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

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CHAPTER VII

RESERVATIONS TO TREATIES

Addendum

2. Texts of the draft guidelines with commentaries thereto adopted at the fifty-second session of the International Law Commission

1.1.8 [1.1.8] Reservations made under exclusionary clauses

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

Commentary

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

(2) 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,[2] the Council of Europe,[3] the ILO[4] and in various other conventions. Among

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[1] Cf. 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.

[2] Cf. article 8, first subparagraph, of the Convention of 15 June 1955 relating to the settlement of conflicts between the law of nationality and the law of domicile: "Each Contracting State, when signing or ratifying the present Convention or acceding thereto, may declare that it excludes the application of this Convention to disputes between laws relating to certain matters"; see also article 9 of The Hague Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and foundations.

[3] Cf. article 34, paragraph 1, of the European Convention for the peaceful settlement of disputes of 29 April 1957: "On depositing its instrument of ratification, any one of the High Contracting Parties may declare that it will not be bound by: (a) Chapter III relating to arbitration; or (b) Chapters II and III relating to conciliation and arbitration"; see also article 7, paragraph 1, of the 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"); and 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"), etc. For other examples, see Sia Spiliopoulo Åkermark, "Reservation clauses in treaties concluded within the Council of Europe", *ICLQ*, 1999, pp. 504-505.

[4] Cf. article 2 of International Labour Convention No. 63 of 1938, concerning statistics 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".

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".[5]

(3) The question whether or not statements made in application of such exclusionary clauses are reservations is controversial. The strongest argument that they are not clearly derives from the 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, the ILO wrote:

> "It has been the consistent and long-established practice of the ILO not to accept for registration instruments of ratification of international labour Conventions when accompanied with reservations. As has been written, 'this basic proposition of refusing to recognize any reservations is as old as ILO itself' (see W.P. Gormley, 'The Modification of Multilateral Conventions by Means of Negotiated Reservations and Other Alternatives: A Comparative Study of the ILO and Council of Europe', *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.
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> "In his Memorandum to the Committee of Experts for the Codification of International Law, the ILO Director-General wrote with respect to labour Conventions:
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> > '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

[5] 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.

> overruled if the consent of the Governments alone could suffice to modify the substance and detract from the effect of the Conventions' (see League of Nations, *Official Journal*, 1927, at p. [882]).

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

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

"Wilfred Jenks, Legal Adviser of the ILO, addressing in 1968 the 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, even required, to attach declarations - optional and compulsory accordingly. A compulsory declaration may define the scope of the obligations accepted or give other essential specifications. In some other cases a declaration is needed only where the ratifying State wishes to make use of permitted exclusions, exceptions or modifications. In sum, compulsory and optional declarations relate to limitations *authorized* by the Convention itself, and thus do not amount to reservations in the legal sense. As the Written Statement of the ILO in the *Genocide Case* read, 'they are therefore a part of the terms of the convention as approved by the Conference when adopting the convention and both from a legal and from a practical point of view are in no way comparable to reservations' (see *ICJ Pleadings, 1951*, at p. 234). Yet for some, these flexibility devices have 'for all practical purposes the same operational effect as reservations' (see Gormley, op. cit., *supra*, at p. 75)."[6]

(4) In the Commission's view, this reasoning reflects a respectable tradition, but is somewhat less than convincing:

- In the first place, while international labour conventions are obviously adopted under very specific circumstances, they are nevertheless treaties between States, and the participation of non-governmental representatives in their adoption does not modify their legal nature;
- Secondly, the possibility that the International Labour Conference might revise a convention that proved to be inadequate proves nothing about the legal nature of

[6] Reply to the questionnaire, pp. 3-5.

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 and the present Guide to Practice.

(5) 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 treaty provisions. 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 …".

(6) The fact that a unilateral statement purporting to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author[7] 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 [[8]] formulate reservations and even the content of such reservations".[9]

(7) In fact, exclusionary clauses are clearly related to reservation clauses, and the resulting unilateral statements are related to the "specified" reservations "expressly authorized" by a treaty, including international labour conventions.[10] They are indeed unilateral statements made

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[7] Cf. draft guidelines 1.1 and 1.1.1.

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

[9] Pierre-Henri Imbert, op. cit., p. 12.

