for example, by the statements made under the General Act of Arbitration, article 38, paragraph 1, of which provides:

Accessions to the present General Act may extend:

- A. Either to all the provisions of the Act (Chapters I, II, III and IV);
- B. Or to those provisions only which relate to conciliation and judicial settlement (Chapters I and II), together with the general provisions dealing with these procedures (Chapter IV).<sup>263</sup>

The same is true of several ILO conventions, in which this technique, often used subsequently,<sup>264</sup> was introduced by Convention (No. 102) concerning Minimum Standards of Social Security, article 2 of which provides:

Each Member for which this Convention is in force—

- (a) shall comply with—
  - (i) Part I;
  - (ii) at least three of Parts II, III, IV, V, VI, VII, VIII, IX and X, ...;
  - (iii) the relevant provisions of Parts XI, XII and XIII; and
  - (iv) Part XIV.

<sup>260</sup> See footnote 237 above.

<sup>261</sup> Paragraph (3) of the commentary to article 14 (see footnote 238 above).

<sup>262</sup> Spiliopoulou Åkermark, loc. cit. (footnote 216 above), p. 504.

<sup>263</sup> The Revised General Act for the Pacific Settlement of International Disputes adds a third possibility:

“C. Or to those provisions only which relate to conciliation (chapter I), together with the general provisions concerning that procedure (chapter IV)”.

<sup>264</sup> See Imbert, op. cit. (footnote 218 above), p. 172.

Along the same lines, mention may be made of the European Social Charter, article 20, paragraph 1, of which provides for a partially optional system of acceptance.<sup>265</sup>

Each of the Contracting Parties undertakes:

(a) to consider part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that Part;

(b) to consider itself bound by at least five of the following Articles of Part II of this Charter: Articles 1, 5, 6, 12, 13, 16 and 19;

(c) . . . to consider itself bound by such a number of Articles or numbered paragraphs of Part II of the Charter as it may select, provided that the total number of Articles or numbered paragraphs by which it is bound is not less than 10 Articles or 45 numbered paragraphs.<sup>266</sup>

(6) Such provisions should not be equated with the optional clauses referred to in draft guideline 1.4.6 [1.4.6, 1.4.7], from which they are clearly very different: the statements which they invite the parties to formulate are not optional, but binding, and condition the entry into force of the treaty for them<sup>267</sup> and they have to be made at the time of giving consent to be bound by the treaty.

(7) Similarly, these statements cannot be completely equated with those made in application of an exclusionary clause.<sup>268</sup> Clearly, they end up by excluding the application of provisions which do not appear in them. They do so indirectly, however, through partial acceptance,<sup>269</sup> and not by excluding the legal effect of those provisions, but because of the silence of the author of the statement in respect of them.

(8) The same is true of statements made under the second category of treaty clauses which, even more clearly, offer a choice between the provisions of a treaty because they oblige the parties to choose a given provision (or a given set of provisions) or, *alternatively*, another provision (or another set of provisions). This is no longer a question of choosing *among* the provisions of a treaty, but of choosing *between them*, on the understanding that, in contrast to the previous case, there can be no accumulation,<sup>270</sup> and the acceptance of a treaty is not partial (even

<sup>265</sup> H. Wiebringhaus, “La Charte sociale européenne : vingt ans après la conclusion du Traité”, *Annuaire français de droit international*, vol. 28 (1982), p. 934, at p. 936.

<sup>266</sup> This complex system was used again in article A, paragraph 1, of the revised European Social Charter. See also articles 2 and 3 of the European Code of Social Security and article 2 of the European Charter for Regional or Minority Languages:

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

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

<sup>267</sup> This may be seen from the rest of the wording of article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions cited above in paragraph (2) of the commentary.

<sup>268</sup> See draft guideline 1.1.8.

<sup>269</sup> Imbert, op. cit. (see footnote 218 above), p. 170.

<sup>270</sup> Article 287 of the United Nations Convention on the Law of the Sea is midway between the two approaches: States must choose one or more binding procedures for the settlement of disputes leading to binding decisions, failing which the arbitral procedure provided for in annex VII applies. But there may be an accumulation of different procedures.

if the obligations deriving from it may be more or less binding depending on the option selected).

(9) These “alternative clauses” are less common than those analysed above. They do exist, however, as demonstrated, for example, by article 2 of ILO Convention (No. 96) concerning fee-charging employment agencies (revised 1949).<sup>271</sup>

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

2. Any Member accepting the provisions of Part III of the Convention may subsequently notify the Director General that it accepts the provisions of Part II; as from the date of the registration of such notification by the Director General, the provisions of Part III of the Convention shall cease to be applicable to the Members in question and the provisions of Part II shall apply to it.<sup>272</sup>

(10) As has been observed, “[o]ptional commitments ought to be distinguished from authorized reservations, although they in many respects resemble such reservations”.<sup>273</sup> Moreover, the silence of article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions, which differs greatly from the reference in paragraph 1 to articles 19 to 23, on reservations,<sup>274</sup> constitutes, in contrast with unilateral statements made under an exclusionary clause, an indication of the clear dividing line between reservations and these alternative commitments.

