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Third report on reservations to treaties

by Mr. Alain Pellet, Special Rapporteur

Addendum

Contents

		Paragraphs	Page
Section 2.	"Reservations" and interpretative declarations in respect of bilateral treaties	422–521	3
1.	"Reservations" to bilateral treaties	426–493	3
(a)	The difficulty in interpreting the silence of the Vienna Conventions on reservations to bilateral treaties	427–445	4
(i)	The 1969 Convention on the law of treaties	428–439	4
(ii)	The 1986 Convention on treaties concluded by international organizations	440–443	8
(iii)	The 1978 Convention on succession of States in respect of treaties	444–445	9
(b)	The practice of States with regard to reservations to bilateral treaties	446–465	9
(c)	The legal nature of "reservations" to bilateral treaties	466–493	14
(i)	The moment when "reservations" to bilateral treaties are formulated	468–472	14
(ii)	"Reservations" to bilateral treaties do not purport "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to their author	473–476	15
(iii)	"Reservations" to bilateral treaties are proposals to amend	477–493	16

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2.	Interpretative declarations made in respect of bilateral treaties	494–521	20
	(a) The practice of interpretative declarations made in respect of bilateral treaties	496–503	20
	(b) Features of interpretative declarations made in respect of bilateral treaties	504–521	23
Section 3.	Alternatives to reservations (postponed)	522	28

Section 2. "Reservations" and interpretative declarations in respect of bilateral treaties

422. Although it would appear simple, the question of reservations to bilateral treaties is one of those that elicits the most questions and controversies, either because such reservations are considered impossible, or because they are likely to create major problems, or because emphasis is placed on the special regime applicable to them.

423. Since the Special Rapporteur's preliminary report[557] was considered in 1995, members of the Commission have taken somewhat divergent positions with regard to the importance, or even the existence, of reservations to bilateral treaties. While some members felt that such reservations were a particularly important aspect of the topic,[558] others felt that they could be summarized briefly, or even ignored altogether,[559] largely because they were not really reservations[560] or because they were governed by a logic quite different from that underlying multilateral treaties.[561]

424. Although the Special Rapporteur has said that he leans more towards the second viewpoint, he has agreed to prepare a study without any preconceived notions on the subject.[562] That is the purpose of this section.

425. It does in fact seem appropriate to him to link the question of reservations to bilateral treaties with the question of the definition of reservations, since the principal point of disagreement concerns the determination of whether what some States and authors term "reservations" to bilateral treaties are in fact reservations. Accordingly, he will endeavour to answer this question by looking at the practice of States in this area and the way the question is dealt with by doctrine in the provisions of the Vienna Conventions of 1969 and 1986 and their *travaux préparatoires*. This analysis will be supplemented by a look at the specific problems posed by the formulation of interpretative declarations in respect of bilateral treaties.

1. "Reservations" to bilateral treaties

426. A review of the text and the *travaux préparatoires* of the three Vienna Conventions on the law of treaties and the practice of States in this area results in ambiguous conclusions insofar as the possibility of attaching "reservations" to bilateral treaties is concerned.

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[557] A/CN.4/470 and Corr.1.

[558] Mr. Lukashuk (20 June 1995, A/CN.4/SR.2402, pp. 15-16; 16 July 1996, A/CN.4/SR.2460, pp. 12-13; and 3 June 1997, A/CN.4/SR.2487, p. 12), Mr. He Qizhi (26 June 1997, A/CN.4/SR.2500, p. 22), Mr. Brownlie (ibid., p. 26) or Mr. Gocco (1 July 1997, A/CN.4/SR.2502, p. 5); see also some of the positions taken by representatives of States in the Sixth Committee ("Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session prepared by the Secretariat", A/CN.4/483, para. 93, p. 12).

[559] Mr. Rosenstock (16 June 1995, A/CN.4/SR.2401, p. 3), Mr. Rao (ibid., p. 19), Mr. Ferrari-Bravo (26 June 1997, A/CN.4/SR.2500, p. 22).

[560] Mr. Tomuschat (16 June 1995, A/CN.4/SR.2401, p. 4) and Mr. Yamada (29 June 1995, A/CN.4/SR.2407, p. 11). One member of the Sixth Committee also felt that "considering reservations to bilateral agreements would be equivalent to renegotiating those instruments" ("Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session prepared by the Secretariat", A/CN.4/472/Add.1, para. 168, p. 43).

[561] Mr. De Saram (22 June 1995, A/CN.4/SR.2404, p. 5) and Mr. Crawford (26 June 1997, A/CN.4/SR.2500, pp. 29-30).

[562] See statements made on 6 July 1995, A/CN.4/SR.12, p. 13; 3 June 1997, A/CN.4/SR.2487, pp. 16-17; and 27 June 1997, A/CN.4/SR.2501, p. 6.

However, with this study it is possible to formulate draft guidelines which the Special Rapporteur believes would, if adopted, resolve the persistent ambiguities in this area.

(a) The difficulty in interpreting the silence of the Vienna Conventions on reservations to bilateral treaties

427. The 1969 and 1986 Vienna Conventions say nothing about interpretative declarations made in respect of bilateral treaties, which is logical, since they do not take up the question of interpretative declarations. What is more surprising is that they are equally silent on the subject of reservations to bilateral treaties: neither article 2, paragraph 1 (d), which defines reservations, nor articles 19 to 23, which set out their legal regime, raise or exclude the possibility of such reservations. Nowhere does the word "bilateral" appear.[563] And the 1978 Vienna Convention on Succession of States in respect of Treaties explicitly contemplates only reservations to multilateral treaties.

(i) The 1969 Convention on the law of treaties

428. 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",[564] 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.[565]

429. At first glance, the *travaux préparatoires* for this provision would seem to suggest that it does not concern bilateral treaties.

430. While at the outset of its work on reservations the Commission was divided with regard to reservations only to multilateral treaties,[566]in 1956 Sir Gerald Fitzmaurice stressed, in his initial report, the particular features of the regime of reservations to treaties with

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[563] This is also a dominant feature of the two Conventions as a whole: the word "bilateral" appears only once, in article 60, paragraph 1, concerning the termination or suspension of the operation of a treaty as a consequence of its breach (this peculiar feature was noted by Mr. Crawford during the discussion in the Commission in 1977 on reservations to treaties: 18 July 1997, A/CN.4/SR.2500, p. 28).

[564] See in this connection a remark by Mr. Calle y Calle during the preparation of the draft articles on treaties concluded by international organizations, *Yearbook ... 1981*, vol. I, p. 43 (1650th meeting, 13 May 1981).

[565] During the debate on this provision, Mr. Verdross said that "[t]he distinction between an ordinary ***multilateral*** treaty and a ***multilateral*** treaty concluded between a restricted group of States was not clear, since no numerical criterion was laid down by which to determine what constituted a 'restricted' group" (663rd meeting, 18 June 1962, *Yearbook ... 1962*, vol. I, p. 226, emphasis added); similarly: Mr. Tunkin (ibid., p. 227, and 664th meeting, 19 June 1962, ibid., p. 232).

[566] 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".

limited participation, a category in which he expressly included bilateral agreements.[567] Likewise, in his first report, in 1962, Sir Humphrey Waldock did not exclude the case of reservations to bilateral treaties, but treated it separately.[568]

431. However, this reference to bilateral treaties disappeared from the draft text after Sir Humphrey's proposals were considered by the Drafting Committee in the same year.[569] The summary records of the discussion do not explain why this happened, but the explanation is most likely given in the introductory paragraph to the commentary on draft articles 16 and 17 (future articles 19 and 20 of the 1969 Convention) contained in the Commission's 1962 report and included in its final report in 1966:

> "A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement – either adopting or rejecting the reservation – the treaty will be concluded; if not, it will fall to the ground."[570]

432. In a case that clearly illustrates this, the Government of the United States of America suggested, in its observations on the draft adopted on first reading, that the relevant section should be entitled "Reservations to multilateral treaties", to which the Special Rapporteur replied:

> "The articles [in this section] are directed to reservations to multilateral treaties, while the notion of a reservation to a bilateral treaty is legally somewhat meaningless. In law, a reservation to a bilateral treaty appears purely and simply as a counter-offer and, if it is not accepted, there can be no treaty. However, in order to remove the slightest possible risk of misunderstanding, it is proposed that the title to the section should explicitly confine its contents to reservations to multilateral treaties."[571]

While some members of the Commission expressed doubts,[572] the proposal was adopted by the Commission.[573]

433. Thus when it adopted the draft article (17, para. 2) which was the source of current article 20, paragraph 2, the text was contained in part II, section 2, entitled "Reservations to *multilateral* treaties".[574] In fact, all one can conclude from this is that, in the eyes of the Commission, the rules it had adopted were not applicable to reservations to bilateral treaties,

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[567] 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).

