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

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CHAPTER VIII

RESERVATIONS TO TREATIES

2. Text of the draft articles with commentaries thereto, including the explanatory note, adopted by the Commission at its fifty-fifth session

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Explanatory note

Some draft guidelines in the Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

Commentary

(1) Following a suggestion by the Drafting Committee, the Commission considered that it would be useful to place "explanatory notes" at the beginning of the Guide to Practice in order to provide information to users of the Guide on its structure and purpose. Other questions that might arise in future could also be included in these preliminary notes.

(2) The purpose of this first explanatory note is to define the function and the "instructions for use" of the model clauses that accompany some draft guidelines, in accordance with the decision taken by the Commission at its forty-seventh session.[1]

(3) These model clauses are intended mainly to give States and international organizations examples of provisions that it might be useful to include in the text of a treaty in order to avoid the uncertainties or drawbacks that might result, in a particular case, from silence about a specific problem relating to reservations to that treaty.

(4) Model clauses are alternative provisions from among which negotiators are invited to choose the one best reflecting their intentions, on the understanding that they may adapt them, as appropriate, to the objectives being sought. It is therefore essential to refer to the commentaries to these model clauses because they alone can determine whether the situation is one in which their inclusion in the treaty would be useful.

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[1] See the report of the Commission on its forty-seventh session, *Yearbook ... 1995*, vol. II, Part Two, p. 108, para. 487 (b).

2.5 Withdrawal and modification of reservations and interpretative declarations

Commentary

(1) The purpose of the present section of the Guide to Practice is to specify the conditions of substance and of form in which a reservation may be modified or withdrawn.

(2) As in the case of the Guide as a whole, the point of departure of the draft guidelines included in this section is constituted by the provisions of the 1969 and 1986 Vienna Conventions on the question under consideration. These provisions are article 22, paragraphs 1 and 3 (a), and article 23, paragraph 4, which deal only with the question of withdrawal of reservations, not with that of their modification. The Commission endeavoured to fill this gap by proposing guidelines on declarations of parties to a treaty intended to modify the content of a reservation made previously, whether the purpose of the modification is to limit or strengthen its scope.[2]

[(3) In the latter case, however, the modification is interpreted as the late formulation of a new reservation. Accordingly, the Commission included a draft guideline on the enlargement of the scope of a reservation, not in the present section, but in section 2.3, entitled "Late formulation of a reservation".]*

(4) The Commission nevertheless deemed it appropriate, for the convenience of users, to include all the draft guidelines on the withdrawal of reservations in section 2.5, without restricting it to procedure, the subject of chapter 2 of the Guide. Draft guidelines 2.5.7 and 2.5.11 thus relate to the effect of the withdrawal, in whole or in part, of a reservation.

2.5.1 Withdrawal of reservations

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

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[2] See draft guidelines 2.5.10 and 2.5.11.

* This paragraph (3) of the commentary anticipates the Commission's consideration of chapter 1 of the Special Rapporteur's eighth report (A/CN.4/535, paras. 33-47).

Commentary

(1) Draft guideline 2.5.1 reproduces the text of article 22, paragraph 1, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which is itself based on that of article 22, paragraph 1, of the 1969 Vienna Convention, with the addition of international organizations. These provisions were hardly discussed during the *travaux préparatoires.*

(2) The question of the withdrawal of reservations did not attract the attention of Special Rapporteurs on the law of treaties until fairly recently and even then to a limited degree. Brierly and Sir Hersch Lauterpacht did not devote a single draft article to the question of the criterion for the admissibility of reservations.[3] It was not until 1956 that, in his first report, Sir Gerald Fitzmaurice proposed the following wording for draft article 40, paragraph 3:

> "A reservation, though admitted, may be withdrawn by formal notice at any time. If this occurs, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related and is equally entitled to claim compliance with the provision by the other parties."[4]

(3) The draft was not discussed by the Commission, but, in his first report, Sir Humphrey Waldock returned to the concept in a draft article 17, entitled "Power to formulate and withdraw reservations", which posited the principle of the "absolute right of a State to withdraw a

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[3] The furthest Lauterpacht went was to draw attention to some proposals made in April 1954 to the Commission on Human Rights on the subject of reservations to the "Covenant of Human Rights", expressly providing for the possibility of withdrawing a reservation simply by notifying the Secretary-General of the United Nations (second report on the law of treaties, A/CN.4/87, para. 7; *Yearbook … 1954*, vol. II, pp. 131-132).

[4] *Yearbook … 1956*, vol. II, p. 116, document A/CN.4/101. In his commentary on this provision, Sir Gerald Fitzmaurice restricted himself to saying that it did not require any explanation (ibid., p. 131, para. 101).

reservation unilaterally, even when the reservation has been accepted by other States".[5] This proposal was not discussed in plenary, but the Drafting Committee, while retaining the spirit of the provision, made extensive changes not only to the wording, but even to the substance: the new draft article 19, which dealt exclusively with "The withdrawal of reservations", no longer mentioned the notification procedure, but included a paragraph 2 relating to the effect of the withdrawal.[6] This draft was adopted with the addition[7] of a provision in the first paragraph specifying when the withdrawal took legal effect.[8] According to draft article 22 on first reading:

> "1. A reservation may be withdrawn at any time and the consent of the State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.
>
> 2. Upon withdrawal of the reservation, the provisions of article 21 cease to apply."[9]

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[5] *Yearbook … 1962*, vol. II, p. 75, document A/CN.4/144, para. (12), of the commentary to draft article 17. Paragraph 6 of this draft article states:

> "A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty" (ibid., p. 61).