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

<sup>271</sup> Imbert stresses that this is the best example of the type of clause allowing States to make a choice in the restrictive sense (op. cit. (see footnote 218 above), p. 172); see also F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5 (1988), p. 134.

<sup>272</sup> See also section 1 of article XIV of the Articles of Agreement of the International Monetary Fund, as amended in 1978, whereby:

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

<sup>273</sup> Horn, op. cit. (see footnote 271 above), p. 133.

<sup>274</sup> See paragraphs (13) to (15) of the commentary to draft guideline 1.1.8.

(12) There are striking differences between these statements and reservations, however, because, unlike reservations, these statements are the condition sine qua non<sup>275</sup> of the participation of the author of the statement in the treaty. Moreover, although they exclude the application of certain provisions of the treaty in respect of the State or international organization making the statement, this exclusion relates to the treaty itself and is inseparable from the entry into force of other provisions of the treaty in respect of the author of the same statement.

### 1.7 Alternatives to reservations and interpretative declarations

#### Commentary

(1) Reservations are not the only procedure enabling the parties to a treaty to exclude or modify the legal effect of certain provisions of the treaty or of certain particular aspects of the treaty as a whole. Accordingly, it seems useful to link the consideration of the definition of reservations to that of other procedures, which, while not constituting reservations, are, like them, designed to enable and do indeed enable States to modify obligations under treaties to which they are parties; this is a question of alternatives to reservations and recourse to such procedures may probably make it possible, in specific cases, to overcome some problems linked to reservations. In the Commission’s view, these procedures, far from constituting invitations to States to make a treaty less effective, as some members seemed to fear, would instead help to make recourse to reservations less “necessary” or frequent by offering more flexible treaty techniques.

(2) Moreover, some members of the Commission considered that certain of these alternatives differed profoundly from reservations in that they constituted, not unilateral statements, but clauses in the treaty itself, and that, accordingly, they related more to the process of drafting a treaty than to its application. It seemed clear, however, that, as they produce effects almost identical to those produced by reservations, these techniques deserve to be mentioned in the chapter of the Guide to Practice devoted to the definition of reservations, if only so as to identify more clearly the key elements of the concept, distinguish them from reservations and, where applicable, draw appropriate conclusions with regard to the legal regime of reservations.

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

(4) Some of these alternative procedures are the subject of draft guidelines in section 1.4 of the Guide to Practice. However, these deal only with “unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations”,<sup>276</sup> excluding other techniques for modifying the provisions of a treaty or their interpretation. Given the practical nature of the Guide to

<sup>275</sup> This is the reason why draft guideline 1.4.7 [1.4.8] states that a treaty must expressly require the parties to choose between two or more provisions of the treaty; if the choice is optional, an exclusionary clause within the meaning of draft guideline 1.1.8 is what is involved.

<sup>276</sup> See draft guideline 1.4.



Practice it has undertaken to draft, the Commission considered that it might be useful to devote a short section of the instrument to the range of procedures constituting alternatives to reservations and interpretative declarations, to serve as a reminder to users and, in particular, to the negotiators of treaties of the wide range of possibilities available to them for that purpose.

### 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] *Alternatives to reservations*

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

**(a) The insertion in the treaty of restrictive clauses purporting to limit its scope or application;**

**(b) The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.**

#### *Commentary*

(1) The formulation of reservations constitutes a means for States (and to some extent, for international organizations) partially to preserve their freedom of action while accepting in principle to limit that freedom by becoming bound by a treaty. This “concern of each Government with preserving its capacity to reject or adopt [and adapt] the law (a minimal, defensive concern)”<sup>277</sup> is particularly present in two situations: where the treaty in question deals with especially sensitive matters or contains exceptionally onerous obligations<sup>278</sup> or where it binds States whose situations are very different and whose needs are not necessarily met by a uniform set of rules.

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

In framing any *Convention or Recommendation*\* of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.<sup>279</sup>

According to ILO, which bases its refusal to permit reservations to the international labour conventions on this article:<sup>280</sup>

This would suggest that the object of the framers of the Treaty of Peace, in imposing on the Conference this obligation to give preliminary consideration to the special circumstances of each country, was to

<sup>277</sup> G. de Lacharrière, *La politique juridique extérieure* (Paris, Economica, 1983), p. 31.

<sup>278</sup> Such is the case, for example, of the charters of “integrating” international organizations (see the Treaties establishing the European Communities; see also the Rome Statute of the International Criminal Court).

<sup>279</sup> This provision reproduces the provisions of article 405 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).

<sup>280</sup> See paragraph (3) of the commentary to draft guideline 1.1.8.

prevent States from pleading, after the adoption of a convention, a special situation which had not been submitted to the Conference’s judgment.<sup>281</sup>

As in the case of reservations, but by a different procedure, the aim is:

to protect the integrity of the essential object and purpose of the treaty while simultaneously allowing the maximum number of States to become parties, though they are unable to assume full obligations.<sup>282</sup>

(3) The quest to reconcile these two goals is the aim both of reservations in the strict sense and of the alternative procedures that are the subject of draft guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4]. Reservations are one of the means intended to bring about this reconciliation. But they are far from “the only procedure which makes it possible to vary the content of a treaty in its application to the parties”<sup>283</sup> without undermining its purpose and object. Many other procedures are used to give treaties the flexibility necessitated by the diversity of situations of the States or international organizations seeking to be bound,<sup>284</sup> it being understood that the word “may” in the text of draft guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] must not be interpreted as implying any value judgement as to the use of one or the other technique, but must be understood as being purely descriptive.

