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Fourteenth report on reservations to treaties

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Addendum

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IV. Effects of reservations and interpretative declarations

179. The fourth part of the Guide to Practice, as provided for in the general outline of the study,[296] covers the effects of reservations, acceptances and objections, to which the effects of interpretative declarations and reactions thereto (approval, opposition, recharacterization or silence) should also be added. This part follows the logic of the Guide to Practice, in which an attempt is made to present, as systematically as possible, all of the legal issues concerning reservations and related unilateral declarations, as well as interpretative declarations: after defining the issues (in the first part of the Guide) and establishing the rules for assessing the validity (second part of the Guide) and permissibility (third part of the Guide) of these various declarations, the fourth part is concerned with determining the legal effects of the reservation or interpretative declaration.[297]

180. Although it was initially planned that the fourth part would address issues relating to "The prohibition of certain reservations",[298] it does not seem to be the appropriate place for this section of the provisional outline. Those issues have in fact been addressed in the context of permissibility of reservations, in the third part of the Guide. The study should therefore concentrate on the effects of reservations, acceptances and objections, on the one hand, and on the effects of interpretative declarations and reactions to them, on the other.

181. First of all, it is worth recalling a point that is crucial to understanding the legal effects of a reservation or interpretative declaration. It is now accepted by the International Law Commission that both reservations and interpretative declarations are defined in relation to the legal effects that their authors intend them to have on the treaty. Accordingly, guideline 1.1 (Definition of reservations) provides as follows:

> "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.[299]

In the same spirit, guideline 1.2 (Definition of interpretative declarations) states that:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State

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[296] Second report on reservations to treaties, A/CN.4/477 and Add.1, *Yearbook ... 1996*, vol. II, Part One, pp. 48-49, para. 37.

[297] The fifth and final part of the Guide to Practice will address the succession of States in relation to reservations.

[298] Second report on reservations to treaties, A/CN.4/477 and Add.1, *Yearbook ... 1996*, vol. II, Part One, pp. 48-49, para. 37, section IV.A.

[299] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 195.

> 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.[300]

182. Although the potential legal effects of a reservation or interpretative declaration are thus a "substantive element"[301] of its definition,[302] this does not at all mean that a reservation or interpretative declaration actually produces those effects. The fourth part of the Guide is not intended to determine the effects that the author of a reservation or the author of an interpretative declaration purported it to have — this issue was dealt with in the first part on the definition and identification of reservations and interpretative declarations. The fourth part, in contrast, deals with determining the legal effects that reservations and interpretative declarations actually produce in relation to eventual reactions from other contracting parties. The purported effects and the effects actually achieved are not necessarily identical and depend on the one hand on the validity and permissibility of the reservations and interpretative declarations and, on the other hand, on the reactions of other interested States or international organizations.

A. Effects of reservations, acceptances and objections

1. The rules of the Vienna Conventions

183. Despite the relevant provisions set out in the Vienna Conventions, the effects of a reservation or of an acceptance of or objection to a reservation remain one of the most controversial issues of treaty law. Article 21 of the two conventions refers exclusively to the "legal effects of reservations and of objections to reservations". The drafting of this provision was relatively simple compared to that of the other provisions on reservations. Neither the International Law Commission nor the United Nations Conference on the Law of Treaties, held at Vienna in 1969, seem to have had any particular difficulty in formulating the rules presented in the first two paragraphs of article 21 concerning the effects of reservations (whereas paragraph 3 deals with the effects of objections).

184. The Commission's first Special Rapporteur on the law of treaties, J. L. Brierly, had already suggested in his draft article 10, paragraph 1, that a reservation be considered as:

> limiting or varying the effect of [a] treaty in so far as concerns the relation of [the] State or organization [author of the reservation] with one or more of the existing or future parties to the treaty.[303]

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[300] Ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), p. 207.

[301] *Yearbook ... 1998*, vol. II, Part Two, p. 94, para. 500. The Special Rapporteur has emphasized that "it is generally recognized that the function of reservations is to purport to produce legal effects" (Third report on reservations to treaties, A/CN.4/491/Add.3, para. 147). Frank Horn maintains that the fact that reservations purport to produce certain specific legal effects is the "*differentia specifica*" of this type of unilateral act (see A/CN.4/614/Add.1, note 200, T.M.C. Asser Instituut, The Hague, 1988, p. 41). See also the statements of Mr. Ruda and Mr. Rosenne who have emphasized the close link between the definition of the reservation and the legal effects that it is likely to produce (*Yearbook ... 1965*, vol. I, 799th meeting, 19 June 1965, p. 167, para. 46 and 800th meeting, 11 June 1965, p. 171, para. 8).

[302] For a definition of reservations in general, see draft guidelines 1.1, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199 and 1.1.1 (ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217).

[303] [First] Report on the law of treaties, *Yearbook of the International Law Commission 1950*, vol. II, p. 238.

Fitzmaurice made the first proposal for a separate provision on the legal effects of a reservation, which largely prefigured the first two paragraphs of the current article 21.[304] It is interesting that these draft provisions seemed to smack of the obvious: Fitzmaurice did not make any comment on the draft and only noted that "it is considered useful to state these consequences, but they require no explanation".[305]

185. At the outset, Waldock suggested a provision on the effects of a reservation deemed "admissible",[306] and since then his proposal has undergone only minor drafting changes.[307] Neither Sir Humphrey[308] nor the Commission considered it necessary to comment at length on that rule, the Commission merely stating that:

> These rules, which appear not to be questioned, follow directly from the consensual basis of the relations between parties to a treaty.[309]

Nor did the issue give rise to observations or criticisms from States between the two readings by the Commission or at the Vienna Conference.

186. The drafting of the current article 21, paragraph 3, posed greater difficulties. This provision, logically absent from Sir Humphrey's first proposals, had to be included in the article on the effects of reservations and objections when the Commission accepted that a State objecting to a reservation could nevertheless establish treaty relations with the author of the reservation.[310] An American proposal to that effect convinced Sir Humphrey of the logical need for such a provision,[311] but its drafting by the Commission was nevertheless time-

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[304] Report on the law of treaties, A/CN.4/101, *Yearbook ... 1956*, vol. II, pp. 115-116.

[305] Ibid., p. 127, para. 101.

[306] This is the term that was used in draft article 18, para. 5, as presented in Sir Humphrey's first report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 61.

[307] The text proposed by Sir Humphrey for article 18, para. 5, became article 18 ter, entirely devoted to the legal effect of reservations, with a few editorial changes from the Drafting Committee (see *Yearbook ... 1962*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 63). Subsequently, the Drafting Committee made other changes to the draft (ibid., 667th meeting, 25 June 1962, p. 253, para. 71). It ultimately became article 21, as adopted by the Commission on first reading in 1962 (ibid., vol. II, p. 181). The text underwent changes made necessary by the rephrasing of other provisions on reservations. The changes were purely editorial, except for the change to subparagraph 1 (b) (on this point, see para. 279 below).

[308] A/CN.4/144, *Yearbook ... 1962*, vol. II, p. 68, para. 21.

[309] See the ILC commentary in 1962 (*Yearbook ... 1962*, vol. II, p. 181 (commentary on article 21)) and the commentary on draft article 19 adopted on second reading in 1965 (*Yearbook ... 1966*, vol. II, p. 209, para. 1).

[310] See Daniel Müller's commentary on article 21 (1969) in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités, Commentaire article par article*, Brussels, Bruylant, 2006, p. 888, paras. 7 and 8.

[311] Fourth report on the law of treaties, A/CN.4/177 and Add.1, in *Yearbook ... 1965*, vol. II, pp. 47 and 55. See also the comments of the Danish Government (ibid., p. 46).

consuming.[312] The Conference made only a relatively minor change in order to harmonize paragraph 3 with the reversal of the presumption of article 20, paragraph 4 (b).[313]

187. The resumed consideration of article 21 during the drafting of the 1986 Vienna Convention did not pose any significant difficulties. During the very brief discussion of draft article 21, two members of the Commission emphasized that the provision in question "followed logically" from draft articles 19 and 20.[314] Even more clearly, Mr. Calle y Calle stated that:

> if reservations were admitted, their legal effect was obviously to modify the relations between the reserving party and the party with regard to which the reservation was established.[315]

The Commission, and then several years later the Vienna Conference, adopted article 21 with only the drafting changes required by the broader scope of the 1986 Convention.

188. One might think that the widespread acceptance of article 21 during adoption of the draft articles on the law of treaties between States and international organizations or between international organizations showed that the provision was even then accepted as reflecting international custom on the subject. The arbitral ruling made concerning the delimitation of the continental shelf in the *Mer d'Iroise* case corroborates this analysis. The Court of Arbitration recognized:

> that the law governing reservations to multilateral treaties was then undergoing an evolution which crystallized only in 1969 in Articles 19 to 23 of the Vienna Convention on the Law of Treaties.[316]

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[312] Although Sir Humphrey considered that the case of a reservation to which a simple objection had been made was "not altogether easy to express" (*Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 270, para. 96), most of the members (see Mr. Ruda (ibid., para. 13); Mr. Ago (ibid., 814th meeting, 29 June 1965, p. 271, paras. 7 and 11); Mr. Tounkine (ibid., para. 8) and Mr. Briggs (ibid., p. 272, para. 14) were convinced that it was necessary, and even "indispensable" (Mr. Ago, ibid., p. 271, para. 7) to introduce a provision on that subject "in order to forestall ambiguous situations" (ibid., p. 271, para. 7). However, members had different opinions as to the basis of the paragraph proposed by the United States and the Special Rapporteur: whereas Sir Humphrey's proposal emphasized the consensual basis of the treaty relationship established despite the objection, the paragraph proposed by the United States seemed to suggest that the intended effect originated only from the unilateral act of the objecting State, that is, from the objection, without the reserving State having a real choice. The two positions had their supporters within the Commission (see the positions of Mr. Yasseen (ibid., 800th meeting, 11 June 1965, p. 171, para. 7 and pp. 172 and 173, paras. 21-23 and 26), Mr. Tunkin (ibid., 800th meeting, 11 June 1965, p. 172, para. 18) and Mr. Pal (ibid., para. 24) and those of Mr. Waldock (ibid., p. 173, para. 31, Mr. Rosenne (ibid., p. 172, para. 10) and Mr. Ruda (ibid., p. 172, para. 13)). The text that the Commission finally adopted on a unanimous basis (ibid., 816th meeting, 2 July 1965, p. 284), however, is very neutral and clearly shows that the issue was left open by the Commission (see also the Special Rapporteur's summing-up, ibid., 800th meeting, 11 June 1965, p, 173, para. 31).

[313] *United Nations Conference on the Law of Treaties, Official Records, Second Session, Vienna, 9 April to 22 May 1969, summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), 33rd plenary meeting, 21 May 1969, p. 181.

[314] Cf. Mr. Tabibi, *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 98, para. 7; Mr. Dadzie, ibid., p. 99, para. 18.

[315] Ibid., p. 98, para. 8.

[316] *United Nations, Reports of International Arbitral Awards*, vol. XVIII, p. 32, para. 38.

189. Nevertheless, the effects of a reservation, acceptance or objection are not fully addressed by article 21 of the 1969 and 1986 Vienna Conventions. This provision concerns only the effect of those instruments on the content of the treaty relationship between the reserving party and the other contracting parties. The separate issue of the effect of the reservation, acceptance or objection on the consent of the reserving party to be bound by the treaty is covered not by article 21 of the two Vienna Conventions, but by article 20, entitled "Acceptance of and objection to reservations".

190. This provision is the result of draft article 20 adopted by the Commission on first reading in 1962, entitled "The effects of reservations".

> [1.] (a) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.
>
> (b) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 below shall apply.
>
> 2. Except in cases falling under paragraphs 3 and 4 below and unless the treaty otherwise provides:
>
> (a) Acceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State, as soon as the treaty is in force;
>
> (b) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.
>
> 3. Except in a case falling under paragraph 4 below, the effect of a reservation to a treaty which has been concluded between a small group of States shall be conditional upon its acceptance by all the States concerned unless:
>
> (a) The treaty otherwise provides; or
>
> (b) The States are members of an international organization which applies a different rule to treaties concluded under its auspices.
>
> 4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides.[317]

191. This provision was appropriate to its title, as it did indeed cover the effects of a reservation and the reactions to a reservation on the entry into force of the treaty for the reserving State. In 1965, however, it was included in the new draft article 19 entitled "Acceptance of and objection to reservations"[318] (which later became article 20 of the 1969 Vienna Convention), after significant reworking out of concern for clarity and simplicity.[319] In the context of that reworking, the

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[317] *Yearbook ... 1962*, vol. II, p. 176.