[6] At the request of Bartoš (*Yearbook … 1962*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 67).

[7] Ibid., paras. 69-71.

[8] Ibid., 667th meeting, 25 June 1962, p. 253, paras. 73-75.

[9] *Yearbook … 1962*, vol. II, p. 181, document A/5209; article 21 related to "The application of reservations".

(4) Only three States reacted to draft article 22,[10] which was consequently revised by the Special Rapporteur. He proposed that:[11]

> The provision should take the form of a residual rule;
>
> It should be specified that notification of a withdrawal should be made by the depositary, if there was one;
>
> A period of grace should be allowed before the withdrawal became operative.[12]

(5) During the consideration of these proposals, two members of the Commission maintained that, where a reservation formulated by a State was accepted by another State, an agreement existed between those two States.[13] This proposition received little support and the majority favoured the notion, expressed by Bartoš, that "normally, a treaty was concluded in order to be applied in full; reservations constituted an exception which was merely tolerated".[14] Following

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[10] Fourth report of Sir Humphrey Waldock on the law of treaties, *Yearbook … 1965*, vol. II, p. 55, document A/CN.4/177 and Add.1 and 2. Israel considered that notification should be through the channel of the depositary, while the United States of America welcomed the "provision that the withdrawal of the reservation 'takes effect when notice of it has been received by the other States concerned'"; the comment by the United Kingdom of Great Britain and Northern Ireland related to the effective date of the withdrawal; see commentary to draft guideline 2.5.8, paragraph (4), below. For the text of the comments by the three States, see *Yearbook … 1966*, vol. II, pp. 351 (United States), 295 (Israel, para. 14) and 344 (United Kingdom).

[11] For the text of the draft article proposed by Waldock, see ibid., p. 56, or *Yearbook … 1965*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 43.

[12] On this point, see commentary to draft guideline 2.5.8, paragraph (4).

[13] See the comments by Verdross and (less clearly) Amado, 800th meeting, 11 June 1965, p. 175, para. 49, and p. 176, para. 60.

[14] Ibid., p. 175, para. 50.

this discussion, the Drafting Committee effectively reverted, in a different formulation, to the two concepts in paragraph 1 of the 1962 text.[15] The new text was the one eventually adopted[16] and it became the final version of draft article 20 ("Withdrawal of reservations"):

> "1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
>
> 2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States."[17]

(6) The commentary to the provision was, apart from a few clarifications, a repetition of that of 1962.[18] The Commission expressed the view that the parties to the treaty "ought to be presumed to wish a reserving State to abandon its reservation, unless a restriction on the withdrawal of reservations has been inserted in the treaty".[19]

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[15] See para. (3) above; for the first text adopted by the Drafting Committee in 1965, see *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 272, para. 22.

[16] See *Yearbook ... 1965*, vol. I, 816th meeting, p. 284, paras. 56-60, and *Yearbook ... 1966*, vol. I, Part Two, p. 327, para. 106.

[17] *Yearbook ... 1966*, vol. II, p. 209, document A/6309/Rev.1; drafted along the same lines, the corresponding text was article 22 of the 1965 draft (*Yearbook ... 1965*, vol. II, p. 162, document A/6009).

[18] See para. (3) above.

[19] *Yearbook … 1966*, vol. II, p. 209.

(7) At the Vienna Conference, the text of this draft article (which had by now become article 22 of the Convention) was incorporated unchanged, although several amendments of detail had been proposed.[20] However, on the proposal of Hungary, two important additions were adopted:

> First, it was decided to bring the procedure relating to the withdrawal of objections to reservations into line with that relating to the withdrawal of reservations themselves;[21] and,
>
> Secondly, a paragraph 4 was added to article 23 specifying that the withdrawal of reservations (and of objections) should be made in writing.[22]

(8) Basing himself on the principle that "there is no reason to put international organizations in a situation different from that of States in the matter of reservations", Paul Reuter, in his fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, restricted himself to submitting "draft articles which extend the rules embodied in articles 19 to 23 of the 1969 Convention to agreements to which international organization are parties", subject only to "minor drafting

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[20] See the list and the text of these amendments and sub-amendments in the report of the Committee of the Whole, *Official Records of the United Nations Conference on the Law of Treaties. First and Second sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), pp. 141-142, paras. 205-211.

[21] For the text of the Hungarian amendment, see A/CONF.39/L.18, which was reproduced in *Official Records* ..., op. cit. (footnote 132), p. 267; for the discussion of it, see the debates at the 11th plenary meeting of the Conference (30 April 1969) in *Official Records of the United Nations Conference on the Law of Treaties, Second session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 36-38, paras. 14-41.