[10] At the same time, there is little doubt that a practice accepted as law has developed in the ILO. Under this practice, any unilateral statement seeking to limit the application of the provisions of international labour conventions that is not explicitly stipulated is inadmissible. This is also clearly the case with regard to the conventions adopted by The Hague Conference of Private International Law (see Georges A.L. Droz, "*Les réserves et les facultés dans les*

at the time consent to be bound[11] 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,[12] it would seem that they are not and need not be subject to a separate legal regime.

(8) Except for the absence of the word "reservations", there appears to be little difference between the aforementioned exclusionary clauses[13] and what are indisputably reservation clauses, such as article 16 of The Hague Convention of 14 March 1970 on celebration and recognition of the validity of marriages,[14] 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[15] and 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.[16] It is thus apparent that, in both their form and their effects,[17] the statements made when expressing consent to be

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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.

[11] With regard to statements made in application of an exclusionary clause, but following its author's expression of consent to be bound, see para. (18) below.

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

[13] Para. (2).

[14] "A Contracting State may reserve the right to exclude the application of chapter I" (art. 28 provides for the possibility of "reservations").

[15] "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".

[16] "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'".

[17] 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.

bound under exclusionary clauses are in every way comparable to reservations when provision is made for the latter, with restrictions, by reservation clauses.[18]

(9) Some members of the Commission questioned whether the fact that a State party cannot object to a statement made under such an exclusionary clause does not rule out the classification of such a statement as a reservation. This is no doubt true of every reservation formulated under a reservation clause: once a reservation is expressly provided for in a treaty, the contracting States know what to expect; they have accepted in advance the reservation or reservations concerned in the treaty itself. It thus appears that the rules in article 20 on both acceptance of reservations and objections to them do not apply to reservations expressly provided for, including opting-out clauses or exclusionary provisions.[19] This is, moreover, not a problem of definition, but one of legal regime.

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

(11) In reality, exclusionary clauses take the form of "negotiated reservations", as the term is currently (and erroneously) accepted in the context of The Hague Conference on Private International Law and further developed in the context of the Council of Europe.[20] "Strictly speaking, this means that it is the *reservation* - and not only the right to make one - that is the

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[18] See Pierre-Henri Imbert, op. cit., p. 169, and Sia Spiliopoulo Åkermark, op. cit., pp. 505-506.

[19] Conversely, States may "object" to some statements (for example, statements of non-recognition), but that does not make such statements reservations.

[20] 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, and Sia Spiliopoulo Åkermark, op. cit., pp. 489-490.

subject of the negotiations."[21] These, then, are not "reservations" at all in the proper sense of the term, but *reservation clauses* that impose limits and are precisely defined when the treaty is negotiated.

(12) It is true that, in some conventions (at least those of the Council of Europe), exclusionary *and* reservation clauses are present at the same time.[22] This is probably more a reflection of terminological vagueness, than of a deliberate distinction.[23] And it is striking that, in its reply to the Commission's questionnaire, the 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.[24]

(13) The case covered in draft guideline 1.1.8 is the same as that dealt with in article 17, paragraph 1, of the 1969 and 1978 Vienna Conventions:

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

(14) This provision, which was adopted without change by the 1968-1969 Vienna Conference,[25] is contained in part II, section 1 (Conclusion of treaties), and creates a link with

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[21] Pierre-Henri Imbert, op. cit., p. 196. The term is used in the Council of Europe in a broader sense, seeking to cover the "*procedure* intended to enumerate either in the body of the Convention itself or in an annex the limits of the options available to States in formulating a reservation" (Héribert Golsong, op. cit., p. 228 (emphasis added); see also Sia Spiliopoulo Åkermark, op. cit., p. 498 and also pp. 489-490).

[22] See arts. 7 (note 3 above) and 8 of the Council of Europe Convention of 1968 on reduction of cases of multiple nationality and the examples given by Sia Spiliopoulo Åkermark, op. cit p. 506, note 121.

[23] Morever, the fact that certain multilateral conventions prohibit any reservations while allowing some statements which may be equated with exclusionary clauses (see art. 124 of the Statute of the International Criminal Court of 17 July 1998) is not in itself decisive; it too is no doubt more the result of terminological vagueness than of an intentional choice aimed at achieving specific legal effects.