[318] *Yearbook ... 1965*, vol. II, p. 162.

[319] Fourth report on the law of treaties (A/CN.4/177 and Adds. 1 and 2), in *Yearbook ... 1965*, vol. II, p. 50, paras. 4 and 5.

Commission also decided to abandon the link between objections and the conditions for permissibility of a reservation, including its compatibility with the object and purpose of the treaty.

192. At the Vienna Conference, the first paragraph of this provision underwent substantial amendment,[320] and paragraph 4 (b) was then altered by a Soviet amendment.[321] This latter amendment was very significant as it reversed the presumption of article 4 (b): any objection would in future be considered a simple objection unless its author had clearly expressed an intention to the contrary. Furthermore, despite the inappropriate title of article 20, it is clear from the origin of this provision that it was intended to cover, inter alia, the effects of a reservation of it, any acceptance and of objections to that reservation.

193. Nevertheless, articles 20 and 21 of the Vienna Convention have some unclear elements and some gaps. In State practice, the case foreseen by article 21, paragraph 3, is no longer seen as "unusual"[322] as the Commission had initially envisaged; on the contrary, owing to the presumption of article 20, paragraph 4 (b), it has become the most frequent type of objection.

194. The practice of States is not limited to recourse to the effects set out in paragraph 3. They are increasingly trying to have their objections produce different effects. The absence of a firm position on the part of the Commission, which intentionally opted for a neutral solution that was acceptable to everyone, far from resolving the problem, created others that should be resolved in the Guide to Practice.

195. Nor do articles 20 and 21 respond to the question of what effects are produced by a reservation that does not meet the conditions of substantial permissibility set out in article 19 or of formal permissibility (contained in article 23 and elsewhere). In other words, neither article 20 nor article 21 set out the consequences of the non-permissibility of a reservation, at least not expressly. It is also of particular concern that the application of paragraph 3 on the combined effects of a reservation and an objection is not limited to cases of permissible reservations, that is, reservations established in accordance with article 19, contrary to the provision of paragraph 1. Professor Gaja is therefore quite right to consider that "Article 21 is somewhat obscure".[323]

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[320] See the amendments by Switzerland (A/CONF.39/C.1/L.97), France and Tunisia (A/CONF/39/C.1/L.113) and Thailand (A/CONF.39/C.1/L.150). These amendments were adopted by a large majority (*United Nations Conference on the Law of Treaties, Official Records, First Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), 25th meeting, 16 April 1968, p. 135, para. 30).

[321] A/CONF/39/L.3, *United Nations Conference on the Law of Treaties, Official Records, First and Second Sessions, Vienna, 26 March to 24 May 1968 and 9 April to 22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), pp. 265-266. This amendment was adopted by 49 votes to 21, with 30 abstentions (*United Nations Conference on the Law of Treaties, Official Records, Second Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), 10th plenary meeting, 29 April 1969, p. 35, para. 79). See also D. Müller, "Article 20 (1969)", in Olivier Corten and Pierre Klein (see note 310), pp. 806-807, para. 14.

[322] See the Fourth report on the law of treaties, A/CN.4/177 and Add.1, *Yearbook ... 1965*, vol. II, p. 55.

[323] Gorgio Gaja, "Unruly Treaty Reservations", in *Le droit international á l'heure de sa codification, Études en l'honneur de Roberto Ago*, Milan, A. Giuffrè, 1987, p. 330.

196. Under these conditions, it seems logical to begin the study by examining the legal effects of a permissible reservation, which are set out — at least partially — in the two Vienna Conventions. The issue of the legal effects of a non-permissible reservation, which has — in part — already been addressed by a section of the tenth report on reservations to treaties[324] and on which the Commission has already adopted two guidelines,[325] should also be given further consideration, so as to give some guidance to the author of such a reservation and to other contracting parties.

2. Permissible reservations

197. The legal effects of a permissible reservation depend to a large extent on the reactions that it has received. A permissible and accepted reservation has different legal effects to those of a permissible reservation to which objections have been made. Article 21 of the Vienna Conventions establishes this distinction clearly. In its 1986 version, which is fuller in that it includes the effects of reservations and reactions from international organizations:

> 1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
>
> (b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.
>
> 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.
>
> 3. When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

While paragraph 1 of this provision concerns the legal effects of an established reservation, a concept that should be clarified, paragraph 3 covers the legal effects of a reservation to which an objection has been made. A distinction should therefore be made between the case of a permissible and accepted reservation — that is, an "established" reservation, on the one hand, and that of a permissible reservation[326] to which an objection has been made, on the other hand. Paragraph 2 of article 21 does not, properly speaking, address the legal effects of a reservation, but rather the absence of legal effects of the reservation on the legal relations between contracting parties other than the author of the reservation, independently of its established or permissible nature. This issue will be examined below in the section on the effects of reservations on treaty relations between other contracting parties.

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[324] A/CN.4/558/Add.2, paras. 181-208.

[325] These are guidelines 3.3 (Consequences of the non-permissibility of a reservation) et 3.3.1 (Non-permissibility of reservations and international responsibility). See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), chap. V, sect. C.2.

[326] It should be noted that paragraph 3 of article 21 does not refer only to a permissible reservation which has been the subject of an objection. It is therefore possible that this provision also applies to the case of an objection to a non-permissible reservation.

(a) Established reservations

198. According to the chapeau of article 21, paragraph 1, only an established reservation — in accordance with the provisions of articles 19, 20 and 23 — has the legal effects set out in that paragraph and, in particular, in its subparagraphs (a) and (b). As for the scope of application of article 21, paragraph 1, the Vienna Conventions merely make a rather clumsy reference to provisions concerning the substantial permissibility of a reservation (article 19), consent to a reservation (article 20) and the form of a reservation (article 23), without explaining the interrelation of those provisions in greater detail. It therefore seems appropriate, before considering the legal effects produced by an established reservation, to return to the concept of established reservation, which is essential for determining the "normal" legal effects of a reservation.

(i) The "establishment" of a reservation

a. The general rule

199. Under the terms of the chapeau of article 21 of the Vienna Conventions, a reservation is established "with regard to another party in accordance with articles 19, 20 and 23". The phrase, which appears clear on the surface and which is often understood as referring to permissible reservations accepted by a Contracting Party, contains many uncertainties and imprecisions which are the result of a significant recasting undertaken by the Commission during the second reading of the draft articles on the law of treaties in 1965, on the one hand, and changes introduced to article 20, paragraph 4 (b) of the Convention during the Vienna Conference in 1969.

200. First of all, the reference to article 23 as a whole is awkward, to say the least, since the provisions of article 23, paragraphs 3 and 4, have no effect on the establishment of a reservation. They concern only its withdrawal and the fact that, in certain cases, the formulation of an acceptance or an objection does not require confirmation.

201. Second, it is difficult, indeed, impossible, to determine what connection might exist between the establishment of a reservation and the effect on the entry into force of the treaty of an objection provided for in article 20, paragraph 4 (b). The objection cannot be considered as consent to the reservation since, to the contrary, it aims to "exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization".[327] Accordingly, a reservation to which an objection has been made is obviously not established within the meaning of article 21, paragraph 1.

202. Consultation of the *travaux préparatoires* provides an explanation for this "contradiction". In the draft articles adopted by the Commission, which contained in article 19 (later article 21) the same reference, the presumption of article 17 (future article 20), paragraph 4 (b)) established the principle that a treaty did not enter into force between a reserving State and a State which had made an objection. Since the treaty was not in force, there was no reason to determine the legal effects of the reservation on the content of treaty relations. Moreover, the comments of the Commission specified: "Paragraphs 1 and 2 of this article set out the rules

[327] See guideline 2.6.1 (Definition of objections to reservations), *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), pp. 186-201.

concerning the legal effects of a reservation which has been established under the provisions of articles 16, 17 and 18, *assuming that the treaty is in force*."[328] The "contradiction" was introduced only during the Conference through the reversal of the presumption of article 20, paragraph 4 (b), following the adoption of the Soviet amendment.[329] Because of this new presumption, a treaty does remain in force for the reserving State even if a simple objection is formulated. However, this could not mean that the reservation is established under article 21.

203. In his first report, Sir Humphrey Waldock took into account the condition of consent to a reservation for it to be able to produce its effects. The draft article 18 that he proposed to devote to "Consent to reservations and its effects" specified that:

> A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is presumed to have given, its consent thereto in accordance with the provisions of the following paragraphs of this article.[330]

In its advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice also highlighted this basic principle of the law of reservations, and of treaty law as well:

> It is well established that in its treaty relations a State cannot be bound without its consent and that consequently no reservation can be effective against any State without its agreement thereto.[331]

It is this idea to which paragraph 1 of article 21 of the Vienna Conventions refers, and this is the meaning which must be given to the reference to article 20.

204. Consent to the reservation is therefore a *sine qua non* for the reservation to be considered established and to produce its effects. But contrary to what has been maintained by certain partisans of the opposability school,[332] consent is not the only condition. The chapeau of article 21, paragraph 1, cumulatively refers to consent to the reservation (the reference to article 20), permissibility (article 19) and validity (article 23). Consent alone is thus not sufficient for the reservation to produce its "normal" effects. Moreover, the reservation must be permissible within the meaning of article 19 and have been so formulated that it complies with the rules of

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[328] *Yearbook ... 1966*, vol. II, p. 209, para. (1) of the commentary on article 19 (italics added).

[329] See para. 192 above.

[330] *Yearbook ... 1962*, vol. II, p. 61.

[331] Advisory Opinion of 28 May 1951, International Court of Justice Reports 1951, p. 17. See also Daniel Müller, "Article 20 (1969)", in Olivier Corten and Pierre Klein (see note 310), pp. 809-811, paras. 20-24.

[332] On these two schools, see First Report on the Law and Practice Relating to Reservations to Treaties, A/CN.4/470, *Yearbook … 1995*, pp. 158-9. See also Jean Kyongun Koh, "Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision", Harvard I. L. Jl. 1982, pp. 71-116; C. Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", *British Year Book of International Law* 1993, pp. 263-269; Rosa Riquelme Cortado (see A/CN.4/614/Add.1), note 211. pp. 73-82; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd ed., 1984, p. 81, note 78; and Alain Pellet, "Article 19 (1969)", in Olivier Corten and Pierre Klein (see note 310), p. 696 et seq. paras. 111 et seq.

procedure and form set forth in article 23. Only this combination can "establish" the reservation.

205. This necessary combination of permissibility and consent results also from the phrase in article 21, paragraph 1 which states that a reservation is established "with regard to another party". Logically, a reservation cannot be permissible only with regard to another party. Either it is permissible or it is not. This is a question which in principle is not subject to the will of the other contracting parties[333] unless, of course, they decide by common accord to "permit" the reservation.[334] On the other hand, a reservation which is objectively permissible is opposable only to the parties which have, in one way or another, consented to it. It is a bilateral link which is created, following acceptance, between the reserving State and the contracting party which has consented thereto. The reservation is established only in regard to that party and it is only in relations with that party that it produces its effects.

206. As a consequence, it seems necessary to emphasize once again in the Guide to Practice that the establishment of a reservation results from the combination of its permissibility and of consent. To simply reproduce article 21, paragraph 1, which defines the notion of an established reservation, does not seem feasible precisely because of the references to other provisions of the Vienna Conventions. The fourth part, on the legal effects of reservations and interpretative declarations, could open with a guideline 4.1 reading as follows:

4. Legal effects of reservations and interpretative declarations

4.1. Establishment of a reservation

A reservation is established with regard to another contracting party if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if the other contracting party has accepted it.

b. Special situations

207. Guideline 4.1 relates only to the general rule, and does not fully answer the question of whether a reservation is established. Article 20, which embodies in its paragraph 4 the general rule regarding consent to a reservation and hence constitutes the cornerstone of the "flexible" Vienna system,[335] does in fact contain exceptions as regards the expression of consent to the reservation by the other contracting parties. Moreover, paragraph 4 clearly specifies that it applies only in "cases not falling under the preceding paragraphs and unless the treaty otherwise provides". The establishment of the reservation, and particularly the requirement of consent, may thus be modified depending on the nature of the reservation or of the treaty, but also by any provision incorporated in the treaty to that effect.

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[333] See the Tenth report on reservations to treaties, A/CN.4/558/Add.2, paras. 201-3.

[334] Ibid., paras. 205-8.

