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Fifth report on reservations to treaties

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Addendum

Contents

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II. Alternatives to reservations and interpretative declarations

66. In his first report, the Special Rapporteur mentioned a number of problems resulting from several specific treaty approaches which appeared to be rival institutions of reservations. Like the latter, these approaches are "aimed at modifying participation in treaties, but, like them, [put] at risk the universality of the conventions in question (additional protocols; bilateralization; selective acceptance of certain provisions, etc.)."[160]

67. As indicated in the second report, it seems useful to link the consideration of the definition of reservations to that of other procedures, which, while not constituting reservations, are, like them, "designed to and do enable States to modify obligations under treaties to which they are parties; this is a question of alternatives to reservations, and recourse to such procedures may likely make it possible, in specific cases, to overcome some problems linked to reservations."[161]

68. Such consideration, to which this chapter is devoted, has two aims.[162] In the first place, such procedures can be a source of inspiration for the progressive development of the law applicable to reservations. Second — and it is for this reason that their description should be linked to the definition of reservations — some of these procedures are so close to reservations that the question arises whether they should not simply be treated as equivalent. Draft guidelines intended to facilitate distinctions between such procedures and reservations in the strict sense round out the discussion; it is proposed to include them in chapter I of the Guide to Practice, on "Definitions", which should thus be complete.

69. The same problem arises, *mutatis mutandis*, with regard to interpretative declarations.

70. For the sake of convenience, it is probably simplest, first, to present a brief overview of the many approaches designed to modify obligations resulting from a treaty or enabling its interpretation to be clarified (part A) and, second, to compare reservations, as they are defined in the draft guidelines already adopted in the Guide to Practice, more specifically with these alternative procedures (part B).

A. Different procedures for modifying or interpreting treaty obligations

71. Neither reservations nor interpretative declarations, as defined in sections 1.1 and 1.2, respectively, of the Guide to Practice, are the only approaches available to the parties for modifying the effects of the provisions of a treaty (in the first case) and clarifying its meaning (in the second case).

1. Different procedures for modifying the effects of a treaty

72. In the first judgement which it rendered, the Permanent Court of International Justice declined, not without reason, to "see in the conclusion of any Treaty by

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[160] A/CN.4/470, para. 149; see also paras. 145-147.

[161] A/CN.4/477, para. 39.

[162] See, in this connection, the approach taken with regard to treaties concluded within the Council of Europe by Sia Spiliopoulo Akermark, "Reservation Clauses in Treaties Concluded Within the Council of Europe", *International and Comparative Law Quarterly*, 1999, pp. 479-514, note, p. 506.

which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."[163]

73. The fact remains that, once concluded through the expression of the free consent of the parties, treaties prove to be "voluntary traps" from which States (or international organizations) can "escape" only under very stringent, rarely fulfilled conditions, as codified and listed exhaustively[164] in the Vienna Convention on the Law of Treaties of 1969.

74. In order to avoid this trap or, at least, mitigate its severity, States and international organizations strive to preserve their freedom of action by limiting treaty obligations. At the risk of undermining legal safeguards, "the ideal, for the diplomat and the politician, is, without any doubt, the non-binding obligation".[165]

75. This "concern of each government with preserving its capacity to reject or adopt [and adapt] the law (a minimal, defensive concern)"[166] is particularly present in two situations: where the treaty in question deals with especially sensitive matters or contains exceptionally onerous obligations,[167] or where it binds States whose situations are very different and whose needs are not necessarily met by a uniform set of rules. It is this type of consideration which led the authors of the Constitution of the International Labour Organization (ILO) to state:

> "In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries."[168]

76. According to ILO, which bases its refusal to permit reservations to the international labour conventions on this article:

> "This would suggest that the object of the framers of the Treaty of Peace, in imposing on the Conference this obligation to give preliminary consideration to the special circumstances of each country, was to prevent States from pleading, after the adoption of a convention, a special situation which had not been submitted to the Conference's judgment."[169]

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[163] Judgment of 17 August 1923, *Case concerning the S.S. Wimbledon, P.C.I.J. series A*, No. 1, p. 25.

[164] Cf. article 42, paragraph 1, of the Vienna Convention on the Law of Treaties of 1969.

[165] Michel Virally, "Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", in Université catholique de Louvain, quatrième colloque du Département des Droits de l'homme, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruylant, Brussels, 1982, p. 7.

[166] Guy de Lacharrière, *La politique juridique extérieure*, Économica, Paris, 1983, p. 31.

[167] Such is the case, for example, of the charters of "integrating" international organizations (cf. the Treaties establishing the European Communities; see also the Rome Statute of the International Criminal Court).

[168] Article 19, paragraph 3. This article reproduces the provisions of article 405 of the Treaty of Versailles.

[169] "Admissibility of reservations to general conventions," memorandum by the Director of the International Labour Office submitted to the Council on 15 June 1927, League of Nations, *Official Journal*, July 1927, p. 883. See also "Written Statement of the International Labour Organization" in International Court of Justice, *Pleadings, Oral Arguments, Documents — Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pp. 224 and 236.

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

> "to protect the integrity of the essential object and purpose of the treaty while simultaneously allowing the maximum number of States to become parties, though they are unable to assume full obligations".[170]

The quest to reconcile these two goals is the aim both of reservations in the strict sense and of the alternative procedures dealt with in this chapter.

77. Reservations are one of the means intended to bring about this reconciliation.[171] But they are far from "the only procedure which makes it possible to vary the content of a treaty in its application to the parties"[172] without undermining its purpose and object. Many other procedures are used.

78. Some authors have endeavoured to reduce all these procedures to one. Thus, Georges Droz, former Deputy Secretary General of the Hague Conference on Private International Law, has proposed to classify these alternatives to reservations under the single heading "options": "Like reservations, they undermine the uniformity created by the treaty. But unlike reservations, in which the reserving State is seen to withdraw to some extent from the treaty on a specific point, options simply allow for a modification, an extension or a clarification of the terms of the treaty within a framework and limits expressly provided for therein. Reservations and options have as their purpose to facilitate accession to the treaty for the largest number of States, despite the deep differences which may exist in their legal systems and despite certain national interests, but they do so differently. Reservations are a "surgical" procedure which amputates certain provisions from the treaty,[[173]] while options are a more "therapeutic" procedure which adapts the treaty to certain specific needs".[174]

79. While it has been severely criticized,[175] the notion of "options" has the advantage of showing that reservations are not the only means by which the parties to a multilateral treaty can modify the application of its provisions, to which a number of other procedures can lend a flexibility made necessary by the different situations of the States or international organizations seeking to be bound by the treaty.

80. The common feature of these procedures, which makes them alternatives to reservations, is that, like the latter, they purport "to exclude or to modify the legal

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[170] W. Paul Gormley, "The Modification of Multilateral Conventions by means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and Council of Europe", Part I, *Fordham Law Review*, 1970-1971, p. 65. On the strength of these similarities, this author, at the cost of worrisome terminological confusion, encompasses in a single study "all devices the application of which permit a State to become a party to a multilateral convention without immediately assuming all of the maximum obligations set forth in the text", ibid., p. 64.

[171] See the second report on the law of treaties, A/CN.4/477/Add.1, para. 90.

[172] Jean Combacau and Serge Sur, *Droit international public*, Montchrestien, Paris, 1999, p. 133.

[173] This is a somewhat reductionist conception of reservations, as shown by some of the draft guidelines adopted up to now (cf. guidelines 1.1.1, 1.1.3 and 1.1.6).

[174] "Les réservations et les facultés dans les Conventions de La Haye de droit international privé", *Revue critique du droit international privé*, 1969, p. 383.

[175] Particularly by Ferenc Majoros, who believes that "the set of 'options' is merely an amorphous group of provisions *which afford various options*" ("Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", *Journal du droit international*, 1974, p. 88. (Italics in original.)

effect of certain provisions of the treaty"[176] or "of the treaty as a whole with respect to certain specific aspects"[177] in their application to certain parties. But there the similarities end, and drawing up a list of them proves difficult, "for the imagination of legal scholars and diplomats in this area has proved to be unlimited".[178] In addition, on the one hand, some treaties combine several of these procedures with each other and with reservations, and on the other hand, it is not always easy to differentiate them clearly from one another.[179]

81. If, however, an effort is made to do so, there are numerous ways to classify them.

82. Some procedures for modifying the legal effects of the provisions of a treaty are provided for in the treaty itself; others are external to it. This was the distinction adopted by Professor Michel Virally, one of the few authors to undertake a general enquiry into "the means used in practice to limit the binding effect of treaties": "In general, it can be stated that the State has two methods at its disposal. The first consists of introducing limits on [treaty] obligations into the very texts in which they are defined. The second, on the other hand, consists of introducing these limits into the application of the texts by which States have bound themselves".[180]

83. In the first of these two categories, mention can be made of the following:

– Restrictive clauses, "which limit the purpose of the obligation by making exceptions to and placing limits on it"[181] in respect of the area covered by the obligation or its period of validity;

– Escape clauses, "which have as their purpose to suspend the application of general obligations in specific cases",[182] and among which mention can be made of saving clauses and derogations;[183]

– Opting- [or contracting-] in clauses, which have been defined as "those to which the parties accede only through a special acceptance procedure, separate from accession to the treaty as a whole";[184]

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[176] See draft guideline 1.1 of the Guide to Practice.

[177] See draft guideline 1.1.1.

[178] Michel Virally, "Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", in Université catholique de Louvain, quatrième colloque du Département des Droits de l'homme, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruylant, Brussels, 1982, p. 6.

[179] Ibid., p. 17.

[180] Ibid., p. 8.

[181] Ibid., p. 10. This notion corresponds to "clawback clauses" as they have been defined by Rosalyn Higgins: "By a 'clawback' clause is meant one that permits, in normal circumstances, breach of an obligation for a specified number of public reasons" ("Derogations Under Human Rights Treaties", *British Year Book of International Law*, 1976-1977, p. 281; see also Fatsah Ouguergouz, "L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général, *Revue Générale de Droit International Public*, 1994, p. 296). Other authors propose a more restrictive definition; according to R. Gitleman, clawback clauses are provisions "that entitle a State to restrict the granted rights to the extent permitted by domestic law" ("The African Charter on Human and People's Rights", *Virginia Journal of International Law*, 1982, p. 691, cited by Rusen Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles — Etude sur l'article 15 de la Convention européenne des droits de l'homme*, Bruylant, Brussels, 1987, p. 25).

[182] M. Virally, ibid., p. 12.

[183] See paras. 138-139 below.

[184] M. Virally, op. cit., p. 13.

– Opting- [or contracting-] out clauses, "under which a State will be bound by rules adopted by majority vote if it does not express its intent not to be bound within a certain period of time";[185] or

– Those which offer the parties a choice among several provisions; or again,

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

84. In the second category, which includes all procedures enabling the parties to modify the effect of the provisions of the treaty, but which are not expressly envisaged therein, are the following:

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

– Suspension of the treaty,[186] whose causes are enumerated and codified in part V of the Vienna Conventions of 1969 and 1986, particularly the application of the principles *rebus sic stantibus*[187] and *non adimpleti contractus*;[188]

– Amendments to the treaty, where they do not automatically bind all the parties thereto;[189] and

– Protocols or agreements having as their purpose (or effect) to supplement or modify a multilateral treaty only between certain parties,[190] including in the framework of "bilateralization".[191]

85. Among the latter modification procedures, the first two are unilateral, but derive from the general international law of treaties, while the last two derive from the joint initiative of the parties to the treaty, or some of them, following its adoption.

86. There are, in fact, many other possible classifications of these various approaches to modifying treaty obligations.

87. They can, for example, be classified according to the procedures used. Some are treaty-based; they are provided for either in the treaty whose effects are to be modified (such is the case with regard to restrictive clauses or amendments) or in a different treaty (protocols). Others are unilateral (reservations in cases where a treaty is silent, suspension of treaty provisions). Most are "mixed" in the sense that, being envisaged in the treaty, these procedures are implemented through unilateral declarations of the "receiving" State (reservations provided for in the treaty, including "negotiated reservations",[192] unilateral statements formulated pursuant to

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[185] Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des cours de l'Académie de droit international*, 1994-VI, vol. 250, p. 329; see also Christian Tomuschat, "Obligations Arising for States Without or Against Their Will", *Recueil des cours de l'Académie de droit international*, 1993, vol. 241, pp. 264 et seq.