[24] See note 3 above.

[25] See *United Nations Conference on the Law of Treaties, first and second sessions (Vienna, 26 March-24 March 1968 and 9 April-2 May 1969),* Documents of the Conference

articles 19 to 23 dealing specifically with reservations. It 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 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."[26]

(15) The expression "without prejudice to articles 19 to 23" in article 17 of the 1969 and 1986 Vienna Conventions implies that, in some cases, options amount to reservations."[27] 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.

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

(17) It so happens that some treaties allow the parties to exclude, by means of a unilateral statement, the legal effect of certain of the treaty'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:

(A/CONF.39/II/Add.2) (United Nations publication, Sales No. E.70.V.5), Reports of the Committee of the Whole, paras. 156-157, pp. 129-130.

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

[27] See Sia Spiliopoulo Åkermark, op. cit., p. 506.

- 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";[28]
- 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.

(18) Unilateral statements made under provisions of this type are certainly not reservations.[29] In this respect, the fact that they are formulated (or may be formulated) at a time other than the time of consent to be bound is perhaps not in itself absolutely decisive insofar as nothing prevents negotiators from departing from the provisions of the Vienna Conventions, which are merely residual in nature. Nevertheless, statements made under these exclusionary clauses after the entry into force of the treaty are very different from reservations in that they do not place conditions on the accession of the State or the international organization which makes them. Reservations are an element of the conclusion and entry into force of a treaty, as is demonstrated by the inclusion of articles 19 to 23 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

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[28] 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 above (para. 11).

[29] 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.

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.

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

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

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

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

Commentary

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

(2) The unilateral statements referred to in the first paragraph of draft guideline 1.4.6 may seem similar to those mentioned in draft guideline 1.1.8, i.e. those made under an exclusionary clause. In both cases, the treaty expressly provides for such statements, which the parties are free to make in order to modify the obligations imposed on them by the treaty. However, they are also very different in nature: while statements made under an exclusionary clause (or an opting-out or contracting-out clause) purport to exclude or modify the legal effect of certain provisions of the treaty as they apply to the parties who have made them and must therefore be viewed as genuine reservations, those made under optional clauses have the effect of increasing the declarant's obligations beyond what is normally expected of the parties under the treaty and do not affect its entry into force in their case.

(3) The purpose of optional clauses or opting-in [or contracting-in] clauses, which may be defined as provisions stipulating that the parties to a treaty may accept obligations which, in the absence of explicit acceptance, would not be automatically applicable to them, is not to reduce, but to increase, the obligations arising from the treaty for the author of the unilateral statement.[30]

(4) The most famous optional clause is certainly Article 36, paragraph 2, of the Statute of the International Court of Justice,[31] 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,[32] or are

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[30] According to Michel Virally, these are clauses "to which the parties accede only through special acceptance as distinct from accession to the treaty as a whole" ("Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", 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. 13).

[31] "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".

[32] "A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant …"; see also the former articles 25 (acceptance of the right to address individual petitions to the Commission) and 46 (acceptance of inter-State declarations) of the European Convention 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 which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention".

exclusively prescriptive in nature, as in the case, for example, of article 25 of the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations.[33]

(5) Despite some academic opinions to the contrary,[34] in reality, statements made under such clauses have little in common, at the technical level, with reservations, apart from the (important) fact that they both purport to modify the application of the effects of the treaty and it is quite clear that "opt-out clauses seem to be much closer to reservations than opt-in clauses".[35] 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 what they have explicitly chosen",[36] 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[37] or to limit the

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[33] "Any Contracting State may, at any time, declare that the provisions of this Convention will be extended, in relation to other States making a declaration under this article, to an official deed ("*acte authentique*") drawn up by or before an authority or public official and directly enforceable in the State of origin insofar as these provisions can be applied to such deeds"; see also 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 the ILO to the ICJ in 1951, in ICJ, *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.

[34] 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", *Fordham Law Review*, 1970-1971, Part I, pp. 68 and 75, and Part II, p. 450.

[35] Sia Spiliopoulo Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", *I.C.L.Q.*, 1999, pp. 479-514, especially p. 505.

[36] Ibid.