(4) The common feature of these procedures, which makes them alternatives to reservations, is that, like the latter, they purport “to exclude or to modify the legal effect of certain provisions of the treaty”<sup>285</sup> or “of the treaty as a whole with respect to certain specific aspects”<sup>286</sup> in their application to certain parties. But there the similarities end and drawing up a list of them proves difficult, “for the imagination of legal scholars and diplomats in this area has proved to be unlimited.”<sup>287</sup> In addition, on the one hand, some treaties combine several of these procedures with each other and with reservations and, on the other hand, it is not always easy to differentiate them clearly from one another.<sup>288</sup>

<sup>281</sup> “The admissibility of reservations to general conventions”, memorandum by the Director of the International Labour Office, submitted to the Council on 15 June 1927 (League of Nations, *Official Journal* (July 1927), p. 883. See also “Written statement of the International Labour Organization” (footnote 245 above), pp. 224 and 236.

<sup>282</sup> Gormley, loc. cit. (see footnote 229 above). On the strength of these similarities, this author, at the cost of worrisome terminological confusion, encompasses in a single study “all devices the application of which permit a State to become a party to a multilateral convention without immediately assuming all of the maximum obligations set forth in the text”, *ibid.*, p. 64.

<sup>283</sup> J. Combacau and S. Sur, *Droit international public*, 4th ed. (Paris, Montchrestien, 1999), p. 133.

<sup>284</sup> Some authors have endeavoured to reduce all these procedures to one: see, inter alia, Droz, who contrasts “reservations” and “options” (loc. cit. (footnote 224 above), p. 383). On the other hand, F. Majoros believes that “the set of ‘options’ is merely an amorphous group of provisions which afford various options” (“Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye”, *Journal du droit international*, No. 1 (1974), p. 73, at p. 88.

<sup>285</sup> See draft guideline 1.1.

<sup>286</sup> See draft guideline 1.1.1 [1.1.4].

<sup>287</sup> Virally, loc. cit. (footnote 242 above), p. 6.

<sup>288</sup> *Ibid.*, p. 17.

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

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

(a) Restrictive clauses, “which limit the purpose of the obligation by making exceptions to and placing limits on it”<sup>289</sup> in respect of the area covered by the obligation or its period of validity;

(b) Escape clauses, “which have as their purpose to suspend the application of general obligations in specific cases”<sup>290</sup> and among which mention can be made of saving and derogations clauses;<sup>291</sup>

<sup>289</sup> Ibid., p. 10. This notion corresponds to “clawback clauses” as they have been defined by R. Higgins: “By a ‘clawback’ clause is meant one that permits, in normal circumstances, breach of an obligation for a specified number of public reasons” (“Derogations under human rights treaties”, *The British Year Book of International Law, 1976–1977*, p. 281; see also F. Ouguergouz, “L’absence de clause de dérogation dans certains traités relatifs aux droits de l’homme : les réponses du droit international général”, *RGDIP* (1994), p. 296). Other authors propose a more restrictive definition: according to R. Gittleman, clawback clauses are provisions “that entitle a state to restrict the granted rights to the extent permitted by domestic law” (“The African Charter on Human and Peoples’ Rights: A legal analysis”, *Virginia Journal of International Law*, vol. 22, No. 4 (Summer 1982), p. 667, at p. 691, cited by R. Ergec, *Les droits de l’homme à l’épreuve des circonstances exceptionnelles : étude sur l’article 15 de la Convention européenne des droits de l’homme* (Brussels, Bruylant, 1987), p.24).

<sup>290</sup> Virally, loc. cit. (footnote 242 above), p. 12.

<sup>291</sup> Escape clauses permit a contracting party temporarily not to meet certain treaty requirements owing to the difficulties it is encountering in fulfilling them as a result of special circumstances, whereas waivers, which produce the same effect, must be authorized by the other contracting parties or by an organ responsible for monitoring treaty implementation. A comparison of article XIX, paragraph 1 (a), and article XXV, paragraph 5, of the General Agreement on Tariffs and Trade shows the difference clearly. Article XIX, paragraph 1 (a), reads:

“If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession”.

This is an escape clause (this option has been regulated but not abolished by the Agreement on Safeguards contained in annex IA to the Marrakesh Agreement Establishing the World Trade Organization). On the other hand, the general provision laid down in article XXV (Joint Action by the Contracting Parties), paragraph 5 is a waiver:

“In exceptional circumstances not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties”.

(See also article VIII, section 2 (a), of the Articles of Agreement of the International Monetary Fund).