[335] See *Yearbook ... 1966*, vol. II, p. 266, para. 21 of the commentary on article 17. See also Derek W. Bowett, "Reservations to non-restricted multilateral treaties", *British Year Book of International Law 1976-1977*, p. 84; Daniel Müller, "Article 20 (1969)", in Olivier Corten and Pierre Klein (see note 310), p. 799, para. 1.

i. Expressly authorized reservations

208. According to article 20, paragraph 1, expressly authorized reservations need not be accepted "subsequently" by the other contracting parties. However, this paragraph 1 does not mean that the reservation is exempt from the requirement for the contracting parties' assent; it simply expresses the idea that, since the parties have given their assent even before the formulation of the reservation, and have done so in the text of the treaty itself, subsequent acceptance is superfluous. Moreover, the expression "unless the treaty so provides" which appears in the text of this provision[336] clearly requires this interpretation. Only reservations that are actually covered by this prior agreement do not require subsequent acceptance, and are thus, logically established from the moment they are permissibly made.[337]

209. It should be recalled that the draft articles adopted by the Commission on second reading did not continue the possibility of *a priori* acceptance solely to reservations "expressly" authorized by the treaty, but also included reservations "impliedly" authorized, but the work of the Commission sheds no light on the meaning to be attributed to this concept.[338] At the Vienna Conference, a number of delegations expressed their doubts regarding this solution[339] and proposed amendments aimed at deleting the words "or impliedly",[340] and the change was accepted.[341] Sir Humphrey Waldock, Expert Consultant at the Conference, had himself recognized that "the words 'or impliedly' in article 17, paragraph 1, seemed to have been retained in the draft articles as a relic from earlier and more detailed drafts which dealt with implied prohibition and implied authorization of reservations".[342] It is thus with good reason that reservations implicitly authorized by the treaty are not mentioned in article 20, paragraph 1.

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[336] The words "unless the treaty so provides" were added by the Special Rapporteur in order to take account of "the possibility ... that a treaty may specifically authorize reservations but on condition of their acceptance by a specified number or fraction of the parties" (Fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 50). This wording was slightly modified by the Drafting Committee (ibid., vol. I, 813th meeting, 29 June 1965, p. 265, para. 30). In 1966, the wording was once again slightly modified, but the summary records of the meetings shed no light on the reasons for this change.

[337] "Made", not "formulated", because they produce their effects without any additional formality being required. See the commentary on guideline 3.1 (Permissible reservations), *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10) pp. 330-331, para. 6.

[338] *Yearbook ... 1966*, vol. II, p. 220 and the commentary, which is not particularly illuminating on this point, p. 225, para. 18.

[339] See the statements by the representatives of India (*Summary records of the plenary meetings and of the meetings of the Committee of the Whole*) (A/CONF.39/11), (see note 320), 24th meeting, p. 128, para. 30, the United States (ibid., p. 130, para. 53) and Ethiopia (ibid., 25th meeting, 16 April 1968, p. 134, para. 15).

[340] See the amendments by France and Tunisia (A/CONF.39/C.1/L.113), Switzerland (A/CONF.39/C.1/L.97) and Thailand (A/CONF.39/C.1/L.150) (*Documents of the Conference* (A/CONF.39/11/Add.2, note 321 above, p. 135)).

[341] The three amendments aimed at deleting "or impliedly" (see note 340) were adopted by 55 votes to 18, with 12 abstentions (*Summary records*) (A/CONF.39/11), note 321 above, 25th meeting, 16 April 1968, p. 135, para. 30.

[342] Ibid., 24th meeting, 16 April 1968, pp. 126-127, para. 14.

210. Had it been held, as Frank Horn suggests,[343] that where a treaty prohibits certain reservations or certain categories of reservations, it *ipso facto* authorizes all others, which amounts to a reversal of the presumption of article 19 (b), this interpretation would clearly place article 20, paragraph 1, in direct contradiction to article 19. Assuming this to be the case, the inclusion in the treaty of a clause prohibiting reservations to a specific provision would suffice to institute total freedom to make any reservation whatsoever other than those that were expressly prohibited; the criterion of the object and purpose of the treaty would then be rendered inapplicable.[344] The Commission has already ruled out this interpretation in guideline 3.1.3 (Permissibility of reservations not prohibited by the treaty), which makes it clear that reservations not prohibited by the treaty are not *ipso facto* permissible and hence can with still greater reason not be regarded as established and accepted by the terms of the treaty itself.

211. By the same token, and despite the regrettable lack of precision in the Conventions on this point, a general authorization of reservations in a treaty cannot constitute *a priori* acceptance on the part of the contracting parties. To say that all the parties have the right to formulate reservations to the treaty cannot imply that this right is unlimited, still less that all reservations so formulated are, by virtue of the simple general clause included in the treaty, established within the meaning of the chapeau to article 21, paragraph 1. To accept this way of looking at things would render the Vienna regime utterly meaningless. Such general authorizations do no more than refer to the general regime, of which the Vienna Conventions constitute the expression, and which is based on the fundamental principle that the parties to a treaty have the power to formulate reservations.

212. Nor is the notion of an expressly authorized reservation identical or equivalent[345] to the concept of a specified reservation. This was very clearly established by the arbitral tribunal in the Delimitation of the Continental Shelf of *Mer d'Iroise* case in relation to the interpretation of article 12 of the 1958 Geneva Convention on the Continental Shelf, paragraph 1 of which provides that:

> "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive".

213. There can be no doubt that, pursuant to this provision, any State may make its consent to be bound by the Geneva Convention subject to the formulation of a reservation so "specified", that is to say any reservation relating to articles 4 to 15,

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[343] Frank Horn, *Reservations and Interpretative Declaration to Multilateral Treaties*, T.M.C. Asser Instituut, The Hague, 1988, p. 132.

[344] See inter alia the criticisms by Christian Tomuschat (see A/CN.4/614/Add.1, note 198), p. 475.

[345] P. H. Imbert nevertheless maintains that specified reservations are included within the term "expressly authorized reservation". In support of this interpretation he suggests that article 20, para. 1, in no way limits the right of contracting States to object to an expressly authorized reservation, but expresses only the idea that the reserving State becomes a contracting party upon the deposit of its instrument of ratification or accession ("La question des réserves dans la décision arbitrale du 30 juin 1977 relative á la délimitation du plateau continental entre la République francaise et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", Annuaire Français de droit international, 1978, pp. 52-57). He does not deny that this solution openly contradicts the provisions of article 20, but justifies his approach by referring to the work of the Vienna Conference. See also the commentary on guideline 3.1.2, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 348 and 349, para. 11.

in accordance with article 19 (b) of the Vienna Conventions. This authorization does not however imply that any reservation so formulated is necessarily valid,[346] nor, *a* fortiori, that the other parties have consented, under article 12, paragraph 1, to any and every reservation to articles 4 to 15. The Court of Arbitration considered that this provision:

> "cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1 to 3 ... Such an interpretation ... would amount almost to a license to contracting States to write their own treaty."[347]

214. State practice supports the solution used by the Court of Arbitration. The fact that 11 States objected to reservations made to this Convention,[348] although those reservations only concern articles other than articles 1 to 3, as provided for in article 12, paragraph 1 of the Convention, is moreover revealing as regards the interpretation to be followed.

215. The term "reservations expressly authorized" by the treaty must be interpreted restrictively in order to meet the objective of article 20, paragraph 1. In the *case concerning the Delimitation of the Continental Shelf of the Mer d'Iroise*, the Court of Arbitration rightly considered that:

> Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance.[347]

216. In order to determine which "expressly authorized" reservations do not require subsequent unilateral acceptance, it is thus appropriate to determine which reservations the parties have already consented to in the treaty. In this regard, Frank Horn emphasized that "where the contents of authorized reservations are fixed beforehand, acceptance can reasonably be construed as having been given in advance, at the moment of consenting to the treaty".[349]

217. In line with this opinion, the scope of article 20, paragraph 1 contains two types of prior authorizations through which parties do not simply accept the abstract possibility of formulating reservations, but determine in advance exactly what reservations may be made. On the one hand, a reservation made pursuant to a reservations clause that authorizes the parties purely and simply to exclude the

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[346] See on this question guideline 3.1.4 (permissibility of specified reservations) and the commentary thereon, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 32, para. 39.

[347] Arbitral award of 30 June 1977, *Reports of International Arbitral Awards*, vol. XVIII.

[348] Available online at http://treaties.un.org/ (status of treaties), Ch. XXI, 4, *Multilateral treaties deposited with the Secretary-General*.

[349] Frank Horn (see note 343), p. 133.

application of a provision[350] or an entire part of the treaty[351] must be deemed to be an "expressly authorized reservation". In this case, the other contracting parties may appreciate exactly, when the treaty is concluded, what contractual relations they will have with the parties that exercise the option of making reservations pursuant to the exclusion clause. On the other hand, "negotiated"[352] reservations can also be regarded as specified reservations. Indeed, certain international conventions do not purely and simply authorize State parties to make reservations to one provision or another, but contain an exhaustive list of reservations from among which States must make their choice.[353] This procedure also allows contracting States to gauge precisely and *a priori* the impact and effect of a reservation on treaty relations. By expressing its consent to be bound by the convention, a State or an international organization consents to any reservations permitted by the "list".

218. In these two cases, the content of the reservation is sufficiently predetermined by the treaty for these reservations to be able to be considered "expressly authorized" within the meaning of article 20, paragraph 1 of the Conventions. The contracting parties are aware in advance of the treaty relations that derive from the formulation of a given reservation and have agreed to it in the actual text of the treaty. There is no surprise and the principle of consent is not undermined.

219. The Commission has, moreover, provided a starting point for a definition of the notion of expressly authorized reservations in its guideline 3.1.4 (Permissibility of specified reservations). Pursuant to this provision:

> Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

A contrario, a specified reservation whose content is fixed in the treaty is considered *ipso facto* to be permissible and, given the provision expressly authorizing them, established.

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[350] See, for example, article 20, para. 1, of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws: "Any High Contracting Party may, when signing or ratifying the present Convention or acceding thereto, append an express reservation excluding any one or more of the provisions of Articles 1 to 17 and 21." Treaties often authorize a reservation excluding the application of a provision concerning the settlement of disputes (see Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 169 (note 27) and Rosa Riquelme Cortado (see A/CN.4/614/Add.1, note 211), pp. 135 and 136).

[351] Revised General Act for the Pacific Settlement of International Disputes of 1949, article 38; European Convention for the Peaceful Settlement of Disputes of 1957, article 34. The Convention concerning Minimum Standards of Social Security, No. 102, of the International Labour Organization (ILO) combines, moreover, this possibility of rejecting the application of entire chapters with a minimum number of chapters that must actually be applied (art. 2) (see also article 2 of ILO Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits, article 20 of the European Social Charter or article 2 of the European Code of Social Security of 1964). See also Rosa Riquelme Cortado, A/CN.4/614/Add.1, note 211, p. 134.

[352] On this notion, see also *Yearbook … 2000*, vol. II, Part Two, p. 116, para. (11) of the commentary on guideline 1.1.8. See also W. Paul Gormley, "The Modification of Multilateral Conventions by Means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and Council of Europe", Part I, *Fordham Law Review*, vol. 39, p. 59 (1970-1971), p. 75 and 76 and Pierre-Henri Imbert, op. cit., note 350, pp. 196 et seq.

[353] For Council of Europe practice, see Rosa Riquelme Cortado (see A/CN.4/614/Add.1, note 211), pp. 130 et seq.

220. Guideline 4.1.1 presents the exception to the general rule contained in article 20, paragraph 1 of the Vienna Conventions while establishing a link to the notion of "established reservation". Indeed, since a reservation expressly authorized by the treaty is, by definition, permissible and accepted by the contracting parties, making it in a way that respects the rules applicable to the formulation and the communication of reservations is all that is required to establish it. That makes it binding on all the contracting parties.

4.1.1 Establishment of a reservation expressly authorized by the treaty

A reservation expressly authorized by the treaty is established with regard to the other contracting parties if it was formulated in accordance with the form and procedure specified for the purpose.

A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and organizations, unless the treaty so provides.

The term "reservation expressly authorized by the treaty" applies to reservations excluding the application of one or more provisions of the treaty or modifying the legal effect of one or more of its provisions or of the treaty as a whole, pursuant to and to the extent provided by an express provision contained in the treaty.

221. The first paragraph of guideline 4.1.1 sets forth the specific rule that applies to the establishment of reservations expressly authorized by the treaty, while the second recalls article 20, paragraph 1, of the 1986 Vienna Convention. While that reference may not be strictly necessary, as it follows from a close reading of guidelines 4.1 and 4.1.1, it is in line with the Commission's established and consistent practice of incorporating to the extent possible the provisions of the Convention. That is also why the Special Rapporteur has not changed the wording despite the fact that the phrase "unless the treaty so provides" states the obvious and, moreover, appears superfluous in this provision.[354] The third paragraph endeavours to define the concept of an "expressly authorized reservation".