[568] 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).

[569] See draft article 18 *bis* proposed by the Drafting Committee (18 June 1962, 663rd meeting, *Yearbook ... 1962*, vol. I, p. 226).

[570] *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; but see para. 432 below).

[571] Sir Humphrey Waldock, fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, p. 45.

[572] See in particular the comments by Mr. Ruda, who said that he preferred the title "'Reservations' because some of the provisions of the 1962 articles 18 to 22 ... could apply both to bilateral and to multilateral treaties" (797th meeting, 8 June 1965, para. 66, *Yearbook ... 1965*, vol. I, p. 154).

[573] 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.

[574] Ibid. and Report of the Commission to the General Assembly on the work of its eighteenth session, *Yearbook ... 1966*, vol. II, p. 202.

and it was pointless to adopt any rules adapted to cover such reservations, since they posed no problem. And yet the Commission also seemed to be acknowledging that reservations could be made to bilateral treaties.

434. However, even this general, subtle conclusion is cast into doubt by 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 Vienna Convention on the Law of Treaties.

435. To begin with, it will be noted that France and Tunisia had submitted a joint amendment which reintroduced an explicit reference to reservations to bilateral treaties and sought to stipulate, in article 17, paragraph 2 (subsequently article 20, paragraph 2, of the Vienna Convention), that

> "A reservation to *a bilateral treaty* or to a restricted multilateral treaty requires acceptance by all the contracting States."[575]

Introducing this amendment, the representative of Tunisia said that the text as drafted by the Commission might lead erroneously to an excessively restrictive interpretation of the article "as allegedly covering only multilateral treaties, to the exclusion of bilateral treaties".[576] The amendment was sent to the Drafting Committee[577] and dropped by the sponsors.[578]

436. However, a Hungarian proposal to delete the reference to multilateral treaties from the title of the section on reservations[579] was sent by the Committee of the Whole to the Drafting Committee,[580] which adopted it[581] and whose decision was recorded at the plenary meeting on 29 April 1969, after Mr. Yasseen, Chairman of the Drafting Committee, explained that the Committee had endeavoured not to prejudge the issue of the possible wording of reservations to bilateral treaties:

> "In the title of Section 2, the Drafting Committee had adopted an amendment by Hungary (A/CONF.39/C.1/L.137) to delete the words 'to multilateral treaties' after the word 'reservations', since the adjective 'multilateral' did not modify the noun

[575] Document A/CONF.39/C.1/L.113; text also reproduced in United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, *Official Records*, Documents of the Conference, United Nations, New York, 1971, "Reports of the Committee of the Whole", p. 239; emphasis added.

[576] United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, *Official Records*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations, New York, 1969, Committee of the Whole, 21st meeting, 10 April 1968, p. 111.

[577] Ibid., 25th meeting, 16 April 1968, p. 136.

[578] 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, Committee of the Whole, 84th meeting, 10 April 1969, p. 213; the representative of France explained that decision by the fact that "it would be for the States concerned to include in their treaties provisions allowing for the special nature of restricted multilateral treaties", although he made no mention of bilateral treaties.

[579] 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).

[580] United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, *Official Records*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations, New York, 1969, Committee of the Whole, 20th meeting, 10 April 1968, p. 106.

[581] Document A/CONF.39/C.1/3 contains the Drafting Committee's decision on the titles of parts, sections and articles of the Convention and the statement by the Chairman of the Committee of the Whole at the Committee's 28th meeting (ibid., 18 April 1968, para. 2, p. 146).

'treaty' in the definition of a reservation given in article 2, paragraph 1 (d); that did not, of course, prejudice the question of reservations to bilateral treaties".[582]

437. However, the day after this decision was taken, the question occasioned an interesting exchange of views between the President of the Conference, Mr. Roberto Ago, and the Chairman of the Drafting Committee:

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

"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."[583]

438. Apparently, the Conference did not return to this question.

439. Commenting on this exchange of views, J. M. Ruda endorsed the statement by Mr. Ago: "This statement was not challenged and the Convention has no provisions regarding reservations to bilateral treaties".[584] Conversely, Renata Szafarz believes that "one may conclude from the amendments tabled at the conference and discussion that: (a) the above description [in article 2, paragraph 1 (d) of the 1969 Vienna Convention] does not exclude the possibility of its application also to bilateral treaties ..."[585] Richard Edwards is more circumspect: basing himself on practice and on the ambiguity of the *travaux*

[582] 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.

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

[584] J. M. Ruda, "Reservations to treaties", *Receuil des cours ... 1975-III*, vol. 146, p. 110.

[585] Renata Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, 1970, p. 294.

préparatoires, he maintains that the latter "actually leave ... the matter ambiguous given the statement of the President of the Vienna Conference. Further examination of the *travaux* does not resolve the matter but instead suggests that action was taken at the Conference, without strenuous objection, but with differing views on whether there would be any impact on bilateral treaties".[586] This was, in fact, the relatively inconclusive conclusion to be drawn from the *travaux préparatoires*.

(ii) The 1986 Convention on treaties concluded by international organizations

440. The question was hardly discussed during the preparation of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Right at the outset the Special Rapporteur, 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."[587]

441. Moreover, while the Commission had initially considered devoting specific provisions to reservations made to treaties concluded between several international organizations, it was thought that "the opportunity for an international organization to formulate a reservation, even at the stage of formal confirmation, would afford the States members of that organization useful safeguards with respect to undertakings signed too hastily".[588] On that occasion the Commission noted:

> "This remark carried so much weight that it was argued that the system of reservations established by article 19 should be extended to the case of treaties between two international organizations. That raised the question whether the mechanism of reservations can operate generally in the case of bilateral treaties. Although the text of the Vienna Convention does not formally preclude this possibility,[589] the Commission's commentaries of 1966 leave no doubt that it regarded reservations to bilateral treaties as going beyond the technical mechanism of reservations and leading to a proposal to reopen negotiations.[590]The Commission did not wish to start a debate on this question, although most of its members considered that the regime of reservations could not be extended to bilateral treaties without distorting the notion of a 'reservation'. Considered as a whole, however, the texts of draft articles 19 and 19 *bis* in fact relate to multilateral treaties."[591]

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[586] Richard W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, 1989, p. 404.

[587] Fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook ... 1975*, vol. II, p. 36; see also *Yearbook ... 1975*, vol. I, 1348th meeting, 10 July 1975, para. 40, p. 238, and *Yearbook ... 1981*, vol. I, 1648th meeting, 11 May 1981, para. 28, p. 29. Paul Reuter took the same position in his book *Introduction au droit des traités* (3rd ed., revised and expanded by Philippe Cahier, Paris, P.U.F., 1995, p. 72): "... *bien que techniquement possible pour un traité bilatéral, la 'réserve' ne constitue pas dans le cadre de ce dernier une figure juridique pratique, ni originale, car elle se ramène à rouvrir après leur clôture les négociations*" ("... while technically possible in the case of bilateral treaties, 'reservations' are neither a pratical nor an original legal construct in this context, for they lead to a reopening of negotiations after the negotiations have ended").

[588] Report of the International Law Commission to the General Assembly on its twenty-ninth session, *Yearbook ... 1977*, vol. II, Part Two, commentary on draft article 19, p. 106.

[589] The commentary refers the reader to the statement by the Chairman of the Drafting Committee of the Vienna Conference, cited in note 583 above.

[590] The commentary refers the reader to the commentary made in 1966, cited in note 575 above.

[591] Report of the Commission to the General Assembly on the work of its twenty-ninth session, *Yearbook ... 1977*, vol. II, Part Two, commentary on draft article 19, p. 106; the discussion referred to in the commentary took place at the 1649th, 1650th and 1651st meetings (held on 12 and 13 May 1981) (*Yearbook ... 1981*, vol. I; see in particular the statements by Mr. Ushakov, p. 38, Mr. Reuter, pp. 40 and 44, Sir Francis Vallat, p. 42, Mr. Riphagen, Mr. Calle y Calle, Mr. Tabibi and Mr. Njenga, pp. 42-43);

442. Ultimately, these articles were not retained in the final draft adopted by the Commission, which went back to the system used in the 1969 Convention.[592] It was this text which, with slight modification, was adopted by the Vienna Conference in 1986,[593] and the question of reservations to bilateral treaties was apparently not taken up again.