(c) Opting-[or contracting-]in clauses, which have been defined as “those to which the parties accede only through a special acceptance procedure, separate from accession to the treaty as a whole”;<sup>292</sup>

(d) Opting-[or contracting-]out clauses, “under which a State will be bound by rules adopted by majority vote even if it does not express its intent not to be bound within a certain period of time”;<sup>293</sup> or

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

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

(7) In the second category,<sup>294</sup> which includes all procedures that, although not expressly envisaged therein, enable the parties to modify the effect of the provisions of the treaty, are the following:

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

(b) Suspension of the treaty,<sup>295</sup> whose causes are enumerated and codified in part V of the 1969 and 1986 Vienna Conventions, particularly the application of the principles *rebus sic stantibus*<sup>296</sup> and *non adimpleti contractus*;<sup>297</sup>

(c) Amendments to the treaty, where they do not automatically bind all the parties thereto,<sup>298</sup> or

(d) Protocols or agreements having as their purpose (or effect) to supplement or modify a multilateral treaty only between certain parties,<sup>299</sup> including in the framework of “bilateralization”.<sup>300</sup>

(8) This list by no means claims to be exhaustive: as emphasized above,<sup>301</sup> negotiators display seemingly limitless ingenuity which precludes any pretensions to exhaustiveness. Consequently, draft guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] is restricted to mentioning two procedures which are not mentioned elsewhere and are sometimes characterized as “reservations”, although they do not by any means meet the definition contained in draft guideline 1.1.

<sup>292</sup> Virally, loc. cit. (footnote 242 above), p. 13.

<sup>293</sup> Simma, loc. cit. (see footnote 214 above); see also Tomuschat, *ibid.*

<sup>294</sup> Among the latter modification techniques, the first two are unilateral, but derive from the general international law of treaties, while the last two derive from the joint initiative of the parties to the treaty, or some of them, following its adoption.

<sup>295</sup> Termination of the treaty is a different matter; it puts an end to the treaty relations.

<sup>296</sup> See article 62 of the 1969 and 1986 Vienna Conventions.

<sup>297</sup> See article 60 of the 1969 and 1986 Vienna Conventions.

<sup>298</sup> See article 40, paragraph 4, and article 30, paragraph 4, of the 1969 and 1986 Vienna Conventions.

<sup>299</sup> See article 41 of the 1969 and 1986 Vienna Conventions.

<sup>300</sup> See paragraphs (19) to (23) of the commentary.

<sup>301</sup> See paragraph (4) of the commentary.

(9) Other “alternatives to reservations”, which take the form of unilateral statements made in accordance with a treaty, are the subject of draft guidelines appearing in section 1.4 of the Guide to Practice. This applies to statements made under: an optional clause, sometimes accompanied by conditions or restrictions (draft guideline 1.4.6 [1.4.6, 1.4.7]), or a clause providing for a choice between several provisions or groups of provisions (draft guideline 1.4.7 [1.4.8]).

(10) There are other alternative procedures which so obviously do not belong in the category of reservations that it does not seem useful to mention them specifically in the Guide to Practice. This is true, for example, of notifications of the suspension of a treaty. These too are unilateral statements, as reservations are, and, like reservations, they may purport to exclude the legal effects of certain provisions of the treaty, if separable,<sup>302</sup> in their application to the author of the notification, but only on a temporary basis. Governed by article 65, paragraph 1, of the 1969 and 1986 Vienna Conventions,<sup>303</sup> their purpose is to release the parties “between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension”<sup>304</sup> and they are clearly different from reservations, not so much by the temporary nature of the exclusion of the operation of the treaty<sup>305</sup> as by the timing of their occurrence, which is necessarily subsequent to the entry into force of the treaty in respect of the author of the statement. Furthermore, the Conventions make such

statements subject to a legal regime that differs clearly from the reservations regime.<sup>306</sup>

(11) The same applies when the suspension of the effect of the provisions of a treaty is the result of a notification made not, as in the case referred to above, under the rules of the general international law of treaties, but on the basis of specific provisions in the treaty itself.<sup>307</sup> The identical approach taken when applying this method and that of reservations is noteworthy:

Both approaches appear to show little concern for the integrity of an international agreement, since they prefer a more universal application thereof. The option of formulating reservations is an element that is likely to promote more widespread acceptance of international treaties. Similarly, the fact that it is possible to release oneself or be released for a given period of time from one’s international obligations is such as to encourage a hesitant State to enter finally into a commitment that offers it a number of advantages.

There, however, the similarity between the two procedures ends.<sup>308</sup>

In fact, in the case of a reservation, the partners of the reserving State or international organization are informed at the outset of the limits on the commitment of that State or organization, whereas, in the case of a declaration under an escape clause, the aim is to remedy unforeseeable difficulties arising from the application of the treaty. The time element of the definition of reservations is thus absent, as it is in the case of all unilateral statements purporting to suspend the provisions of a treaty.<sup>309</sup> Since there is no likelihood of serious confusion between such notifications and reservations, it is not essential to include a draft guideline relating to the former in the Guide to Practice.

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

(13) It would seem that everything but their purpose differentiates these procedures from reservations. They are purely conventional techniques which take the form not of unilateral statements, but of one or more agreements between the parties to a treaty or between some of them. Where restrictive clauses in the treaty, amendments that enter into force only for certain parties to the treaty or “bilateralization” procedures are concerned, however, problems may arise if only because certain legal positions have been adopted which, in a most questionable manner, characterize such procedures as “reservations”. This is why the majority of the members of the Commission considered it useful to refer to them explicitly in draft guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4].