[22] On this amendment, see the commentary to draft guideline 2.5.2, paragraph (2).

changes".[23] So it proved with article 22, in which the Special Rapporteur restricted himself to adding a reference to international organizations, and article 23, paragraph 4, which he reproduced in its entirety.[24] These proposals were adopted by the Commission without amendment[25] and retained on second reading.[26] The 1986 Vienna Conference did not bring about any fundamental change.[27]

(9) It appears from the provisions thus adopted that the withdrawal of a reservation is a unilateral act. This puts an end to the once deeply debated theoretical question of the legal nature of withdrawal: is it a unilateral decision or a conventional act?[28] Article 22, paragraph 1,

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[23] *Yearbook ... 1975*, vol. II, pp. 36 and 37, document A/CN.4/285, para. (5) of the general commentary on section 2.

[24] Ibid., p. 38, and fifth report, *Yearbook ... 1976*, vol. II, Part One, p. 146.

[25] See the Commission's discussions in 1977: 1434th meeting, 6 June 1977, *Yearbook ... 1977*, vol. I, pp. 100-101, paras. 30-34; 1435th meeting, 7 June 1977, ibid., p. 103, paras. 1 and 2; 1451st meeting, 1 July 1977, ibid., pp. 194-195, paras. 12-16; and the report of the Commission, *Yearbook ... 1977*, vol. II, Part Two, pp. 114-115.

[26] States and international organizations made no comment on these provisions. See the tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II, Part One, pp. 63-64; the Commission's discussions: 1652nd meeting, 15 May 1981, *Yearbook ... 1981*, vol. I, p. 54, paras. 27-29; 1692nd meeting, 16 July 1981, ibid., pp. 264-265, paras. 38-41; the report of the Commission, *Yearbook ... 1981*, vol. II, Part Two, p. 140; and the final report for 1982, *Yearbook ... 1982*, vol. II, Part Two, p. 37.

[27] See *Official Records of the United Nations Conference on the Law of Treaties between States and international organizations or between international organizations, Vienna*, 18 February-21 March 1986, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5, vol. I), fifth plenary meeting, 18 March 1986, p. 14, paras. 62-63.

[28] On this disagreement on the theory, see particularly P.H. Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 288, or Frank Horn, *Reservations and Interpretative Declarations*, T.M.C. Asser Instituut, pp. 223-224, and the references cited. For a muted comment on this disagreement during the *travaux préparatoires* on article 22, see para. (5) above.

of the two Vienna Conventions rightly opts for the first of these positions. As the International Law Commission stated in the commentary to the draft articles adopted on first reading:[29]

> "It has sometimes been contended that when a reservation has been accepted by another State it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a regime between the two States which cannot be changed without the agreement of both. The Commission, however, considers that the preferable rule is that the reserving State should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted."[30]

(10) This is still the Commission's view. By definition, a reservation is a unilateral[31] act, even though States or international organizations may, by agreement, reach results comparable to those produced by reservations,[32] but the decision to opt for a reservation, by contrast, rightly implies a resort to unilateralism. It would therefore be illogical to require agreement from the other Contracting Parties to undo what the unilateral expression of the will of a State has done.

(11) It could perhaps be argued that, in accordance with article 20 of the Vienna Conventions, a reservation which is made by a State or an international organization and is not expressly provided for by the treaty is effective only for the parties which have accepted it, if only implicitly. On the one hand, however, such acceptance does not alter the nature of the reservation - it gives effect to it, but the reservation is still a distinct unilateral act - and, on the other hand and above all, such an argument involves extremely formalistic reasoning that takes no account of the benefit of limiting the number and the scope of reservations in order to preserve the integrity of the treaty. As has been rightly observed,[33] the signatories to a

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[29] See para. (3) above.

[30] *Yearbook … 1962*, vol. II, pp. 181-182, document A/5209, para. (1) of the commentary to article 22.

[31] Cf. article 2, paragraph 1 (d), of the Vienna Conventions and draft guideline 1.1.of the Guide to Practice.

[32] Cf. draft guideline 1.7.1.

[33] See para. (5) above.

multilateral treaty expect, in principle, that it will be accepted as a whole and there is at least a presumption that, if a necessary evil, reservations are regretted by the other parties. It is worth pointing out, moreover, that the withdrawal of reservations, while sometimes regulated,[34] is never forbidden under a treaty.[35]

(12) Furthermore, to the best of the Commission's knowledge, the unilateral withdrawal of reservations has never given rise to any particular difficulty and none of the States or international organizations which replied to the Commission's questionnaire on reservations[36] has noted any problem in that regard. The recognition of such a right of withdrawal is also in accordance with the letter or the spirit of treaty clauses expressly relating to the withdrawal of reservations, which are either worded in terms similar to those in article 22, paragraph 1,[37] or aim to encourage withdrawal by urging States to withdraw them "as soon as circumstances permit".[38] In the same spirit, international organizations and the human rights treaty monitoring bodies constantly issue recommendations urging States to withdraw reservations that they made when ratifying or acceding to treaties.[39]

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[34] See the commentary to draft guidelines 2.5.7 and 2.5.8.

[35] Cf. Luigi Migliorino, "La revoca di reserve e di obiezioni a riserve", *Rivista di diritto internazionale* 1994, p. 319.

[36] See particularly, in the questionnaire addressed to States, questions 1.6, 1.6.1, 1.6.2 and 1.6.2.1 relating to withdrawal of reservations.