443. The Commission thus reverted to the 1969 text (with the necessary additions to deal with the topic under consideration) and to the ambiguities which persist in that text.

(iii) The 1978 Convention on succession of States in respect of treaties

444. It appears that the question of reservations to bilateral treaties in the case of a succession of States was not raised during the discussion in the Commission or at the Vienna Conference of 1978. 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.[594] Indeed, article 20, the only provision of that instrument to deal with reservations, is included in section 2 of part III,[595] which deals with multilateral treaties,[596] 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".

445. 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.

(b) The practice of States with regard to reservations to bilateral treaties

446. If, as the responses to the questionnaire on reservations to treaties indicate, international organizations do not appear to attach "reservations" to their signature or act of formal confirmation of bilateral treaties to which they are parties,[597] this is not the case with States, some of which do not hesitate to make unilateral statements which they call "reservations" in respect of bilateral treaties, while others claim to be opposed to them.

447. A review of State practice in the area of reservations to bilateral treaties is hardly more conclusive than a review of the provisions of the Vienna Conventions in the light of their *travaux préparatoires*: such practice exists, but it is unclear whether it can be interpreted

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see also the statement by the Chairman of the Drafting Committee, Mr. Díaz González, of 16 July 1981 (1692nd meeting), *Yearbook ... 1981*, vol. I, pp. 262-263, and 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: "it was pointed out that there had been examples in practice of reservations to bilateral treaties, that the question was the subject of dispute, and that the Vienna Convention was cautiously worded and took no stand on the matter".

[592] Ibid.

[593] See the first report on the law and practice concerning reservations to treaties, A/CN.4/470, paras. 87-88, pp. 40-41.

[594] See on this subject the observations of Mr. Mikulka during the debate on the Special Rapporteur's first report (18 July 1995, A/CN.4/SR.2406, p. 19).

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

[596] Section 3 deals with bilateral treaties.

[597] The Food and Agriculture Organization of the United Nations (FAO), however, notes that: "When presented with or presenting a 'standard' agreement, amendments are sought and made as needed, rather than making reservations."

as confirming the existence of reservations to bilateral treaties as a specific institution. This is a practice which has been in existence for a long time and is geographically circumscribed.

448. 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".[598] The Senate consequently asked the President to renegotiate the Treaty with the British Government, which accepted the amendment – a word which was actually in use at the time and which remained so for many years.[599]

449. The search for the partner State's consent is, moreover, a constant in United States practice in this area. As the Department of State noted in its instructions to the 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."[600] Such consent is usually given, but this is not always the case.

450. For example, Napoleon accepted a modification made by the Senate to the Treaty of Peace and Amity of 1800 between the United States and France, but then attached his own condition to it, which the Senate accepted.[601] An even more complicated case concerns ratification of the Convention 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.[602]

451. In other cases, the partner of the United States has refused the amendment requested by the Senate, and the treaty has not entered into force. For example, the United Kingdom rejected amendments to an 1803 convention concerning the border between Canada and the United States and an 1824 convention for suppression of the African slave trade which the United States Senate had requested.[603] Another famous rejection of the United States Senate's demands, again by the British Government, involves the treaty of 20 December 1900 dealing with the Panama Canal, which was consequently renegotiated and led to the signing of a new agreement, the Hay-Pauncefote Treaty of 18 November 1901.[604]

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[598] 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 Confederation: in 1778, the United States Congress demanded and obtained renegotiation of the Treaty of Commerce with France of 6 February 1778 (ibid., note 13).

[599] Ibid. Concerning the terminology used in United States domestic practice, see also note 652 below.

[600] Quoted by Green Haywood Hackworth, *Digest of International Law*, vol. V (Washington, D.C., United States Printing Office, 1943), p. 115.

[601] Marjorie Owen, "Reservations to multilateral treaties", *Yale Law Journal*, 1928–1929, pp. 1090-1091, or William W. Bishop, Jr., op. cit., pp. 267-268.

[602] Ibid., p. 269.

[603] Ibid., p. 266.

[604] Green Haywood Hackworth, op. cit., pp. 113-114.

452. Despite these "failures", the practice of reservations by the United States of America to bilateral treaties is firmly established, and the United States often subordinates its ratification of a bilateral treaty to acceptance by the other party of the changes sought by the Senate.[605]

453. In 1929, Marjorie Owen estimated that somewhere between 66 and 87 bilateral treaties had been subject to a "reservation" by the United States after the Senate had imposed a condition on their ratification.[606] More recently, Kevin Kennedy compiled detailed statistics covering the period from 1795 to 1990. These data show that the United States Senate made its advice and consent to ratify conditional for 115 bilateral treaties during that period, a figure that includes interpretative declarations, which account for 15 per cent on average of all bilateral treaties to which the United States has become a party in just under two centuries.[607] 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.[608]

454. In its response to the questionnaire on reservations, the United States of America confirmed that this practice remains important where the country's bilateral treaties are concerned. The United States attached to its response a list of 13 bilateral treaties that were accepted with reservations between 1975 and 1985.[609] Such was the case, for example, of the Treaties concerning the permanent neutrality and operation of the Panama Canal[610] of 7 September 1977,[611] 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.[612]

455. It is striking to note, however, that only the United States gave an affirmative answer to question 1.4 of the questionnaire.[613] All other States that answered this question did so in the negative.[614] Some of them simply said that they do not formulate reservations to bilateral treaties, but others went on to provide some interesting details.

456. Spain, for example, said:

> "*España no ha formulado ninguna reserva a tratados bilaterales, al no estar contemplada esta prática en Derecho español.*"("Spain has not formulated any

[605] See the many examples cited by Green Haywood Hackworth, op. cit., pp. 112-130; Kevin C. Kennedy, "Conditional approval of treaties by the United States Senate", *Loyola of Los Angeles International and Comparative Law Journal*, October 1966, pp. 100-122; or Marjorie M. Whiteman, *Digest of International Law*, vol. 14, pp. 159-164.

[606] Marjorie Owen, op. cit., p. 1091.

[607] Kevin C. Kennedy, op. cit., p. 98.

[608] Ibid., pp. 99-103 and 112-116.

[609] The Special Rapporteur is not sure whether this means that the United States has not formulated any reservations to a bilateral treaty since 1985. Professor Kennedy, who seems to have made a complete inventory in studying this practice (ibid.), offers no examples later than that date.

[610] The Senate resolution of 16 March 1976 stipulates that ratification of the second treaty is subject to two "amendments", two "conditions", four "reservations" and five "understandings"...

[611] Concerning the ratification of these two treaties, see in particular Georges Fischer, "*Le canal de Panama: Passé, présent, a venir*", *Annuaire français de droit international*, 1977, pp. 745-790, or Richard W. Edwards, Jr., op. cit., pp. 378-381.

[612] The Senate resolution of 17 July 1986 requesting these changes called them "amendments".

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

[614] The following States answered in the negative: Bolivia, Canada, Chile, Croatia, Denmark, Finland, France, Germany, the Holy See, India, Israel, Italy, Japan, the Republic of Korea, Kuwait, Mexico, Monaco, Panama, Peru, San Marino, Slovakia, Slovenia, Spain, Sweden and Switzerland.

reservations to bilateral treaties, as no provision is made in Spanish law for this practice.")

This would seem to imply that Spain does not rule out this possibility in international law.

457. Germany proved to be more sceptical on this point, saying

"The Federal Republic of Germany 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.

458. 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 in an endeavour to overcome the difficulties."