<sup>302</sup> See article 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties), subparagraph (a), and article 44 (Separability of treaty provisions) of the 1969 and 1986 Vienna Conventions. See also P. Reuter, “Solidarité et divisibilité des engagements conventionnels” in Y. Dinstein, ed., *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht, Nijhoff, 1989), pp. 623–634, also reproduced in P. Reuter, *Le développement de l’ordre juridique international : écrits de droit international* (Paris, Economica, 1995), pp. 361–374.

<sup>303</sup> “A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty, terminating it, withdrawing from it, or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.”

<sup>304</sup> Article 72, paragraph 1 (a), of the 1969 and 1986 Vienna Conventions.

<sup>305</sup> Certain reservations can be made only for a specific period; thus, Horn offers the example of ratification by the United States of the Convention on Extradition, with the reservation that certain provisions thereof should not be applicable to the United States “... until subsequently ratified in accordance with the Constitution of the United States” (op. cit. (see footnote 271 above), p. 100). And certain reservation clauses even impose such a provisional nature (see article 25, paragraph 1, of the European Convention on the Adoption of Children and article 14, paragraph 2, of the European Convention on the Legal Status of Children Born out of Wedlock, whose wording is identical:

“A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period”;

or article 20 of the Convention on the Recognition of Divorces and Legal Separations, which authorizes Contracting States which do not provide for divorce to reserve the right not to recognize a divorce, but whose paragraph 2 states: “This reservation shall have effect only so long as the law of the State utilizing it does not provide for divorce”).

<sup>306</sup> See, in particular, articles 65, 67, 68 and 72.

<sup>307</sup> As indicated above (footnote 291), such exclusionary clauses fall into two categories: waivers and escape clauses.

<sup>308</sup> A. Manin, “À propos des clauses de sauvegarde”, *Revue trimestrielle de droit européen*, No. 1 (January-March 1970), p. 3.

<sup>309</sup> See paragraph (10) above. See also, in that connection, Spiliopoulou Åkermark, loc. cit. (footnote 216 above), pp. 501–502.

(14) There are countless restrictive clauses purporting to limit the purpose of obligations resulting from the treaty by introducing exceptions and limits and they are to be found in treaties on a wide range of subjects, such as the settlement of disputes,<sup>310</sup> the safeguarding of human rights,<sup>311</sup> protection of the environment,<sup>312</sup> trade<sup>313</sup> and the law of armed conflicts.<sup>314</sup> Although such provisions are similar to reservations in their object,<sup>315</sup> the two pro-

<sup>310</sup> In addition to article 27 of the European Convention for the Peaceful Settlement of Disputes, see, for example, article I of the Agreement between Great Britain and France, providing for the Settlement by Arbitration of certain Classes of Questions which may arise between the two Governments (London, 14 October 1903) (*British and Foreign State Papers, 1902–1903*, vol. 96, p. 35), which has served as a model for a great number of subsequent treaties:

“Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of 29 July 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties.”

<sup>311</sup> See the references to “clawback clauses” (footnote 289 above). For example (again, there are innumerable examples), article 4 of the International Covenant on Economic, Social and Cultural Rights:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

<sup>312</sup> See article VII (Exemptions and other special provisions relating to trade) of the Convention on international trade in endangered species of wild fauna and flora, or article 4 (Exceptions) of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

<sup>313</sup> See article XII (Restrictions to safeguard the balance of payments), article XIV (Exceptions to the rule of non-discrimination), article XX (General exceptions) or article XXI (Security exceptions) of the General Agreement on Tariffs and Trade.

<sup>314</sup> See article 3 common to the Geneva Conventions of 12 August 1949 (minimum level of protection).

<sup>315</sup> Imbert gives two examples that highlight this fundamental difference, by comparing article 39 of the Revised General Act for the Pacific Settlement of International Disputes with article 27 of the European Convention for the Peaceful Settlement of Disputes (*op. cit.* (see footnote 218 above), p. 10); under article 39, paragraph 2, of the Revised General Act for the Pacific Settlement of International Disputes, reservations that are exhaustively enumerated must be indicated at the time of accession and

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

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

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

Meanwhile, article 27 of the European Convention for the Peaceful Settlement of Disputes reads:

“The provisions of this Convention shall not apply to:

“(a) Disputes relating to facts or situations prior to the entry into force of this Convention as between the Parties to the dispute;

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

Article 39 of the Revised General Act for the Pacific Settlement of International Disputes is a reservation clause; article 27 of the European Convention for the Peaceful Settlement of Disputes is a restrictive clause. There are striking similarities: in both cases, the aim is to exclude identical types of disputes from methods of settlement provided for by the treaty in question.

cedures operate differently: in the case of restrictive clauses, there is a general exclusion arising out of the treaty itself; in the case of reservations, it is merely a possibility available to the States parties, permitted under the treaty, but becoming effective only if a unilateral statement is made at the time of accession.<sup>316</sup>

(15) At first glance, there would appear to be no likelihood of confusion between such restrictive clauses and reservations. However, not only is language usage deceptive and “terms such as ‘public order reservations’, ‘military imperatives reservations’, or ‘sole competence reservations’ are frequently encountered”,<sup>317</sup> but authors, including the most distinguished among them, have caused an unwarranted degree of confusion. For example, in an often quoted passage<sup>318</sup> from the dissenting opinion that he appended to the judgment of ICJ in the *Ambatielos* case, Judge Zoričić stated the following:

A reservation is a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning.<sup>319</sup>

(16) Draft guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] refers to restrictive clauses both as a warning against this frequent confusion and as an indication that they are a possible alternative to reservations within the meaning of the Guide to Practice.