[186] Termination of the treaty is a different matter; it puts an end to the treaty relations (see para. 133 below).

[187] Cf. article 62 of the Vienna Conventions.

[188] Cf. article 60 of the Vienna Conventions.

[189] Cf. article 40, paragraph 4, and article 30, paragraph 4, of the Vienna Conventions.

[190] Cf. article 41 of the Vienna Conventions.

[191] See section 2, paragraph 2 (c), below.

[192] See paras. 164-165 and 169-170 below.

escape clauses,[193] opting-in or opting-out clauses or clauses offering a choice among the treaty provisions).

88. In most cases, these procedures purport to limit, on behalf of one or more contracting parties, the obligations imposed in principle by the treaty. Such is the purpose not only of reservations[194] but also of restrictive or escape clauses. It may happen, however, that they increase such obligations, as opting-in clauses clearly demonstrate. As to the other procedures listed above, they are "neutral" in this respect, since they may purport either to limit or to increase the obligations, as the case may be (choice among treaty provisions, amendments, protocols).

89. Lastly, among these various procedures, some are "reciprocal" and purport to modify the effects of the treaty provisions in their application not only by the "receiving" State, but also by the other contracting parties in respect of that State. Such is the case, under certain conditions, of the reservations formulated under article 21 of the Vienna Conventions of 1969 and 1986, and, in general, of restrictive clauses, amendments and protocols (unless they expressly provide for discriminatory regimes). On the other hand, statements formulated under escape clauses (derogations or saving clauses) are in essence non-reciprocal (although the treaty may expressly provide the opposite[195]). As to the opting-in or opting-out mechanisms or the provisions offering the parties a choice, they raise interesting questions in this regard (some of which will be considered more extensively in section 2 below), but generally speaking, it can be considered that everything depends on the wording of the relevant provisions or on the nature of the treaty concerned.

90. Thus, the famous article 36, paragraph 2, of the Statute of the International Court of Justice clearly limits the acceptance by States of the compulsory jurisdiction of the Court to disputes between them and States which have made the same declaration:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a. The interpretation of a treaty;
>
> b. Any question of international law;
>
> c. The existence of any fact which, if established, would constitute a breach of an international obligation;
>
> d. The nature or extent of the reparation to be made for the breach of an international obligation."[196]

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[193] The "mixed" nature of this procedure is particularly apparent in the case of derogations (as opposed to saving clauses), as they are not only provided for in the treaty, but must further be authorized by the other contracting parties on the initiative of the receiving party.

[194] See draft guidelines 1.1.5 and 1.1.6.

[195] Cf. article XIX, paragraph 3, of the General Agreement on Tariffs and Trade (GATT) of 1947.

[196] Italics added. The drafting of paragraph 3 ("The declarations referred to above may be made unconditionally or on condition of reciprocity ...") introduces an element of uncertainty. In practice, however, optional declarations under article 36, paragraph 2, are generally made on condition of reciprocity and the Court ensures its strict observance (cf., among numerous examples: Permanent Court

The same is true of article 5, paragraph 2, of the European Convention on Mutual Assistance in Criminal Matters of 1959:

> "Where a Contracting Party makes a declaration in accordance with paragraph 1 of this Article, any other Party may apply reciprocity."

91. On the other hand, the implementation of the escape clauses contained in human rights treaties is in essence non-reciprocal, and it is inconceivable that, for example, if a State party to the European Convention on Human Rights makes use of the option afforded by article 15 of that Convention,[197] the other States parties would be released from their own obligations under the Conventions, even with regard to the nationals of that State.

92. The fairly frequent combination of these various procedures further complicates their necessary[198] classification. To take but three examples:

– The optional declarations under article 36, paragraph 2, of the Statute of the International Court of Justice[199] can be, and frequently are, accompanied by reservations;

– States can formulate reservations to restrictive clauses contained in escape clauses appearing in multilateral conventions; the reservation by France to article 15 of the European Convention on Human Rights (which is an escape clause and, more specifically, a saving clause[200]) constitutes an abundantly commented[201] illustration of this; and

– The entry into force of the derogation regimes provided for in certain conventions can be subordinated to the conclusion of a supplementary agreement; such is the case, for example, of article 23, paragraph 5, of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters, signed at The Hague on 1 February 1971, whereby:

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of International Justice, Judgment of 14 June 1936, *Phosphates in Morocco, P.C.I.J., series A/B*, No. 74, p. 22, and International Court of Justice, Judgment of 6 July 1997, *Certain loans in Norway*, *I.C.J. Reports 1957*, pp. 23-24, and Judgment of 11 June 1998, *Land and maritime boundary between Cameroon and Nigeria*, *I.C.J. Reports 1998*, pp. 298-299).

197 "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law, ... 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. ..."

198 Necessary again for the same reason (cf. para. 30 above): in the absence of clear distinctions and definitions, it is not possible to determine the legal regime applicable to a specific unilateral provision or declaration.

199 See para. 90 above and paras. 191-193 below.

200 See paras. 138-139 below.

201 See, for example: Alain Pellet, "La ratification par la France de la Convention européenne des droits de l'homme", *Revue du droit public*, 1974, pp. 1358-1363; Vincent Coussirat-Coustère, "La réserve française à l'article 15 de la Convention européenne des droits de l'homme, *Journal du droit international*, 1975, pp. 269-293; Gérard Cohen-Jonathan, *La Convention européenne des droits de l'homme*, Économica, Paris, 1989, pp. 564-566, or Paul Tavernier, commentary on article 15 in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert, eds., *La Convention européenne des droits de l'homme — Commentaire article par article*, Économica, Paris, 1995, pp. 493-494.

"In the Supplementary Agreements referred to in article 21[202] the Contracting States may agree: ...

5. Not to apply this Convention to decisions rendered in the course of criminal proceedings ..."

93. The Special Rapporteur hesitated for a long time before proposing the inclusion in the Guide to Practice of draft guidelines on alternatives to reservations. Upon reflection, however, he found it useful to include them for reasons comparable to those which led the Commission to include in the Guide a section 1.4 on "Unilateral statements other than reservations and interpretative declarations";[203] the Guide to Practice has a strictly "utilitarian" purpose, and it is probably not superfluous to remind negotiators of international conventions that within the law of treaties there are, alongside reservations, various approaches making it possible to modify the effects of treaties through recourse to different procedures.

94. It seems useful, therefore, to include in the Guide to Practice a draft guideline 1.7.1[204] with the following wording:

1.7.1 Alternatives to reservations

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

95. The question arises whether these procedures should be enumerated in the Guide to Practice (on the understanding that, in any event, such an enumeration would not be exhaustive) or whether such a list should appear only in the commentary. Ever hoping to better meet the needs of users, the Special Rapporteur leans towards the first solution, on the understanding, however, that procedures not specifically defined in other draft guidelines should be defined in the commentary. Since the Guide to Practice is not intended to become an international treaty, such a non-exhaustive enumeration does not appear to have the same drawbacks as when this type of procedure is used in a codification convention. This could be the subject of the following draft guideline:

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

Modification of the effects of the provisions of a treaty by procedures other than reservations may, in particular, result from the inclusion in the treaty of:

– *Restrictive clauses that limit the purpose of obligations deriving from the treaty by making exceptions to and placing limits on them;*

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[202] Article 21 provides as follows: "Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect."

[203] See, in particular, paras. (1) and (2) of the commentary on draft guideline 1.4 (*Official Records of the General Assembly, Fifty-fourth session, Supplement No. 10* (A/54/10), p. 209).

[204] This numbering is provisional. The Commission may perhaps prefer to place the section provisionally numbered 1.7 on alternatives to reservations and interpretative declarations before draft guideline 1.6 on scope of definitions.

– *Escape clauses that allow the contracting parties to suspend the application of general obligations in specific cases and for a limited period;*

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

Modification of the effects of the provisions of a treaty may also result from:

– *Their suspension in accordance with the provisions of articles 57 to 62 of the Vienna Conventions of 1969 and 1986;*

– *Amendments to the treaty which enter into force only between certain parties; or*

– *Supplementary agreements and protocols having as their purpose to modify the treaty only as it affects the relations between certain contracting parties.*

2. Procedures for interpreting a treaty other than interpretative declarations

96. Just as reservations are not the only means at the disposal of contracting parties for modifying the application of the provisions of a treaty, interpretative declarations are not the only procedure by which States and international organizations can specify or clarify their meaning or scope.

97. Leaving aside the third-party interpretation mechanisms provided for in the treaty,[205] the variety of such alternative procedures in the area of interpretation is nonetheless not as great. To the best of the Special Rapporteur's knowledge, hardly more than two procedures of this type can be mentioned.

98. In the first place, it is very often the case that the treaty itself specifies the interpretation to be given to its own provisions. Such is the primary purpose of the clauses containing the definition of the terms used in the treaty.[206] Moreover, it is very common for a treaty to provide instructions on how to interpret the obligations imposed on the parties either in the body of the treaty itself[207] or in a separate instrument.[208]

99. Second, the parties, or some of them,[209] may conclude an agreement for the purposes of interpreting a treaty previously concluded between them. This possibility is expressly envisaged in article 31, paragraph 3 (a), of the Vienna Conventions of 1969 and 1986, which requires the interpreter to take into account, together with the context:

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[205] Cf. Denys Simon, *L'interprétation judiciaire des traités d'organisations internationales*, Pedone, 1981, 936 p.

[206] Cf., among countless examples, article 2 of the Vienna Conventions of 1969 and 1986 or article XXX of the Statutes of the International Monetary Fund.

[207] Cf., here again among countless examples, article 13, paragraph 4, of the International Covenant on Economic, Social and Cultural Rights: "No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, ..."

[208] Cf. "Notes and supplementary provisions" to the GATT of 1947. This corresponds to the possibility envisaged in article 30, paragraph 2, of the Vienna Conventions of 1969 and 1986.

[209] Where all the parties to the interpretative agreement are also parties to the original treaty, the interpretation is authentic (see the final commentary of the International Law Commission on article 27, para. 3 (a), of the draft articles on the law of treaties, which became article 30, para. 3 (a), of the Vienna Convention of 1969: *Yearbook...1966*, vol. II, p. 241, para. 14; cf., with regard to bilateral treaties, draft guideline 1.5.3.

"(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".

100. Moreover, it may happen that the interpretation is "bilateralized".[210] Such is the case where a multilateral convention relegates to bilateral agreements the task of clarifying the meaning or scope of certain provisions. Thus, article 23 of the Hague Conference Convention of 1971 on the recognition and enforcement of foreign judgements in civil and commercial matters, referred to earlier,[211] provides that contracting States shall have the option of concluding supplementary agreements in order, *inter alia*:

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

2. To clarify the meaning of the term 'law' in States with more than one legal system; ..."

101. It therefore seems desirable to include in the Guide to Practice a provision on alternatives to interpretative declarations, if only for the sake of symmetry with the proposal made above concerning alternatives to reservations.[212] On the other hand, in view of the small number of these alternatives, it does not appear necessary to devote a separate draft guideline to their enumeration. A single draft guideline can cover the two draft guidelines 1.7.1 and 1.7.2.

102. This draft guideline could be drafted as follows:

1.7.5 Alternatives to interpretative declarations

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

103. No special provision concerning alternatives to conditional interpretative declarations[213] appears to be necessary: the alternative procedures listed above are treaty-based and require only the agreement of the contracting parties. It matters little, therefore, whether or not the agreed interpretation constitutes the *sine qua non* of their consent to be bound.

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[210] On the "bilateralization" of reservations, see section 2, paragraph 2 (c), below, and draft guideline 1.7.4.

[211] See para. 92 above.

[212] See paras. 93 and 94.

[213] See draft guideline 1.2.1.

B. Distinction between reservations and other procedures for modifying the effects of a treaty

104. It is sometimes easy to distinguish between the various options available to States for modifying effects of a treaty with reservations; sometimes, however, it is by no means obvious how to draw such a distinction.

