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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-FIRST SESSION

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CHAPTER VI

RESERVATIONS TO TREATIES

Addendum

GUIDE TO PRACTICE

Commentaries to the guidelines adopted at the fifty-first session

GE.99-63963 (E)

1.5 Unilateral statements in respect of bilateral treaties

(1) The above draft guidelines seek to delimit as closely as possible the definition of reservations to multilateral treaties that and of other unilateral statements which are formulated in connection with a treaty and with which they may be compared, or even confused, including interpretative declarations. The Commission questioned whether it was possible to transpose these individual definitions to unilateral statements formulated in respect of bilateral treaties or at the time of their signature or of the expression of the final consent of the parties to be bound. This is the subject matter of section 1.5 of the Guide to Practice.

(2) Strictly speaking, it would have been logical to include the individual definitions which appear in the draft guidelines hereafter respectively in section 1.4, insofar as draft guideline 1.5.1 [1.1.9] is concerned (since the Commission considers that so-called “reservations” to bilateral treaties do not correspond to the definition of reservations within the meaning of the present Guide to Practice), and in section 1.2, insofar as draft guidelines 1.5.2 [1.2.7] and 1.5.3 [1.2.8] are concerned (since they deal with genuine interpretative declarations). Given its particular nature, however, the Commission felt that the Guide would better serve its practical purpose if the draft guidelines devoted more specifically to unilateral statements formulated in respect of bilateral treaties were to be grouped in one separate section.

(3) The Commission considers, moreover, that the draft guidelines on unilateral statements other than reservations and interpretative declarations, grouped in section 1.4, could be applied, where necessary, to those dealing with bilateral treaties. [210]

1.5.1 [1.1.9] “Reservations” to bilateral treaties

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification

[210] It being understood that transposition is not always possible. In particular, draft guideline 1.4.3, concerning statements of non-recognition, is not relevant to bilateral treaties.

of the provisions of the treaty to which it is subordinating the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

(1) The 1969 and 1986 Vienna Conventions are silent on the subject of reservations to bilateral treaties: neither article 2, paragraph 1 (d), which defines reservations, nor articles 19 to 23, [211] which set out their legal regime, raise or exclude expressly the possibility of such reservations. And the 1978 Convention on Succession of States in respect of Treaties explicitly contemplates only reservations to multilateral treaties.

(2) While at the outset of its work on reservations the Commission was divided with regard to reservations only to multilateral treaties, [212] in 1956, Sir Gerald Fitzmaurice stressed, in his initial report, the particular features of the regime of reservations to treaties with limited participation, [213] a category in which he expressly included bilateral

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

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

[213] The Commission also asked the question whether the particular features of "reservations" to bilateral treaties did not characterize rather the unilateral statements made with respect to "plurilateral" (or "multiple-party bilateral") treaties, such as, for example, the peace treaties concluded at the end of the First and Second World Wars. These have the appearance of multilateral treaties, but may in fact be regarded as bilateral treaties. It is doubtful whether the distinction, although interesting from the theoretical point of view, affects the scope of draft guideline 1.5.1: either the treaty will be considered to have two actual parties (despite the number of those contracting), and that situation is covered by draft guideline 1.5.1, or the

agreements. [214] Likewise, in his first report, in 1962, Sir Humphrey Waldock did not exclude the case of reservations to bilateral treaties, but treated it separately. [215]

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

> "A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement - either adopting or rejecting the reservation - the treaty will be concluded; if not, it will fall to the ground." [216]

Following a suggestion by the United States, the Commission had furthermore expressly entitled the section of the draft articles on reservations as "Reservations to multilateral treaties". [217]

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statement is made by one constituent of the "multiple party" and is a conventional reservation within the meaning of draft guideline 1.1.

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

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

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

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

(4) It is hardly possible, however, to draw any conclusion from this in view of the positions taken during the Vienna Conference and the decision of that Conference to revert to the heading "Reservations" for part II, section 2, of the 1969 Convention on the Law of Treaties. It should in particular be noted that the Conference's Drafting Committee approved a Hungarian proposal to delete the reference to multilateral treaties from the title of the section on reservations [218] in order not to prejudge the issue of reservations to bilateral treaties. [219]

(5) However, after that decision, the question occasioned an exchange of views between the President of the Conference, Mr. Roberto Ago, and the Chairman of the Drafting Committee, Mr. Mustapha K. Yasseen, [220] which

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

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

[220]Ibid., 11th plenary meeting, 30 April 1969, p. 37:

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

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

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

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

indicates that the Conference had not, in fact, taken a firm position as to the existence and legal regime of possible reservations to bilateral treaties. [221]

(6) The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations sheds no new light on the question. [222] However, the 1978 Vienna Convention on Succession of States in respect of Treaties tends to confirm the general impression gathered from a review of the 1969 and 1986 Conventions that the legal regime of reservations provided for in those Conventions (to which article 20, paragraph 3, of the 1978 Convention refers) is applicable solely to multilateral treaties and not to bilateral treaties. Indeed, article 20, the only provision of that instrument to deal with reservations, is included

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

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

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

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

in section 2 of part III, [223] which deals with multilateral treaties, [224] and expressly stipulates that it is applicable "when a newly independent State establishes its status as a party or as a contracting State to a *multilateral* treaty by a notification of succession".

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

(8) It is nevertheless the case that in practice some States do not hesitate to make unilateral statements, which they call "reservations" with respect to bilateral treaties, while others declare themselves hostile to them.

(9) This is a practice which has been in existence for a long time, [225] widely used by the United States of America [226] and, less frequently, by other

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[223]Which concerns only "newly independent States".

[224]Section 3 deals with "bilateral treaties".

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

[226]In 1929, Marjorie Owen estimated somewhere between 66 and 87 bilateral treaties had been subject to a "reservation" by the United States after the Senate had imposed a condition on their ratification ("Reservations to multilateral treaties", Yale Law Journal, 1928-1929, p. 1091). More recently, Kevin Kennedy complied detailed statistics covering the period from 1795 to 1990. These data show that the United States Senate made its advice and consent to ratify conditional for 115 bilateral treaties during that period, a figure that includes interpretative declarations, which account for 15 per cent on average of all bilateral treaties to which the United States has become a party in just under two centuries (Kevin C. Kennedy, "Conditional approval of treaties by the U.S. Senate", Loyola of Los Angeles International and Comparative Journal, Oct. 1996, p. 98). The same statistics show that this practice of "amendments" or "reservations" involves all categories of agreement and is particularly frequent in the area of extradition, friendship, commerce and navigation treaties ("FCN treaties", and even peace treaties (see ibid., pp. 99-103 and 112-116). In its response to the questionnaire on reservations, the United States of America confirmed that this practice

States in their relations with the United States. [227] The fact remains that, of all the States which replied to the International Law Commission questionnaire on reservations, only the United States gave an affirmative to question 1.4; [228] all the others answered in the negative. [229] Some of them simply said that they do not formulate reservations to bilateral treaties, but others indicated their concerns about that practice. [230]

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remains important where the country's bilateral treaties are concerned. The United States attached to its response a list of 13 bilateral treaties that were accepted with reservations between 1975 and 1985. Such was the case, for example, of the Treaties concerning the permanent neutrality and operation of the Panama Canal of 7 September 1977, the Special Agreement under which Canada and the United States agreed to submit their dispute on the delimitation of maritime zones in the Gulf of Maine area to the International Court of Justice, and the Supplementary Extradition Treaty with the United Kingdom of 25 June 1985.

[227]Either its partners make counter-proposals in response to the reservations of the United States (see examples given by Marjorie Owen, "Reservations to multilateral treaties", Yale Law Journal, 1928-1929, pp. 1090-1091 and William W. Bishop, Jr., "Reservations to treaties", Recueil des cours de l'Académie de droit international 1961-II, vol. 103, pp. 2667-269), or they themselves take the initiative (see the examples given by Marjorie M. Whiteman, Digest of International Law, vol. 14, 1970, p. 161 (Japan), M. Owen, ibid., p. 1093 (New Grenada), Green Haywood Hackworth, Digest of International Law, vol. V, Washington, D.C., United States Printing Office, 1943, pp. 126-130 (Portugal, Costa Rica, El Salvador, Romania).

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

[229]Bolivia, Canada, Chile, Croatia, Denmark, Finland, France, Germany, Holy See, India, Israel, Italy, Japan, Republic of Korea, Kuwait, Mexico, Monaco, Panama, Peru, San Marino, Slovakia, Slovenia, Spain, Sweden and Switzerland.

[230]See Germany's position:

> "The Federal Republic has not formulated reservations to bilateral treaties. It shares the commonly held view that a State seeking to attach a reservation to a bilateral treaty would in effect refuse acceptance of that treaty as drafted. This would constitute an offer for a differently formulated treaty incorporating the content of the reservation and would thus result in the reopening of negotiations".