[37] See the examples given by P.H. Imbert, op. cit. (footnote 28), p. 287, note 19, or by F. Horn, op. cit. (footnote 28), p. 437, note 1. See also, for example, the Convention relating to the Status of Refugees, of 28 July 1951, article 42, para. 2; the Convention on the Continental Shelf, of 29 April 1958, article 12, para. 1; the European Convention on Establishment, of 13 December 1955, article 26, para. 3; or the 1962 model clause of the Council of Europe, which appears in "Models of final clauses", given in a Memorandum of the Secretariat (CM (62) 148, 13 July 1962, pp. 6 and 10).

[38] See, for example, the European Patent Convention (Munich Convention) of 5 October 1973, article 167, para. 4, and other examples cited by P.H. Imbert, op. cit. (footnote 28), p. 287, note 20, or by F. Horn, op. cit. (footnote 28), p. 437, note 2.

[39] See the examples cited in the commentary to draft guideline 2.5.3, footnote 73.

(13) Such objectives also justify the fact that the withdrawal of a reservation may take place "at any time",[40] which could even mean before the entry into a treaty by a State which withdraws a previous reservation,[41] although the Special Rapporteur knows of no case in which this has occurred.[42]

(14) The now customary nature of the rules contained in article 22, paragraph 1, and 23, paragraph 4, of the 1969 and 1986 Vienna Conventions and reproduced in draft guideline 2.5.1 seems not to be in question[43] and is in line with current practice.[44]

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[40] One favoured occasion for the withdrawal of reservations is at the time of the succession of States, for on that date the newly independent State can express its intention of not maintaining the reservations of the predecessor State (cf. the 1978 Vienna Convention on Succession of States in respect of Treaties, art. 20, para. 1). This situation will be examined during the general consideration of the fate of reservations and interpretative declarations in the case of succession of States.

[41] This eventuality is expressly provided for by the final clauses of the Convention concerning Customs Facilities for Touring, its Additional Protocol and the Customs Convention on the Temporary Importation of Private Road Vehicles, all of 4 June 1954 (para. 5); see *Yearbook ... 1965*, vol. II, p. 105, document A/5687, Part Two, annex II, para. 2. There is a considerable number of cases in which a State has made a reservation on signing a treaty, but subsequently renounced it because of representations made either by other signatories or by the depositary (cf. the examples given by F. Horn, op. cit. (footnote 28), pp. 345-346); but these are not strictly speaking withdrawals: see commentary to draft guideline 2.5.2, paras. (7) and (8).

[42] On the other hand, several cases of withdrawal of a reservation fairly soon after it had been made can be cited. See, for example, Estonia's reply to question 1.6.2.1 of the Commission's questionnaire: the restrictions on its acceptance of annexes III-V of the International Convention for the Prevention of Pollution from Ships of 1973 (MARPOL Convention) (as modified by its Protocol of 1978), to which it had acceded on 2 December 1991, were lifted on 28 July 1992, when Estonia was considered to be in a position to observe the conditions laid down in these instruments. The United Kingdom states that it withdrew, retrospectively from the date of ratification and three months after formulating it, a reservation to the 1959 Agreement Establishing the Inter-American Development Bank.

[43] Cf. L. Migliorino, op. cit. (footnote 35), pp. 320-321, or Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, 1970, p. 313.

[44] Cf. the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, prepared by the Treaty Section of the Office of Legal Affairs, United Nations, 1997, ST/LEG/8, Sales No. E.94.V.15, p. 64, para. 216. The few States which made any comment on this subject in their replies to the questionnaire on reservations (question 1.6.2.1) said that any withdrawals of reservations had followed a change in their domestic law (Colombia, Denmark, Israel,

(15) The wording chosen does not call for any particular criticism, although some fault could be found with the first phrase ("Unless the treaty provides otherwise…"), which some members of the Commission have suggested should be deleted. This explanatory phrase, which appeared in the Commission's final draft, but not in that of 1962,[45] was added by the Special Rapporteur, Sir Humphrey Waldock, following comments by Governments[46] and endorsed by the Drafting Committee at the seventeenth session in 1965.[47] It goes without saying that most of the provisions of the Vienna Conventions and all the rules of a procedural nature contained in them are of a residual, voluntary nature and must be understood to apply "unless the treaty otherwise provides". The same must therefore be true, *a fortiori*, of the Guide to Practice. The explanatory phrase that introduces article 22, paragraph 1, may seem superfluous, but most members of the Commission take the view that this is not sufficient cause for modifying the wording chosen in 1969 and retained in 1986.

(16) This phrase, with its reference to treaty provisions, seems to suggest that model clauses should be included in the Guide to Practice. The issue is, however, less to do with procedure as such so much as with the effect of a withdrawal; the allusion to any conflict with treaty provisions is really just a muted echo of the concerns raised by some members of the Commission and some Governments about the difficulties that might arise from the sudden withdrawal of a reservation.[48] To meet those concerns, it might be wise to incorporate limitations on the right to withdraw reservations at any time in a specific provision of the treaty.[49]

Sweden, Switzerland, United Kingdom, United States) or a reassessment of their interests (Israel). On reasons for withdrawal, see Jean-François Flauss, "Note sur le retrait par la France des réserves aux traités internationaux" (*AFDI*), 1986, pp. 860-861.

[45] See paras. (3) and (5) above.

[46] Fourth report on the law of treaties, *Yearbook … 1965*, vol. II, pp. 55-56; see also ibid., vol. I, 800th meeting, 11 June 1965, p. 174, para. 45.