222. It should also be emphasized that once it has been clearly established that a given reservation falls under article 20, paragraph 1, not only is its acceptance by the other parties not necessary, but they are deemed to have effectively and definitively accepted it, with all the consequences that follow therefrom. One of the consequences of this particular regime is that the other parties cannot object to this type of reservation.[355] Accepting this reservation in advance in the text of the treaty itself effectively prevents the contracting parties from subsequently making an objection, as "[t]he Parties have already agreed that the reservation is permissible and, having made its permissibility the object of an express agreement, the Parties have abandoned any right thereafter to object to such a reservation".[356] An

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[354] See Daniel Müller, "Article 20 (1969)", in Olivier Corten and Pierre Klein (see note 310), p. 888, para. 7.

[355] Derek W. Bowett (see note 335), p. 84; Massimo Coccia, "Reservations to Multilateral Treaties on Human Rights", *California Western International Law Journal*, vol. 15, 985, No. 1, p. 9.

[356] Derek W. Bowett (see note 335), p. 84 and 85.

amendment[357] proposed by France at the Vienna Conference expressed exactly the same idea, but was not adopted by the Drafting Committee.[358] Guideline 2.8.12 (Final nature of acceptance of a reservation) is therefore applicable a fortiori to expressly authorized reservations. They are deemed to have been accepted, and thus there can be no objection to them. The commentary on guideline 4.1.1 might draw attention to the matter.

ii. Reservations to treaties with "limited participation"

223. Another specific case provided for by the Vienna Convention, article 20, paragraph 2, is that of treaties "with limited participation". Paragraph 2 states that the flexible system shall not apply to any treaty whose application in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty. In such cases, a reservation requires acceptance by all the parties.

224. Fitzmaurice made a distinction between plurilateral treaties, which were in his view closer to bilateral treaties, and multilateral treaties.[359] However, it was only in Sir Humphrey Waldock's first report that the usefulness of such a distinction became clearly apparent. What is now article 20, paragraph 2, resulted from a compromise between the members of the Commission who remained deeply convinced of the virtues of the traditional system of unanimity and the proponents of Sir Humphrey's flexible system.[360] At the time, the paragraph represented the last bastion which the proponents of unanimity refused to give up. During the second reading of the Waldock draft, the principle behind article 20, paragraph 2, no longer gave rise to debate in the Commission or at the Vienna Conference.

225. However, the main issue is not the principle of unanimity, which has long been practised. Rather, the question is how to determine which treaties are not subject to the safeguard clause and are therefore excluded from the flexible system. Until 1965, the limited number of parties was the only criterion referred to by the special rapporteurs and the Commission.[361] Sir Humphrey's fourth report took into account the criticisms levelled against that criterion, and recognized that "to find a completely precise definition of the category of treaties in issue is not within the

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[357] A/CONF.39/C.1/L.169. Paragraph 2 of the single article that, according to the French proposal, was to replace articles 16 and 17 of the ILC draft provided that "a reservation expressly authorized by the treaty cannot be the subject of an objection by other contracting States, unless the treaty so provides" (*Documents of the Conference* (A/CONF.39/11/Add.2) (see note 321), p. 133).

[358] With regard to the rejection of that amendment, Pierre-Henri Imbert concluded that the States represented at the Conference did not want to restrict the right to object to expressly authorized reservations (op. cit., note 350, p. 55).

[359] First report on the law of treaties, A/CN.4/101, *Yearbook ... 1956*, vol. II, p. 127, para. 97.

[360] The Special Rapporteur stressed that "paragraph [4] and paragraph 2 represented the balance on which the whole article was based" (*Yearbook ... 1962*, vol. I, 664th meeting, 19 June 1962, p. 230, para. 17). See also the statements made by Gros (ibid., 663rd meeting, 18 June 1962, pp. 228-229, para. 97) and Ago (ibid., p. 228, para. 87).

[361] This is true of G. G. Fitzmaurice (draft article 38 in the First report on the law of treaties, A/CN.4/101, *Yearbook ... 1956*, vol. II, p. 115) and of Sir Humphrey Waldock (draft article 1 (d), First report on the law of treaties, A/CN.4/144, *Yearbook ... 1962*, vol. II, p. 221). Draft article 20, para. 3, which was adopted by the Commission on first reading in 1962, refers to treaties concluded "between a small group of States" (*Yearbook ... 1962*, vol. II, p. 176).

bounds of possibility".[362] At the same time, he proposed a reference to the intention of the parties: "the application of its provisions between all the parties is to be considered an essential condition of the treaty".[363] The parties' intention to preserve the integrity of the treaty was therefore the criterion for ruling out the "flexible" system and retaining the traditional unanimity system. The Commission adopted that idea, making minor drafting changes to what would become the present paragraph 2.[364]

226. It is worth noting, however, that the new provision addresses a completely different category of treaty than had been envisaged before 1962. The reference to intention has two advantages. First, it allows the flexible system to extend to treaties which, although ratified by only a small number of States, are otherwise more akin to general multilateral treaties. Second, it excludes treaties that have been ratified by a more significant number of States, but whose very nature requires that the integrity of the treaty be preserved. The concept of the plurilateral treaty has therefore shifted towards that of a treaty whose integrity must be ensured.[365]

227. The criterion of number was never completely discarded, and remains in paragraph 2. However, its function has changed. Before 1965, it was the sole factor in determining whether or not a given treaty belonged within the "flexible" system. Its purpose is now to shed light on the intention of the parties. As a result, it now carries less weight in determining the nature of a treaty, having become an auxiliary criterion in this respect while unfortunately remaining somewhat imprecise and difficult to apply.[366] The reference to the "limited number of the negotiating States" is particularly unusual, and does not allow a clear distinction between such treaties and multilateral treaties proper; the latter can also be concluded as a result of negotiations between only a few States. It seems preferable to refer not to negotiating States, but rather to States authorized to become parties to the treaty.[367]

228. Sir Humphrey proposed other "auxiliary" criteria that could assist in the intrinsically problematic task of establishing the parties' intentions. In his fourth report, he also mentioned the nature of the treaty and the circumstances of its conclusion.[368] The change was never explained, and despite the proposals of the United States, which pressed for the definition to refer to the nature of the treaty,[369] the object and purpose of the treaty was the only other "auxiliary" criterion adopted by the Committee and subsequently at the Vienna Conference. The criterion of object and purpose, like that of number, is far from clear-cut. The inclusion of such an enigmatic criterion[370] does not help clarify the interpretation of paragraph 2.

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362 Document A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 51, para. 7.

363 Draft article 19, para. 2, ibid., p. 50.

364 See *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, pp. 258-260, paras. 36-53, and ibid., 816th meeting, 2 July 1965, pp. 283-284, paras. 43-49.

365 Pierre-Henri Imbert (see note 350), p. 115.

366 See in particular the criticisms made by Pierre-Henri Imbert, ibid., pp. 112 and 113. See also the United States proposal at the Vienna Conference, to delete any reference to criteria other than intention, owing to those difficulties; Summary records (A/CONF.39/11), see note 320, 21st meeting, 10 April 1968, p. 108, para. 9.

367 Pierre-Henri Imbert (see note 350), pp. 112-113.

368 A/CN.4/177 and Add. 1 and 2, *Yearbook ... 1965*, vol. II, p. 51, para. 7.

369 See amendment A/CONF.39/C.1/L.127, *Official Records: Documents of the Conference* (A/CONF.39/11/Add.2) (see note 321), p. 135.

370 See draft guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty) and 3.1.6 (Determination of the object and purpose of the treaty), *Official Records of the*

Indeed, one could argue that it makes the task even more arbitrary and subjective.[371]

229. Paragraph 2 of article 20 is unclear, or at any rate difficult to interpret, not only in respect of its scope, but also in respect of the applicable legal regime. According to paragraph 2, reservations require acceptance by all parties. Only two things can be deduced for certain. First, such reservations are not subject to the "flexible" system set forth in paragraph 4. Indeed, paragraph 4 confirms that view, in that it applies only to "cases not falling under the preceding paragraphs". Second, the reservations are indeed subject to unanimous acceptance: they must be accepted "by *all* the parties".

230. However, paragraph 2 of article 20 does not clearly state who should actually accept the reservation. The text does refer to "the parties", but this is hardly satisfactory. It is questionable whether the acceptance of a reservation by all "parties" only should be a condition, a "party" being defined under article 2, paragraph 1 (g) as "a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force". That would contradict the underlying idea, which is that the treaty should be implemented in its entirety by all current and future parties. To argue otherwise would, in no small measure, deprive unanimous consent of its meaning.

231. Moreover, although article 20, paragraph 5 connects the principle of tacit or implied consent to paragraph 2, it remains a mystery how implied acceptance could apply to the treaties referred to in the latter provision. It follows from article 20, paragraph 5 that a contracting State may make any objection only on becoming a party to the Treaty. A signatory State could thus block unanimous acceptance even without formulating a formal objection to the reservation, because it is impossible to presume that State's assent before the 12-month deadline to elapse. Article 20, paragraph 5 would therefore have the exact opposite of the desired effect, namely the rapid stabilization of treaty relations and of the status of the reserving State.[372] For precisely that reason, the Special Rapporteur argued in 1962 that where States not yet parties to a treaty are concerned,

> [t]his qualification of the rule is not possible in the case of plurilateral treaties because there the delay of taking a decision does place in suspense the status of the reserving State vis-à-vis all the States participating in the treaty.[373]

232. Such lacunae and inconsistencies are particularly surprising given that article 18 as proposed by Sir Humphrey in 1962 made a clear distinction between the tacit or implied acceptance of "plurilateral treaties" on the one hand and of multilateral treaties on the other hand.[374] These clarifications described the legal regime for the treaties referred to in article 20, paragraph 2, perfectly well. They were nevertheless sacrificed in order to make the provisions on reservations less complex and more succinct.

General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10), pp. 66-82.

[371] See Christian Tomuschat (see A/CN.4/614/Add.1, note 198), p. 479; Pierre-Henri Imbert (see note 350), pp. 114-115.

[372] C.f. Daniel Müller's commentary on article 20 (1969) in Olivier Corten and Pierre Klein (see note 310) above, pp. 820-821, paras. 46-47.

[373] *Yearbook ... 1962*, vol. II, p. 67, para. (16).

[374] First report, A/CN.4/144, *Yearbook ... 1962*, vol. II, pp. 61-62.

233. It therefore seems appropriate and necessary to include in the Guide to Practice a draft guideline on how to establish a reservation to treaties with "limited participation":

4.1.2 Establishment of a reservation to a treaty with limited participation

A reservation to a treaty with limited participation is established with regard to the other contracting parties if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if all the other contracting parties have accepted it.

The term "treaty with limited participation" means a treaty of which the application in its entirety between the parties is an essential condition of the consent of each one to be bound by the treaty.

iii. Reservations to be bound by constituent instruments of international organizations

234. The other exception to the principle that tacit acceptance is sufficient to establish a reservation is provided for by article 40, paragraph 3, of the Vienna Conventions and relates to constituent treaties of international organizations. Under the terms of this provision:

> When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

235. A simple perusal of this provision shows that, in order to be established, a reservation to a constituent treaty of an international organization calls for the acceptance of the competent organ of the organization. The formulation of this acceptance was the subject of a detailed study in the twelfth report on reservations to treaties,[375] which, inter alia, presents the *travaux préparatoires* of this provision. On the basis of that report, the Commission adopted a number of guidelines related to this exception to the rules. These are guidelines 2.8.7 to 2.8.11:

2.8.7 Acceptance of a reservation to the constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

2.8.8 Organ competent to accept a reservation to a constituent instrument

Subject to the rules of the organization, competence to accept the reservation to a constituent instrument of an international organization belongs to the organ competent to decide on the admission of a member to the organization, or to the organ competent to amend the constituent instrument, or to the organ competent to interpret this instrument.

2.8.9 Modalities of the acceptance of a reservation to a constituent instrument

[375] A/CN.4/584 and Corr.1, paras. 240-270.

Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

2.8.10 Acceptance of a reservation to a constituent instrument that has not yet entered into force

In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that organization by the end of a period of 12 months after they were notified of that reservation. Such a unanimous acceptance thus obtained is final.

2.8.11 Reaction by a member of an international organization to a reservation to its constituent instrument

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.[376]

236. It does not appear necessary to recall once again the reasons that led the Commission and the Conference to adopt the provisions contained in article 20, paragraph 3, of the Vienna Conventions. Although guideline 2.8.7 is sufficient to express the need for the acceptance of the competent organ of the organization, it is nevertheless worth recalling this particular requirement in the section dealing with the effects of reservations, given that the acceptance of the competent organization is the sine qua non for the establishment of a reservation to the constituent instrument of an international organization. Only this collective acceptance can enable the reservation to produce all its effects. The individual acceptance of the other members of the organization is indeed not prohibited, but remains without effect on the establishment of the reservation. Guideline 4.1.3 could read as follows:

4.1.3 Establishment of a reservation to a constituent instrument of an international organization

A reservation to a constituent instrument of an international organization is established with regard to the other contracting parties if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if the competent organ of the organization has accepted it in conformity with guidelines 2.8.7 and 2.8.10.