105. The fact that provision may be made in the treaty itself for ways of modifying treaty commitments thus provides no indication as to whether or not the procedures chosen can be described as reservations.[214] The problem is all the trickier in that according to the Vienna definition, which is reflected in draft guideline 1.1 in the Guide to Practice, the manner in which a unilateral act is phrased or named does not constitute an element of its definition as a reservation; a treaty may well not use the term "reservation" in describing a method of modifying treaty commitments, whereas the method in question matches the definition of reservations in all respects and must therefore be regarded as a reservation.[215] As pointed out by Georges Droz, "It is sometimes difficult to distinguish between a reservation and an option, in terms of substance. Some provisions are presented as options but are in fact reservations, while other provisions whereby States 'reserve' certain possibilities are in fact only options".[216]

106. For example, is little doubt that the "declarations" made under article 25 of the European Convention on Nationality[217] constitute reservations even though neither the title nor the relevant provision itself contain the word "reservations". On the other hand, in article 17 of the Energy Charter Treaty of 17 December 1994 "each Contracting Party reserves the right to deny the advantages of this Part ...", even though what is involved here is much more a restrictive clause than a reservation.

107. The fact remains that in some cases the distinction between "options" or "alternatives to reservations" and reservations themselves does not pose any particular problem. This is basically so in the case of two hypotheses: on the one hand, when modification of the effects of a treaty does not result from a unilateral statement but from a treaty procedure, despite the doctrinal confusion that has arisen with respect to the notions of "treaty reservations" or "bilateralization", and, on the other hand, when a unilateral statement by a State has the effect of suspending the application of certain provisions of a treaty or of the treaty as a whole or of terminating it. Much trickier problems arise in the case of hypotheses whereby a treaty provides that the parties may choose between treaty provisions, by means of unilateral statements.

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[214] See paras. 110-111 below.

[215] In this connection, see, for example: Ferenc Majoros, "Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", *Journal du droit international* 1974, p. 88.

[216] "Les réserves et les facultés dans les Conventions de La Haye de droit international prive", *Revue critique de droit international privé* 1969, p. 383.

[217] "Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, that it will exclude Chapter VII from the application of the Convention" (on the subject of this provision, see para. 153 below). See also, for example, article 10 of the agreement of 18 December 1997 on humane trapping rules, and article 19 of the Framework Convention of 1 February 1995 for the Protection of National Minorities.

108. For the sake of simplicity, it is preferable to consider each of the procedures in question individually and then to compare them with the definition of reservations.

1. Treaty methods of modifying the effects of a treaty

109. One might imagine that there is little likelihood of confusing reservations and some of the procedures for modifying the effects of a treaty listed in draft guideline 1.7.2 above, which do not take the form of unilateral statements but of one or more agreements between the party to a treaty or between certain parties to the treaty. However, whether it is a question of restrictive clauses set out in the treaty, amendments that take effect only as between certain parties to the treaty, or "bilateralization" procedures, problems can arise.

(a) Restrictive clauses

110. The fact that a unilateral statement purporting to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author,[218] is specifically provided for by a treaty is not sufficient to characterize such a statement as either being or not being a reservation. This is precisely the object of "reservation clauses" that can be defined as "treaty provisions [... setting] limits within which States should [[219]] formulate reservations and even the content of such reservations";[220] however, other exclusion any clauses with the same or similar effects are nevertheless not reservations within the precise meaning of the word, as defined by the Vienna Conventions and the Guide to Practice.

111. Prof. Pierre-Henri Imbert gives two examples that highlight this fundamental difference, by comparing article 39 of the revised General Act of Arbitration of 28 April 1949[221] with article 27 of the European Convention of 29 April 1957 for the peaceful settlement of disputes.[222] Under article 30, paragraph 2, of the General Act reservations that are exhaustively enumerated and "must be indicated at the time of accession":[223]

"May be such as to exclude from the procedure described in the present act:

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

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

Article 27 of the 1957 Convention reads:

"The provisions of this Convention shall not apply to:

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[218] Cf. draft guidelines 1.1 and 1.1.1.

[219] It would be more accurate to use the word "may".

[220] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux,* Pedone, Paris, 1979, p. 12. If the Commission decides to devote part of the Guide to Practice to definitions (other than the part on reservations and interpretive declarations), it would be desirable to include a definition of reservation clauses. "Negotiated reservations" (see para. 164 et seq. below) fall within this category.

[221] Article 39 of the General Act of Arbitration of 26 September 1928 was similarly worded.

[222] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux,* Pedone, Paris, 1979, p. 10.

[223] Article 39, para. 1.

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

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

112. There are striking similarities here: in both cases the aim is to exclude identical types of disputes from methods of settlement provided for by the treaty in question. However, the two approaches work differently: in the 1957 Convention the exclusion is comprehensive and based on the treaty itself; in the General Act the exclusion is just one of a number of possibilities available to States parties, and this exclusion is permitted by the treaty but takes effect only if a unilateral statement is made at the time of accession.[224] Article 39 of the 1949 General Act of Arbitration is a reservation clause; article 27 of the 1957 Convention is a restrictive clause that limits the object of the obligations imposed by the treaty by making exceptions and setting limits thereto, as stated in the definition proposed above, in draft guideline 1.7.2.

113. There are many such restrictive clauses, in treaties on a wide range of subjects, such as the settlement of disputes,[225] the safeguarding of human rights,[226] protection of the environment,[227] trade,[228] and the law of armed conflicts.[229]

114. At first glance, there would appear to be no likelihood of confusion between such restrictive clauses and reservations. However, not only is language usage deceptive and are "such terms as 'public order reservations', 'military imperatives

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[224] It is therefore not entirely accurate to assert, as P. H. Imbert does, that "in practice, article 27 of the European Convention produces the same result as a reservation in respect of the General Act" (ibid., p. 10). This is true only of the reserving State's relations with other parties to the General Act, and not of such other parties' relations among themselves, to which the treaty applies in its entirety.

[225] In addition to article 27 of the above-mentioned 1957 European Convention, see, for example, article I of the Franco-British Arbitration Agreement of 14 October 1903, which has served as a model for a great number of subsequent treaties: "differences which may arise of a legal nature, or relating to the interpretation of Treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties".

[226] Cf. the "clawback clauses" referred to above in note 181. For example (again, there are innumerable examples), article 4 of the 1966 Covenant on Economic, Social and Cultural Rights: "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society".

[227] Cf. article VII ("Exemptions and other special provisions relating to trade") of the Convention of 3 March 1973 on international trade in endangered species of wild fauna and flora, or article 4 (Exceptions) of the Lugano Convention of 21 June 1993 on Civil Liability for damage resulting from activities dangerous to the environment.

[228] Cf. article XII ("Restrictions to safeguard the balance of payments"), article XIV ("Exceptions to the rule of non-discrimination"), article XX ("General exceptions") or article XXI ("Security exceptions") of the 1947 General Agreement on Tariffs and Trade.

[229] Cf. article 5 of the Geneva Conventions of 12 August 1949 ("Derogations").

reservations', or 'sole competence reservations' frequently encountered",[230] but authors, including the most distinguished among them, have caused an unwarranted degree of confusion. For example, in an oft-quoted passage [231] from the dissenting opinion that he appended to the Judgment of the International Court of Justice rendered on 1 July 1952 in the *Ambatielos (Preliminary objection)* case, Judge Zoričić stated the following:

> "A reservation is a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning."[232]

115. More ambiguously, but nevertheless in an unfortunate manner, Georges Scelle also causes confusion in defining a reservation as "a *treaty clause* emanating from one or *more* governments that have signed or acceded to a treaty and setting up a legal regime derogating from the normal treaty regime".[233]

116. Although the confusion appears to be only doctrinal, the Commission could help to clear up the misunderstandings in question if it were to include in the Guide to Practice, an appropriate draft guideline, which could be inserted in section 1.7 on alternatives to reservations[234] and would read:

1.7.3 Restrictive clauses

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

(b) Amendments that enter into effect only as between certain parties to a treaty

117. It would not appear to be necessary to dwell on another treaty procedure that would facilitate flexible application of a treaty: amendments (and additional protocols) that enter into effect only as between certain parties to a treaty.

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[230] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 10, for an instance of a "public order reservation", see the first paragraph of article 6 of the Havana Convention of 20 February 1928 regarding the Status of Aliens in the respective Territories of the Contracting Parties: "for reasons of public order or safety, States may expel foreigners domiciled, resident, or merely in transit through their territory". For an example of a "sole competence reservation", see article 3, paragraph 11, of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: "nothing contained in this article [on "Offences and sanctions] shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law".

[231] Cf. Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" in *The British Year Book of International Law* 1957, pp. 272-273; however, although he quotes this definition with apparent approval, this distinguished author departs from it considerably in his commentary.

[232] *I.C.J. Reports, 1952,* p. 76.

[233] *Précis de droit des gens (Principes et systématiques)*, Sirey, Paris, vol. 2, 1934, p. 472; emphasis added.

[234] Another option would be to include it in section 1.1 on the definition of reservations.

118. This procedure, which is provided for in article 40, paragraphs 4 and 5,[235] (and article 30, paragraph 4)[236] and article 41[237] of the 1969 and 1986 Vienna Conventions,[238] is applied as a matter of routine. Even if, in terms of its general approach and as regards some aspects of its legal regime (respect for the fundamental characteristics of the treaty, though it does not contain a reference to its "object and purpose"), it is similar to procedures that characterize reservations, it is nonetheless very different in many respects:

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

Such agreement may be reached at any stage, generally following the treaty's entry into effect for its parties,[239] which is not so in the case of reservations that must be formulated at the time of the expression of consent to be bound, at the latest; and

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[235] Article 40 — Amendment of multilateral treaties:
"4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such States.
"5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
(a) Be considered as a party to the treaty as amended;
(b) Be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

[236] Article 30 — Application of successive treaties relating to the same subject-matter:
"3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59 [on termination or suspension of the operation of a treaty implied by conclusion of a later treaty], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
"4. When the parties to the later treaty do no include all the parties to the earlier one:
(a) As between parties to both treaties the same rule applies as in paragraph 3;
(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

[237] Article 41 — Agreements to modify multilateral treaties between certain of the parties only:
"1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
(a) The possibility of such a modification is provided for by the treaty; or
(b) The modification in question is not prohibited by the treaty and:
(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

[238] In its commentary to the corresponding draft articles (article 36, paras. 4-5 (and article 26, para. 4) and article 37), the Commission takes great care to distinguish between "formal amendments" and agreements making "modifications" (cf. *Yearbook* ... 1966, vol. II, p. 232, para. 3, and p. 235, para. 1). Such a distinction does not seem relevant for the purposes of a comparison with reservations.

[239] This is not always the case, however; cf. the well-known New York Agreement of 29 July 1994 relating to the implementation of Part XI of the United Nations Convention of 10 December 1982 on the Law of the Sea.

It is not a question here of excluding or modifying *the legal effect* of certain provisions of the treaty *in their application*", but in fact of modifying *the provisions in question themselves*;[240]

Moreover, whereas reservations can only limit their author's treaty obligations or make provision for equivalent ways of implementing a treaty,[241] amendments and articles can have the effect of both extending and limiting the obligations of States and international organizations party to a treaty.

119. Since there is no fear of confusion in the case of reservations, no clarification is called for and it would appear unnecessary to devote a specific guideline in the Guide to Practice to drawing a distinction which is already quite clear. It will suffice to mention that in this case there is a possible alternative to reservations, in draft guideline 1.7.2, as suggested above. However, some specific agreements concluded between two or more States Parties to basic treaties purporting to produce the same effects as those produced by reservations pose special problems, and it would be possible (and desirable) to combine the two in a single draft guideline.[242]

(c) "Bilateralization" of "reservations"

120. These specific agreements, which are sometimes equated with reservations, fall within the category of the "bilateralization" method, the doctrine of which was examined at The Hague Conference on Private International Law on the occasion of the elaboration of the Convention of 1 February 1971 on the recognition and enforcement of foreign judgements in civil and commercial matters.

121. The bilateralization regime has been described as permitting "contracting States, while being parties to a multilateral convention, to choose the partners with which they will proceed to implement the regime provided for".[243] This is not an innovation of the 1971 Convention, since it can be traced back to article XXXV, paragraph 1, of the 1947 General Agreement on Tariffs and Trade.[244] Moreover, a number of conventions on private international law adopted earlier in the context of the Hague Conference had already at least partially achieved the goal of free choice of partners, by allowing the parties to refuse to be bound vis-à-vis States that had

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[240] In this connection: J. M. Ruda "Reservations to Treaties", *Recueil des cours de l'Académie de droit international* 1975-III, vol. 146, pp. 107-108.

[241] Cf., draft guidelines 1.1.5-1.1.6 and, on the other hand, 1.4.1, 1.4.2 and 1.5.1.