[37] Draft guideline 1.1 of the Guide to Practice.

obligations imposed on [the author] by the treaty,[38] but, instead, to increase them, while the mere entry into force of the treaty for the author does not have this effect.

(6) Here again, to a certain degree, the complex problems of "extensive reservations"[39] 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."

(7) 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.

(8) 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 the Commission wondered whether it was necessary to include a guideline in the Guide to Practice in order to distinguish between them. A majority of its members considered the inclusion of such a distinction useful: even if statements based on optional clauses are obviously technically very different from reservations, with which statements made under exclusionary clauses may (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. [40]

(9) If the treaty so provides or, given the silence of the treaty, if it is not contrary to the object and purpose of the provision in question,[41] there is nothing to prevent such a statement, in

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[38] Draft guideline 1.1.5.

[39] See the commentaries to draft guidelines 1.1.5, 1.4.1 and 1.4.2 in *Official Records of the General Assembly, fifty-fourth session, Supplement No. 10* (A/54/10), pp. 217-221 and 270-274.

[40] Michel Virally includes them under the same heading, "optional clauses" ("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, pp. 13-14).

[41] 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 [on Human Rights]", the consequences

turn, from being accompanied by restrictions aimed at limiting the legal effect of the obligation thereby accepted. This is the case with the reservations frequently made by States when they accept the optional clause recognizing the optional jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute.[42]

(10) While no purpose would be served by deciding whether a distinction needs to be drawn between "reservations" and "conditions", [43] it is sufficient to state that:

> "There is a characteristic difference between these reservations and the type of reservation to multilateral treaties encountered in the law of treaties. … Since the whole transaction of accepting the compulsory jurisdiction is *ex definitione* unilateral and individualized and devoid of any multilateral element or element of negotiation, the function of reservations in a declaration cannot be to exclude or vary the legal effect of some existing provision in relation to the State making the declaration. Their function, together with that of the declaration itself, is to define the terms on which that State unilaterally accepts the compulsory jurisdiction - to indicate the disputes which are included within that acceptance, in the language of the *Right of Passage* (Merits) case."[44]

(11) These observations are consistent with the jurisprudence of the International Court of Justice and, in particular, its recent judgment of 4 December 1998 in the *Fisheries Jurisdiction* case between Spain and Canada:

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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 32) (judgment of 23 March 1995, para. 75, R.U.D.H. 1995, p. 139).

[42] 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 judgement of the ICJ of 4 December 1998 in the *Fisheries Jurisdiction* case (Spain v. Canada), para. 42, and the judgment of 21 June 2000 in the *Aerial Incident of 10 August 1999* case (Pakistan v. India), paras. 37-38.

[43] Shabtai Rosenne makes a distinction between these two concepts (ibid., pp. 768-769).

[44] Ibid., p. 769. The passage in question from the judgment relating to the *Right of Passage over Indian Territory* case of 12 April 1960 appears on page 34 of *ICJ Reports* 1960.

> "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 …".[45]

(12) The same goes for the reservations which States attach to statements made under other optional clauses, such as those resulting from acceptance of the jurisdiction of the International Court of Justice under article 17 of the General Act of Arbitration, in respect of which the Court has stressed "the close and necessary link that always exists between a jurisdictional clause and reservations to it".[46]

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

(14) In view of the great theoretical and practical importance[47] of the distinction, it seems necessary to supplement draft guideline 1.4.6 by specifying that the conditions and restrictions which accompany statements made under an optional clause do not constitute reservations within the meaning of the Guide to Practice any more than such statements themselves do.

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

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

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

[46] Judgment of 19 December 1978 in the *Aegean Sea Continental Shelf* case, *ICJ Reports, 1978*, p. 33, para. 79.

[47] Particularly as regards interpretation; cf. the aforementioned judgment of the ICJ of 4 December 1998 in the *Fisheries Jurisdiction* case, paras. 42-56.

Commentary

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

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

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

(3) The commentary to this provision, reproduced without change by the Vienna Conference,[48] is concise, but sufficiently clear about the case covered:

> "Paragraph 2 takes account of a practice which is not very common but which is sometimes found, for example, in the General Act for the Pacific Settlement of International Disputes and in some international labour conventions. The treaty offers each State a choice between differing provisions of the treaty".[49]

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[48] 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.