[47] Ibid., 814th meeting, 29 June 1965, p. 272, para. 22.

[48] See the commentary to draft guideline 2.5.8, para. (4).

[49] See the model clauses proposed by the Commission following draft guideline 2.5.8.

2.5.2 Form of withdrawal

The withdrawal of a reservation must be formulated in writing.

Commentary

(1) The draft guideline reproduces the wording of article 23, paragraph 4, which is worded in the same way in both the 1969 and the 1986 Vienna Conventions.

(2) Whereas draft article 17, paragraph 7, adopted on first reading by the Commission in 1962 required that the withdrawal of a reservation should be effected "by written notification",[50] the 1966 draft was silent regarding the form of withdrawal. Several States made proposals to restore the requirement of written withdrawal[51] with a view to bringing the provision "into line with article 18 [23 in the definitive text of the Convention], where it was stated that a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing."[52] Although K. Yasseen (Iraq) considered that "an unnecessary additional condition [was thereby introduced] into a procedure which should be facilitated as much as possible",[53] the principle was unanimously adopted[54] and it was decided to include this

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[50] *Yearbook … 1962,* vol. II, p. 75, document A/CN.4/144, p. 69; see the commentary to draft guideline 2.5.1, para. (5).

[51] See the amendments proposed by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1), Hungary (A/CONF.39/C.1/L.178 and A/CONF.39/L.17) and the United States (A/CONF.39/C.1/L.171), reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March-24 May 1968* and *9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.6), documents of the Committee of the Whole, pp. 152-153 and 287.

[52] Statement by Mrs. Bokor-Szegó (Hungary) in *Official Records* …, op. cit., p. 36, para. 13.

[53] Ibid., p. 38, para. 39.

[54] Ibid., para. 41.

provision not in article 20 itself, but in article 23, which dealt with "Procedure regarding reservations" in general and was, as a result of the inclusion of this new paragraph 4, placed at the end of the section.[55]

(3) Although Yasseen had been right, at the 1969 Conference, to emphasize that the withdrawal procedure "should be facilitated as much as possible",[56] the burden imposed on a State by the requirement of written withdrawal should not be exaggerated. Moreover, although the rule of parallelism of forms is not an absolute principle in international law,[57] it would be incongruous if a reservation, about which there can surely be no doubt that it should be in writing,[58] could be withdrawn simply through an oral statement. It would result in considerable uncertainty for the other Contracting Parties, which would have received the written text of the reservation, but would not necessarily have been made aware of its withdrawal.[59]

(4) The Commission has nevertheless considered whether the withdrawal of a reservation may not be implicit, arising from circumstances other than formal withdrawal.

(5) Certainly, as Ruda points out, "the withdrawal of a reservation … is not to be presumed".[60] Yet the question still arises as to whether certain acts or conduct on the part of a State or an international organization should not be characterized as the withdrawal of a reservation.

(6) It is, for example, certainly the case that the conclusion between the same parties of a subsequent treaty containing provisions identical to those to which one of the parties had made a reservation, whereas it did not do so in connection with the second treaty, has, in practice, the

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[55] Ibid., 29th meeting, 19 May 1969, p. 159, paras. 10-13. See José Maria Ruda, "Reservations to Treaties", *RCADI* 1975-III, vol. 146, p. 194.

[56] See footnote 53 above.

[57] See the commentary to draft guideline 2.5.4, para. (6).

[58] See draft guideline 2.1.1.

[59] In this connection, see J.M. Ruda, op. cit. (footnote 55), pp. 195-196.

[60] Ibid., p. 196.

same effect as a withdrawal of the initial reservation.[61] The fact remains that it is a separate instrument and that a State which made a reservation to the first treaty is bound by the second and not the first. If, for example, a third State, by acceding to the second treaty, acceded also to the first, the impact of the reservation would be fully felt in that State's relations with the reserving State.

(7) Likewise, the non-confirmation of a reservation upon signature, when a State expresses its consent to be bound,[62] cannot be interpreted as being a withdrawal of the reservation, which may well have been "formulated" but, for lack of formal confirmation, has not been "made" or "established".[63] The reserving State has simply renounced it after the time for reflection has elapsed between the date of signing and the date of ratification, act of formal confirmation, acceptance or approval.

(8) The reasoning has been disputed, basically on the grounds that the reservation exists even before it has been confirmed: it has to be taken into account when assessing the extent of the obligations incumbent on the signatory State (or international organization) under article 18 of the Conventions on the Law of Treaties; and, under article 23, paragraph 3, "an express acceptance or an objection does not need to be renewed if made before confirmation of the reservation".[64] Nevertheless, as the same writer says: "Where a reservation is not renewed [confirmed], whether expressly or not, no change occurs, either for the reserving State itself or in its relations with the other parties, since until that time the State was not bound by the treaty.

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[61] In this connection, see Jean-François Flauss, "Note sur le retrait par la France des réserves aux traités internationaux" (*AFDI*), 1986, pp. 857-858, but see also F. Tiberghien, *La protection des réfugiés en France*, Économica, Paris, 1984, pp.34-35 (quoted by Flauss, p. 858, footnote 8).

[62] Cf. the 1969 and 1986 Vienna Conventions, art. 23, para. 2, and draft guideline 2.2.1 and the commentary to it in the report of the Commission on the work of its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 464-472.