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[376] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), chap. V, sect. C.2.

(ii) Effects of established reservations

237. A reservation "established" within the meaning of guideline 4.1 produces all the effects purported by its author, that is to say, to echo the wording of guideline 1.1.1 (Object of reservations), "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".[377] If that is done, the object of the reservation as desired or purported by its author is achieved.

238. However, modifying or excluding the legal effect of one or more provisions of the treaty is not the only effect of the establishment of the reservation; it also constitutes the author of the reservation a contracting party to the treaty. Following the establishment of the reservation, the treaty relationship is established between the author of the reservation and the contracting party or parties for which the reservation is established.

a. Entry into force of the treaty and status of the author of the reservation

239. The establishment of the reservation has a number of consequences for its author relating to the very existence of the treaty relationship and the author's status in relation to the other contracting parties. It may even result in the entry into force of the treaty for all of the contracting States or contracting international organizations. These consequences follow directly from article 20, paragraph 4 (a) and (c) of the Vienna Conventions: the first of these provisions relates to the establishment of treaty relations between the author of the reservation and the contracting party which has accepted it (hence, the contracting party for which the reservation is established), whereas the second relates to whether the consent of the reserving State or reserving international organization takes effect, or in other words whether the author of the reservation becomes a contracting party to the treaty. They read as follows:

> 4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
>
> (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
>
> (b) ...
>
> (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

240. The Commission's comments on draft article 17 (which becomes article 20) clearly explain the object of the provisions:

> Paragraph 4 contains the three basic rules of the "flexible" system which are to govern the position of the contracting States in regard to reservations to any multilateral treaties not covered by the preceding paragraphs. Subparagraph (a) provides that acceptance of a reservation by another contracting State constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force. Subparagraph (b), on the other

[377] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10, p. 205).

> hand, states that a contracting State's objection precludes the entry into force of the treaty as between the objecting and reserving States, unless a contrary intention is expressed by the objecting State. Although an objection to a reservation normally indicates a refusal to enter into treaty relations on the basis of the reservation, objections are sometimes made to reservations for reasons of principle or policy without the intention of precluding the entry into force of the treaty between the objecting and reserving States. Subparagraph (c) then provides that an act expressing the consent of a State to be bound and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation. This provision is important since it determines the moment at which a reserving State may be considered as a State which has ratified, accepted or otherwise become bound by the treaty.[378]

241. The rule that the acceptance of a permissible reservation establishes a treaty relationship between the author of the reservation and the State or international organization that has accepted it also makes good sense. It appears in various forms in the drafts by all the special rapporteurs on the law of treaties. The only difference between Sir Humphrey's approach and that of his predecessors lies in the number of acceptances needed in order to produce this effect. The attachment of the first three rapporteurs to the traditional regime of unanimity meant that they did not accept the establishment of a treaty relationship unless all the other contracting parties had accepted the reservations. In Sir Humphrey's flexible approach, each State (or international organization) not only decides individually whether a reservation is opposable to it or not; this individual acceptance also has effects independently of the reactions of the other States or international organizations, but logically, only in the bilateral relations between the author of the reservation and the author of the acceptance. The Commission explained in its commentary on draft article 20 as adopted on first reading that the application of this flexible system may:

> certainly have the result that a reserving State may be a party to the treaty with regard to State X, but not with regard to State Y, although States X and Y are mutually bound by the treaty. But in the case of a general multilateral treaty or of a treaty concluded between a considerable number of States, this result appears to the Commission not to be as unsatisfactory as allowing State Y, by its objection, to prevent the treaty from coming into force between the reserving State and State X, which has accepted the reservation.[379]

242. This system of "relative" participation in the treaty[380] is applicable, however, only in the "normal" instance of establishment of the reservation. Clearly, it cannot be applied in cases where unanimous acceptance is required in order to establish a reservation. For the reservation to be able to produce its effects, including the entry into force of the treaty for the author of the reservation, all of the contracting parties must consent to the reservation. Consequently, the treaty necessarily enters into force in the same way for all of the contracting parties, on the one hand, and the author of the reservation, on the other hand. A comparable solution is necessary in the case of a reservation to the constituent instrument of an international organization; only the acceptance of the competent organ can establish the

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[378] *Yearbook ... 1966*, vol. II, p. 207, para. (21) of the commentary.

[379] *Yearbook ... 1962*, vol. II, p. 181, para. (23) of the commentary. See also *Yearbook ... 1966*, vol. II, pp. 207-208, para. (22) of the commentary on draft article 17.

[380] *Yearbook ... 1966*, vol. II, pp. 207-208, para. (22) of the commentary on draft article 17.

reservation and constitute its author one of the circle of contracting parties. Once this acceptance is obtained, the author of the reservation establishes treaty relations with all the other contracting parties without their individual consent being required.

243. It should however be noted that once the reservation is established, in conformity with the rules described in guidelines 4.1 to 4.1.3 depending on the nature of the reservation and of the treaty, a treaty relationship is formed between the author of the reservation and the contracting party or parties in respect of whom the reservation is established: the contracting party which accepted the reservation (in the "normal" case), and all the contracting parties (in the other cases). It thus suffices to recall this rule which constitutes the core of the Red Vienna Regime, without any need to distinguish again between the general rule and the exceptions to it, as the drafting of guidelines 4.1, 4.1.1, 4.1.2 and 4.1.3 makes it possible to determine in respect of whom the reservation is established and with whom the treaty relationship is constituted:

4.2 Effects of an established reservation

4.2.3 Effects of the entry into force of a treaty on the status of the author of an established reservation

The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States or international organizations in respect of which the reservation is established if or when the treaty is in force.

244. Guideline 4.2.3 does not resolve the issue of the date on which the author of the reservation may be considered to have joined the group of contracting States or contracting international organizations. Article 20, paragraph 4 (c), of the 1969 Convention was quite rightly inserted by the Commission in order to fill that gap. As Sir Humphrey Waldock explained in his fourth report:

> The point is not purely one of drafting, since it touches the question of the conditions under which a reserving State is to be considered a "party" to a multilateral treaty under the "flexible" system. Indeed, not only the Australian but also the Danish Government urges the Commission to deal explicitly with that question, since it may affect the determination of the date on which the treaty comes into force and may otherwise be of concern to a depositary. The Special Rapporteur understands the position under the "flexible" system to be that a reserving State is to be considered as a "party" if and at the moment when another State which has established its consent to be bound by the treaty accepts the reservation either expressly or tacitly under paragraph 3 of the existing article 19 (paragraph 4 of the new article 20 as given below).[381]

Waldock's explanation, which thus gave rise to article 20, paragraph 4 (c), of the 1969 Convention, is perhaps not entirely correct: indeed, it is impossible to determine whether the author of the reservation becomes a "party" to the treaty in the sense of article 2, paragraph 1 (g), of the 1969 Convention, as, independently of the establishment of the reservation, the treaty may not be in force owing to the low number of ratifications or acceptances. However, what can be determined with certainty is the issue of whether the author becomes a contracting State or contracting organization, that is, whether the author has "consented to be bound by

[381] *Yearbook ... 1965*, vol. II, pp. 52-53, para. 11.

the treaty, whether or not the treaty has entered into force" (article 2, paragraph 1 (f)). It is also the subject of article 20, paragraph 4 (c), which merely states that the "act expressing … [the author of the reservation's] consent to be bound by the treaty and containing a reservation *is effective* when at least one other contracting State has accepted the reservation".[382]

245. Although the rule seems to be clearly established by article 20, paragraph 4 (c), of the Vienna Conventions — the author of a reservation becomes a contracting State or contracting organization as soon as the author's permissible reservation has been accepted by at least one contracting State or organization — its practical application is far from consistent and is even less coherent. The main parties concerned by the application of this rule, that is, depositaries, have applied and continue to apply it in a very approximate manner.

246. The Secretary-General of the United Nations, in his capacity as depositary of multilateral treaties, for example, agrees that any instrument expressing consent to be bound by a treaty which is accompanied by a reservation may be deposited and, refusing to adopt a position on the issue of the permissibility or effects of the reservation, "indicates the date on which, in accordance with the treaty provisions, the instrument would normally produce its effect, leaving it to each party to draw the legal consequences of the reservations that it deems fit".[383] In other words, the Secretary-General does not wait for at least one acceptance to be received before accepting the definitive deposit of an instrument of ratification or accession accompanied by a reservation, but treats such instruments in the same way as any other ratification or accession that is not accompanied by an objection:

> Since he is not to pass judgement, the Secretary-General is not therefore in a position to ascertain the effects, if any, of the instrument containing reservations thereto, inter alia, whether the treaty enters into force as between the reserving State and any other State, a fortiori between a reserving State and an objecting State if there have been objections. As a consequence, if the final clauses of the treaty in question stipulate that the treaty shall enter into force after the deposit of a certain number of instruments of ratification, approval, acceptance or accession, the Secretary-General as depositary will, subject to the considerations in the following paragraph, include in the number of instruments required for entry into force all those that have been accepted for deposit, whether or not they are accompanied by reservations and whether or not those reservations have met with objections.[384]

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[382] Emphasis added.

[383] United Nations, *Summary of practice of the Secretary-General as depositary of multilateral treaties*, New York, 1999, ST/LEG/7/Rev.1, para. 187.

[384] Ibid., para. 184.

This position, which is entirely open to criticism[385] in view of the content of article 20, paragraph 4 (c), of the Vienna Conventions (read in conjunction with article 20, paragraph 5), has been justified by the Secretary-General by the fact that:

> no objection had ever in fact been received from any State concerning an entry into force that included States making reservations. Finally, for a State's instrument not to be counted, it might conceivably be required that all other contracting States, without exception, would have not only objected to the participation of the reserving State, but that those objecting States would all have definitely expressed their intention that their objection would preclude the entry into force of the treaty as between them and the objecting State.[386]

247. To give a recent example, Pakistan has acceded to the International Convention for the Suppression of the Financing of Terrorism through a notification dated 17 June 2009. This instrument was accompanied by reservations to articles 11, 14 and 24 of the Convention. Despite the reservations, the Secretary-General noted in his depositary notification of 19 June 2009 that:

> The Convention will enter into force for Pakistan on 17 July 2009 in accordance with its article 26 (2) which reads as follows: "For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession."[387]

Pakistan's instrument is therefore considered by the depositary as taking immediate effect, notwithstanding article 20, paragraph 4 (c), of the 1969 Vienna Convention. For the depositary, Pakistan is one of the contracting States, and even a party to the International Convention for the Suppression of the Financing of Terrorism, independently of whether its reservations have been accepted by at least one other contracting party.

248. This practice, which seems to have been followed for many years and which existed well before the 1969 Vienna Convention,[388] has also been followed by other depositary institutions or States. Thus, both the Dominican Republic and the Council of Europe informed the Secretary-General of the United Nations in 1965 that, as a depositary, a reserving State was "counted among the number of countries necessary for bringing the convention into force"[389] — in other words, as soon as it acquired the status of a contracting State. Other depositaries, including the United States, the Organization of American States and the Food and Agriculture

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[385] Imbert, Pierre-Henri, *A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités, réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire*. In Annuaire français de droit international, 1980, pp. 524-541; Gorgio Gaja (see note 323), pp. 323-324; Rosa Riquelme Cortado, op. cit. (see A/CN.4/614/Add.1, note 211), pp. 245-250; or Daniel Müller's commentary on article 20 (1969), in Olivier Corten and Pierre Klein (eds.), (see note 310), pp. 821 and 822, para. 48.

[386] *Summary of practice of the Secretary-General as depositary of multilateral treaties*, United Nations, New York, 1999, ST/LEG/7/Rev.1, para. 186.

[387] Available online at http://treaties.un.org (*Status of treaties (Multilateral treaties deposited with the Secretary-General)*, chap. XVIII, 11).

[388] See *Yearbook ... 1965*, vol. II, para. 109, p. 103.

[389] Ibid., vol. II, p. 98.