The replies from Italy and the United Kingdom were very similar. However, the United Kingdom added:

> "The United Kingdom does not itself seek to make reservations a condition of acceptance of a bilateral treaty. If Parliament were (exceptionally) to refuse to enact the legislation necessary to enable the United Kingdom to give effect to a bilateral treaty, the United Kingdom authorities would normally seek to renegotiate the treaty

(10) Another important feature of the practice of States in this area is the fact that, in all cases where the United States or its partners have entered "reservations" (often called "amendments" [231]) to bilateral treaties, they have endeavoured in all cases to renegotiate the treaty in question and to obtain the other Party's acceptance of the modification which is the subject of the "reservation". [232] If agreement is obtained, the treaty enters into force with

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in an endeavour to overcome the difficulties".

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

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

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

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

the modification in question; [233] if not, the ratification process is discontinued and the treaty does not enter into force. [234]

(11) In the Commission's opinion, the following conclusions may be drawn from this review:

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

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

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

[234] See, for example, the United Kingdom's rejection of amendments to an 1803 convention concerning the border beteen Canada and the United States and an 1824 convention for suppression of the African slave trade which the United States had requested (see William W. Bishop, Jr., "Reservations to Treaties", Recueil des cours de l'Académie de droit international 1961-II, vol. 103, p. 266) or the United Kingdom's refusal to accept the United States reservations to the treaty of 20 December 1900 dealing with the Panama Canal, which was consequently renegotiated and led to the signing of a new agreement, the Hay-Pauncefote Treaty of 28 November 1902. See Green Haywood Hackworth, Digest of International Law, vol. V (Washington, D.C., United States Printing Office, 1943, pp. 113-114). An even more complicated case concerns ratification of the Conventon of Friendship, Reciprocal Establishments, Commerce and Extradition between the United States of America and Switzerland of 25 November 1850, which was the subject of a request for amendments, first by the United States Senate, then by Switzerland, and then again by the Senate, all of which were adopted and the instruments of ratification, which had been amended three times, exchanged five years after the date of signature (ibid., p. 269).

(12) As indicated by the practice described above, despite some obvious points in common with reservations to multilateral treaties, “reservations” to bilateral treaties are different in one key respect: their intended and their actual effects.

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

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

(15) But this is precisely the feature which distinguishes such “reservations” to bilateral treaties from reservations to multilateral treaties. There is no doubt that, with a “reservation”, one of the contracting parties to a bilateral treaty intends to modify the legal effect of the provisions of the original treaty. But while a reservation does not affect the provisions of the instrument in the case of a multilateral treaty, a “reservation” to a bilateral treaty seeks to modify it: if the reservation produces the effects sought by its author, it is not the “legal effect” of the provisions in question that will be modified or excluded “*in their application*” to the author; it is the provisions themselves that will be modified. A reservation to a multilateral treaty has a subjective effect: if it is accepted, the legal effect of the provisions in question is modified vis-à-vis the State or the international organization that formulated it. A reservation to a bilateral treaty has an objective effect: if it is accepted by the other State, it is the treaty itself that is amended.

(16) Similarly, there is no doubt that a reservation to a multilateral treaty produces effects only if it is accepted, in one way or another, expressly or implicitly, by at least one of the other contracting States or international

organizations. [235] The same is true for a reservation to a bilateral treaty: the co-contracting State or international organization must accept the "reservation", or else the treaty will not enter into force. Thus the difference does not have to do with the need for acceptance, which is present in both cases, in order for the reservation to produce its effects, but with the consequences of acceptance:

> In the case of a multilateral treaty, an objection does not prevent the instrument from entering into force, even, at times, between the objecting State or international organization and the author of the reservation, [236] and its provisions remain intact;
>
> In the case of a bilateral treaty, the absence of acceptance by the co-contracting State or international organization prevents the entry into force of the treaty; acceptance involves its modification.

(17) Thus a "reservation" to a bilateral treaty appears to be a proposal to amend the treaty in question or an offer to renegotiate it. This analysis corresponds to the prevailing views in doctrine. [237] Moreover, saying that acceptance of a "reservation" to a bilateral treaty is equivalent to amending the treaty does not make the reservation an amendment: it is simply a

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[235]Article 20 of the 1969 and 1986 Conventions states that a reservation can have been accepted in advance by all the signatory States and be expressly authorized by the treaty (para. 1), or it can be expressly accepted (paras. 2, 3 and 4), or it can be "considered to have been accepted" if no objection is raised within 12 months (para. 5).