[63] Non-confirmation is, however, sometimes (wrongly) called "withdrawal"; cf. *Multilateral Treaties deposited with the Secretary-General*, Status as at 31 December 2000 (United Nations publication, Sales No. E.01.V.5, vol. I, p. 376, footnote 16), relating to the non-confirmation by the Indonesian Government of reservations formulated when it signed the Single Convention on Narcotic Drugs, 1961.

[64] Pierre-Henri Imbert, *Les réserves aux traites multilatéraux*, Pedone, Paris, 1979, p. 286.

Conversely, if the reservation is withdrawn after the deposit of the instrument of ratification or accession, the obligations of the reserving State are increased by virtue of the reservation and it may be bound for the first time by the treaty with parties which had objected to its reservation. A withdrawal thus affects the application of the treaty, whereas non-confirmation has no effect at all, from this point of view."[65] The effects of non-confirmation and of withdrawal are thus too different for it to be possible to class the two institutions together.

(9) It would even seem impossible to consider that an expired reservation has been withdrawn. It sometimes happens that a clause in a treaty places a limit on the period of validity of reservations.[66] But expiration is the consequence of the juridical event constituted by the lapse of a fixed period of time, whereas withdrawal is a unilateral juridical act expressing the will of its author.

(10) The same applies when, as sometimes occurs, the reservation itself sets a time limit to its validity. Thus, in its reply to the questionnaire on reservations,[67] Estonia stated that it had limited its reservation to the European Convention on Human Rights to one year, since "one year

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[65] Ibid.; footnote omitted.

[66] See for example, art. 12 of the Council of Europe Convention on the Unification of Certain Points of Substantive Law on Patents for Invention of 1963, which provides for the possibility of non-renewable reservations to some of its provisions for maximum periods of 5 or 10 years, while an annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles of 1973 allows Belgium to make a reservation for a three-year period starting at the entry into force of the Convention. See also the examples given by Sia Spiliopoulou Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", *International and Comparative Law Quarterly* (*ICLQ*), 1999, pp. 499-500, or P.H. Imbert, op. cit. (footnote 106), p. 287, note 21; also article 124 of the Rome Statute of the International Criminal Court of 17 July 1998, which sets a seven-year time limit on the possibility of non-acceptance of the Court's competence in respect of war crimes. Other Council of Europe conventions such as the Conventions on the Adoption of Children, of 24 April 1967, and the Legal Status of Children Born out of Wedlock, of 15 October 1975 likewise authorize only temporary, but renewable reservations; as a result of difficulties with the implementation of these provisions (cf. Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, 1999, pp. 101-102), the new reservation clauses in Council of Europe conventions state that failure to renew a reservation would cause it to lapse (see the Criminal Law Convention on Corruption of 1999, art. 38, para. 2).

[67] Replies to questions 1.6 and 1.6.1.

is considered to be a sufficient period to amend the laws in question".[68] In this case, the reservation ceases to be in force not because it has been withdrawn, but because of the time limit set by the text of the reservation itself.

(11) What have been termed "forgotten reservations"[69] must also be mentioned. A reservation is "forgotten", in particular, when it forms part of a provision of domestic law which has subsequently been amended by a new text that renders it obsolete. This situation, which is not uncommon,[70] although a full assessment is difficult, and which is probably usually the result of negligence by the relevant authorities or insufficient consultation between the relevant services, has its drawbacks. Indeed, it can lead to total legal chaos, particularly in States with a tradition of legal monism.[71] Moreover, since domestic laws are "merely facts" from the standpoint of

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[68] See also the example given by Jörg Polakiewicz (op. cit. (footnote 179), pp. 102-104). It can also happen that a State, when formulating a reservation, indicates that it will withdraw it as soon as possible (cf. the reservation by Malta to articles 13, 15 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women, *Multilateral Treaties* ..., op. cit. (footnote 174), p. 234; see also the reservations by Barbados to the International Covenant on Civil and Political Rights, ibid., vol. I, p. 162).

[69] J.F. Flauss, op. cit. (footnote 61) p. 861, or F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, The Hague, 1988, p. 223.

[70] See J.F. Flauss, ibid., p. 861; see, pp. 861-862, the examples concerning France given by this author.

[71] In these States, judges are expected to apply duly ratified treaties (although not reservations) and these generally take precedence over domestic laws, even if the latter were adopted later. Cf. article 55 of the French Constitution of 1958 and the many constitutional provisions which either use the same wording or are inspired by it in French-speaking African countries. The paradoxical situation can thus arise that, in a State that has aligned its internal legislation with a treaty, it is nonetheless the treaty as ratified (and thus stripped of the provision or provisions to which reservations were made) which prevails, unless the reservation is formally withdrawn. The problem is less acute in States with a dualist system: international treaties are not applied as such, although, in all cases, national judges will apply the most recent *domestic* law.

international law,[72] whether the legal system of the State in question is monist or dualist, an unwithdrawn reservation, having been made at international level, will continue, in principle, to be fully effective and the reserving State will continue to have an advantage over the other parties, although such an attitude could be questionable in terms of the principle of good faith, the scope of which, however, is still uncertain.