Organization of the United Nations, reported a more nuanced practice and do not in principle count reserving States as contracting States.[389]

249. However, the Special Rapporteur is of the view that although the application of article 20, paragraph 4 (c), of the Vienna Conventions is hesitant, to say the least, the rule expressed in this provision has not lost its authority. It is certainly part of the reservations regime established by the 1969 and 1986 Vienna Conventions and it has been a principle of the Commission to complement the provisions on reservations of these two Conventions, rather than to contradict them.[390] According to the terms of article 20, paragraph 4 (c), of the Vienna Conventions, the author of a reservation does not become a contracting State or organization until at least one other contracting State or other contracting organization accepts the reservation, either expressly — which seldom occurs — or tacitly on expiration of the time period set by article 20, paragraph 5, and referred to in guidelines 2.6.13[391] and 2.8.1.[392] In the worst case, the consequence of strict application of this provision is a delay of twelve months in the entry into force of the treaty for the author of the reservation. This delay may certainly be considered undesirable; nevertheless, it is caused by the author of the reservation, and it can be reduced by express acceptance of the reservation on the part of a single other contracting State or a single other contracting international organization.

250. In the light of the above, a guideline should be included in the Guide to Practice which expresses the idea of article 20, paragraph 4 (c), rather than reproducing it word for word. As soon as a valid reservation is accepted by at least one contracting State or one contracting international organization, the reservation is established as indicated in guidelines 4.1, 4.1.1, 4.1.2 and 4.1.3, and the instrument of ratification or accession of the author of the reservation takes effect and constitutes the author a contracting State or a contracting international organization. This has the consequence that the author of the reservation is one of the contracting States or contracting organizations even if the treaty has not yet entered into force. This is the idea reflected in guideline 4.2.1:

4.2.1 Status of the author of an established reservation

As soon as the reservation is established, its author is considered a contracting State or contracting organization to the treaty.

251. Clearly, if the treaty is in force, the author of an established reservation also becomes a party to it.

252. Moreover, if the treaty has not yet entered into force, the establishment of the reservation and the permissibility of the instrument through which the author of the reservation has expressed consent to be bound by the treaty may have the consequence that the treaty enters into force for all contracting States and organizations, including the author of the reservation. That is the case if, following the establishment of the reservation, the addition of the author to the number of contracting parties has the result that the conditions for the entry into force of the

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[390] First report on the law and practice relating to reservations to treaties, A/CN.4/470, *Yearbook ... 1995*, vol. II, Part One, pp. 151-154, paras. 153-169.

[391] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 213-217.

[392] Ibid., *Sixty-fourth Session, Supplement No. 10* (A/64/10), chap. V, sect. C.2.

treaty are fulfilled. This consequence then depends largely on the circumstances of the case, and in particular on the conditions for the entry into force of the treaty as established by the final clauses, the number of contracting parties and so on. It is thus scarcely possible to draw a general rule in this respect except that the author of the established reservation must be included in the number of contracting States or organizations that determines the entry into force of the treaty. This is made clear by guideline 4.2.2:

> **4.2.2 Effect of the establishment of a reservation on the entry into force of a treaty**
>
> When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States or contracting organizations required for the treaty to enter into force once the reservation is established.

b. Effect of an established reservation on the content of treaty relations

253. The entry into force of the treaty between the author of the reservation and the parties to the treaty that have accepted it is not the only consequence of the establishment of the reservation. It also modifies the content of the treaty relationship thus constituted and thus achieves the object of the reservation in the sense that "the provisions of the treaty to which the reservation relates" will be modified "to the extent of the reservation" in the mutual relations between the two States concerned.[393] This effect follows, as the Commission pointed out, "directly from the consensual basis of the relations between parties to a treaty".[394] The reservation, which is nothing but an offer formulated by its author purporting to modify or exclude the application of certain provisions of the treaty, and its acceptance constitute an agreement between the protagonists, an agreement *inter partes*, which modulates their treaty relations deriving from the treaty.

254. Article 21, paragraph 1 (a) of the Vienna Conventions specifies the effect an established reservation produces for its author on the content of treaty relations. In the 1986 Vienna Convention, this provision reads:

> A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation.

255. The term "modify" used in this provision must however be interpreted broadly. It seems strange that the texts of this provision and of article 2, paragraph 1 (d), should never have been harmonized. Article 2, paragraph 1 (d) of the Vienna Conventions defines a reservation as any unilateral statement whereby a State "purports to exclude or to modify the legal effect of certain provisions of the treaty". However, this inconsistency scarcely affects the outcome, given that paragraphs 1 (a) and (b) clearly specify that the provision of the treaty will be modified "to the extent of the reservation". This wording includes both excluding

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[393] On the principle of reciprocity, see paras. 272-290 below.

[394] *Yearbook ... 1966*, vol. II, p. 209, para. (1) of the commentary on article 19 [21].

reservations — whereby States purport purely and simply to exclude the application of one or more provisions of the treaty — and limiting reservations, which simply relate to a specific aspect of the provision in question, without completely excluding its application.

256. Another inconsistency, and a more serious one, may be signalled between the definition of the term "reservation" in the Vienna Conventions and the effects provided for by article 21, paragraph 1, two provisions that need to be juxtaposed:[395] whereas according to article 21 the reservation modifies "the provisions of the treaty", the object of the reservation under article 2, paragraph 1 (b), is to modify or exclude "the legal effect of certain provisions of the treaty". This problem did not go unnoticed during the discussions in the Commission: while some members stressed that the reservation could not change the provisions of the treaty, and that it would be preferable to replace "provisions" by "application",[396] other members paid little attention to the matter[397] or indicated their clear satisfaction with the text proposed by the Drafting Committee.[398]

257. In the literature, the question of whether it is the "provisions of the treaty" or their "legal effects" that are modified has been raised more forcefully. Professor Pierre-Henri Imbert is of the view that:

> It is precisely the link which the drafters of the Vienna Convention established between reservations and the provisions of a convention that seems to be most open to criticism, in that a reservation is aimed at eliminating not a *provision* but an *obligation*.[399]

258. However, this view considers the effect of the reservation only from the standpoint of its author, and appears to overlook the fact that in modifying the author's obligation the reservation also affects the correlative rights of the States or international organizations that have accepted the reservation. It is thus more convincing to conclude that, with regard to this question:

> Article 2, paragraph 1 (b), of the 1969 and 1986 Conventions is better drafted than article 24, paragraph 1. It is unclear how a reservation, which is an instrument *external* to the treaty, could modify *a provision of that treaty*. It might exclude or modify its application, i.e. its effect, but not the text itself, i.e. the provisions.[400]

259. And yet the text of article 2, paragraph 1 (d), also does not appear to correspond fully to State practice with respect to reservations, in that it specifies that a reservation can purport to exclude or modify only "the legal effect of *certain*

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[395] Third report on reservations to treaties, A/CN.4/491/Add.3, para. 149.

[396] Mr. Rosenne (*Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 172, para. 9, and 814th meeting, 29 June 1965, p. 291, para. 2) and Mr. Tsuruoka (ibid., p. 172, para. 16).

[397] Mr. Tounkine "considered it of no great importance whether the wording used was 'modifies the provisions of the treaty' or 'modifies the application of the provisions of the treaty'" (ibid., para. 9). For a similar view, see Mr. Briggs (ibid., para. 13).

[398] Mr. Briggs (ibid., 800th meeting, 11 June 1965, p. 173, para. 28).

[399] Pierre-Henri Imbert (see note 350), p. 15 (in the original).

[400] Third report on reservations to treaties, A/CN.4/491/Add.3, para. 154 (italics in the original).

provisions of the treaty".[401] It is in fact not uncommon for States to formulate reservations in order to modify the application of a treaty as a whole, or at least of a substantial part of it. In some cases, such reservations can certainly not be regarded as permissible, in that they deprive the treaty of its object and purpose, so that they no longer have the status of "established reservations".[402] However, this is not always the case, and there are in practice many examples of such across-the-board reservations which were not the subject of objections or challenges by the other contracting States.[403] Article 21, paragraph 1, appears more open in this respect, in that it simply provides that the reservation modifies (or excludes) "the provisions of the treaty to which the reservation relates to the extent of the reservation". If a reservation can thus permissibly purport to modify the legal effects of all of the provisions of a treaty in certain specific aspects, as the Commission clearly acknowledged in guideline 1.1.1 (Object of reservations),[404] it will have the effect, once established, of modifying all these provisions in accordance with article 21, paragraph 1, or indeed, as the case may be, all of the provisions of the treaty.[405]

260. It follows that a permissibly established reservation affects the treaty relations of the author of the reservation in that it excludes or modifies the legal effect of a provision or provisions of the treaty, or even of the treaty as a whole, on a specific aspect and on a reciprocal basis.[406]

261. In accordance with the Commission's well-established practice in the context of the Guide to Practice, it is consequently appropriate to incorporate a guideline 4.2.4 which largely reproduces article 21, paragraph 1 (a), of the 1986 Vienna Convention while specifying that the reservation modifies not the provision of the treaty in question, but its legal effects:[407]

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[401] Pierre-Henri Imbert, op. cit., note 350, pp. 14-15; Renata Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, vol. 2, 1970, p. 296. See also Alain Pellet (third report on reservations to treaties, A/CN.4/491/Add.3 and Corr.1, para. 156. See however D. N. Hylton, who maintains that "reservations modify a treaty only in regard to specific provisions" ("Default Breakdown: the Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations", *Vanderbilt Journal of International Law*, vol. 27, 1994, No. 2, p. 422).

[402] See guideline 1.1.1 (Object of reservations), *Yearbook ... 1999*, vol. II, Part Two, p. 94, paras. 6 and 7.

[403] Ibid., para. 5.

[404] Guideline 1.1.1 "Object of reservations" reads: "A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation" (*Yearbook ... 1999*, vol. II, Part Two, p. 93).

[405] Patrizia de Cesari has written on this subject that "[m]ediante le riserve, gli Stati possono produrre l'effetto di restringere il campo d'applicazione materiale o soggetivo della convenzione, fino all'esclusione di una o più disposizioni dell'accordo o alla non applicazione per determinati soggetti, oppure manifestare la volontà di accettare le disposizioni con modalità restrittive o con limiti di ordine temporale o territoriale". [By means of reservations, States can reduce the material or subjective scope of application of a treaty to the point of exclusion of one or more provisions of the treaty or its non-application to specific subjects, or again they can demonstrate willingness to accept the provisions of the treaty in accordance with restrictive modalities or by attaching to the limitations of a temporal or territorial nature."] ("Riserve, dichiarazioni e facolta' delle convenzioni dell'Aja di diretto internazionale privato"), in Tullio Treves (ed.), "Six Studies on Reservations", *Communicazioni e Studi*, vol. 22, 2002, p. 167, para. 8.

[406] On the question of reciprocity, see paras. 272-290 below.

[407] See para. 258 above.

4.2.4 Content of treaty relations

A reservation established with regard to another party modifies for the reserving State or international organization in its relations with that other party the legal effects of the provisions of the treaty to which the reservation relates, to the extent of the reservation.

262. In order to clarify further the content of the obligations and rights of the author of the reservation and of the State or international organization with regard to which the reservation is established, it is wise to distinguish between, as Frank Horn terms them, on the one hand "*modifying reservations*" and on the other hand "*excluding reservations*".[408] The distinction is certainly not always easy to make. Thus, a reservation by which its author purports to limit the scope of application of a treaty obligation only to a certain category of persons may be understood equally well as a modifying reservation (it modifies the legal effect of the initial obligation by limiting the circle of persons concerned) or as an excluding reservation (it purports to exclude the application of the treaty obligation for all persons not forming part of the specified category).[409] The distinction does, however, permit a better insight into the two most common hypotheses. The vast majority of reservations may be classified in one or other of these categories, or at least understood by means of this distinction.

263. In the case of excluding reservations, the author of the reservation purports to exclude the legal effect of one or more provisions of the treaty. There are many examples of this.[410] An excluding reservation that is particularly frequently utilized is that relating to compulsory dispute settlement procedures. Thus Pakistan notified the Secretary-General of the following reservation when it acceded on 17 June 2009 to the International Convention for the Suppression of the Financing of Terrorism:

> The Government of the Islamic Republic of Pakistan does not consider itself bound by Article 24, Paragraph 1 of the International Convention for the Suppression of the Financing of Terrorism. The Government of Islamic Republic of Pakistan hereby declares that, for a dispute to be referred to the International Court of Justice, the agreement of all parties shall in every case be required.[411]

264. A large number of reservations also purport to exclude the application of material provisions of the treaty. Egypt, for example, formulated a reservation to the Vienna convention on diplomatic relations purporting to exclude the legal effect of article 37, paragraph 2:

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[408] See Frank Horn (see note 343), pp. 80-87.

[409] See for example the Egyptian reservation to the Vienna Convention on Consular Reservations: "Article 49 concerning exemption from taxation shall apply only to consular officers, their spouses and minor children. This exemption cannot be extended to consular employees and to members of the service staff".