459. The fact remains that the response to the questionnaire was far from universal, and examples of "reservations" to bilateral treaties from States other than the United States of American can in fact be found. These include, first of all, the counter-proposals made by some States in response to the reservations of the United States; early examples have been cited above,[615] and there are others. Japan, for example, did not agree to ratification of the Treaty of Friendship, Commerce and Navigation of 2 April 1953 with the United States except by means of a "reciprocal" reservation.[616] Sometimes the initiative seems to have been taken first by the partner country of the United States. Marjorie Owen cites the example of an 1857 treaty with New Granada [Colombia], which proposed "modifications" that were accepted by the United States.[617] Similarly, Portugal, Costa Rica and Romania expressed their desire that extradition treaties concluded with the United States in 1908, 1922 and 1924 respectively should not be applicable if the person to be extradited would be subject to the death penalty in the United States; the United States accepted this condition.[618] In 1926 El Salvador ratified a commercial treaty with the United States subject to a number of reservations, most of which were withdrawn at the request of the latter; it nevertheless accepted two of them, which it considered minor. These are reflected in a protocol issued in connection with the exchange of ratifications, although they are described there as "understandings".[619]

460. It is interesting to note that this practice, even when not employed by the United States, is limited to relations with that country. Yet it is difficult to draw any firm conclusions from this observation. For one thing, the fact that the Special Rapporteur is unable to provide any examples other than the ones relating to the United States may be explained by the exceptional wealth of documentation pertaining to that country, whereas the practice may exist elsewhere and its existence go unknown for want of readily accessible publications or commentary. Conversely, it is quite striking that the constitutional justifications for this

[615] Para. 450.

[616] See Marjorie M. Whiteman, op. cit., p. 161.

[617] Marjorie Owen, op. cit., p. 1093.

[618] Green Haywood Hackworth, op. cit., pp. 126-127 and 129-130.

[619] Ibid., pp. 127-128, or William W. Bishop, Jr., op. cit., p. 269. For another example concerning a "reservation" rejected by the United States, see para. 464 below.

practice cited by the United States can be found elsewhere, and yet they have not led other States in similar constitutional situations to formulate reservations to their bilateral treaties.

461. In the United States, the Senate's power to make the President's ratification of both multilateral and bilateral treaties subject to certain reservations is generally deduced from article II, section 2, of the Constitution, which stipulates: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur ..."[620] In truth, however, all democratic countries, whether theirs is a parliamentary, presidential or assembly form of government, appear to find themselves in this situation, and yet this does not lead them to formulate reservations to the bilateral treaties they conclude.

462. Pierre-Henri Imbert does not share this point of view, believing that a distinction should be made between parliamentary and presidential forms of government. In presidential regimes, he maintains, "*comme par exemple [aux] États-Unis, le rôle des Assemblées élues est évidemment beaucoup plus important. Le Sénat américain, en effet, n'est pas seulement une assemblée législative. Il est aussi un collaborateur indispensable. Lorsqu'il examine un traité, il est tenté d'agir en conseil du gouvernement: la possibilité d'amender lui semble tout naturel*" ("as, for example, in the United States, the role of elected assemblies is obviously much more important. Indeed, the United States Senate is not only a legislative assembly. It is also an indispensable collaborator. When it reviews a treaty, it tends to act as an adviser to the Government: it considers the prospect of amending the treaty to be entirely natural").[621] This may explain the respective "state of mind" of parliamentary and executive authorities in each case, but in strictly legal terms, nothing prevents a parliament whose authorization is a requirement for ratification from conditioning such ratification by formulating a reservation.

463. The three most recent constitutions of the French Republic have made ratification of many categories of treaty by the President of the Republic subject to parliamentary authorization:[622] thus France finds itself, *mutatis mutandis*, in the same situation as the United States of America, and while France may formulate reservations to multilateral treaties at the request of Parliament[623] it appears never to have done so in the case of bilateral treaties.

464. Nevertheless, the case of France reveals at least one instance in which a parliament has sought to make legislative authority to ratify subject to the formulation of a reservation. During the debate on the Washington Agreement of 29 April 1929 for the reimbursement of French debts to the United States (once again, the same country), the Finance Committee of the Chambre des députés proposed a text incorporating reservations into the authorization act (which would have compelled the President of the Republic to formulate them upon depositing the instrument of ratification). This project was abandoned at the request of the

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[620] See, for example, Louis Henkin, "The treaty makers and the law makers: the Niagara reservation", *Columbia Law Review*, 1956, p. 1176; William W. Bishop, Jr., op. cit., pp. 268-269; or Marjorie M. Whiteman, op. cit., p. 138.

[621] Pierre-Henri Imbert, *Les réserves aux traité multilatéraux* (Paris, Pédone, 1979), p. 395.

[622] Article 8 of the Constitutional Act of 16 July 1875, article 27 of the 1946 Constitution and article 53 of the 1958 Constitution; for commentary on this provision, see Alain Pellet in Gérard Conac and François Luchaire, dirs., *La Constitution de la République française* (Paris, Économica, 1987), pp. 1005-1058, notes pp. 1039-1042 and 1047-1051).

[623] See the examples given by Alain Pellet, ibid., pp. 1041 and 1048, or Pierre-Henri Imbert, op. cit., pp. 394-395; in the latter case, the examples also cover Belgian and Italian practice. Imbert notes that in a parliamentary regime, assemblies "may authorize ratification by proposing reservations. However, this option is not exercised frequently, either because of practical difficulties (such as, for example, the need to reopen negotiations), or simply because it is regarded with much suspicion" (p. 394).

Minister for Foreign Affairs and the Minister of Finance for reasons of expediency[624] although not for legal reasons. It should also be noted that, given Parliament's hesitation in this case, the executive power took the initiative of requesting the inclusion of a safeguard clause making the repayment subject to payment of reparations by Germany. This was what the United States would have called a "reservation" in its own practice, and it refused to accept it.[625]

465. From this review, admittedly incomplete, one may draw the following conclusions:

(a) 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);

(b) This practice, which may elicit constitutional objections in some countries, does not do so at the international level, if only because the States concluding treaties with the United States 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;

(c) The legal nature of "reservations" to bilateral treaties.

466. One must nevertheless question whether these "reservations" are true ones – in other words, whether they correspond to the Vienna definition.[626] Once again, it is easiest to hold the different elements of that definition up to the practice of reservations to bilateral treaties. It will then be seen that, despite some obvious points in common with reservations to multilateral treaties, "reservations" to bilateral treaties are different in one key respect: their intended and their actual effects.

467. From practice, as described above, it appears that reservations to bilateral treaties are formulated unilaterally by States (and, a priori, nothing prevents an international organization from doing the same) once the negotiations have ended, and they bear different names that may reflect real differences in domestic law, but not in international law. From these different standpoints, they meet the first three criteria set out in the Vienna definition:

> "'Reservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or [by a State] when making a notification of succession to a treaty ..."

(i) The moment when "reservations" to bilateral treaties are formulated

468. Admittedly, this definition cannot be used as it stands: reservations to bilateral treaties are consistent with this first part of the Vienna definition, but some of the details contained in that definition have no logical application to them. This is particularly evident as regards the moment when a reservation to a bilateral treaty may be made.

469. In the first place, it is inconceivable that a reservation to a bilateral treaty would be formulated at the time of signature. Of course, it may happen that the negotiator only places his signature at the bottom of the treaty "subject to" subsequent confirmation, and he may on that occasion indicate the points on which the State he represents has concerns.

[624] Regarding this episode, see Alexandre-Charles Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, Éditions du CNRS, 1962), vol. I, pp. 284-285.

[625] Charles Rousseau, *Droit international public*, vol. I, *Introduction et sources* (Paris, Pédone, 1970), pp. 122-123.

[626] See para. 82 above.

Technically speaking, however, this does not correspond to a reservation but to an institution apart from the law of treaties: that of signature *ad referendum*, by which the signatory accepts the text of a treaty only on condition that his signature be confirmed by the appropriate authority; if this is done, the treaty is considered to have been signed from the outset;[627] if it is not done, the treaty becomes void or is renegotiated.

470. Secondly, it goes without saying that it is impossible to accede to a bilateral treaty. Although the Vienna Conventions do not define it[628] accession may be considered to be the act by which a State or an international organization that has not participated in the negotiation of the treaty, or in any case signed its text, expresses its final consent to be bound. This is only conceivable in the case of multilateral treaties; bilateral treaties cannot be negotiated and signed by a single State!

471. Thirdly, and lastly, article 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties does not contemplate the possibility of a newly independent State formulating a reservation when notifying a succession except in the case of multilateral treaties; however part III, section 3 of that Convention makes no such provision in the case of bilateral treaties.[629] This is normal, since the principle here is one of rupture: the treaty remains in force only if the two States expressly or implicitly so agree.[630] Thus it is highly questionable whether a newly independent State can formulate a "reservation" to a bilateral treaty on such an occasion: the unilateral statement that it might make to exclude or modify the legal effect of certain provisions of the treaty would have an effect only if the other party accepted it – in other words, if the treaty was ultimately amended.