[242] See draft guideline 1.7.4 and para. 130 below.

[243] M. H. Van Hoogstraten, "*L'état présent de la Conférence de La Haye de Droit International Privé*", in *Virginia Journal of International Law, The Present State of International Law*, Kluwer, Deventer, 1973, p. 287.

[244] "This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting Party and any other contracting party if (a) the two contracting parties have not entered into tariff negotiations with each other, and (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application." See Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 199. The practice of "lateral agreements" (cf. Dominique Carreau and Patrick Juillard, *Droit international économique*, Libraire général de droit et de jurisprudence, Paris, 1998, pp. 54-56 and 127) has accentuated this bilateralization. See also article XIII of the Agreement Establishing the World Trade Organization.

not participated in the conventions' adoption[245] or making the effect of the accession of such States subject to the specific consent of contracting States.[246] The same applies to article 37 of the European Convention of 16 May 1972 on State Immunity, adopted in the context of the Council of Europe.[247]

122. The general approach involved in this procedure is not comparable with the approach on which the reservations method is based; it allows a State to exclude by means of its silence or by means of a specific declaration, the application of a treaty as a whole in its relations with one or more other States and not to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain aspects. It is more comparable with statements of non-recognition, where such statements purport to exclude the application of a treaty between a declaring State and the non-recognized entity.[248]

123. However, in response to a Belgian proposal, the 1971 Enforcement Convention goes further than these traditional bilateralization methods. It not only makes the Convention's entry into effect with respect to relations between two States subject to the conclusion of a supplementary agreement,[249] but it also permits the two States to modify their commitment *inter se* within the precise limits set in article 23;[250]

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[245] Cf., for example, article 13, paragraph 4, of the Companies Convention of 1 June 1956: Accession shall have an effect only on relations between the acceding State and States which raise no objection in the six months following this communication (quoted by P. H. Imbert, op. cit., p. 200, who also refers to article 12 of the Legalization Convention of 5 October 1961, article 31 of the Maintenance-enforcement Convention of 2 October 1973, and article 42 of the Administration of Estates Convention of 2 October 1973). For more recent examples, see article 44, paragraph 3, of The Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption, article 58, paragraph 3, of The Hague Convention of 19 October 1996 concerning competence, applicable law, recognition, execution and cooperation in matters relating to parental responsibility and measures for the protection of children, or article 54, paragraph 3, of the Convention of 2 October 1999 on the international protection of adults.

[246] Cf., for example, article 17, paras. 2-3, of the Children's maintenance-enforcement Convention of 15 April 1958:

> The Convention shall take effect, as between the acceding State and the State which has declared that it accepts such accession on the sixtieth day following the day on which the instrument of accession is deposited.
>
> Accession shall have an effect on only relations between the acceding State and contracting States which have declared that they accept such accession ... (quoted by P. H. Imbert, op. cit., who also refers to article 13 of the contractual forum-sales convention of 15 April 1958, article 21 of the Protection of Infants Convention of 5 October 1961, article 39 of the Taking of Evidence Convention of 18 March 1970, article 28 of the Divorce Convention of 1 June 1970, and article 18 of the Traffic Accidents Convention of 4 May 1971; also see P. Jenard, "Une technique originale: La bilatéralisation de conventions multilatérales", *Belgian Review of International Law* 1966, p. 389).

[247] "3. ... if a State having already acceded to the Convention notifies the Secretary General of the Council of Europe of its objection to the accession of another non-member State, before the entry into force of this accession, the Convention shall not apply to the relations between these two States."

[248] Cf. draft guideline 1.4.3 and paras. (5)-(9) of the commentary (O*fficial Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 277-279).

[249] See note 202 above for the text of article 21 of the Convention.

[250] Mentioned above in paras. 92 and 100. The initial Belgian proposal did not envisage this modification possibility, which was established subsequently as the discussions progressed (Cf. P. Jenard, "Une technique originale: La bilatéralisation de conventions multilatérales", *Belgian Review of International Law* 1966, pp. 392-393).

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

Below is a list of 23 possible ways of modifying the Convention, whose purposes, as summarized in the explanatory report of C. N. Fragistas, are as follows:

"1. *To clarify a number of technical expressions used by the Convention* whose meaning may vary from one country to another (article 23 of the Convention, items No. 1, 2, 6 and 12);

2. *To include within the scope of the Convention matters that do not fall within its scope* (article 23 of the Convention, items No. 3, 4 and 22);

3. *To apply the Convention in cases where its normal requirements have not been met* (article 23 of the Convention, items No. 7, 8, 9, 10, 11, 12 and 13);

4. *To exclude the application of the Convention in respect of matters normally covered by it* (article 23 of the Convention, item No. 5);

5. *To declare a number of provisions inapplicable* (article 23 of the Convention, item No. 20);

6. *To make a number of optional provisions of the Convention mandatory* (article 23 of the Convention, items No. 8*bis* and 20);

7. *To regulate issues not settled by the Convention or adapt a number of formalities required by it to domestic legislation* (article 23 of the Convention, items No. 14, 15, 16, 17, 18 and 19)".[251]

124. According to Prof. P. H. Imbert, many of these alternatives "simply permit States to define words or to make provision for procedures; however, a number of them restrict the effect of the Convention and are genuine reservations (particularly those set out in paragraph 5, 8, 13, 19 and 20)".[252] The Special Rapporteur does not agree.

125. These options, which permit States concluding a supplementary agreement to exclude from the application of the Convention certain categories of jurisdictional decisions or not to apply certain provisions thereof, either as a general rule or in particular circumstances, do indeed purport to exclude or modify the legal effect of certain provisions of the Convention or of the Convention as a whole with respect to certain specific aspects, in their application to the two States. However, and this is a fundamental difference, such exclusions or modifications are not the product of a unilateral statement, which constitutes an essential element of the definition of reservations,[253] but, rather, an agreement between two of the States parties to the basic convention that does not affect the other Contracting Parties to the Convention.

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[251] Conférence de la Haye, *Actes et documents de la session extraordinaire*, 1966, p. 364 — emphasis in the original text. Also see Georges A. L. Droz, "Le récent projet de Convention de La Haye sur la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale", *Netherlands International Law Review* 1966, p. 240.

[252] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 200.

[253] Cf. draft guideline1.1.

126. As Georges Droz states, "if such provisions had been set out in the body of the Treaty itself, they would have constituted genuine reservations [[254]], but as a result of bilateralization they are confined to relations between two partners. The wish to eliminate the classic reservation system is obvious".[255]

"The system leads to the elaboration of two instruments: a multilateral convention, on the one hand, and a supplementary agreement, on the other, which, although based on the multilateral convention, nevertheless has an independent existence".[256] The supplementary agreement is, so to speak, an instrument that is not a prerequisite for the entry into effect of the Convention but for ensuring that the Convention has effects on relations between the two States concluding the agreement, since its effects will otherwise be diminished (and it is in this respect that its similarity to the reservations procedure is particularly obvious) or increased; however, its treaty nature precludes any equation with reservations.

127. The 1971 Enforcement Convention is not the only treaty that makes use of this procedure of pairing a basic convention and a supplementary agreement, thus permitting the introduction to the convention of alternative contents, even though the convention is a typical example and probably a more refined product. Reference may also be made, *inter alia*, to:[257]

Article 20 of The Hague Convention of 15 November 1965 on the service of judicial documents, which permits contracting States to "agree to dispense with" a number of provisions; "but its application is not [based] on the free choice of a partner";[258]

Article 34 of the Convention of 14 June 1974 on the Limitation Period in the International Sale of Goods, which prompts the same comment;

Articles 26, 56 and 58 of the European Convention of 14 December 1972 on social security, which with similar wording states:

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

or, for more recent examples:

Article 39, paragraph 2, of The Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption:

> "Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have

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[254] *Sic.* see (a) above and draft guideline 1.7.3.

[255] Georges A. L. Droz, "Les réserves et les facultés dans les Conventions de La Haye de droit international privé", *Revue critique de droit international privé* 1969, p. 391.

[256] P. Jenard, Rapport du Comité restreint sur la bilatéralisation, Conférence de La Haye, *Actes et documents de la session extraordinaire*, 1966, p. 145. Also see the explanatory report by C. N. Fragistas, ibid., pp. 363-364.

[257] These examples are taken from Pierre-Henri Imbert, op. cit., note 244 above, p. 201.

[258] Ibid.; also see Georges A. L. Droz, op. cit., note 255 above, pp. 390-391. In fact, this procedure bears a resemblance to amendments between certain parties to the basic convention alone.

concluded such an agreement shall transmit a copy to the depositary of the Convention".[259]

or article 5 (Voluntary extension) of the Helsinki Convention of 17 March 1992 on the Transboundary Effects of Industrial Accidents:

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

128. It seems inappropriate to devote a draft guideline to bilateralization as such since this treaty procedure does not have a *ratione materiae* effect but, rather, a *ratione personae* effect. On the other hand, there are quite powerful reasons in favour of a draft guideline on "bilateralized reservations" purporting to produce, in the relations of parties to a supplementary agreement, the same effect as that produced by reservations proper with which they are sometimes wrongly equated.

129. Such a draft guideline might read:

1.7.4. ["Bilateralized reservations"] [Agreements between States having the same object as reservations]

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

130. The alternative titles proposed for this draft guideline are intended to indicate that two approaches are conceivable: the Commission may wish to limit the guideline strictly to supplementary "bilateralization" agreements and, in that event, the logical title is the first one (even though using inverted commas does not work well)[260] and it would be desirable to include in the text the wording inside square brackets: or the Commission may wish to opt for a more general formulation to cover comprehensively all agreements containing derogations, in other words, both "bilateralized reservations" and amendments and protocols between certain parties to treaties only and the second solution (without the words inside square brackets) would seem to be preferable. The Special Rapporteur himself has a preference for the second alternative, in the interest of achieving the greatest completeness possible, even though, as indicated above,[261] amendments and protocols do not give rise to serious problems of definition vis-à-vis reservations. In either case, the nuances of the various possible formulations should be discussed in the commentary to this draft guideline.

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[259] Once again, one cannot truly speak of bilateralization in a strict sense since this provision does not call for the choice of a partner. Also see article 52 of the draft Hague convention of 19 October 1996 concerning competence, applicable law, recognition, execution and cooperation in matters relating to parental responsibility and measures relating to protection of children, or article 49 of The Hague convention of 2 October 1999 on international protection of adults.

[260] Inverted commas were used in the title of draft guideline 1.5.1. on "'Reservations' to bilateral treaties", but that approach was criticized by the representative of Spain in the Sixth Committee (see note 135 above).

[261] In section (b).

2. Unilateral declarations purporting to suspend a treaty or certain provisions thereof

131. Unlike in the case of the procedures considered above, which reflect agreement between the parties to the treaty or between certain parties to it, the notifications in question in this paragraph are unilateral statements just as reservations are. And as in the case of reservations, they can purport to exclude the legal effect of certain provisions of a treaty in their application to the author of the notification, but only on a temporary basis. They can also suspend application of the treaty as a whole; in such cases, they are subject to the same legal regime as in the case of notifications of withdrawal or termination. Even though they are generally considered from a different angle, notifications made under a waiver or escape clause differ from the preceding clauses only with respect to their legal basis (since provision is made for them by means of a treaty provision, and not in the form of the general international law of treaties).

(a) Notifications of suspension, denunciation or termination of a treaty

132. Under article 65, paragraph 1, of the 1969 and 1986 Vienna Conventions:

> "A party which, under the provisions of the present Convention[262] invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it, or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor."

133. Unquestionably, unilateral statements are what is being dealt with here. However, that is where all possible comparisons with reservations end. These notifications do not purport "to exclude or modify the legal effect of *certain provisions* of a treaty", "or of the Treaty as a whole *with respect to certain specific aspects*",[263] but to put an end to the instrument that the treaty constitutes (in the case of notification of termination",[264] to treaty relations (in the case of notification of withdrawal or denunciation of a multilateral treaty)[265] or to release the parties "between which the operation of the treaty is suspended from the obligation to perform the treaty [*as a whole*] in their mutual relations during the period of the suspension".[266]

134. The problem of a possibly increasing similarity to reservations could, however, arise if the suspension did not affect the treaty as a whole but only certain provisions thereof: in such a case,[267] it is indeed a question of temporarily excluding the legal

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[262] See para. 73 above.