[236]See article 20, para. 4 (b), of the 1969 and 1986 Conventions.

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

unilateral proposal to amend, prior to the treaty's entry into force, [238] while the amendment itself is treaty-based, is the result of an agreement between the parties [239] and is incorporated into the negotiated text, even if it can be contained in one or more separate instruments.

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

> "The action of the Senate when it undertakes to make so-called 'reservations' to a treaty is evidently the same in effect as when it makes so-called 'amendments', whenever such reservations and amendments in any substantial way affect the terms of the treaty. The so-called reservations which the Senate has been making from time to time are really not reservations as that term has generally been understood in international practice up to recent times." [240]

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

(20) Although most of the members of the Commission consider such a statement to constitute an offer to renegotiate the treaty, which, if accepted by the other party, becomes an amendment to the treaty, it does not appear essential for this to be stated in the Guide to Practice, since, as the different

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[238] The term "counter-offer" has been used. Marjorie Owen ("Reservations to multilateral treaties", Yale Law Journal, 1928-1929, p. 1091) traces this idea of a "counter-offer" back to Hyde, International Law, 1922, para. 519. The expression also appears in the American Law Institute's Restatement of the Law Third - The Foreign Relations Law of the United States, Washington, D.C., vol. 1, 14 May 1986, para. 113, p. 182; see also the position of Mr. Ago and Mr. Yasseen, cited in note 22 above, and that of Paul Reuter, note 22 above).

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

[240] Quoted by Green Haywood Hackworth, Digest of International Law, vol. V, United States Printing Office, Washington, 1943, p. 112; along the same lines, see the position of David Hunter Miller, note 237.

categories of unilateral statement mentioned in section 1.4 above are neither reservations in the usual meaning of the term nor interpretative statements, they do not fall within the scope of the treaty. [241]

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties

Guidelines 1.2 and 1.2.1 [1.2.4] are applicable to multilateral as well as to bilateral treaties.

(1) The silence of the Vienna Conventions on the Law of Treaties extends *a fortiori* to interpretative declarations made in respect of bilateral treaties: the Conventions do not mention interpretative declarations in general [242] and are quite cautious insofar as the rules applicable to bilateral treaties are concerned. [243] Such declarations are nonetheless common and, unlike "reservations" to the same treaties, [244] they correspond in all respects to the definition of interpretative declarations adopted for draft guideline 1.2.

(2) Almost as old as the practice of "reservations" to bilateral treaties, [245] the practice of interpretative declarations in respect of such treaties is less geographically limited [246] and does not seem to give rise to objections where principles are concerned. As for the present situation, of

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[241] See draft guideline 1.4 and the commentary thereto.

[242] See paragraph (1) of the commentary to draft guideline 1.2.

[243] See paragraph (1) of the commentary to draft guideline 1.5.1 [1.1.9].

[244] See draft guideline 1.5.1 [1.1.9] and the commentary thereto.

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

[246] See the commentary to draft guideline 1.5.1 [1.1.9], paragraphs (9) to (11). However, as with "reservations" to bilateral treaties, the largest number of examples can be found in the practice of the United States of America; in just the period covered by that country's reply to the questionnaire on reservations (1975-1995), it mentions 28 bilateral treaties to which it attached interpretative declarations upon expressing its consent to be bound.

the 22 States that answered question 3.3 [247] of the Commission's questionnaire on reservations, four said that they had formulated interpretative declarations in respect of bilateral treaties; and one international organization, the International Labour Organization (ILO), wrote that it had done so in one situation, while noting that the statement was in reality a "corrigendum", "made in order not to delay signature". However incomplete, these results are nevertheless significant: while only the United States claimed to make "reservations" to bilateral treaties, [248] it is joined here by Panama, Slovakia and the United Kingdom and by one international organization; [249] and while several States criticized the very principle of "reservations" to bilateral treaties, [250] none of them showed any hesitation concerning the formulation of interpretative declarations in respect of such treaties. [251]

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

(4) Whereas the word "reservation" certainly does not have the same meaning when it is applied to a unilateral statement made in respect of a bilateral treaty as it does when it concerns a multilateral instrument, the same is not true in the case of interpretative declarations: in both cases, they are unilateral statements, however named or phrased, made "by a State or by an

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

[248] See the commentary to draft guideline 1.5.1 [1.1.9], paragraph (9).

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

[250] See the commentary to draft guideline 1.5.1 [1.1.9], note 240.