472. This last observation, however, does not apply to any "reservations" that a predecessor State may formulate upon notification of its succession. This is the fundamental character of all "reservations" to bilateral treaties, regardless of when they are formulated, and which distinguishes them from reservations to multilateral treaties as they are defined by the three Vienna Conventions.

(ii) "Reservations" to bilateral treaties do not purport "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to their author

473. The definition of reservations set out in the Vienna Conventions was carefully weighed; each word is significant and, notwithstanding the criticisms that have been levelled at it, it appropriately describes the phenomenon of reservations, even if it leaves some uncertainties which the Guide to Practice seeks to dispel.

474. One of the fundamental elements of this definition is the teleological element, the objective pursued by the State or international organization making the reservation. By its unilateral statement, the author "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization". This wording is not entirely applicable to reservations to bilateral treaties, or at least if it is, it is misleading, for it overlooks one of their principle characteristics.

475. 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

[627] See article 12, paragraph 2 (b), of the 1969 and 1986 Vienna Conventions.

[628] The "definition" set out in article 2, paragraph 1 (b), of the 1969 Convention and article 2, paragraph 1 (b) *ter*, of the 1986 Convention is entirely tautological and useless.

[629] See para. 444 above.

[630] See articles 24 and 28.

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.

476. It is important to state this clearly: a reservation to a multilateral treaty produces effects only if it is accepted, in one way or another, expressly or implicitly, by at least one of the other contracting States or international organizations.[631] The same is true for a reservation to a bilateral treaty: the co-contracting State or international organization must accept the "reservation", or else the treaty will not enter into force. Thus the difference does not have to do with the need for acceptance, which is present in both cases, in order for the reservation to produce its effects, but with the consequences of acceptance:

(a) In the case of a multilateral treaty, an objection does not prevent the instrument from entering into force,[632] even, at times, between the objecting State or international organization and the author of the reservation,[633] and its provisions remain intact;

(b) In the case of a bilateral treaty, the absence of acceptance by the co-contracting State or international organization prevents the entry into force of the treaty; acceptance involves its modification.

(iii) "Reservations" to bilateral treaties are proposals to amend

477. "Reservations" to bilateral treaties, then, do not produce an effect if they are not accepted, and it is hardly conceivable that this fundamental point should not be mentioned in their definition: while a reservation to a multilateral treaty paralyses, to the extent indicated by its author, the treaty's legal effect, a reservation to a bilateral treaty is, in reality, nothing more than a proposal to amend the treaty or an offer to renegotiate it.

478. This analysis corresponds to the prevailing views in doctrine.

479. Some authors have concluded that a reservation to a bilateral treaty is purely and simply inconceivable. According to Charles Rousseau,

> "*[p]our les traités bilateraux ... on se trouve en présence d'une véritable convention synallagmatique mettant à la charge des parties contractantes des obligations précises et dans laquelle la prestation de l'un des signataires forme la contrepartie naturelle de la prestation de l'autre co-contractant. Dès lors une ratification assortie de réserves est inconcevable, car elle ne peut s'interpréter ... que comme un refus de ratifier accompagné d'une nouvelle offre de négocier. Elle n'a de valeur que si l'autre co-contractant y donne son acceptation expresse ...*"("bilateral treaties ... are true synallagmatic conventions which impose specific obligations on the contracting parties and in which the signing by one of the parties is the natural complement to the signing

[631] 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).

[632] Subject to the separate question of determining whether an objection can have an effect on the number of States required for entry into force of the treaty; this problem will be considered in the report on the effects of reservations.

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

by the other co-contractor.[634] Consequently, a ratification with reservations attached is inconceivable, since it can only be interpreted ... as a refusal to ratify accompanied by a new offer to negotiate. It has no value unless the other co-contractor expressly accepts it ...").[635]

480. The need for acceptance of any "reservation" to a bilateral treaty is virtually unanimously endorsed in doctrine and consistent with the teachings of practice. Marjorie Owen, after citing a great many examples of such reservations and the results thereof, concluded in 1929: "From these examples, it seems reasonably clear that neither party has doubted the right of the other to introduce reservations at the time of ratification: the only restriction upon this liberty is that the other signatory shall consent to such reservations".[636]

481. This is also consistent with the position taken back in 1919 by Hunter Miller, long an officer with the United States Department of State and Legal Adviser to the United States delegation to the 1919 Paris Conference: "One conclusion supported by *all* of the foregoing precedents is that the declaration, whether in the nature of an explanation, an understanding, an interpretation, or reservation of any kind, *must be agreed to by the other Party to the treaty*. In default of such acceptance, the treaty fails ... Accordingly, in a treaty between two Powers only, the difference between a reservation of any nature and an amendment, is purely one of form. In an agreement between two Powers there can be only *one* contract. The whole contract is to be sought in all the papers, and whether an explanation or interpretation or any other kind of a declaration relating to the terms of the treaty is found in the treaty as signed or in the instruments of ratification is wholly immaterial. There are only two contracting Parties and each has contracted only with the other and has accepted an identic instrument of ratification from the other, which together with the signed treaty constitute one agreement."[637]

482. This is also the view of Bishop (who quotes Miller):[638] "Bilateral treaties invited the analogy of ordinary bilateral contract doctrines of offer and acceptance, with a reservation being treated as a counter-offer which must be accepted by the other party if it were to be any contract between the parties".[639]

483. This idea of a "counter-offer"[640] does in fact highlight the contractual nature of the phenomenon of reservations to bilateral treaties: whereas reservations to multilateral treaties do not lend themselves to a contractual approach,[641] reservations to bilateral treaties demand

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[634] Georges Scelle concedes that a bilateral treaty may have the character of a "treaty-law", which leads him to acknowledge the possibility of reservations to such treaties, although he excludes them in the case of "treaty-contracts" (*Précis de droit des gens (principes et systématiques)*, vol. II (Paris, Sirey, 1934; reissued in 1984 by CNRS), p. 474).

[635] Charles Rousseau, op. cit., p. 122; similarly, Alfredo Maresca, *Il diritto dei tratatti – La Convenzione codificatrice di Vienna del 23 Maggio 1969* (Milan, Giuffrè, 1971), pp. 281-282.

[636] Marjorie Owen, op. cit., pp. 1093-1094.

[637] David Hunter Miller, *Reservations to Treaties: The Effect and the Procedure in Regard Thereto* (Washington, D.C., 1919), pp. 76-77.

[638] William W. Bishop, Jr., op. cit. p. 271, note 14.

[639] Ibid., p. 267; see also p. 269.

[640] Marjorie Owen (op. cit., 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*, vol. 1 (Washington, D.C., 14 May 1986), para. 113, p. 182; see also the position of Mr. Ago and Mr. Yasseen, para. 437 above, and that of Paul Reuter, note 509 above.

[641] See paras. 123-129 above.

such an approach. The "reservation" only has meaning, only produces an effect, only exists if the "counter-proposal" which it constitutes is accepted by the other State.[642]

484. Thus, as is clear from practice, a "reservation" to a bilateral treaty is actually a request to renegotiate the treaty.[643] If this request is refused, either the State that made the proposal abandons it and the treaty enters into force as signed, or else the treaty itself is simply abandoned. If, on the other hand, the other State agrees to the request, it can do so quite simply – and the treaty enters into force with the modification desired by the State that formulated the proposal – or it can in turn put forward a "counter-counter-proposal",[644] and the final text will be the one produced by the new negotiations between the two States.

485. There has been some question as to whether acceptance of the new offer constituted by the "reservation" must be express or may be tacit.[645] In practice, it seems that it is always express;[646] the United States in particular includes both its own reservations and their acceptance by the other State in its instruments of ratification.[647] This is also consistent with a theoretical requirement: acceptance of a "reservation" to a bilateral treaty ultimately leads in reality to amendment of the treaty; otherwise a State cannot be presumed to be bound by it.