(17) The reference to agreements, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves is made for the same reasons.

(18) It would not appear to be necessary to dwell on another treaty procedure that would make for flexibility in the application of a treaty: amendments (and additional protocols) that enter into effect only as between certain

<sup>316</sup> In the preceding example, therefore, it is not entirely accurate to assert, as Imbert does, that “in practice, article 27 of the European Convention produces the same result as a reservation in respect of the General Act” (*ibid.*). This is true only of the reserving State’s relations with other parties to the Revised General Act for the Pacific Settlement of International Disputes and not of such other parties’ relations among themselves, to which the treaty applies in its entirety.

<sup>317</sup> Imbert, *ibid.* For an example of a “public order reservation”, see the first paragraph of article 6 of the Convention regarding the Status of Aliens in the respective Territories of the Contracting Parties: “For reasons of public order or safety, States may expel foreigners domiciled, resident, or merely in transit through their territory.” For an example of a “sole competence reservation”, see article 3, paragraph 11, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: “Nothing contained in this article [on ‘offences and sanctions’] shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a party and that such offences shall be prosecuted and punished in conformity with that law.”

<sup>318</sup> See G. Fitzmaurice, “The law and procedure of the International Court of Justice 1951–4: Treaty interpretation and other treaty points”, *The British Year Book of International Law* 1957, pp. 272–273; however, although he quotes this definition with apparent approval, this distinguished author departs from it considerably in his commentary.

<sup>319</sup> *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports* 1952, p. 28, at p. 76. For another example, see G. Scelle, *Précis de droit des gens : principes et systématiques*, part II (Paris, Sirey, 1934), p. 472.

parties to a treaty,<sup>320</sup> but it does seem necessary to consider certain specific agreements which are concluded between two or more States parties to basic treaties, which purport to produce the same effects as reservations and in connection with which reference has been made to the “bilateralization” of “reservations”.

(19) The bilateralization regime has been described as permitting “contracting States, while being parties to a multilateral convention, to choose the partners with which they will proceed to implement the regime provided for”.<sup>321</sup> It can be traced back to article XXXV, paragraph 1, of the General Agreement on Tariffs and Trade.<sup>322</sup> The general approach involved in this procedure is not compa-

<sup>320</sup> This procedure, which is provided for in article 40, paragraphs 4 and 5 (and article 30, paragraph 4), and article 41 of the 1969 and 1986 Vienna Conventions, is applied as a matter of routine. Even if, in terms of its general approach and as regards some aspects of its legal regime (respect for the fundamental characteristics of the treaty, though it does not contain a reference to its “object and purpose”), it is similar to procedures that characterize reservations, it is nonetheless very different in many respects:

(a) The flexibility it achieves is not the product of a unilateral statement by a State, but of agreement between two or more parties to the initial treaty;

(b) Such agreement may be reached at any stage, generally following the treaty’s entry into effect for its parties, which is not so in the case of reservations that must be formulated at the time of the expression of consent to be bound, at the latest;

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

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

Since there is no fear of confusion in the case of reservations, no clarification is called for and it would appear unnecessary to devote a specific guideline in the Guide to Practice to drawing a distinction which is already quite clear.

<sup>321</sup> M. H. van Hoogstraten, “L’état présent de la Conférence de La Haye de droit international privé”, in *The Present State of International Law and other Essays: written in honour of the Centenary Celebration of the International Law Association 1873–1973*, M. Bos, ed. (Deventer, Kluwer, 1973), p. 387.

<sup>322</sup> “This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if

“(a) the two contracting parties have not entered into tariff negotiations with each other, and

“(b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application”.

See Imbert, *op. cit.* (footnote 218 above), p. 199. The practice of “lateral agreements” (See D. Carreau and P. Juillard, *Droit international économique* (Paris, Librairie générale de droit et de jurisprudence, 1998), pp. 54–56 and 127) has accentuated this bilateralization. See also article XIII of the Marrakesh Agreement Establishing the World Trade Organization or certain conventions adopted at the Hague Conference on Private International Law: for example, article 13, paragraph 4, of the Convention concerning recognition of the legal personality of foreign companies, associations and institutions; article 12 of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents; article 31 of the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, article 42 of the Convention concerning the International Administration of the Estates of Deceased Persons; article 44, paragraph 3, of the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption; article 58, paragraph 3, of the Convention on Jurisdiction,

able with the approach on which the reservations method is based; it allows a State to exclude, by means of its silence or by means of a specific declaration, the application of a treaty as a whole in its relations with one or more other States and not to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain aspects. It is more comparable with statements of non-recognition, where such statements purport to exclude the application of a treaty between a declaring State and the non-recognized entity.<sup>323</sup>

(20) However, the same is not true when bilateralization involves an agreement to derogate from a treaty concluded among certain parties in application of treaty provisions expressly authorizing this, as can be seen in the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, adopted on 1 February 1971 within the framework of the Hague Conference on Private International Law. It was, in fact, during the elaboration of this Convention that the doctrine of “bilateralization of reservations” came into being.