[263] Cf. draft guidelines 1.1 and 1.1.1.

[264] Cf. article 70, paragraph 1, of the Vienna Conventions.

[265] Cf. article 70, paragraph 2, of the Vienna Conventions.

[266] Article 72 of the Vienna Conventions.

[267] This possibility is not excluded by the Vienna Conventions (despite their obvious caution); cf. article 57 (a) (Suspension of a treaty under its provisions) and article 44 of the two Conventions on "separability of treaty provisions"). See Paul Reuter, "Solidarité et divisibilité des engagements conventionnels" *in* Y. Dinstein, ed., *International Law at a Time of Perplexity — Essays in Honour of Shabtai Rosenne,* Nijhoff, Dordrecht*,* 1989*,* pp. 623-634, also reproduced *in* Paul Reuter, *Le développement de l'ordre juridique international-Écrits de droit international*, Économica, Paris, 1995, pp. 361-374.

effect of certain provisions of a treaty in their application to the State or international organization that made the notification of partial suspension. And the temporary nature of such exclusion is not a decisive element in the differentiation from reservations, since reservations may be formulated for just a fixed period.[268] Moreover, reservation clauses can impose such a provisional nature.[269]

135. However, even in the case of a notification of partial suspension, a fundamental element of the definition of reservations is still lacking, since it can be assumed that such a notification is not made by a State "when signing, ratifying, formally confirming, accepting or approving a treaty or by a State when making a notification of succession to a treaty"[270] or, more generally, by its author when expressing consent to be bound,[271] but, on the contrary, after the treaty has taken effect for the author, which suffices in order to distinguish clearly between such unilateral statements and reservations.

136. Furthermore, the Vienna Conventions make such statements subject to a legal regime that differs clearly from the reservations regime.[272]

(b) Notifications made under a waiver or an escape clause

137. It can happen that the suspension of the effect of the provisions of a treaty is the result of a notification not made, as in the hypothesis considered above, under the rules of general international treaty law, but on the basis of specific provisions set out in the treaty itself.

138. As indicated above,[273] such escape clauses fall into two categories:[274] waivers and escape clauses. Although some authors do not draw a clear distinction between the two,[275] it can be assumed that escape clauses permit a contracting party

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[268] Frank Horn offers the example of ratification by the United States of the 1933 Montevideo Convention on Extradition, with the reservation that certain provisions thereof should not be applicable to the United States "... until subsequently ratified in accordance with the Constitution of the United States" (*Reservations and Interpretative Declarations to Multilateral Treaties*, Swedish Institute of International Law, Studies in International Law, No. 5, Tobias Michael Carel Asser Instituut, The Hague, 1988, p. 100).

[269] Cf. article 25, paragraph 1, of the 1967 European Convention on the adoption of children, and article 14, paragraph 2, of the 1975 European Convention on the legal status of children born out of wedlock, whose wording is identical: "A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period"; or article 20 of the Hague Divorce Convention of 1 June 1970, which authorizes Contracting States which do not provide for divorce to reserve the right not to recognize a divorce, but whose paragraph 2 states: "This reservation shall have effect only so long as the law of the State utilizing it does not provide for divorce".

[270] Draft guideline 1.1.

[271] Cf. draft guideline 1.1.2.

[272] Cf., in particular, articles 65, 67, 68 and 72.

[273] Para. 83.

[274] Cf. Patrick Daillier and Alain Pellet, *Droit international public (Nguyen Quoc Dinh)*, Libraire générale de droit et de jurisprudence, Paris, 6th ed., 1999, pp. 218 or 302.

[275] Aleth Manin provides a broad definition of "escape clauses", which covers both escape clauses *stricto sensu* and waivers: "The term 'escape clauses' is used to refer to the provisions set out in certain international agreements which offer contracting parties which invoke them the option of temporarily derogating, either fully or partially, from the provisions contained in such agreements as and when certain circumstances justify their application, upon completion of a

temporarily not to meet certain treaty requirements owing to the difficulties it is encountering in fulfilling them as a result of special circumstances, whereas waivers, which produce the same effect, must be authorized by the other contracting parties or by an organ responsible for monitoring treaty implementation. That is to say, notifications made on the basis of an escape clause produce effects *ipso facto*, owing solely to the fact that they are notified to the other parties or to the depositary by the beneficiary State, whereas only authorization by the other contracting States or, more often, by an organ of an international organization, gives effect to notifications under a waiver.

139. A comparison of article XIX, paragraph 1, and article XXV, paragraph 5, of the 1947 General Agreement on Tariffs and Trade shows the difference clearly.[276] The first article reads:

> "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to threaten serious injury to domestic producers in that territory of like products, the contracting party shall be free, in respect of such products, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."[277]

This is an escape clause. On the other hand, the general provision laid down in article XXV, paragraph 5 (entitled "Joint Action by the Contracting Parties"), is a waiver:

> "In exceptional circumstance not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a Contracting Party by this Agreement; provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the Contracting Parties."[278]

140. The shared characteristic of these two types of clauses is that they authorize States parties to the treaty containing them to suspend their treaty obligations temporarily. In that respect they bear a similarity to reservations, without there being any reason to focus on the distinction between escape clauses and waivers, since a

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procedure determined by each agreement considered" ("À propos des clauses de sauvegarde", *Revue trimestrielle de droit européen*, 1970, p. 1). Also see Michel Virally, op. cit., note 165 above, pp. 14-15, or Fatsah Ouguergouz, "L'absence de clauses de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général", *Revue général de droit international public*, 1994, p. 290.

276 Cf. Dominique Carreau and Patrick Juillard, *Droit international économique,* Libraire générale de droit et de jurisprudence, Paris, 4th edition, 1998, p. 104. Article 15 of the European Convention on Human Rights (see note 197 above) provides another well-known example of an escape clause, in a very different field.

277 This option has been regulated but not abolished by the 1994 GATT Agreement on Safeguards (Marrakesh, 15 April 1994).

278 The same applies, for example, to article VIII, section 2 (a), of the IMF Agreement: "... no member shall, *without the approval of the Fund*, impose restrictions on the making of payments and transfers for current international transactions".

treaty may make the formulation of a reservation subject to the reactions of the other parties,[279] which means that it is closer to a waiver than to an escape clause.

141. As stated by Prof. Aleth Manin, "the identical approach taken in the case of the two methods is noteworthy. Both approaches appear to show little concern for the integrity of an international agreement, since they prefer a more universal application thereof. The option of formulating reservations is an element that is likely to promote more widespread acceptance of international treaties. Similarly, the fact that it is possible to release oneself or be released for a given period of time from one's international obligations is such as to encourage a hesitant State to enter finally into a commitment that offers it a number of advantages".[280]

142. "There, however, the similarity between the two procedures ends."[281] In fact, in the case of a reservation, the partners of the reserving State or international organization are informed at the outset of the limits on the commitment of that State or organization, whereas in the case of a declaration under an escape clause, the aim is to remedy unforeseeable difficulties arising from the application of the treaty. The time element of the definition of reservations is thus absent, as it is in the case of all unilateral statements purporting to suspend the provisions of a treaty.[282]

143. For the sake of completeness, a guideline with the following wording could be included in section 1.4 of the Guide to Practice, on "Unilateral statements other than reservations and interpretative declarations":

A unilateral declaration by which a State or an international organization purports to notify its intention to suspend the application of [all or] certain provisions of a treaty [whether in application of an escape clause or a waiver or under general rules on the suspension of treaties] is outside the scope of the present Guide to Practice.

144. However, since there is no likelihood of serious confusion between such notifications and reservations it is not essential to include such a guideline in the Guide to Practice.

3. Procedures providing for a choice between provisions of a treaty by means of a unilateral statement

145. The distinction between reservations on the one hand and unilateral statements made on the basis of a treaty clause which allows States to choose between the treaty's provisions on the other hand, however, proves to be far more problematic.

146. In an effort to clarify this matter, it would be useful to look at in succession:

– Statements by which a State, exercising an option provided for in a treaty, excludes the application of certain provisions of the treaty;

– Statements by which, conversely, a State accepts obligations which the treaty specifically presents as being optional;

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[279] Cf. the examples given by P. H. Imbert, op.cit., note 244 above , pp. 174-176.

[280] Aleth Manin, "À propos des clauses de sauvegarde", *Revue trimestrielle de droit européen,* 1970, p. 3.

[281] Ibid.

[282] See para. 135 above. See also, in that connection, Sia Spiliopoulo Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", *International and Comparative Law Quarterly*, 1999, pp. 501-502.

– Lastly, statements by which a State chooses between obligations deriving from a treaty, again in exercise of an option provided for in the treaty itself.

147. Three preliminary comments must be made here:

1. First, the specific purpose of these unilateral statements is, once again, to modify the application of the treaty to which they relate in order to facilitate accession thereto; in this way such statements come close to being reservations as defined in the Vienna Conventions and the Guide to Practice;

2. Secondly, as has already been noted[283] the fact that such options are provided for in the treaty whose application they seek to modify clearly does not of itself afford sufficient grounds for distinguishing between such unilateral statements and reservations: the purpose of reservation clauses is also to allow States to suspend the application of certain provisions of the treaty even though this may entail certain conditions;

3. Thirdly, and lastly, the distinction between the three formulas above is not always obvious,[284] particularly as they can occasionally be combined. Nevertheless, from an intellectual standpoint, they can and must be considered separately when comparing them to reservations as defined in draft guideline 1.1 and those that follow.

(a) Unilateral statements excluding the application of certain provisions of a treaty under an exclusionary clause

148. This case is contemplated by article 17, paragraph 1, of the 1969 and 1986 Vienna Conventions:

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

149. This provision, which was adopted without modification by the 1968-1969 Vienna Conference,[285] is explained by the International Law Commission as follows in its final report of 1966 on the draft articles on the law of treaties:

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

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[283] See para. 110 above.

[284] For examples, see paras. 180 or 203 and 204 below.

[285] See *United Nations Conference on the Law of Treaties, First and second sessions (Vienna, 26 March-24 May 1968 and 9 April-2 May 1969*), Documents of the Conference (United Nations publication, Sales No. E.70.V.5), Reports of the Committee of the Whole, paras. 156-157, pp. 129-130.

State to be bound by part of a treaty is effective only if the treaty or the other contracting States authorize such a partial consent."[286]

150. One thing that is immediately obvious about this provision is the fact that while it appears in section 1 of part II ("Conclusion of treaties"), it creates a link with articles 19 to 23, which are specifically devoted to reservations. Thus it becomes even more important to determine whether statements by which a State or an international organization expresses its consent to be bound only to part of a treaty when a treaty so permits are reservations or not.

151. Such exclusionary clauses (opting or contracting out) are quite common. Samples can be found in the conventions adopted under the auspices of The Hague Conference on Private International Law, the Council of Europe and ILO and in various other conventions.[287] Among the latter, one may cite by way of example article 14, paragraph 1, of the London Convention of 2 November 1973 for the Prevention of Pollution from Ships:

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

152. The Hague Conference, which is surely the most inventive body when it comes to modifying the provisions of treaties drafted under its auspices, has used exclusionary clauses on many occasions:

– Article 8, first subparagraph, of the Convention of 15 June 1955 relating to the settlement of the conflicts between the law of nationality and the law of domicile:

"Each Contracting State, when signing or ratifying the present Convention or acceding thereto, may declare that it excludes the application of this Convention to disputes between laws relating to certain matters".

– Article 9 of The Hague Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and foundations:

"Each Contracting State, when signing or ratifying the present Convention or acceding thereto, may reserve the right to limit the scope of its application, as stipulated in article 1".

153. The appearance of exclusionary clauses in conventions concluded by the Council of Europe is also common:[288]

– Article 34, paragraph 1, of the European Convention for the peaceful settlement of disputes of 29 April 1957:

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[286] *Yearbook ... 1966,* vol. II, pp. 219-220.

[287] The provisions which follow are cited by way of example and in no way exhaust the list of exclusionary clauses of conventions adopted in these forums. For other examples, see in general P. H. Imbert, *Les réserves aux traités multilatéraux,* Pedone, Paris, 1979, pp. 171-172.

[288] For other examples, see Sia Spiliopoulo Åkermark, "Reservation clauses in treaties concluded within the Council of Europe", *ICLQ*, 1999, pp. 504-505.