486. Here, too, the problem is stated differently for reservations to multilateral treaties, which do not entail modification of the treaty; the treaty's application is simply "neutralized" in the relations between the author of the reservation and the party or parties that accept it. In the case of "reservations" to a bilateral treaty, the treaty itself is modified to the advantage of the author of the reservation and to the detriment of the other party. Here one does not go back to general international law or to international law "minus the treaty";[648] rather, new *treaty* obligations[649] are created. A treaty cannot be concluded implicitly, which means that the rules set out in paragraphs 2 and 5 of article 20 of the 1969 and 1986 Vienna Conventions cannot and must not be extended to bilateral treaties.

487. In fact, saying that acceptance of a "reservation" to a bilateral treaty is equivalent to amending the treaty does not make the reservation an amendment: it is simply a unilateral proposal to amend, prior to the treaty's entry into force, while the amendment itself is conventional in nature, is the result of an agreement between the parties[650] and is incorporated into the negotiated text, even if it can be contained in one or more separate instruments.

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642 In support of this contractual analysis, apart from William W. Bishop, Jr. (see note 640 above), see in particular Louis Henkin, op. cit., pp. 1164-1169, or Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T. M. C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. V, 1988, p. 23.

643 This is in fact apparent from the Commission's commentary, cited in para. 431 above. See also note 561 above and the replies of Germany, Italy and the United Kingdom to the questionnaire on reservations to treaties, cited in paras. 457 and 458 above. See also Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th Edition, vol. I, *Peace* (London, Longman), p. 1242, or Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), p. 54.

644 See para. 450 above.

645 See Frank Horn, op. cit., pp. 4 and 126.

646 See Marjorie M. Whiteman, op. cit., p. 138.

647 See, however, the somewhat strange case cited by Marjorie Owen (op. cit., p. 1093) of the German-American Treaty on Commerce of 19 March 1925, to which the United States Senate made "reservations" that were accepted by Germany "notwithstanding serious fundamental objections".

648 See para. 224 above.

649 See the draft article proposed by Sir Humphrey Waldock in 1962, note 569 above.

650 See article 39 of the 1969 and 1986 Conventions.

488. At the international level, the distinction between "reservations" and "amendments" in the domestic practice of the United States is devoid of meaning: regardless of the term used or of the fact that Congress imposes conditions under different names, they are always just offers to amend the treaty.

489. According to Richard Edwards,"[r]eservations and treaty amendments are not the same things. An amendment may lessen or expand obligations under a treaty, while a reservation normally seeks to reduce the burdens imposed by a treaty on the reserving party".[651] While this may be the case domestically, it is certainly not the case at the international level: in both cases, the Senate makes its consent to modify the treaty conditional. The same holds true for all conditions it places thereon, with the exception of interpretative declarations, which raise problems that differ in some aspects.[652]

490. 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."[653]

491. Thus, while this is not a conclusive argument, it is interesting to note that neither the American members of the International Law Commission during the preparation of the Commission's draft articles on the law of treaties, nor the United States delegates to the Vienna Conferences which adopted the 1969, 1978 and 1986 Conventions stressed, or apparently even mentioned, "reservations" to bilateral treaties during the debate on reservations. This would seem to reflect their awareness that this institution, the permissibility of which under international law can hardly be contested,[654] was based on a different logic and could not be assimilated to what are called "reservations" in international law. These texts are in fact "conditional ratifications"; they also exist in respect of multilateral treaties,[655] which are governed by a legal regime that is very different from the regime of reservations in the sense of the Vienna Conventions on the law of treaties.

492. This, then, is the conclusion which the Special Rapporteur proposes that the Commission draw from the foregoing analysis:

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[651] Richard W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, 1989, p. 380.

[652] See section 3 below. 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

(Kevin C. Kennedy, op. cit., p. 100).

[653] Quoted by Green Haywood Hackworth, op. cit., p. 112; along the same lines, see the position of David Hunter Miller, para. 481 above.

[654] See para. 465 above.

[655] See para. 168 above.

(a) It may happen that a State or an international organization formulates, after signing a bilateral treaty but prior to the treaty's entry into force, a unilateral statement by which it purports to obtain from the other contracting party a modification of the provisions of the treaty, to which it subordinates the expression of its consent to be bound;

(b) Whatever it is called, and even if it is called a "reservation", such a statement does not constitute a reservation in the sense of the Vienna Conventions or, more broadly, the law of treaties; it is thus not subject to the legal regime applicable to reservations to treaties;

(c) The statement constitutes an offer to renegotiate the treaty and, if this offer is accepted by the other party, it becomes an amendment to the treaty, whose new text is binding on both parties once they have expressed their final consent to be bound in accordance with the modalities stipulated in the law of treaties.

493. In this spirit, the Commission might wish to adopt the following draft guideline:

Guide to practice:

"*1.1.9 A unilateral statement formulated by a State or by an international organization after signing a bilateral treaty but prior to its entry into force, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it subordinates the expression of its final consent to be bound by the treaty, does not constitute a reservation, however phrased or named.*

"*The express acceptance of the contents of this statement by the other party results in an amendment to the treaty whose new text is binding on both parties once they have expressed their final consent to be bound.*"

2. Interpretative declarations made in respect of bilateral treaties

494. 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[656] and are quite cautious insofar as the rules applicable to bilateral treaties are concerned.[657]

495. In fact, such interpretative declarations do not pose any real problems vis-à-vis those made in respect of multilateral treaties, although it seems that they are invariably conditional.[658] This is the only outstanding feature that can be observed from a review of relatively extensive practice.

(a) The practice of interpretative declarations made in respect of bilateral treaties

496. Apparently more recent than the practice of reservations to bilateral treaties, the practice of interpretative declarations to such treaties is less geographically limited and does not seem to give rise to objections where principles are concerned.

497. The oldest example cited by Kevin Kennedy, author of an exhaustive survey of conditional approvals of treaties (in general) by the United States Senate, dates back to the "understandings" which the United States set as a condition for its acceptance of the Treaty of Peace, Amity, Commerce and Navigation with Korea in 1883.[659] Earlier examples can

[656] See paras. 349-356 above.

[657] See note 564 above.

[658] See paras. 314-355 above and draft guideline 1.2.4.

[659] Kevin C. Kennedy, op. cit., p. 118.

be found: William Bishop notes a declaration attached by Spain to its instrument of ratification of the Treaty of 22 February 1819 ceding Florida,[660] and Charles Rousseau mentions "the approval [*sic*] by the [French] Parliament of the Franco-Tunisian Convention of 8 June 1878, voted with an interpretative reservation to article 2, paragraph 3, concerning the regulation of loans issued by Tunisia".[661]

498. The situation at present, as reflected in the replies to the questionnaires on reservations, is as follows:

(a) Of 22 States that answered question 3.3,[662] four said that they had formulated interpretative declarations in respect of bilateral treaties;

(b) 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".[663]

499. These results may seem "meagre"; they are significant nevertheless:

(a) While only the United States claimed to make "reservations" to bilateral treaties,[664] it is joined here by Panama, Slovakia and the United Kingdom[665] and by one international organization;[666]

(b) While several States criticized the very principle of "reservations" to bilateral treaties,[667] none of them showed any hesitation concerning the formulation of interpretative declarations in respect of such treaties;

(c) Furthermore, the replies to the questionnaires, interesting though they might be, provide an incomplete picture of the situation: many States and international organizations, unfortunately, have not yet replied, and the information requested relates only to the past 20 years.

500. It thus appears that the practice of interpretative declarations to bilateral treaties is well established and fairly general. Here again, the United States of America is one of the

[660] William W. Bishop, Jr., op. cit., p. 316.

[661] Charles Rousseau, op. cit., p. 120.

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

[663] See the letter of the Director-General of ILO to the Minister of Public Service, Labour and Social Welfare of Zimbabwe which accompanied signature of the Agreement of 8 February 1990 concerning the subregional office in Harare: "This letter is to confirm the following understandings of the International Labour Organization: that: 'employed in the service of the Harare Office' [in article 4, paragraph (e), of the Agreement] is understood within the meaning of Article 4, paragraph 1, and that 'the right to transfer out of the Republic of Zimbabwe, without any restriction or limitation, provided that the official concerned can show good cause for their lawful possession of such funds' means 'the right to transfer the same out of the Republic of Zimbabwe, without any restriction or limitation, provided that the officials concerned can show good cause for the lawful possession thereof;'. The Office further understands the word 'telephone' in Article 9, paragraph 1, of the Agreement, to mean 'telecommunications'" (*Official Bulletin*, 1994, Series A, No. 3, p. 254).