[251] The United Kingdom criticizes the United States *understanding* on the matter of the Treaty concerning the Cayman Islands relating to Mutual Legal Assistance; but what the Government of the United Kingdom seems to be rejecting here is the possibility of modifying a bilateral treaty under the guise of interpretation (by means of "*understandings*" which are really "reservations").

international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions". [252] Thus, draft guideline 1.2, which provides this definition, may be considered to be applicable to declarations which interpret bilateral as well as multilateral treaties.

(5) On one point, however, the practice of interpretative declarations in respect of bilateral treaties seems to differ somewhat from the common practice for multilateral treaties. Indeed, it appears from what has been written that "in the case of a bilateral treaty it is the invariable practice, prior to the making of arrangements for the exchange of ratifications and sometimes even prior to ratification of the treaty, for the government making the statement or declaration to notify the other government thereof in order that the latter may have an opportunity to accept, reject, or otherwise express its views with respect thereto". [253] And, once approved, the declaration becomes part of the treaty:

> "... where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument [...], and when the treaty is afterwards ratified by the other party with the declaration attached to it, and their ratifications duly exchanged - the declaration thus annexed is part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged." [254]

(6) It is difficult to argue with this reasoning, which leads one to ask whether interpretative declarations which are made in respect of bilateral

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[252] Cf. draft guideline 1.2.

[253] Marjorie M. Whiteman, *Digest of International Law*, vol. 14, 1970, pp. 188-189.

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

treaties, just like “reservations” to such treaties, [255] must necessarily be accepted by the other party. In reality, this does not seem to be the case: in (virtually?) all cases, interpretative declarations made in respect of bilateral treaties have been accepted because the formulating State requested it, but one can easily imagine that it might not make such a request. Indeed, the logic which leads one to distinguish between interpretative declarations which are conditional and those which are not [256] would seem to be easily transposed to the case of bilateral treaties: everything depends on the author’s intention. It may be the condition *sine qua non* of the author’s consent to the treaty, in which case it is a conditional interpretative declaration, identical in nature to those made in respect of multilateral treaties and consistent with the definition proposed in draft guideline 1.2.1 [1.2.4]. But it may also be simply intended to inform the partner of the meaning and scope which the author attributes to the provisions of the treaty without, however, seeking to impose that interpretation on the partner, and in this case it is a “simple interpretative declaration”, which, like those made in respect of multilateral treaties, [257] can actually be made at any time.

(7) Accordingly, the Commission felt that it was not necessary to adopt specific draft guidelines on interpretative declarations in respect of bilateral treaties, since these fall under the same definition as interpretative declarations in respect of multilateral treaties, whether it be their general definition, as given in draft guideline 1.2, or the distinction between simple and conditional interpretative declarations which follows from draft guideline 1.2.1 [1.2.4]. It therefore seems to be sufficient to take note of this in the Guide to Practice.

(8) On the other hand, draft guideline 1.2.2 [1.2.1], concerning interpretative declarations formulated jointly, is not, of course, relevant in the case of bilateral treaties.

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[255] See paragraphs (16) to (20) of the commentary to draft guideline 1.5.1 [1.1.9].

[256] See draft guideline 1.2.1 [1.2.4] and the commentary thereto.

[257] See draft guideline 1.2 and paragraphs (21) to (30) of the commentary thereto.

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

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party

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

(1) Although acceptance of an interpretative declaration formulated by a State in respect of a bilateral treaty is not inherent in such a declaration, [258] it might be asked whether acceptance modifies the legal nature of the interpretative declaration.

(2) In the Commission's opinion, the reply to this question is affirmative: when an interpretative declaration made in respect of a bilateral treaty is accepted by the other party, [259] it becomes an integral part of the treaty and constitutes the authentic interpretation thereof. As the Permanent Court of International Justice noted, “the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it”. [260] Yet in the case of a bilateral treaty this power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of

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[258] See paragraphs (5) and (6) of the commentary to draft guideline 1.5.2 [1.2.7].

[259] And one can imagine that this would be the case even when an interpretative declaration is not conditional.