[410] Available online at http://treaties.un.org/ (*Status of treaties* (*Multilateral treaties deposited with the Secretary-General*), chap. III.6). See also guideline 1.1.8 and the commentary thereon (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10*), A/55/10, pp. 205-221.

[411] See also the comparable reservations of Algeria, Andorra, Bahrain, Bangladesh, China, Colombia, Cuba, Egypt, El Salvador, Saudi Arabia, the United Arab Emirates, the United States of America, etc. Available online at http://treaties.un.org/ (*Multilateral treaties deposited with the Secretary-General* (chap. XVIII, 11)).

> Paragraph 2 of article 37 shall not apply.[412]

Cuba also made a reservation purporting to exclude the application of article 25, paragraph 1, of the Convention on special missions:

> The Revolutionary Government of the Republic of Cuba enters an express reservation with regard to the third sentence of paragraph 1, article 25 of the Convention and consequently does not accept the assumption of consent to enter the premises of the special mission for any of the reasons mentioned in that paragraph or for any other reasons.[413]

Or again, the Government of Rwanda formulated a reservation to the Convention on the Elimination on All Forms of Racial Discrimination worded as follows:

> The Rwandese Republic does not consider itself as bound by article 22 of the Convention.[414]

265. Applying article 21, paragraph 1 (a), of the Vienna Conventions to reservations of this kind is relatively easy. An established reservation modifies the legal effect of the treaty provision to which the reservation relates "to the extent of the reservation", that is to say by purely and simply excluding any legal effect of the treaty provision. Once the reservation is established, everything in the treaty relations between the author of the reservation and the parties that have accepted it takes place as if the treaty did not include the provision referred to in the reservation. Excluding reservations thus have a "contraregulatory effect".[415] The author of the reservation is no longer bound by the obligation stemming from the treaty provision in question, but is in no way prevented from complying with it (and being held to it if the treaty norm enunciates a customary obligation). Logically, the other States or international organizations with regard to which the reservation is established have, through their acceptance, waived their right to demand performance of the obligation stemming from the treaty provision in question in the context of their treaty relationship with the author of the reservation.

266. This shows, moreover, that the exclusion of an obligation stemming from a provision of the treaty by a reservation does not automatically mean that the author of the reservation refuses to fulfil the obligation. The author of the reservation may simply wish to exclude the application of the treaty obligation *within the legal framework established by the treaty*. A State or an international organization may be in full agreement with a norm contained in a provision of the treaty, but nevertheless reject the competence of a treaty body or a judicial authority with respect to the application and interpretation of that norm. Although remaining entirely free to comply with the obligation established within the treaty framework, the author nevertheless excludes the opposability of the control mechanisms established by the treaty.[416]

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[412] Available online at http://treaties.un.org/ (*Multilateral treaties deposited with the Secretary-General*), (chap. III, 3). See also the reservation formulated by Morocco (ibid.).

[413] Ibid. (chap. III, 9).

[414] Ibid. (chap. IV, 2).

[415] Frank Horn (see note 343), p. 84.

[416] See also guideline 3.1.8 (Reservations to a provision reflecting a customary norm) and the commentary thereon, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10*, A/62/10), pp. 87-98, and in particular para. (7) of the commentary.

267. It thus seems appropriate to specify the exclusion effect produced by such reservations. This is the purpose of guideline 4.2.5, which is not an alternative to guidelines 4.2.3 but seeks to specify its meaning with respect to a particular category of reservations:

> **4.2.5 Exclusion of the legal effect of a treaty provision**
>
> A reservation established with regard to another party which purports to exclude the legal effect of a treaty provision renders the treaty provision(s) inapplicable in relations between the author of the reservation and the other party.
>
> The author of the established reservation is not required to comply with the obligation imposed by the treaty provision(s) concerned in treaty relations between it and States and international organizations with regard to which the reservation is established.
>
> The State or international organization with regard to which the reservation is established cannot claim the right contained in the relevant provision in the context of its treaty relations with the author of the reservation.

268. The concrete effect of a modifying reservation is significantly different. In contrast to excluding reservations, the author of a reservation does not purport to be released from its obligations under one or more treaty provisions in order to regain freedom of action within the treaty legal framework. Rather, it purports to replace the obligation under the treaty with a different one. A clear example of this type of reservation is the reservation of the Federal Republic of Germany to the Convention on Psychotropic Substances:

> In the Federal Republic of Germany, manufacturers, wholesale distributors, importers and exporters are not required to keep records of the type described [in paragraph 2 of article 11 of the Convention] but instead to mark specifically those items in their invoices which contain substances and preparations in Schedule III. Invoices and packaging slips showing such items are to be preserved by these persons for a minimum period of five years.[417]

By this reservation, Germany thus purported not only to exclude the application of article 11, paragraph 2, of the Convention on Psychotropic Substances, but to replace the obligation under that provision with another, different one.

269. The Finnish reservation to article 18 of the Convention on Road Signs and Signals of 1968 is another example that clearly shows that the author of the reservation is not simply releasing itself from its obligation under the treaty, but is replacing the latter with another obligation:

> Finland reserves the right not to use signs E,9a or E,9b to indicate the beginning of a built-up area, nor signs E,9c or E,9d to indicate the end of such an area. Instead of them symbols are used. A sign corresponding to sign E,9b is used to indicate the name of a place, but it does not signify the same as sign E,9b.[418]

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[417] Available online at http://treaties.un.org/ (*Status of Treaties/Multilateral treaties deposited with the Secretary-General*) (chap. VI, 6).

[418] Ibid. (chap. XI, B.20).

270. By such a modifying reservation the author, once the reservation is established, is not simply released from all treaty obligations covered by the reservation. The effect of the reservation is to replace the obligation initially provided for in the treaty by another one which is provided for in the reservation. In other words, the obligation under the treaty provision which is the subject of the reservation is replaced or modified, in the treaty relations between its author and the State or international organization in regard to which the reservation is established, by the one set forth in the reservation; or, more exactly, the established reservation leads to replacement of the obligation and the correlative right under the relevant treaty provision by the obligation and the correlative right provided for in the reservation or resulting from the treaty provision as modified by the reservation.

271. Guideline 4.2.6 clarifies guideline 4.2.2 by explaining the effect of a reservation with a modifying effect on the content of treaty relations:

4.2.6 Modification of the legal effect of a treaty provision

A reservation established with regard to another party which purports to modify the legal effect of a treaty provision has the effect, in the relations between the author of the reservation and the other party, of substituting the rights and obligations contained in the provision as modified by the reservation for the rights and obligations under the treaty provision which is the subject of the reservation.

The author of an established reservation is required to comply with the obligation under the treaty provision (or provisions) modified by the reservation in the treaty relations between it and the States and international organizations with regard to which the reservation is established.

The State or international organization with regard to which the reservation is established can claim the right under the treaty provision modified by the reservation in the context of its treaty relations with the author of the reservation in question.

272. As soon as the reservation has been "established", it can be invoked not only by its author but also by any other party in regard to which it has acquired this status. The reservation creates between its author and the parties with regard to which it is established a special regulatory system which is applied on a reciprocal basis. In this regard, Sir Humphrey Waldock has explained that "reservations always work both ways".[419] This idea is also to be found in article 21, paragraph 1 (b), of the Vienna Convention, which, in its 1986 version, reads as follows:

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

(a) …

(b) modifies those provisions [of the treaty which is their subject] to the same extent for that other party in its relations with the reserving State or international organization.

[419] "General Course on Public International Law", Recueil des cours de l'Académie du droit international de la Haye (RCADI), vol. 106, 1962-II, p. 87.

273. It follows that the author of the reservation is not only released from compliance with the treaty obligations which are the subject of the reservation; it also loses the right to require the State or international organization with regard to which the reservation is established to fulfil the treaty obligations covered by the reservation.

274. This principle of reciprocity is based on common sense.[420] The regulatory system governing treaty relations between the two States concerned reflects the common denominator of their respective commitments resulting from the overlap — albeit partial — of their wills.[421] It follows "directly from the consensual basis of treaty regulations",[422] which has a significant influence on the general regime of reservations of the Vienna Convention. In his first report on treaty law, Sir Humphrey explains:

> A reservation operates reciprocally between the reserving State and any other party to the treaty, so that both are exempted from the reserved provisions in their mutual relations.[422]

The International Court of Justice has presented the problem of the reciprocal application of the optional declarations of acceptance of compulsory jurisdiction contained in article 36, paragraph 2, of the Statute of the Court in a comparable, although slightly different, way. In its judgment in the *Norwegian loans* case, it stated:

> "… since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the two Declarations coincide in conferring it. A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdictions, exists within these narrower limits indicated by the French reservation."[423]

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[420] Dionisio Anzilotti believed that "l'effetto della riserva è che lo Stato riservante non è vincolato dalle disposizioni riservate: *naturalmente*, le altre parti non sono vincolate verso di lui, di guisa che, nei rapporti tra lo Stato riservante e gli altri, le disposizioni riservate sono come se non facessero parte del trattato" ["the effect of the reservation is that the reserving State is not bound by the provisions which are the subject of the reservation; *naturally*, the other parties are not bound in respect to it; thus, in relations between the reserving State and the others, it is as if the provisions which are the subject of the reservation are not part of the treaty."] (*Corso di diritto internazionale*, vol. 1 (Introduzione-Teorie generali), CEDAM, Padova, 1955, p. 355) (italics added).

[421] Roberto Baratta, *Gli effetti della riserve ai trattati*, Antonio Giuffrè, Milan, 1999, p. 291: "Si è poi visto che l'orientamento che emerge della pratica internazionale appare in sintonia con il principio consensualistico posto a fondamento del diritto dei trattati: la norma riservate è priva di giuridicità non essendosi formato l'accordo fra tali soggetti a causa dell'apposizione della riserva stessa." ["We have seen, moreover, that the trend resulting from international practice seems to be linked with the consensual principle, a basic element of treaty law: the rule which is the subject of the reservation loses its juridical status, absent an agreement between subjects of law due to the fact of the formulation of the reservation itself."]

[422] Sir Humphrey Waldock, first report on the law of treaties, A/CN.4/144, *Yearbook ... 1962*, vol. II, p. 68, para. 21. The International Law Commission endorsed this explanation in the comments on draft article 19 (which became article 21) adopted on second reading (*Yearbook … 1966*, vol. II, p. 227, para. 1 of the commentary).

[423] Judgment of 6 July 1957, *Case of Certain Norwegian Loans, International Court of Justice, Reports of Judgments, Advisory Opinions and Orders*, 1957, p. 23.

275. The reciprocity of the effects of the reservation also rebalances the inequalities created by the reservation in the bilateral relations between the author of the reservation and the other States or international organizations with regard to which the reservation is established. These latter cannot, through the reservations mechanism, be bound by more obligations towards the author of the reservation than the latter itself is ready to assume.[424] Professor Simma believed the following in this regard:

> Wer sich bestimmten Vertragsverpflichtungen durch einen Vorbehalt entzogen hat, kann selbst auch nicht verlangen, im Einklang mit den vom Vorbehalt erfassten Vertragsbestimmungen behandelt zu werden [Whoever has withdrawn from certain treaty obligations by a reservation cannot claim treatment in accordance with the treaty provisions which are the subject of the reservation].[425]

276. The reciprocal application of a reservation follows directly from the idea of the reciprocity of international commitments and of give-and-take between the parties and conforms to the maxim *do ut des*.

277. Furthermore, the reciprocity of the effects of the reservation plays a regulatory, even a deterrent role, which is not unimportant in the exercise of the widely recognized freedom to formulate a reservation: the author of the reservation must have in mind that the effects of the reservation are not only to the author's benefit; the author also runs the risk of the reservation being invoked against it. On this subject, Sir Humphrey has written:

> There is of course another check upon undue exercise of the freedom to make reservations in the fundamental rule that a reservation always works both ways, so that any other State may invoke it against the reserving State in their mutual relations.[426]

Reciprocal application thus cuts both ways and "contributes significantly to resolving the inherent tension between treaty flexibility and integrity".[427] In a way, this principle appears to be a complement to, and is often far more effective than, the requirement of permissibility of the reservation, owing to the uncertain determination of permissibility in a good number of cases. The proliferation of reservations in human rights treaties, in which context the principle of reciprocity plays only a marginal role,[428] can probably be explained in part by the link between

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[424] See *Yearbook ... 1966*, vol. II, p. 206, para .13 of the comments on draft articles 16 and 17. Roberto Baratta has rightly maintained that the reciprocity of the effects of a reservation has proven to be a "strumento di compensazione nelle mutue relazioni pattizie tra parti contraenti; strumento che è servito a ristabilire la parità nel *quantum* degli obblighi convenzionali vicendevolmente assunti, parità unilateralmente alterata da una certa riserva" ["Compensatory mechanism in the mutual relations between contracting parties which has served to restore the balance in the *quantum* of reciprocally assumed treaty obligations that was unilaterally altered by a given reservation"] (op. cit., note 427, p. 292).