(21) However, in response to a Belgian proposal, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters goes further than these traditional bilateralization methods. Not only does article 21 of this Convention make its entry into force with respect to relations between two States subject to the conclusion of a supplementary agreement,<sup>324</sup> but it also permits the two States to modify their commitment *inter se* within the precise limits set in article 23.<sup>325</sup>

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

This is followed by a list of 22 possible ways of modifying the Convention, whose purposes, as summarized, are:

1. *To clarify a number of technical expressions used by the Convention whose meaning may vary from one country to another (article 23 of the Convention, Nos. 1, 2, 6 and 12);*

Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; article 54, paragraph 3, of the Convention on the International Protection of Adults; or article 37, paragraph 3, of the European Convention on State Immunity, adopted in the context of the Council of Europe: “. . . if a State having already acceded to the Convention notifies the Secretary General of the Council of Europe of its objection to the accession of another non-member State, before the entry into force of this accession, the Convention shall not apply to the relations between these two States”.

<sup>323</sup> See draft guideline 1.4.3 [1.1.7] and paragraphs (5) to (9) of the commentary (footnote 212 above).

<sup>324</sup> Article 21 reads:

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

<sup>325</sup> The initial Belgian proposal did not envisage this possibility of modification, which was established subsequently as the discussions progressed (See P. Jenard, “Une technique originale : la bilatéralisation de conventions multilatérales”, *Belgian Review of International Law* (1966–2), pp. 392–393).

2. To include within the scope of the Convention matters that do not fall within its scope (article 23 of the Convention, Nos. 3, 4 and 22);
3. To apply the Convention in cases where its normal requirements have not been met (article 23 of the Convention, Nos. 7, 8, 9, 10, 11, 12 and 13);
4. To exclude the application of the Convention in respect of matters normally covered by it (article 23 of the Convention, No. 5);
5. To declare a number of provisions inapplicable (article 23 of the Convention, No. 20);
6. To make a number of optional provisions of the Convention mandatory (article 23 of the Convention, Nos. 8 bis and 20);
7. To regulate issues not settled by the Convention or adapt a number of formalities required by it to domestic legislation (article 23 of the Convention, Nos. 14, 15, 16, 17, 18 and 19).<sup>326</sup>

Undoubtedly, many of these alternatives “simply permit States to define words or to make provision for procedures”,<sup>327</sup> however, a number of them restrict the effect of the Convention and have effects very comparable to those of reservations, which they nevertheless are not.<sup>328</sup>

(22) The Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters is not the only treaty that makes use of this procedure of pairing a basic convention and a supplementary agreement, thus permitting the introduction to the convention of alternative contents, even though the convention is a typical example and probably a more refined product. Reference may also be made, *inter alia*, to:<sup>329</sup> article 20 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which permits contracting States to “agree to dispense with” a number of provisions;<sup>330</sup> article 34 of the Convention on the Limitation Period in the International Sale of Goods;<sup>331</sup> articles 26, 56 and 58 of the European Convention on Social Security, which with similar wording states:

The application [of certain provisions] as between two or more Contracting Parties shall be subject to the conclusion between those Parties of bilateral or multilateral agreements which may also contain appropriate special arrangements;

or, for more recent examples: article 39, paragraph 2, of the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption:

Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may der-

gate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention;<sup>332</sup>

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

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

(23) These options, which permit parties concluding a supplementary agreement to exclude the application of certain provisions of the basic treaty or not to apply certain provisions thereof, either as a general rule or in particular circumstances, do indeed purport to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the two parties bound by the agreement. However, and this is a fundamental difference from reservations strictly speaking, such exclusions or modifications are not the product of a unilateral statement, which constitutes an essential element of the definition of reservations,<sup>333</sup> but, rather, an agreement between two of the parties to the basic treaty that does not affect the other contracting parties to the treaty:

The system leads to the elaboration of two instruments: a multilateral convention, on the one hand, and a supplementary agreement, on the other, which, although based on the multilateral convention, nevertheless has an independent existence.<sup>334</sup>

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

(24) It is such agreements, which have the same object as reservations and which are described, frequently, but misleadingly, as “bilateralized reservations”, that are the subject of the second subparagraph of draft guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4].

### 1.7.2 [1.7.5] *Alternatives to interpretative declarations*

**In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to**

<sup>326</sup> See the explanatory report of C. N. Fragistas (The Hague Conference on Private International Law, *Actes et documents de la session extraordinaire, 13 to 26 April 1966, Exécution des jugements* (The Hague, Imprimerie nationale, 1969), p. 364). See also G. Droz, “Le récent projet de Convention de La Haye sur la reconnaissance et l’exécution des jugements étrangers en matière civile et commerciale”, *Netherlands International Law Review* (1966), p. 240.