(12) According to most members of the Commission, these examples, taken together, show that the withdrawal of a reservation may never be implicit: a withdrawal occurs only if the author of the reservation declares formally and in writing, in accordance with the rule embodied in article 23, paragraph 4, of the Vienna Conventions and reproduced in draft guideline 2.5.2, that he intends to revoke it. While sharing that viewpoint, some members of the Commission nevertheless considered that the expression by a State or an international organization of its intention to withdraw a reservation entailed immediate legal consequences, mirroring the obligations incumbent upon a State signatory to a treaty under article 18 of the 1969 and 1986 Vienna Conventions.

2.5.3 Periodic review of the usefulness of reservations

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

Commentary

(1) The treaty monitoring bodies, particularly but not exclusively in the field of human rights, are calling increasingly frequently on States to reconsider their reservations and, if possible, to withdraw them. These appeals are often relayed by the general policy-making

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[72] Cf. Permanent Court of International Justice, Judgement of 25 May 1926, *Certain German interests in Polish Upper Silesia*, Series A, No. 7, p. 19.

bodies of international organizations such as the General Assembly of the United Nations and the Committee of Ministers of the Council of Europe.[73] Draft guideline 2.5.3 reflects these concerns.

(2) The Commission is aware that such a provision would have no place in a draft convention, since it could not be of much normative value. The Guide to Practice, however, does not aim to be a convention; it is, rather, a "code of recommended practices".[74] It would therefore not be out of place to draw its users' attention to the drawbacks of these "forgotten", obsolete or superfluous reservations[75] and the benefits of reconsidering them periodically with a view to withdrawing them totally or partially.

(3) It goes without saying that it is no more than a recommendation, as emphasized by the use of the conditional tense in draft guideline 2.5.3 and of the word "consider" in the first paragraph and the words "where relevant" in the second, and that the parties to a treaty that have accompanied their consent to be bound by reservations remain absolutely free to withdraw their reservations or not. This is why the Commission has not thought it necessary to determine precisely the frequency with which reservations should be reconsidered.

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[73] For recent examples, see, among others, the following General Assembly resolutions: 55/79 of 4 December 2000 on the rights of the child (sect. I, para. 3); 54/157 of 17 December 1999 on the International Human Rights Treaties (para. 7); 54/137 of 17 December 1999 and 55/70 of 4 December 2000 on the Convention on the Elimination of All Forms of Discrimination against Women (para. 5); and 47/112 of 16 December 1992 on the implementation of the Convention on the Rights of the Child (para. 7). See also resolution 2000/26 of the Sub-Commission on the Promotion and Protection of Human Rights of 18 August 2000 (para. 1), the Declaration of the Council of Europe Committee of Ministers adopted on 10 December 1998 on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights and, more generally (in that it is not limited to human rights treaties). Parliamentary Assembly of the Council of Europe Recommendation 1223 (1993), para. 7, dated 1 October 1993.

[74] This expression was used by Sweden in its comments on the Commission's 1962 draft on the law of treaties; see the fourth report of Sir Humphrey Waldock, *Yearbook … 1965*, vol. II, p. 49.

[75] In this connection, see the commentary to draft guideline 2.5.2, paras. (9)-(11).

(4) Similarly, in the second paragraph, the elements to be taken into consideration are cited merely by way of example, as shown by the use of the words "in particular". The reference to the integrity of multilateral treaties is an allusion to the drawbacks of reservations, a "necessary evil" that undermines the unity of the treaty regime. The reference to careful consideration of internal law and developments in it since the reservations were formulated may be explained by the fact that the divergence from the treaty provisions of the provisions in force in the State party is often used to justify the formulation of a reservation. Domestic provisions are not immutable, however (and participation in a treaty should in fact be an incentive to modify them), so that it may happen - and often does[76] - that a reservation becomes obsolete because internal law has been brought into line with treaty requirements.

(5) While endorsing draft guideline 2.5.3, some members of the Commission indicated that the words "internal law" were suitable for States, but not for international organizations. In this connection, it may be noted that article 46 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations contains "Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties".[77] The Commission nevertheless considered that the words "rules of an international organization" were not very widely used and were imprecise, owing to the lack of any definition of them. Moreover, the phrase "internal legislation of an international organization" is commonly used as a way of referring to the "proper law"[78] of international organizations.[79]

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[76] See ibid., para. (11).

[77] See the commentary to the corresponding draft guideline, adopted by the Commission in *Yearbook … 1982*, vol. II, Part Two, p. 53, para. (2).

[78] See C.W. Jenks, *The Proper Law of International Organizations*, Stevens, London, 1962, 282 pages.

[79] See Lazar Focsaneanu, "Le droit interne de l'O.N.U.", *AFDI*, 1957, pp. 315-349; Philippe Cahier, "Le droit interne des organisations internationales", *RGDIP*, 1963, pp. 563-602; G. Balladore-Pallieri, "Le droit interne des organisations internationales", *RCADI*, 1969-II, vol. 127, pp. 1-38; and Patrick Daillier and Alain Pellet, *Droit international public (Nguyen Quoc Dinh)*, LGDJ, Paris, 2002, pp. 576-577.

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(a) That person produces appropriate full powers for the purposes of that withdrawal; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(c) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty concluded between the accrediting States and that organization.

Commentary

(1) The two Vienna Conventions of 1969 and 1986, while reticent on the procedure for the formulation of reservations,[80] are entirely silent as to the procedure for their withdrawal. The aim of draft guideline 2.5.4 is to repair that omission.