[425] *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge*, Duncker & Humblot, Berlin, 1972, p. 60.

[426] Op. cit., note 419, p. 87. See also Francesco Parisi, Catherine Ševcenko, "Treaty Reservations and the Economics of Article 21 (l) of the Vienna Convention", *Berkeley Journal of International Law*, vol. 21, 2003, pp. 1-26.

[427] Ibid. See also Roberto Baratta, op. cit., note 421, pp. 295-6.

[428] See para. 285 below.

the formulation of reservations and their reciprocal application:[429] when reciprocity is not a factor, there are more reservations.

278. A number of reservation clauses thus make express reference to the principle of reciprocal application of reservation,[430] whereas other treaties recall the principle of reciprocal application in more general terms.[431] However, such express clauses appear to be superfluous.[432] The principle of reciprocity is recognized not only as a general principle,[433] but also as a principle that applies automatically, requiring neither a specific clause in the treaty nor a unilateral declaration by the States or international organizations that have accepted the reservation to that effect.[434]

279. Draft article 21 adopted on first reading by the Commission in 1962 was, however, not very clear as regards the question of automaticity of the reciprocity principle, in that it provided that the reservation would operate "reciprocally to entitle any other State Party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving State".[435] This formulation of the rule implied that the other contracting States should claim the reservation in order to benefit from the effects of reciprocity. Following the comments of Japan

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[429] Francesco Parisi, Catherine Ševcenko, op. cit., note 426.

[430] This was already the case in article 20, para. 2, of The Hague Convention on Conflict of Nationality Laws of 1930 ("The provisions thus excluded cannot be applied against the Contracting Party who has made the reservation nor relied on by that Party against any other Contracting Party"). Other examples are found in The Hague Conventions on International Private Law (for these reservation clauses, see Ferenc Majoros, *Clunet*, 1974, p. 90 et seq.), in a number of conventions concluded within the Economic Commission for Europe (see Pierre-Henri Imbert (see note 350), pp. 188-191 and p. 251) and in some conventions drawn up and concluded within the Council of Europe. The Model Final Clauses for Conventions and Agreements Concluded within the Council of Europe adopted by the Council of Ministers in 1980 proposes the following provision relating to reciprocity of the effects of reservation: "A Party which has made a reservation in respect of a provision of [the Agreement concerned] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it" (article e, para. 3). See also Frank Horn (see note 343), pp. 146 and 147.

[431] See, for example, article 18 of the Convention on the Recovery Abroad of Maintenance ("A Contracting Party shall not be entitled to avail itself of this Convention against other Contracting Parties except to the extent that it is itself bound by the Convention") or article XIV of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound by the Convention").

[432] Pierre-Henri Imbert (see note 350), p. 252; Ferenc Majoros (see note 430), pp. 83 and 109. Majoros's criticism of the suggestion that clauses reiterating the reciprocity principle should be introduced into treaties is "for reasons of clarity and legal stability" (ibid., p. 81).

[433] Ibid., pp. 83 and 109; Roberto Baratta, op. cit., note 421, p. 243 et seq.; Frank Horn (see note 343), p. 148; see also Bruno Simma (see note 425), pp. 60-61).

[434] Roberto Baratta (see note 421), pp. 227 et seq. and 291; Ferenc Majoros (see note 430), pp. 83 and 109; Francesco Parisi and Catherine Ševcenko (see note 426). There have, however, been cases where, simply as a precaution, States have made their acceptance conditional upon the reciprocal application of the reservation. It is in this sense that we must understand the United States declarations in response to the reservation by Romania and the USSR to the Convention on Road Traffic of 1949, whereby the Government of the United States specified that it "has no objection to [these] reservation[s] but 'considers that it may and hereby states that it will apply [these] reservation[s] reciprocally with respect to [their respective author States]'". Available online at http://treaties.un.org/(*Status of treaties* (*Multilateral treaties deposited with the Secretary-General),* chap. XI, B.1).

[435] *Yearbook ... 1962*, vol. II, p. 181.

and the United States,[436] the text was recast so as to establish that the reservation produces *ipso jure* the same effect for the reserving State and the State accepting it.[437] The text finally adopted by ILC in 1965 thus clearly expresses the idea of automaticity, although it still underwent a number of drafting changes.[438]

280. This does not mean, however, that the principle of reciprocity is absolute — far from it. Although today it constitutes, under cover of article 21, paragraph 1, the general rule, there are nevertheless major exceptions[439] which stem either from the content of the reservation itself or from the content or nature of the treaty.

281. The principle of reciprocity cannot find application in cases where a rebalancing between the obligations of the author of the reservation and the State or international organization with regard to which the reservation is established is unnecessary or proves impossible.

282. This situation arises, for example, in the case of reservations purporting to limit the territorial application of a treaty. Reciprocal application of such reservation is quite simply not possible in practice.[440] Similarly, reciprocal application of the effects of the reservation is also excluded if it was motivated by situations obtaining specifically in the reserving State.[441] Thus, a party to the Convention on Psychotropic Substances of 1971 can certainly not invoke in its favour the reservation formulated by Canada purporting to exclude peyotl,[442] from the application of the Convention; it was formulated solely because of the presence in Canadian territory of groups which use in their magical or religious ceremonies certain psychotropic substances that would normally fall under the Convention regime.[443]

283. The principle of reciprocal application of reservations may also be limited by reservation clauses contained in the treaty itself. An example is the Convention on Customs Facilities for Touring and its Additional Protocol of 1954. Article 20, paragraph 7, of the Convention provides that:

> No Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies. Any State availing itself of this right shall notify the Secretary-General accordingly and the latter shall communicate its decision to all signatory and contracting States.[444]

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[436] *Yearbook ... 1966*, vol. II, pp. 303 and 351. See also the comments by Austria, ibid., p. 282.

[437] Fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 58.

[438] For the final text of draft article 19, see *Yearbook ... 1966*, vol. 2, p. 227.

[439] Bruno Simma (see note 425), p. 61; Roberto Baratta (see note 421), p. 292; D. W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Year Book of International Law*, vol. 16, 1995, p. 139; Frank Horn (see note 343), p. 148.

[440] Pierre-Henri Imbert (see note 350), p. 258; Bruno Simma (see note 425), p. 61.

[441] Frank Horn (see note 343), pp. 165 and 166; Pierre-Henri Imbert (see note 350), pp. 258-260. See however the more cautious ideas relating to these assumptions formulated by Ferenc Majoros (see note 430, pp. 83 and 84).

[442] This is a species of small cactus which has hallucinogenic psychotropic effects.

[443] Available online at http://treaties.un.org/(*Status of Treaties (Multilateral treaties deposited with the Secretary-General)*, chap. VI, para. 16).

[444] Ibid., chap. XI, A.6.

Even though this particular clause does not in itself exclude the principle of reciprocal application, it deprives it of automaticity by making it subject to notification by the accepting State. Such notifications have been made by the United States in relation to the reservations formulated by Bulgaria, Romania and the USSR to the dispute settlement mechanism provided for in article 21 of that Convention.[445]

284. In other cases it is not the clauses or provisions of the treaty that invalidate the application of the principle of reciprocity, but the nature and object of the treaty and the obligations it contains. The principle of reciprocity is conditioned by the reciprocal application of the provisions and obligations of the treaty. If the treaty is not itself based on reciprocity of rights and obligations between the parties, a reservation can also produce no such reciprocal effect.

285. A typical example is afforded by the human rights treaties.[446] The fact that a State formulates a reservation excluding the application of one of the obligations contained in such a treaty does not release a State which accepts the reservation from respecting that obligation, despite the existence of the reservation, as these obligations apply not in an inter-State relationship between the reserving State and the State which has accepted the reservation, but simply in a State-human being relationship. The Human Rights Committee considered in this respect in its general comment No. 24 that:

> Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.[447]

For this reason, the Committee continues, the human rights treaties, "and the Covenant [on Civil and Political Rights] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place".[448]

286. The human rights treaties are not, however, the only ones that do not lend themselves to reciprocity. This effect is also absent from treaties establishing obligations owed to the community of contracting States. Examples can be found in treaties on commodities,[449] in environmental protection treaties, in some

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[445] Ibid., chap. XI, A.6 and A.7. See Rosa Riquelme Cortado (see A/CN.4/614/Add.1) note 211, p. 212 (note 44).

[446] First report on the law and practice relating to reservations to treaties (A/CN.4/470, *Yearbook ... 1995*, vol. II, First Part, p. 148, para. 138.

[447] CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 8. See also Massimo Coccia, "Reservations to Multilateral Treaties on Human Rights", *California Western International Law Journal*, vol. 15, 1985, No. 1, p. 37; Pierre-Henri Imbert (see note 350), p. 153; Michel Virally, "Le principe de réciprocité dans le droit international contemporain", *RCADI*, vol. 122, 1967-III, p. 26 and 27.

[448] CCPR/C/21/Rev.1/Add.6, para. 17.

[449] H. G. Schermers, "The Suitability of Reservations to Multilateral Treaties", *Nederlands Tijdschrift voor Internationaal Recht*, vol. VI, 1959, No. 4, p. 356. See also D. W. Greig, op. cit., note 439, p. 140.

demilitarization or disarmament treaties[450] and also in international private law treaties providing uniform law.[451]

287. In all of these situations, the reservation cannot produce a reciprocal effect in the bilateral relations between its author and the State or international organization with regard to which it is established. Such a bilateral relationship does not exist between the two States. A State party does not owe an individual obligation to another State party to respect the obligation, and the latter does not individually have a right for the obligation to be respected. Thus the reverse effect of the reservation has "nothing on which it can 'bite' or operate".[452]

288. This does not mean, however, that the principle of reciprocity plays no role in these exceptions. The reservation will nevertheless produce at least one effect: even if a State or international organization accepting the reservation, or for that matter a State or international organization formulating an objection to it, is required to discharge the obligations contained in the treaty, the reserving State is not entitled to call for compliance with these obligations which it does not assume on its own account. As Roberto Baratta has rightly pointed out:

> anche in ipotesi di riserve a norme poste dai menzionati acordi l'effetto di reciprocità si produce, in quanto né la prassi, né i princìpi applicabili in materia inducono a pensare che lo State riservante abbia un titolo giuridico per pretendere l'applicazione della dispositione da esso riservata rispetto al soggetto non autore della riserva. Resta nondimeno, in capo a tutti i soggetti che non abbiano apposto la stessa riserva, l'obbligo di applicare in ogni caso la norma riservata a causa del regime solidaristico creato dall'accordo
>
> [even on the assumption of reservations to the norms enunciated in the above-mentioned agreements, the effect of reciprocity is produced, as neither practice nor the principles applicable suggest that the reserving State would have a legal right to call for the application of the provision to which the reservation relates by a subject which is not the author of the reservation. There nonetheless remains the obligation for all subjects which have not formulated the reservation to apply in all cases the norm to which the reservation relates, by virtue of the regime of solidarity established by the agreement].[453]

289. This moreover was the thinking underlying the model clause on reciprocity adopted by the Council of Ministers of the Council of Europe in 1980:

> "A Party which has made a reservation in respect of a provision of [the agreement concerned] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it".[454]

290. Guideline 4.2.7 takes account of the reciprocal application of a reservation by reproducing in large measure article 21, paragraph 1, of the 1986 Vienna

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[450] Frank Horn (see note 343), pp. 164-165.

[451] On the conventions of The Hague Conference on International Private Law, see Patrizia de Cesari (see note 405), pp. 149-174, and Ferenc Majoros (see note 430), pp. 73-109.

[452] G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. 1, Grotius Publications, Cambridge, 1986, p. 412.

[453] R. Baratta (see note 421), p. 294; D. W. Greig (see note 439), p. 140.

[454] See note 430.

Convention. It nevertheless emphasizes that this general rule has major exceptions, contrary to what a reading of article 21 of the Vienna Conventions might suggest:

4.2.7 Reciprocal application of the effects of an established reservation

A reservation modifies the content of treaty relations for the State or international organization with regard to which the reservation is established in their relations with the author of the reservation to the same extent as for the author, unless:

(a) Reciprocal application of the reservation is not possible because of the nature or content of the reservation;

(b) The treaty obligation to which the reservation relates is not owed individually to the author of the reservation; or

(c) The object and purpose of the treaty or the nature of the obligation to which the reservation relates exclude any reciprocal application of the reservation.