<sup>327</sup> Imbert, *op. cit.* (see footnote 218 above), p. 200.

<sup>328</sup> *Contra* Imbert, *ibid.*

<sup>329</sup> These examples have been borrowed from Imbert, *ibid.*, p. 201.

<sup>330</sup> But the application of this provision does not depend on the free choice of partner; see Imbert, *ibid.*; see also Droz, *loc. cit.* (footnote 224 above), pp. 390–391. In fact, this procedure bears a resemblance to amendments between certain parties to the basic convention alone.

<sup>331</sup> The same remark applies to this provision.

<sup>332</sup> Once again, one cannot truly speak of bilateralization in a strict sense since this provision does not call for the choice of a partner. See also article 52 of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children or article 49 of the Convention on the International Protection of Adults.

<sup>333</sup> See draft guideline 1.1: “‘Reservation’ means a unilateral statement\* . . .”.

<sup>334</sup> P. Jenard, Rapport du Comité restreint sur la bilatéralisation, The Hague Conference on Private International Law, *Actes et documents* . . . (see footnote 326 above), p. 145. See also the explanatory report by Fragistas, *loc. cit.* (*ibid.*), pp. 363–364; or Droz, *loc. cit.* (footnote 224 above), p. 391.

**procedures other than interpretative declarations, such as:**

**(a) The insertion in the treaty of provisions purporting to interpret the same treaty;**

**(b) The conclusion of a supplementary agreement to the same end.**

### *Commentary*

(1) Just as reservations are not the only means at the disposal of contracting parties for modifying the application of the provisions of a treaty, interpretative declarations are not the only procedure by which States and international organizations can specify or clarify their meaning or scope. Leaving aside the third-party interpretation mechanisms provided for in the treaty,<sup>335</sup> the variety of such alternative procedures in the area of interpretation is nonetheless not as great. As an indication two procedures of this type can be mentioned.

(2) In the first place, it is very often the case that the treaty itself specifies the interpretation to be given to its own provisions. Such is the primary purpose of the clauses containing the definition of the terms used in the treaty.<sup>336</sup> Moreover, it is very common for a treaty to provide instructions on how to interpret the obligations imposed on the parties either in the body of the treaty itself<sup>337</sup> or in a separate instrument.<sup>338</sup>

(3) Secondly, the parties, or some of them,<sup>339</sup> may conclude an agreement for the purposes of interpreting a

treaty previously concluded between them. This possibility is expressly envisaged in article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, which requires taking 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>340</sup>

(4) Moreover, it may happen that the interpretation is “bilateralized”.<sup>341</sup> Such is the case where a multilateral convention relegates to bilateral agreements the task of para 1 clarifying the meaning or scope of certain provisions. Thus, article 23 of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters provides that contracting States shall have the option of concluding supplementary agreements in order, *inter alia*:

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

2. To clarify the meaning of the term “law” in States with more than one legal system; . . .<sup>342</sup>

(5) It therefore seems desirable to include in the Guide to Practice a provision on alternatives to interpretative declarations, if only for the sake of symmetry with draft guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] on alternatives to reservations. On the other hand, it does not appear necessary to devote a separate draft guideline to the enumeration of alternatives to conditional interpretative declarations.<sup>343</sup> the alternative procedures listed above are treaty-based and require the agreement of the contracting parties. It matters little, therefore, whether or not the agreed interpretation constitutes the *sine qua non* of their consent to be bound.

<sup>335</sup> See D. Simon, *L'interprétation judiciaire des traités d'organisations internationales* (Paris, Pedone, 1981).

<sup>336</sup> See among numerous examples, article 2 of the 1969 and 1986 Vienna Conventions or article XXX of the Articles of Agreement of the International Monetary Fund.

<sup>337</sup> See, here again among numerous examples, article 13, paragraph 4, of the International Covenant on Economic, Social and Cultural Rights: “No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions”.

<sup>338</sup> See notes and supplementary provisions in annex I to the General Agreement on Tariffs and Trade. This corresponds to the possibility envisaged in article 30, paragraph 2, of the 1969 and 1986 Vienna Conventions.

<sup>339</sup> Where all the parties to the interpretative agreement are also parties to the original treaty, the interpretation is authentic (see paragraph (14) of

the commentary to article 27, paragraph 3 (a), of the draft articles on the law of treaties, which became article 30, paragraph 3 (a), of the 1969 Vienna Convention (*Yearbook . . . 1966*, vol. II, p. 221, document A/6309/Rev.1)); see, with regard to bilateral treaties, draft guideline 1.5.3 [1.2.8].

<sup>340</sup> One member of the Commission nevertheless expressed doubt about whether such an agreement should be equated with those dealt with in article 31.

<sup>341</sup> On the “bilateralization” of reservations, see draft guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] and paragraphs (18) to (23) of the commentary.

<sup>342</sup> On this provision, see paragraph (20) of the commentary to draft guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4].

<sup>343</sup> See draft guideline 1.2.1 [1.2.4].