[664] See para. 455 above.

[665] However, the example cited by the United Kingdom concerns its own interpretation of the understandings in the United States instrument of ratification of the Treaty concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters; see paras. 500 and 505 below.

[666] 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."

[667] See paras. 457-458 above.

"main sources" of the practice.[668] In just the period covered by that country's response to the questionnaire (1975–1995), it mentions 28 bilateral treaties to which it attached interpretative declarations upon expressing its consent to be bound. These include:

(a) The two aforementioned treaties of 7 September 1977 concerning the Panama Canal,[669] which, at the request of the United States Senate, were both made subject to "reservations" (called "amendments", "conditions" and "reservations") and interpretations ("understandings") that were included in the instruments of ratification together with an interpretative declaration by Panama;[670]

(b) The Agreement of 18 November 1977 on the implementation of International Atomic Energy Agency (IAEA) safeguards, which constitutes a bilateral treaty between a State and an international organization;

(c) The Conventions with the Federal Republic of Germany of 3 December 1980 and 29 August 1989, on fiscal matters, which gave rise, in the case of the former, to a "memorandum of understanding" followed by a request for explanations by Germany regarding the scope of the understanding to which the Senate had subordinated its consent and, in the case of the second, an exchange of interpretative notes, apparently originated by Germany;

(d) The Treaty on mutual legal assistance in criminal matters with Canada of 18 March 1985, to which the United States attached an interpretative declaration; Canada stated that it considered that the declaration "does not in any way alter the obligations of the United States under this Treaty";[671]

(e) The Treaty concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters of 3 July 1986;[672]

(f) The Convention of 8 October 1993 with Slovakia, on avoidance of double taxation and prevention of tax evasion, which was also the subject of an "understanding" on the part of the Senate. Slovakia noted that the understanding "was prompted by an inadvertent error in the drafting of the English-language text of the treaty and has the effect of correcting the English-language text to bring it into conformity with the Slovak-language text".

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

502. United States practice alone is particularly extensive and clear, and goes well beyond the period covered by the country's reply to the questionnaires on reservations;[673] moreover,

[668] See, however, the observation in para. 460 above concerning reservations to bilateral treaties, which is applicable to interpretative declarations.

[669] See para. 455 above.

[670] In its reply to the questionnaire, Panama did not mention that example, but the Protocol of the exchange of instruments of ratification states: "It is also the understanding of the Republic of Panama ..."; see also para. 502 below.

[671] Similarly, see the reaction of Thailand to the United States "understandings" concerning the Treaty on mutual assistance in criminal matters and the reaction of Mexico to the statement by the United States concerning the Treaty on cooperation for mutual legal assistance of 9 December 1987.

[672] See the reaction of the United Kingdom to the interpretative declaration made by the United States of America, para. 505 below.

[673] See in particular the many examples cited ibid., pp. 116-124, or by Marjorie M. Whiteman, op. cit., pp. 164-170.

far from diminishing, as seems to be the case with "reservations",[674] this practice appears to be becoming entrenched and growing stronger.[675] Secondly, and without prejudice to the ambiguous position of the United Kingdom quoted below,[676] the partners of the United States have occasionally contested that country's interpretations, but not its right to formulate them. Thirdly, these States have occasionally made their own interpretative declarations, concerning the very provisions interpreted by the United States and others as well (as, for example, Panama's "reservations" to the aforementioned 1977 Panama Canal Treaty, which the United States Government considered as being "in fact understandings that did not change the United States interpretation").[677] Lastly, even though it happens less frequently, a sizeable number of States besides the United States of America have taken the initiative of attaching interpretative declarations to the expression of their consent to be bound, in treaties with the United States and with other States.

503. A list of examples, while admittedly not exhaustive, would include:

(a) Interpretative declarations made by Spain and France to treaties going back to 1819 and 1878, respectively;[678]

(b) The "explanations" which the Dominican Republic attached at the request of its Parliament to its approval of a customs convention with the United States in 1907;[679]

(c) An exchange of notes (done at signature) between the United States of America and the United Kingdom at the initiative of the latter, interpreting the 1908 Convention for arbitration between the two countries;[680]

(d) The "interpretative preamble" adopted by the German Parliament in respect of the Treaty concerning Franco-German cooperation of 22 January 1963;[681]

(e) The interpretative declarations made by the Panamanian Parliament, conditioning the country's ratification of two treaties, one concluded with Colombia in 1979 and the other with the United States of America in 1982, which are cited in Panama's reply to the questionnaire on reservations;

(f) Slovakia's interpretative declaration, likewise mentioned in its reply, which it intended to attach to its instrument of ratification of the Treaty on good-neighbourliness and friendly cooperation concluded with Hungary on 19 March 1995.

(b) Features of interpretative declarations made in respect of bilateral treaties

504. The first conclusion that can be drawn from this brief outline of State practice with regard to interpretative declarations is that it is not contested in principle.

505. The United Kingdom did, however, note, with regard to the declarations which the United States of America included with its instrument of ratification of the 1986 Treaty concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters:[682]

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[674] See para. 454 above.

[675] See note 653 above.

[676] See para. 505 below.

[677] The American Law Institute, *Restatement of the Law Third*, vol. 1 (Washington, D.C., 14 May 1986), para. 113, p. 189.

[678] See para. 497 above.

[679] Quoted by Green Haywood Hackworth, op. cit., pp. 124-125.

[680] Ibid., pp. 151-152.

[681] Charles Rousseau, op. cit., pp. 875-878.

[682] See para. 500 above.

"With reference to the understandings included in the United States instrument of ratification, Her Majesty's Government wish formally to endorse the remarks by the leader of the British delegation at the discussions in Washington on 31 October–3 November 1989. They regard it as unacceptable for one party to seek to introduce new understandings after negotiation and signature of a bilateral treaty.

"So far as this particular case is concerned, Her Majesty's Government, while reserving entirely their rights under the treaty, note that during the debate in the Senate on 24 October 1989, an 'understanding' was described as 'an interpretive statement for the purpose of clarifying or elaborating rather than changing an obligation under the agreement'. Her Majesty's Government do not accept that unilateral 'understandings' are capable of modifying the terms of a treaty and have proceeded with ratification on the assumption that the United States will not seek to assert that the present 'understandings' modify the obligations of the United States under the treaty.

"Her Majesty's Government reserve the right to revert separately on the general issue of the attachment of understandings and reservations to bilateral and multilateral treaties."

506. Within this ambiguous statement of position one can read a condemnation of interpretative declarations made after a bilateral treaty is signed. However, the statement must also be interpreted in the light of the replies from the United Kingdom to the questionnaire on reservations, which indicate that while the country categorically rejects the possibility of making reservations to bilateral treaties,[683] it answered "yes" to the question on interpretative declarations.[684] It would therefore seem that what the Government of the United Kingdom is rejecting here is the possibility of modifying a bilateral treaty under the guise of interpretation (by means of "understandings" which are really "reservations").

507. This does not pose any particular problem, but here one again encounters the general problem of distinguishing between reservations and interpretative declarations considered earlier;[685] however, the fact that a treaty is bilateral in nature in no way modifies the conclusions reached in that exercise. In particular, there is no doubt that a unilateral statement presented as an interpretative declaration must be considered to be a "reservation"[686] if it actually results in a modification of one or more provisions of the treaty.[687]

508. Speaking more broadly, whereas the word "reservation" certainly does not have the same meaning when it is applied to a unilateral statement made in respect of a bilateral treaty as it does when it concerns a multilateral instrument, the same is not true in the case of interpretative declarations: in both cases, they are unilateral statements, however named or phrased, made "by a State or by an international organization, whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty

[683] See paras. 457 and 458 above.

[684] See para. 499 above.

[685] See section 1, Paragraph 3, particularly paras. 257-266 and 282-301.

[686] "Reservation" in a very specific sense, since bilateral treaties are involved; the term should really be "proposal to amend" (see paras. 477-493 above).

[687] Cf. the "understanding" in respect of the Treaty of 9 January 1909 with Panama in which the United States Senate refused to submit to arbitration questions affecting the country's vital interests when the Treaty made no provision for such an exception. The Solicitor of the State Department "expressed the view that the resolution was in effect an amendment of the treaty" (Green Haywood Hackworth, op. cit., p. 116).

or to certain of its provisions".[688] Thus, one may say that the draft guidelines concerning the definition of interpretative declarations[689] are applicable to declarations which interpret bilateral as well as multilateral treaties.