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

(4) As has been noted,[50] however, it is not accurate (or, at all events, not very accurate) to say that such a practice is, today, not very common. It is actually fairly widespread, at least in the apparently rather vague sense given to it by the Commission in 1966, but this includes two different hypotheses which do not fully overlap.

(5) The first is illustrated, for example, by the statements made under the 1928 General Act for Conciliation, Judicial Settlement and Arbitration, article 38, paragraph 1, of which provides:

> "Accessions to the present General Act may extend:
>
> A. Either to all the provisions of the Act (chapters I, II, III and IV);
>
> B. Or to those provisions only which relate to conciliation and judicial settlement (chapters I and II), together with the general provisions dealing with these procedures (chapter IV)".[51]

The same is true of several ILO conventions, in which this technique, often used subsequently,[52] 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".

Along the same lines, mention may be made of the European Social Charter, of 18 October 1961, article 20, paragraph 1, of which provides for a partially optional system of acceptance:[53]

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[50] Sia Spiliopoulo Åkermark, op. cit., p. 504.

[51] 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)".

[52] See P.H. Imbert, op. cit., p. 172.

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

"Each of the Contracting Parties undertakes:

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

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

(c) [...] to consider itself bound by such a number of articles or numbered paragraphs of part II of the Charter as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs".[54]

(6) Such provisions should not be equated with the optional clauses referred to in draft guideline 1.4.6, from which they are clearly very different: the statements which they invite the parties to formulate are not optional, but binding, and condition the entry into force of the treaty for them[55] and they have to be made at the time of giving consent to be bound by the treaty.

(7) Similarly, these statements cannot be completely equated with those made in application of an exclusionary clause.[56] Clearly, they end up by excluding the application of provisions which do not appear in them. They do so indirectly, however, through partial acceptance,[57] and not by excluding the legal effect of those provisions, but because of the silence of the author of the statement in respect of them.

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[54] This complex system was used again in article A, paragraph 1, of the revised Social Charter on 3 May 1996. See also articles 2 and 3 of the 1964 European Code of Social Security and article 2 of the European Charter for Regional or Minority Languages of 5 November 1992: "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".

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

[56] See draft guideline 1.1.8.

[57] P.H. Imbert, op. cit., p. 170.

(8) The same is true of statements made under the second category of treaty clauses which, even more clearly, offer a choice between the provisions of a treaty because they oblige the parties to choose a given provision (or a given set of provisions) or, *alternatively*, another provision (or another set of provisions). This is no longer a question of choosing *among* the provisions of a treaty, but of choosing *between them*, on the understanding that, in contrast to the previous case, there can be no accumulation,[58] and the acceptance of a treaty is not partial (even if the obligations deriving from it may be more or less binding depending on the option selected).

(9) These "alternative clauses" are less common than those analysed above. They do exist, however, as demonstrated by, for example, article 2 of ILO Convention No. 96 (revised) of 1949 concerning Fee-Charging Employment Agencies:[59]

> "1. Each Member ratifying this Convention shall indicate in its instrument of ratification whether it accepts the provisions of part II of the Convention, providing for the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies, or the provisions of part III, providing for the regulation of fee-charging employment agencies including agencies conducted with a view to profit.
>
> 2. Any Member accepting the provisions of part III of the Convention may subsequently notify the Director General that it accepts the provisions of part II; as from the date of the registration of such notification by the Director General, the provisions of part III of the Convention shall cease to be applicable to the Members in question and the provisions of part II shall apply to it".[60]

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

[59] 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 (op. cit., 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.

[60] See also section 1 of article XIV of the IMF Statutes (amended 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".

(10) As has been observed, "[o]ptional commitments ought to be distinguished from authorized reservations, although they in many respects resemble such reservations".[61] Moreover, the silence of article 17, paragraph 2, of the Vienna Conventions, which differs greatly from the reference in paragraph 1 to articles 19 to 23 on reservations,[62] constitutes, in contrast with unilateral statements made under an exclusionary clause, an indication of the clear dividing line between reservations and these alternative commitments.

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

(12) There are striking differences with reservations, however, because, unlike reservations, these statements are the condition sine qua non[63] 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.

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

[62] Cf. paras. (13) to (15) of the commentary to draft guideline 1.1.8.

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