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

(a) Chapter III relating to arbitration; or

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

– Article 7, paragraph 1, of the Council of Europe Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality of 6 May 1963:

"Each Contracting Party shall apply the provisions of Chapters I and II.

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

– Article 25, first subparagraph, of the European Convention on Nationality of 6 November 1997:

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

154. International labour conventions also make use of this technique, in keeping with the spirit of article 19 of the ILO Constitution:[289]

– Article 2 of International Labour Convention No. 63 of 1938, concerning statistic of wages and hours of work:

"1. Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude from its acceptance of the Convention:

(a) any one of Parts II, III or IV; or

(b) Parts II and IV; or

(c) Parts III and IV.

2. Any Member which has made such a declaration may at any time cancel that declaration by a subsequent declaration.

3. Every Member for which a declaration made under paragraph 1 of this Article is in force shall indicate each year in its annual report upon the application of this Convention the extent to which any progress has been made with a view to the application of the Part or Parts of the Convention excluded from its acceptance".

– Article 17, paragraph 1,[290] of International Labour Convention No. 119 of 25 June 1963, concerning the guarding of machinery:

"The provisions of this Convention apply to all branches of economic activity unless the Member ratifying the Convention specifies a more limited application by a declaration appended to its ratification".

[289] See para. 75 above.

[290] Paragraph 2 governs statements made in accordance with paragraph 1 and limits the application of the provisions of the Convention.

155. International labour conventions (and other treaties) also contain more complex provisions that cannot be compared to exclusionary clauses, since ultimately they allow States Parties to exclude the application of certain provisions of the convention in respect of themselves while compelling them to accept others which are nevertheless quite different.[291]

156. As far as the Special Rapporteur knows, the great majority of authors who have taken up the question of whether or not statements made in application of such exclusionary clauses are reservations maintain that they are.[292]

157. The strongest argument that they are not clearly derives from ILO's consistent strong opposition to such an assimilation, even though that organization regularly resorts to the opting-out procedure. In its reply to the Commission's questionnaire, ILO wrote, in a long passage which is worth citing in its entirety here:

> "It has been the consistent and long-established practice of the ILO not to accept for registration instruments of ratification of international labour Conventions when accompanied with reservations. As has been written, 'this basic proposition of refusing to recognize any reservations is as old as ILO itself' (see W. P. Gormley, 'The Modification of Multilateral Conventions by Means of Negotiated Reservations and Other Alternatives: A Comparative Study of the ILO and Council of Europe', *Fordham Law Review*, 1970, p. 65). The practice is not based on any explicit legal provision of the Constitution, the Conference Standing Orders, or the international labour Conventions, but finds its logical foundation in the specificity of labour Conventions and the tripartite structure of the Organization. Reference is usually made to two Memoranda as being the primary sources for such firm principle: first, the 1927 Memorandum submitted by the ILO Director to the Council of the League of Nations on the Admissibility of Reservations to General Conventions, and second, the 1951 Written Statement of the International Labour Organization in the context of the ICJ proceedings concerning the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.
>
> "In his Memorandum to the Committee of Experts for the Codification of International Law, the ILO Director General wrote with respect to labour Conventions:
>
> > "'these agreements are not drawn up by the Contracting States in accordance with their own ideas: they are not the work of plenipotentiaries, but of a conference which has a peculiar legal character and includes non-government representatives. Reservations would still be inadmissible, even if all the States interested accepted them; for the rights which the treaties have conferred on non-governmental interests in regard to the adoption of international labour Conventions would be overruled if the consent of the Governments alone could suffice to modify the substance and detract from the effect of the Conventions' (see League of Nations, *Official Journal, 1927*, at p. [882]).

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[291] See section (c) below.

[292] Some authors, however, without specifically taking a position, see distinct differences between contracting out and reservations (see Bruno Simma, "From Bilateralism to Community Interest in International Law", *RCADI*, 1994-VI, vol. 250, pp. 329-331).

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

> "'international labour conventions are adopted and enter into force by a procedure which differs in important respects from the procedure applicable to other international instruments. The special features of this procedure have always been regarded as making international labour conventions intrinsically incapable of being ratified subject to any reservation. It has been the consistent view of the International Labour Organization, since its establishment, that reservations are not admissible. This view is based upon and supported by the consistent practice of the International Labour Organization and by the practice of the League of Nations during the period from 1920-1946 when the League was responsible for the registration of ratifications of international labour conventions' (see *ICJ Pleadings, 1951*, at pp. 217, 227-228).

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

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

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

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

the ILO Director General in his 1927 Memorandum to the Council of the League of Nations,

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

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

> "Notwithstanding the prohibition of formulating reservations, ILO member States are entitled, and, at times, ever required, to attach declarations — optional and compulsory accordingly. A compulsory declaration may define the scope of the obligations accepted or give other essential specifications. In some other cases a declaration is needed only where the ratifying State wishes to make use of permitted exclusions, exceptions or modifications. In sum, compulsory and optional declarations relate to limitations *authorized* by the Convention itself, and thus do not amount to reservations in the legal sense. As the Written Statement of the ILO in the *Genocide Case* read, 'they are therefore a part of the terms of the convention as approved by the Conference when adopting the convention and both from a legal and from a practical point of view are in no way comparable to reservations' (see *ICJ Pleadings, 1951*, at p. 234). Yet for some, these flexibility devices have 'for all practical purposes the same operational effect as reservations' (see Gormley, op. cit., *supra*, at p. 75)."[293]

158. This reasoning reflects a respectable tradition but is somewhat less than convincing:

– In the first place, while international labour conventions are obviously adopted under very specific circumstances, they are nevertheless treaties between States, and the participation of non-governmental representatives in their adoption does not modify their legal nature;

– Secondly, the possibility that the International Labour Conference might revise a convention that proved to be inadequate proves nothing about the legal nature of unilateral statements made in application of an exclusionary clause: the revised convention could not be imposed against their will on States that had made such statements when becoming parties to the original convention, and it matters little in such cases whether or not those statements were reservations;

– Lastly, and most importantly, the position traditionally taken by ILO reflects a restrictive view of the concept of reservations which is not reflected in the Vienna Conventions.

[293] Reply to questionnaire, pp. 3-5.

159. In fact, the Vienna Conventions do not preclude the making of reservations, not because of an authorization implicit in the general international law of treaties as codified in articles 19 to 23 of the 1969 and 1986 Conventions, but on the basis of specific conventional provisions: reservation clauses.[294] This is quite clear from article 19 (b) of the Conventions, which concerns treaties that provide "that only *specified* reservations ... may be made", or article 20, paragraph 1, which stipulates that "a reservation *expressly authorized* by a treaty does not require any subsequent acceptance ...".

160. In fact, exclusionary clauses are clearly related to reservation clauses, and the resulting unilateral statements are related to the "specified" reservations "expressly authorized" by a treaty, including international labour conventions.[295] They are indeed unilateral statements made at the time consent to be bound is expressed and purporting to exclude the legal effect of certain provisions of the treaty as they apply to the State or the international organization making the statement, all of which corresponds exactly to the definition of reservations, and, at first glance at least,[296] it would seem that they are not and need not be subject to a separate legal regime.

161. Except for the absence of the word "reservations", there appears to be little difference between the aforementioned exclusionary clauses[297] and:

– Article 16 of The Hague Convention of 14 March 1970 on celebration and recognition of the validity of marriages:

"A Contracting State may reserve the right to exclude the application of chapter I", article 28 of which provides for the possibility of "reservations";

– Article 33 of the Convention concluded on 18 March 1978 in the context of The Hague Conference on Private International Law, on the taking of evidence abroad in civil or commercial matters:

"A State may, at the time of signature, ratification or accession, exclude, in whole or in part, the application of the provisions of paragraph 2 of article 4 and of Chapter II. No other reservation shall be permitted";

– Or article 35, entitled "Reservations", of the Lugano Convention of the Council of Europe of 21 June 1993, on civil liability for damages resulting from activities dangerous to the environment:

"Any signatory may declare, at the time of signature or when depositing its instrument of ratification, acceptance or approval, that it reserves the right:

...

"(c) not to apply Article 18".

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294 See para. 110 above.

295 At the same time, there is little doubt that a practice accepted as law has developed in ILO. Under this practice, any unilateral statement seeking to limit the application of the provisions of international labour conventions that is not explicitly stipulated is inadmissible. This is also clearly the case with regard to the conventions adopted by The Hague Conference of Private International Law (see Georges A. L. Droz, "*Les réserves et les facultés dans les Conventions de La Haye de droit international privé", RCDIP 1969*, pp. 388-392). However, this is an altogether different question from that of defining reservations.

296 This needs to be verified, but at least it is no longer a question of definition.

297 Paras. 151-154.

And there are countless other examples.

162. The only disturbing element is the simultaneous presence in some conventions (at least those of the Council of Europe) of exclusionary *and* reservation clauses.[298] The Special Rapporteur sees no other explanation for this situation than terminological vagueness.[299] And it is striking that, in its reply to the Commission's questionnaire, ILO should mention among the problems encountered in the areas of reservations those relating to article 34 of the European Convention for the peaceful settlement of disputes, since the word "reservation" does not even appear in this standard exclusionary clause.[300]

163. The distinction is not crystal clear,[301] to say the least, and both in their form and their effects[302] the statements made when expressing consent to be bound under exclusionary clauses are in every way comparable to reservations when provision is made for the latter, with restrictions, by reservation clauses.

164. In reality, exclusionary clauses take the form of "negotiated reservations", as the term is currently (and erroneously) accepted in the context of The Hague Conference on Private International Law and further developed in the Conference of the Council of Europe.[303] As Professor Pierre-Henri Imbert notes, "strictly speaking, this means that it is the *reservation* — and not only the right to make one — that is the subject of the negotiations. In other words, unlike traditional clauses, clauses that apply such a procedure should make it possible to know beforehand not only what the reservation is but also what State will actually make it".[304] At the same time, the term is used in the Council of Europe in a broader sense, seeking to cover the "*procedure* intended to enumerate either in the body of the Convention itself or in an annex the limits of the options available to States in formulating a reservation".[305]

165. These, then, are not "reservations" at all in the proper sense of the term, but *reservation clauses* that impose limits and are precisely defined when the treaty is negotiated. And they are truly nothing more,[306] even in the very rare cases where a specific State is mentioned in the clause as being its only beneficiary.[307]

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[298] See arts. 7 (para. 153 above) and 8 of the Council of Europe Convention of 1968 on reduction of cases of multiple nationality and examples given by Sia Spiliopoulo Åkermark, op. cit., p. 506, note 121.

[299] This uncertainty is also stressed by Sia Spiliopoulo Åkermark, op. cit., p. 513.

[300] See para. 153 above.

[301] Similarly, see Pierre-Henri Imbert, p. 169, or Sia Spiliopoulo Åkermark, op. cit., pp. 505-506.

[302] Similarly, see W. Paul Gormley, "The Modification of Multilateral Conventions by Means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and Council of Europe", Part I, *Fordham Law Review,* 1970-1971, pp. 75-76.

[303] See Georges A. L. Droz, op. cit., pp. 385-388; Héribert Golsong, "*Le développement du droit international régional*" in SFDI, Colloque de Bordeaux, *Régionalisme et universalisme dans le droit international contemporain*, 1997, p. 228, or Sia Spiliopoulo Åkermark, op. cit., pp. 489-490.

[304] Op. cit., see note 244 above, p. 196.

[305] Héribert Golsong, op. cit., p. 228 (emphasis added); see also Sia Spiliopoulo Åkermark, op. cit., p. 498 and also pp. 489-490.

[306] On this point, see Sia Spiliopoulo Åkermark, op. cit., pp. 498-499, or Pierre-Henri Imbert, op. cit., pp. 197-199.

[307] See the annex to the European Convention on Civil Liability for Damage Caused by Motor Vehicles, which allowed Belgium to make a specific reservation for a three-year period, or

166. In the Special Rapporteur's view, these terminological nuances belong in the chapter of the Guide to Practice devoted to definitions, on the understanding that the point cannot be pressed too far, since they say nothing about which legal regime, if any, should govern a particular category of reservations, and since ultimately there is nothing to prevent the parties to a treaty from agreeing on a specific regime or waiver.