509. Since the definition is the same, the consequences are also identical. More specifically:

(a) The nature of a unilateral statement made in respect of a bilateral treaty depends not on its phrasing or name, but on its effect;[690]

(b) In the event that it is difficult to determine this nature, the same rules are applicable;[691]

(c) A general statement of policy made by a State or an international organization when signing or expressing its final consent to be bound by a bilateral treaty does not constitute an interpretative declaration;[692]

(d) Likewise, an "informative declaration", whereby the author provides the other party with indications of the manner in which it intends to implement the treaty domestically is not an interpretative declaration.[693]

510. Declarations of this type are in fact quite common, at least in the practice of the United States of America, where bilateral treaties are concerned. The many examples include:

(a) The declaration by the United States Senate regarding the commercial treaty signed with Korea on 22 May 1882;[694]

(b) The United States "understandings" with regard to the treaties on friendly relations concluded in 1921 with Austria, Germany and Hungary;[695]

(c) The famous "Niagara reservation"[696] which the United States formulated in respect of the 1950 Treaty on the Niagara River:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress."[697]

511. In this last case, Canada said that it accepted "the above-mentioned reservation because its provisions relate only to the internal application of the treaty within the United States

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[688] Draft guideline 1.2.

[689] In particular, draft guideline 1.2, which defines interpretative declarations.

[690] See draft guideline 1.2.2.

[691] See draft guideline 1.3.1.

[692] See draft guideline 1.2.5. The declaration adopted on 26 March 1996 by the Slovak National Council for attachment to Slovakia's instrument of ratification of the 1995 Treaty with Hungary (see para. 503 above) is partly of this nature.

[693] See draft guideline 1.2.6.

[694] William W. Bishop, Jr., op. cit., p. 312.

[695] Ibid., pp. 313-314, and Green Haywood Hackworth, op. cit., pp. 120-121. Concerning the treaty with Austria, the United States Secretary of State told the Austrian Chancellor "The terms of the Resolution with respect to participation of the United States in any agency or commission under the treaty of course relate merely to matters of domestic policy and procedures which are of no concern to the Austrian Government" (ibid., p. 120).

[696] See para. 384 above and the doctrinal commentary quoted in note 522.

[697] Quoted by William W. Bishop, Jr., op. cit., p. 318.

and do not affect Canada's rights or obligations under the treaty".[698] And, in the wake of an internal dispute in the United States, the District of Columbia Court of Appeals held that the problem was a purely domestic one which did not affect the treaty relations between the parties:

> "The reservation therefore made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent. It was not a counter-offer requiring Canadian acceptance before the treaty could become effective. That Canada did 'accept' the reservation does not change its character. The Canadian acceptance, moreover, was not so much an acceptance as a disclaimer of interest."[699]

512. In this case, the uselessness of the other party's acceptance of a declaration is explained by the fact that the statement was not really a reservation or an interpretative declaration.[700] One may wonder, however, what happens when the statement is a genuine interpretative declaration.

513. Here again, the main source of information available to the Special Rapporteur relates to the practice of the United States of America, which tends to indicate that "in the case of a bilateral treaty it is the invariable practice, prior to the making of arrangements for the exchange of ratifications and sometimes even prior to ratification of the treaty, for the Government making the statement or declaration to notify the other Government thereof in order that the latter may have an opportunity to accept, reject, or otherwise express its views with respect thereto."[701]

514. And once the declaration has been approved, it becomes an integral 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 is 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".[702]

515. It is difficult to argue with this reasoning, but it leads to two complementary questions:

(a) Must interpretative declarations which are made in respect of bilateral treaties, just like "reservations" to such treaties,[703] necessarily be accepted by the other party?

(b) If the answer to the first question is no, does the existence of an acceptance modify the legal nature of the interpretative declaration?

516. The answer to the first question is difficult. In practice, it seems that all interpretative declarations made by States prior to ratification of a bilateral treaty[704] have been accepted

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[698] Ibid., p. 319. Compare this with the reaction cited earlier (para. 505) of the United Kingdom to the United States declaration concerning the 1986 Treaty.

[699] *Power Authority of the State of New York v. Federal Power Commission*, 247 F. (2d) 538 (1957), decision drafted by Circuit Judge Bazelon; quoted ibid., p. 321.

[700] See paras. 384-385 above.

[701] Marjorie M. Whiteman, op. cit., pp. 188-189.

[702] Judgement of the United States Supreme Court concerning the Spanish declaration made in respect of the Treaty of 22 February 1819 (cited in para. 497 above), *Doe v. Braden*, 16 How. 635, 656 (US 1853), cited by William W. Bishop, Jr., op. cit., p. 316.

[703] See paras. 473-496 above.

[704] For examples of interpretative declarations made when signing a bilateral treaty, see Green Haywood Hackworth, op. cit., pp. 150-151, or note 681 above.

by the other contracting State.[705] However, this does not imply that their acceptance is required.[706]

517. 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[707] 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[708] would seem to be easily transposed to the case of bilateral treaties: everything depends on the author's intention. It may be the condition *sine qua non* of the author's consent to the treaty, in which case it is a conditional interpretative declaration, identical in nature to those made in respect of multilateral treaties and consistent with the definition proposed in draft guideline 1.2.4. But it may also be simply intended to inform the partner of the meaning and scope which the author attributes to the provisions of the treaty without, however, seeking to impose that interpretation on him, and in this case it is a "simple interpretative declaration", which, like those made in respect of multilateral treaties,[709] may actually be made at any time.

518. The fact remains that, when an interpretative declaration made in respect of a bilateral treaty is accepted by the other party,[710] 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".[711] Yet in the case of a bilateral treaty this power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of a treaty, regardless of its form,[712] exactly as "reservations" to bilateral treaties do once they have been accepted by the co-contracting State or international organization.[713] 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.[714] And this analysis is consistent with that of the United States Supreme Court in the *Doe* case.[715]

519. While he 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

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[705] See, however, the "serious fundamental objections" of Germany to the "reservations and understandings" of the United States of America concerning the Treaty on Commerce of 19 March 1925, mentioned in note 548 above.

[706] And the documentation available to the Special Rapporteur may well be incomplete.

[707] ILO did not specify whether or not that was the case with its interpretation (see note 564 above) of the 1990 Agreement with Zimbabwe (see note 564 above).

[708] See paras. 314-335 above.

[709] See paras. 336-348 above.

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

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

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

[713] See para. 486 above and draft guideline 1.1.9, second subparagraph.

[714] 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".

[715] See para. 514 above.

regime, of reservations and interpretative declarations,[716] the Special Rapporteur suggests to the Commission that it be mentioned in a draft guideline. He does not in fact intend to return to the highly specific question of "reservations" and interpretative declarations in respect of bilateral treaties. If the Commission endorses this intention, there may not be another occasion on which to include such a reference.[717]

520. Bearing this in mind, it is suggested that the Commission adopt the following draft guideline:

"*Guide to practice:*

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

521. In the meantime, it would seem unnecessary to adopt specific draft guidelines on interpretative declarations in respect of bilateral treaties, since these are governed by the same rules and the same criteria as interpretative declarations in respect of multilateral treaties.[718] The only exceptions are draft guidelines 1.2.1, on the joint formulation of interpretative declarations, and 1.2.3, on the formulation of an interpretative declaration when reservations are prohibited by the treaty, rules which cannot, obviously, be transposed to the case of bilateral treaties. It would therefore seem to suffice to state in the Guide to Practice:

"*Guide to practice:*

"*1.2.7 Guidelines 1.2, 1.2.2, 1.2.4, 1.2.5 and 1.2.6 are applicable to unilateral statements made in respect of bilateral treaties.*"

Section 3. Alternatives to reservations (postponed)

522. In view of the length of the present report, the Special Rapporteur finds himself compelled to postpone this section of his fourth report. In it he proposes to present a brief account of the various procedures other than reservations by which States and international organizations may achieve the same objective as those pursued when making reservations, namely exclusion or modification of the legal effect of certain provisions of a treaty in their application to one or more of the parties to the treaty.

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[716] See draft guideline 1.4.

[717] If necessary, the draft guideline could later be moved to a part of the Guide to Practice that seemed more appropriate.

[718] See in particular paras. 508, 509 and 517 above.