[260] Advisory Opinion of 6 December 1923, *Jaworzina* case, Series B, No. 8, p. 37.

a treaty, regardless of its form, [261] exactly as “reservations” to bilateral treaties do once they have been accepted by the co-contracting State or international organization. [262] It becomes an agreement collateral to the treaty which forms part of its context in the sense of paragraphs 2 and 3 (a) of the 1969 and 1986 Vienna Conventions; as such, it must be taken into consideration in interpreting the treaty. [263] And this analysis is consistent with that of the United States Supreme Court in the *Doe* case. [264]

(3) While it is aware that considering this phenomenon in the first part of the Guide to Practice exceeds the scope of that part, which is devoted to the definition, and not the legal regime, of reservations and interpretative declarations, [265] the Commission has seen fit to mention it in a draft guideline. It does not in fact intend to return to the highly specific question of “reservations” and interpretative declarations in respect of bilateral treaties: in the first case, because they are not reservations, in the second, because interpretative declarations to bilateral treaties have no distinguishing feature with respect to interpretative declarations to multilateral treaties, except precisely the one covered in draft guideline 1.5.2 [1.2.7]. For purely practical reasons, therefore, it seems appropriate to make that clear at this stage.

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[261] Exchange of letters, protocol, simple verbal agreement, etc.

[262] See draft guideline 1.5.1 [1.1.9] and paragraphs (15) to (19) of the commentary thereto.

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

[264] See commentary to draft guideline 1.5.2 [1.2.7], note 254.

[265] See draft guideline 1.6.

1.6 [1.4] Scope of definitions

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

(1) The above draft guideline was adopted provisionally by the Commission in 1998 at its fiftieth session in a form which referred only to reservations. The related draft commentary indicated that its title and its placement within the Guide to Practice would be determined at a later stage and that the Commission would consider the possibility of referring, under a single caveat, both to reservations and interpretative declarations, which, in the view of some members, posed identical problems. [266] At its fifty-first session, the Commission as a whole adopted this approach, deeming it necessary to clarify and specify the scope of the entire set of draft guidelines with respect to the definition of the entire set of unilateral statements they define in order to make their particular object clear.

(2) Defining is not the same as regulating. As “a precise statement of the essential nature of a thing”, [267] the sole function of a definition is to determine the general category in which a given statement should be classified. However, this classification does not in any way prejudge the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. A contrario, it is not a reservation if it does not meet the criteria set forth in these draft articles (and in those which the Commission intends to adopt next year), but this does not necessarily mean that such statements are permissible (or impermissible) from the standpoint of other rules of international law. The same is true of interpretative declarations,

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[266] Report of the International Law Commission on the work of its fiftieth session, 1998, General Assembly, Official Records, Fifty-third Session, Supplement No. 10 (A/53/10), pp. 213-214.

[267] The Oxford English Dictionary, 2nd ed. (Oxford, the Clarendon Press, 1989).

which might conceivably not be permissible, either because they would alter the nature of the treaty or because they were not formulated at the required time; [268] etc. [269]

(3) Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime, in the first place, for the assessment of its permissibility. It is only once a particular instrument has been defined as a reservation (or an interpretative declaration, either simple or conditional) that a decision can be taken as to whether it is permissible or not, its legal scope can be evaluated and its effect can be determined. However, this permissibility and these effects are not otherwise affected by the definition, which requires only that the relevant rules be applied.

(4) For example, the fact that draft guideline 1.1.2 [1.2.4] indicates that a reservation “may be formulated” in all of the cases referred to in draft guideline 1.1 and in article 11 of the 1969 and 1986 Vienna Conventions does not mean that such a reservation is necessarily permissible; its permissibility depends upon whether it meets the conditions stipulated in the law on reservations to treaties and, in particular, those stipulated in article 19 of these Conventions. Similarly, the Commission's confirmation of the well-established practice of “across-the-board” reservations in draft guideline 1.1.1 [1.1.4] is in no way meant to constitute a decision on the permissibility of such a reservation in a specific case which depends on its contents and context; the sole purpose of the draft is to show that a unilateral statement of such a nature is indeed a reservation and as such subject to the legal regime governing reservations.

(5) The “rules applicable” referred to in draft guideline 1.6 are, first of all, the relevant rules in the 1969, 1978 and 1986 Vienna Conventions and, in general, the customary rules applicable to reservations and to interpretative declarations, which this Guide to Practice is intended to codify and develop

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[268] This problem may very likely arise in connection with conditional interpretative declarations (see draft guideline 1.2.1).

[269] The same may obviously be said about unilateral statements which are neither reservations nor interpretative declarations as mentioned in section 1.4.

progressively in accordance with the Commission's mandate, and those relating to other unilateral statements which States and international organizations may formulate in respect of treaties, but which are not covered in the Guide to Practice.

(6) More generally, all of the draft guidelines adopted thus far are interdependent and cannot be read and understood in isolation from one another.