167. With regard to unilateral statements made when expressing the author's consent to be bound by a treaty in accordance with an exclusionary clause, a draft guideline should be added to section 1.1 of the Guide to Practice in order to make it clear that what is involved is indeed a reservation, however phrased or named. The draft text might read:

1.1.8[308] *Reservations formulated under exclusionary clauses.*

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

168. On the other hand, and not without some hesitation, the Special Rapporteur does not propose to include in the Guide to Practice a draft guideline defining "negotiated reservations". This term is surely misleading,[309] yet there does not seem to be any particular reason for dealing with it any differently than by means of the draft guideline proposed above for reservation clauses.[310]

169. If, however, the Commission should take the opposite view, the following definition could be considered (and probably included in section 1.7 of the Guide to Practice):

"Negotiated reservations"

A "negotiated reservation" is [the provision of a treaty] [a reservation clause] indicating precisely and within certain limits what reservations can be made to [this] [a] treaty.

The choice of bracketed phrases will depend on whether or not the term "reservation clause" is defined elsewhere.

170. Draft guideline 1.1.8 proposed above is fully compatible with the provisions of article 17, paragraph 1, of the 1969 and 1978 Vienna Conventions.[311] The question has already been raised: "What is the legal meaning of the reference in article 17

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article 32, para. 1 (b), of the European Convention on Transfrontier Television of 1989, which allowed the United Kingdom alone to formulate a specific reservation; example cited by Sia Spiliopoulo Åkermark, op. cit., p. 499.

[308] This numbering is provisional; the Commission may wish to insert the draft text after draft guideline 1.1.2.

[309] See para. 165 above.

[310] See note 220.

[311] Quoted in para. 148 above.

('without prejudice to ...') to articles 19 to 23 of the Vienna Convention on the Law of Treaties, if not to imply that in some cases options amount to reservations?"[312]

171. Yet, conversely, it would appear that this provision is drafted so as to imply that all clauses that offer parties a choice between various provisions of a treaty *are not* reservations.

172. As indicated below,[313] this is certainly true of statements made under opting-in clauses. But one might also ask whether it is not true of certain statements made under opting-out clauses as well.

173. It so happens that some treaties allow the parties to exclude, by means of a unilateral statement, the legal effect of certain of the treaty's provisions in their application to the author of the statement, not (or not only) at the time of expression of consent to be bound, but after the treaty enters into force for them. For example,

– Article 82 of the International Labour Convention on minimum standards authorizes a member State that has ratified the Convention to denounce, 10 years after the entry into force of the Convention, either the entire Convention or one or more of Parts II to X;

– Article 22 of The Hague Convention of 1 June 1970 on the recognition of divorces and legal separations authorizes contracting States, "*from time to time*, [to] declare that certain categories of persons having their nationality need not be considered their nationals for the purposes of this Convention";[314]

– Article 30 of The Hague Convention of 1 August 1989 on successions stipulates that:

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

– Article X of the ASEAN Framework Agreement on Services of 4 July 1996 authorizes a member State to modify or withdraw any commitment in its schedule of specific commitments, subject to certain conditions, at any time after three years from the date on which that commitment entered into force.

174. Unilateral statements made under provisions of this type are clearly not reservations.[315]

175. In this respect, the fact that they are formulated (or may be formulated) at a time other than the time of consent to be bound is perhaps not in itself absolutely decisive in so far as nothing prevents negotiators from departing from the provisions of the Vienna Conventions, which are merely auxiliary in character; this aspect will be studied in more detail in the next chapter of this report.

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[312] Sia Spiliopoulo Åkermark, op. cit., p. 506.

[313] See section (b) below.

[314] Concerning the circumstances under which this provision was adopted, see Georges A. L. Droz, op. cit., pp. 414-415. This, typically, is a "negotiated reservation" in the sense referred to earlier (para. 169) whose sole beneficiary is the United Kingdom and which in reality has the same effects as an optional clause (see para. 180 below).

[315] Significantly, article 22, already cited, of the Convention on the recognition of divorces and legal separations, of the 1970 Hague Conference, is omitted from the list of reservation clauses given in article 25.

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

177. It would be possible to include in section 1.7 of the Guide to Practice a draft guideline specifying the following:

> *Unilateral statements formulated under an exclusionary clause after the entry into force of the treaty*
>
> *A unilateral statement made by a State or an international organization in accordance with a clause in the treaty expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to these parties after the entry into force of the treaty in their respect does not constitute a reservation.*

178. The Special Rapporteur considers, however, that this clarification is not essential. It merely repeats, *a contrario*, indications included in draft guideline 1.1.8 proposed above, and it is probably sufficient to include these explanations in the commentary to that guideline.

(b) Unilateral statements accepting the application of certain provisions of a treaty under an optional clause

179. In contrast to the exclusionary clauses under which the unilateral statements analysed above are made, "optional clauses" (or "opting" or "contracting in" clauses) should be the terms used to designate clauses which envisage that the parties to a treaty may accept provisions which, in the absence of express acceptance, would not be applicable to them.[316]

180. Paradoxically, the distinction between optional clauses and exclusionary clauses is not always obvious. In addition to the particular problems posed by clauses which offer a choice among the provisions of a treaty, some of which resemble both types of clauses,[317] there are clauses which appear to be exclusionary clauses but are really optional clauses in that statements made under these provisions actually result in granting additional rights to the other parties to the

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[316] Here again, this expression should, undoubtedly, be defined in the Guide to Practice if the Commission decides to include in it the definition of the terms used (other than reservations and interpretative declarations).

[317] Which will be considered below, *sub litt.* (c).

treaty, and therefore increase the *obligations* of the State or international organization which made the statement.

181. This is the case, for example, of article 22, already cited (para. 173) of the 1970 Hague Convention on the recognition of divorces and legal separations, the complex scope of which has been explained by Mr. Georges Droz as follows:

> "This power seems very mysterious. It must be remembered that the Convention takes the competence of the national authorities of the spouses as the basis for the recognition of foreign divorces. The purpose of this power is to enable the United Kingdom to specify that certain persons who are British subjects, but are not nationals of the United Kingdom itself (England, Scotland, Wales, Northern Ireland), for example nationals of Hong Kong, will not be regarded as 'nationals' for the purposes of the application of the Convention. This means that a State which is bound by the Treaty to the United Kingdom will, of course, recognize the judgments issued in the United Kingdom concerning English or Scottish people, but, *merely on the basis of the nationality of the spouses*, will not be obliged to recognize judgments issued in London for the benefit of two nationals of Hong Kong. This is actually a power to make a certain specification, not a reservation. Indeed, the United Kingdom is not in any way seeking to lessen the effect on it of the Convention, but instead wishes to spare its partners from a considerable extension of the obligations of the Convention which would result solely from the concept of British nationality".[318]

182. Beyond these, often delicate, problems of the "dividing line" between different categories of treaty provisions allowing States to choose among the provisions of a treaty, it remains true that the optional clauses referred to here have the objective not of lessening but of increasing the obligations deriving from the treaty for the author of the unilateral statement.

183. The most famous of these clauses is Article 36, paragraph 2, of the Statute of the International Court of Justice,[319] but there are many others; such clauses are either drawn up on the same model and result in the acceptance of the competence of a certain mode of settlement of disputes or of monitoring by an organ created by the treaty as envisaged in article 41, paragraph 1, of the 1966 International Covenant on Civil and Political Rights:

> "A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant ..."[320]

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[318] Georges A. L. Droz, "*Les resérves et les facultés dans les Conventions de La Haye de droit international privé*", R.C.D.I.P. 1969, pp. 414-415; italicized in the text.

[319] See above, para. 90.

[320] Compare with article 1 of the Optional Protocol. See also the former articles 25 (acceptance of the right to address individual petitions to the Commission) and 46 (acceptance of inter-State declarations) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (these articles have been modified, to provide for automatic compulsory jurisdiction, by articles 33 and 34 of Protocol No. 11 of 11 May 1994) or article 45, paragraph 1, of the American Convention on Human Rights: "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in

or are exclusively prescriptive in nature, as in the case of, among many other examples, article 25 of the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations:

> "Any Contracting State may, at any time, declare that the provisions of this Convention will be extended, in relation to other States making a declaration under this article, to an official deed ("*acte authentique*") drawn up by or before an authority or public official and directly enforceable in the State of origin insofar as these provisions can be applied to such deeds".[321]

184. Although, curiously, one author has found it possible to affirm that unilateral statements made under such optional clauses "functioned as reservations",[322] in reality, at the technical level, they have very little in common with reservations, apart from the (important) fact that they both purport to modify the application of the effects of the treaty.

185. It is quite clear that "opt-out clauses seem to be much closer to reservations than opt-in clauses".[323] Indeed, not only can

1. Statements made under optional clauses be formulated, generally speaking, at any time, but also,

2. Optional clauses "start from a presumption that parties are not bound by anything other than they have explicitly chosen",[324] while exclusionary clauses, like the mechanism for reservations, start from the opposite assumption; and

3. Statements made under optional clauses purport not to "exclude or to modify the legal effect of certain provisions of [a] treaty in their application" to their author[325] or to limit the obligations imposed on [the author] by the treaty,[326] but, instead, to increase them, while the mere entry into force of the treaty for the author does not have this effect.

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which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention".

321 See also articles 16 and 17, paragraph 2, of the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters, or article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, or article 4, paragraphs 2 and 4, of ILO Convention No. 118 of 1962 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (see also the examples given in the memorandum from ILO to I.C.J. in 1951, in I.C.J., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Pleadings, oral arguments, documents*, p. 232, or again article 4, paragraph 2 (g), of the United Nations Framework Convention on Climate Change of 9 May 1992.

322 "[I]t is valid to conclude that they *function* as reservations" (W. Paul Gormley, "The Modification of Multilateral Conventions by Means of Negotiated Reservations and Other Alternatives: A Comparative Study of the ILO and Council of Europe", Part II, *Fordham Law Review*, 1970-1971, p. 450 — italicized in text). The author makes this comment with regard to former article 25 of the European Convention on Human Rights; see also pp. 68 and 75 regarding comparable clauses appearing in the international labour conventions.

323 Sia Spiliopoulo Åkermark, "Reservation Clauses in Treaties Concluded Within the Council of Europe", I.C.L.Q. 1999, pp. 479-514, not p. 505.

324 Ibid.

325 Draft guideline 1.1 of the Guide to Practice.

326 Draft guideline 1.1.5.

186. Here again, to a certain degree, the complex problems of "extensive reservations"[327] arise. However, draft guideline 1.4.1 adopted by the Commission in 1999 states that:

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

187. The only difference between the statements envisaged in this draft guideline and those under consideration here is that the former are formulated on the sole initiative of the author, while the latter are made under a treaty.

188. Given the great differences between them, a confusion between reservations, on the one hand, and statements made under an optional clause, on the other, need hardly be feared, so that it might be asked whether it is necessary to include a guideline in the Guide to Practice in order to distinguish between them. The Special Rapporteur believes, however, that this question should be answered in the affirmative: even if statements based on optional clauses are clearly, at the technical level, very different from reservations, with which statements made under exclusionary clauses may be (and must be) equated, such statements are nevertheless the counterpart of statements made under exclusionary clauses and their general objective is too similar for them to be ignored, particularly since they are often presented jointly.[328]

189. It is therefore proposed that the following draft guideline should be included in section 1.4 of the Guide to Practice:

> *1.4.6*[329] *Unilateral statements adopted under an optional clause*
>
> *A unilateral statement made by a State or an international organization in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not imposed on them solely by the entry into force of the treaty is outside the scope of the present Guide to Practice.*

190. It goes without saying that, if the treaty so provides or, given the silence of the treaty, if it is not contrary to the goal and purpose of the provision in question,[330] there is nothing to prevent such a statement, in turn, from being accompanied by restrictions aimed at limiting the legal effect of the obligation thereby accepted.

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[327] See the third report on reservations to treaties, A/CN.4/491/Add.3, paras. 208-227.

[328] See, for example, Michel Virally, who includes them in the same term "optional clauses". ("*Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités*"in Catholic University of Louvain, fourth symposium of the Department of Human Rights, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruylant, Brussels, 1982, pp. 13-14).

[329] This numbering is provisional; the Commission may wish to place this guideline after draft guideline 1.4.1.

[330] In the *Loizidou v. Turkey* case, the European Court of Human Rights held that "having regard to the object and purpose of the [European] Convention [of Human Rights], the consequences" of restrictions on its competence "for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for. However no such provision exists in either Article 25 or Article 46" (on these provisions, see above, note 320) (judgment of 23 March 1995, para. 75, R.U.D.H. 1995, p. 139).

191. This is the case with the reservations frequently made by States when they accept the optional clause recognizing the optional jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute.[331]

192. There can be no question, in the context of the present report, of entering into a detailed analysis of the legal nature of these reservations and conditions.[332] It is sufficient to express support for the views expressed by Ambassador Shabtai Rosenne in his masterpiece on the law and practice of the International Court:[333]

> "There is a characteristic difference between these reservations, and the type of reservation to multilateral treaties encountered in the law of treaties. ... Since the whole transaction of accepting the compulsory jurisdiction is *ex definitione* unilateral and individualized and devoid of any multilateral element or element of negotiation, the function of reservations in a declaration cannot be to exclude or vary the legal effect of some existing provision in relation to the State making the declaration. Their function, together with that of the declaration itself, is to define the terms on which that State unilaterally accepts the compulsory jurisdiction — to indicate the disputes which are included within that acceptance, in the language of the *Right of Passage* (Merits) case".[334]

193. These observations are consistent with the jurisprudence of the Court, and, in particular, its recent judgment of 4 December 1998 in the *Fisheries Jurisdiction* case between Spain and Canada:

> "Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. (...) All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout".[335]

194. The same goes for the reservations which States attach to statements made under other optional clauses such as, for example, those resulting from the

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[331] Although the Statute is silent on the possibility of optional declarations under Article 36, paragraph 2, being accompanied by reservations other than the condition of reciprocity, this power, which is well established in practice and was confirmed by committee IV/I of the San Francisco Conference (cf. UNCIO, vol. 13, p. 39) is quite clear. Cf. Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996, vol. II, Jurisdiction*, pp. 767-769; see also the dissenting view of Judge Bedjaoui attached to the judgment of the I.C.J. of 4 December 1998 in the *Fisheries Jurisdiction* case (Spain v. Canada), para. 42); and, for a recent discussion of this question, see the pleadings in the *Aerial Incident of 10 August 1999* (Pakistan v. India) case, 3 April 2000, CR 2000/1, pp. 19-24 (M. Munshi) and 4 April 2000, CR 2000/2, pp. 20-21 (M. Brownlie).

[332] Shabtai Rosenne makes a distinction between these two concepts (ibid., pp. 768-769) which is not convincing to the Special Rapporteur, but this is irrelevant for the purposes of the present report.

[333] However, the second reason mentioned by Ambassador Rosenne does not seem conclusive: it is based on the control exercised by the Court on the validity of reservations included in optional declarations (ibid., pp. 769-770); but if it is not inherent to the institution of reservations to treaties, this control may also be exercised, if necessary, on reservations to multilateral treaties (cf. the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 177-251).

[334] Ibid., p. 769. The passage in question of the judgment relating to the *Right of Passage over Indian Territory* case of 12 April 1960 appears on page 34 of the *I.C.J. Reports* (1960).

[335] Para. 44. See also para. 47: "Therefore, declarations and reservations are to be read as a whole".

acceptance of the competence of the International Court of Justice under article 17 of the General Act for Conciliation, Judicial Settlement and Arbitration[336] in respect of which the Court has stressed "... the close and necessary link that always exists between a jurisdictional clause and reservations to it".[337]

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

196. In view of the great theoretical and practical importance[338] of the distinction, it seems necessary that this should be reflected in a guideline of the Guide to Practice, which is the necessary complement to draft guideline 1.4.6 proposed above. It could be drafted as follows:

1.4.7 Restrictions contained in unilateral statements adopted under an optional clause

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

(c) Unilateral statements providing for a choice between the provisions of a treaty

197. While paragraph 1, mentioned above,[339] of article 17 of the 1969 and 1986 Vienna Conventions concerns the partial exclusion of the provisions of a treaty under an exclusionary clause, paragraph 2 of the same provision envisages the intellectually different hypothesis in which the treaty contains a clause allowing a choice between several of its provisions:

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

198. The commentary on this provision, reproduced without change by the Vienna Conference,[340] is concise but is sufficiently clear about the hypothesis envisaged:

> "Paragraph 2 takes account of a practice which is not very common but which is sometimes found, for example, in the General Act for the Pacific Settlement of International Disputes and in some international labour

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[336] Without prejudice to the exact legal nature of article 38 of this Act; see below, para. 200.

[337] Judgment of 19 December 1978 in the *Aegean Sea Continental Shelf* case, *I.C.J. Reports, 1978*, p. 32, para. 79. For a recent discussion of this question, see again the pleadings in the *Aerial Incident of 10 August 1999* (Pakistan v. India) case, 4 April 2000, CR 2000/2, pp. 44-45 and 6 April 2000, CR 2000/4, pp. 20-22 (M. Pellet).

[338] Particularly as regards interpretation; cf. the afore-mentioned judgment of I. C. J. of 4 December 1998 in *Fisheries Jurisdiction* case, paras. 42-56.

[339] See para. 179.

[340] See above, note 285.

conventions. The treaty offers to each State a choice between differing provisions of the treaty".[341]

199. As has been noted,[342] it is not accurate (or, at all events, not very accurate) to say that such a practice is, today, not very common. It is actually fairly widespread, at least in the apparently rather vague sense given to it by the Commission in 1966. This includes two different hypotheses, however, which do not fully overlap.

200. The first is illustrated, for example, by the statements made under the 1928 General Act for Conciliation, Judicial Settlement and Arbitration,[343] article 38, paragraph 1, of which provides:

"Accessions to the present General Act may extend:

A. Either to all the provisions of the Act (chapters I, II, III and IV);

B. Or to those provisions only which relate to conciliation and judicial settlement (chapters I and II), together with the general provisions dealing with these procedures (chapter IV)".

201. The same goes for several ILO conventions, in which this technique, often used subsequently,[344] was introduced by Convention No. 102 of 1952 concerning Minimum Standards of Social Security, article 2 of which provides:

"Each Member for which this Convention is in force —

(a) shall comply with —

(i) Part I;

(ii) at least three of Parts II, III, IV, V, VI, VII, VIII, IX and X;

(iii) the relevant provisions of Parts XI, XII and XIII; and

(iv) Part XIV".

202. In the same connection, two conventions of great scope which were adopted in the context of the Council of Europe may be cited:

– The European Social Charter, of 18 October 1961, article 20, paragraph 1, of which provides for a partially optional system of acceptance:[345]

"Each of the Contracting Parties undertakes:

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

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

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[341] *Yearbook ... 1966*, vol. II, p. 202, para. 3 of the commentary on article 14 (became article 17 in 1969).

[342] Sia Spiliopoulo Åkermark, "Reservation Clauses in Treaties Concluded Within the Council of Europe", *I.C.L.Q.* 1999, p. 504.

[343] The revised general act of 1949 adds a third possibility: "C. Or to those provisions only which relate to conciliation (chapter I), together with the general provisions concerning that procedure (chapter IV)".

[344] See P. H. Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 172.

[345] Hans Wiebringhaus, "*La Charte sociale européenne: vingt ans après la conclusion du Traité*", *A.F.D.I.* 1982, p. 936.

(c) [...] to consider itself bound by such a number of articles or numbered paragraphs of part II of the Charter as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs";

this complex system was used again in article A, paragraph 1, of the revised Social Charter on 3 May 1996;[346]

– Article 2 of the European Charter for Regional or Minority Languages of 5 November 1992 is similar:

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

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

203. A superficial reading of these provisions could perhaps give rise to the impression that they are optional clauses within the meaning proposed above.[347] In reality, however, they are very different: the statements which they invite the Parties to make are not optional but binding and condition the entry into force of the treaty for them,[348] and they have to be made at the time of giving consent to be bound by the treaty.

204. Similarly, these statements cannot be completely equated with those made in application of an exclusionary clause.[349] Clearly, they end up by excluding the application of provisions which do not appear in them. But they do so indirectly, through partial acceptance,[350] and not by excluding the legal effect of those provisions but because of the silence of the author of the statement in their regard.

205. The same goes for statements made under the second category of treaty clauses which, even more clearly, offer a choice between the provisions of a treaty because they oblige the parties to choose a given provision (or a given set of provisions) *or, alternatively,* another provision (or another set of provisions). This is no longer a question of choosing *among* the provisions of a treaty but of choosing *between them*, on the understanding that, in contrast to the previous case, there can be no accumulation,[351] and the acceptance of the treaty is not partial (even if the obligations deriving from it may be more or less binding depending on the option selected).

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346 See also articles 2 and 3 of the European Code of Social Security of 1964.

347 Para. 179.

348 This may be seen from the rest of the wording of article 17, para. 2, cited above (para. 148) of the Vienna Conventions.

349 See above, (a).

350 P. H. Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 170.

351 Article 287 of the United Nations Convention on the Law of the Sea of 1982 is midway between the two approaches: States must choose one or more binding procedures for the settlement of disputes leading to binding decisions, failing which the arbitral procedure envisaged in annex VII applies. But there may be an accumulation of different procedures.

206. These "alternative clauses" are less common than those analysed above. They do exist, however, as demonstrated by, for example:

– Article 2 of ILO Convention No. 96 (revised) of 1949 concerning Fee-Charging Employment Agencies:[352]

> "1. Each Member ratifying this Convention shall indicate in its instrument of ratification whether it accepts the provisions of part II of the Convention, providing for the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies, or the provisions of part III, providing for the regulation of fee-charging employment agencies including agencies conducted with a view to profit.
>
> 2. Any Member accepting the provisions of part III of the Convention may subsequently notify the Director General that it accepts the provisions of part II; as from the date of the registration of such notification by the Director General, the provisions of part III of the Convention shall cease to be applicable to the Member in question and the provisions of part II shall apply to it";

– Or section 1 of article XIV of the Statutes of IMF (modified in 1976) whereby:

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

207. As has been observed, "[o]ptional commitments ought to be distinguished from authorized reservations although they in many respects resemble such reservations".[353] Moreover, the silence of article 17, paragraph 2, of the Vienna Conventions, which contrasts with the reference in paragraph 1 to articles 19 to 23 on reservations[354] constitutes, in contrast with unilateral statements made under an exclusionary clause, an indication of the clear dividing line between reservations and these alternative commitments.

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

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[352] Pierre-Henri Imbert stresses that this is the best example of the type of clause allowing States to make a choice in the restrictive sense (*Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 172); see also Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, Swedish Institute of International Law, Studies in International Law, No. 5, T. M. C. Asser Instituut, The Hague, 1988, p. 134.

[353] F. Horn, ibid., p. 133.

[354] See above, paras. 150 and 170.

209. There are striking differences from reservations, however, because unlike reservations, these statements are the condition *sine qua non*, by virtue of the treaty, of the participation of the author of the statement in the treaty. Moreover, although they exclude the application of certain provisions of the treaty in respect of the State or international organization making the statement, this exclusion relates to the treaty itself and is inseparable from the entry into force of other provisions of the treaty in respect of the author of the same statement.

210. It seems necessary to specify, in the Guide to Practice, that unilateral statements meeting this definition do not constitute reservations within the meaning of the Guide. This could be done in the form of the following draft guideline:

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

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

Conclusion of the first part

211. In the opinion of the Special Rapporteur, this draft guideline should come at the end of chapter 1 of the Guide to Practice concerning the definition of reservations and interpretative declarations.

212. It goes without saying that the 34 draft guidelines of which chapter 1 is composed cannot attempt to cover all the hypotheses which could occur or resolve in advance all the problems which could arise, so great is the "imagination of legal scholars and diplomats".[355] However, they probably do cover all the *categories* of doubtful cases in which it can legitimately be questioned whether a procedure purporting to modify the application of the treaty is or is not a reservation or an interpretative declaration.

213. The next parts of the Guide to Practice will be strictly confined to unilateral statements corresponding to the various definitions contained in sections 1.1 and 1.2. It is to these definitions alone that the legal regime of reservations and interpretative declarations, as specified in these other parts, applies, which does not mean either that it will necessarily be a uniform regime for each of these categories[356] or that certain elements of these regimes are not applicable to other unilateral statements which do not fall within the scope of the present Guide to Practice.

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[355] See above, para. 80.

[356] Thus, for example, the Commission seems to be inclined towards the definition of a set of rules applicable to conditional interpretative declarations which is markedly closer to the legal regime of reservations than to that of "simple" declarative statements (cf. paras. 13 to 18 of the commentary on draft guideline 1.2.1, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 247-248.