(2) The question has not, however, been completely overlooked by several of the Commission's Special Rapporteurs on the law of treaties. Thus, in 1956, Sir Gerald Fitzmaurice proposed a provision under which the withdrawal of a reservation would be the subject of

[80] See para. (7) below.

"formal notice",[81] but did not specify who should notify whom or how notice should be given. Later, in 1962, Sir Humphrey Waldock, in his first report, went into more detail in draft article 17, paragraph 6, the adoption of which he recommended:

> "… Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty."[82]

(3) Although the proposal was not discussed in plenary, the Drafting Committee simply deleted it[83] and it was not restored by the Commission. During the brief discussion of the Drafting Committee's draft, however, Waldock pointed out that "[n]otification of the withdrawal of a reservation would normally be made through a depositary".[84] This approach was approved by Israel, the only State to provide comments on the draft adopted on first reading on that topic[85] and the Special Rapporteur proposed an amendment to the draft whereby the withdrawal "becomes operative when *notice of it has been received by the other States concerned from the depositary*".[86]

(4) During the discussion in the Commission, Waldock explained that the omission of a reference to the depositary on first reading had been due solely to "inadvertence"[87] and his suggestion for remedying it was not disputed in principle. Mr. Rosenne, however, believed that it was "not as clear as it appeared"[88] and suggested the adoption of a single text grouping

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[81] See commentary to draft guideline 2.5.1, para. (2).

[82] *Yearbook … 1962*, vol. II, p. 61; see also draft guideline 2.5.1, para. (3). The Special Rapporteur on the law of treaties did not accompany this part of his draft with any commentary (ibid., p. 66).

[83] *Yearbook … 1962*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 67.

[84] Ibid., para. 71.

[85] *Yearbook … 1965*, vol. II, p. 55.

[86] Ibid., p. 56; italics added. See the commentary to draft guideline 2.5.1, footnote 10.

[87] *Yearbook … 1965*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 45.

[88] Ibid., p. 176, para. 65.

together all notifications made by the depositary.[89] Although the Drafting Committee did not immediately adopt this idea, this probably explains why its draft again omitted any reference to the depositary,[90] who is also not mentioned in the Commission's final draft[91] or in the text of the Convention itself.[92]

(5) To rectify the omissions in the Vienna Conventions regarding the procedure for the withdrawal of reservations, the Commission might contemplate transposing the rules relating to the formulation of reservations. That calls for further consideration, however.

(6) On the one hand, it is by no means clear that the rule of parallelism of forms has been accepted in international law. In its commentary in 1966 on draft article 51 on the law of treaties relating to the termination of or withdrawal from a treaty by consent of the parties, the Commission concluded that "this theory reflects the constitutional practice of particular States and not a rule of international law. In its opinion, international law does not accept the theory of the '*acte contraire*'".[93] As Paul Reuter pointed out, however, the Commission "is really taking exception only to the formalist conception of international agreements: it feels that what one conceptual act has established, another can undo, even if the second takes a different form from the first. In fact, the Commission is really accepting a non-formalist conception of the theory of

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[89] See ibid., 803rd meeting, 16 June 1965, pp. 197-199, paras. 30-56; for the text of the proposal, see *Yearbook … 1965*, vol. II, p. 73.

[90] See ibid., 814th meeting, 29 June 1965, p. 272, para. 22, and the comments by Mr. Rosenne and Sir Humphrey, ibid., paras. 26-28.

[91] Art. 20, para. 2; see the text of this provision in the commentary on draft guideline 2.5.1, para. (5).

[92] Cf. arts. 22 and 23 of the 1969 and 1986 Vienna Conventions.

[93] Para. (3) of the commentary to draft art. 51, *Yearbook … 1966*, vol. II, p. 249; see also the commentary to art. 35, ibid., pp. 232-233.

the *acte contraire*".[94] This nuanced position surely can and should be applied to the issue of reservations: it is not essential that the procedure followed in withdrawing a reservation should be identical with that used for formulating it, particularly since a withdrawal is generally welcome. The withdrawal should, however, leave all the Contracting Parties in no doubt as to the will of the State or the international organization which takes that step to renounce its reservation. It therefore seems reasonable to proceed on the basis of the idea that the procedure for withdrawing reservations should be modelled on the procedure for formulating them, although that may involve some adjustment and fine-tuning where appropriate.

(7) On the other hand, it has to be said that the Vienna Conventions contain few rules specifically relating to the procedure for formulating reservations, apart from article 23, paragraph 1, which merely states that they must be "communicated to the contracting States [and contracting organizations] and other States [and other international organizations] entitled to become parties to the treaty".[95]

(8) Since there is no treaty provision directly concerning the procedure for withdrawing reservations and in view of the inadequacy even of those relating to the formulation of reservations, the Commission considered draft guidelines 2.1.3 to 2.1.8 relating to the communication of reservations in the light of the current practice and the (rare) discussions of theory and discussed the possibility and the appropriateness of transposing them to the withdrawal of reservations.

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[94] *Introduction au droit des traités*, Presses Universitaires de France, Paris, 3rd ed., ed. Philippe Cahier, p. 141, para. 211 (original italics). See also Sir Ian Sinclair, *The Vienna Conference on the Law of Treaties*, Manchester University Press, 2nd ed., 1984, p. 183. For a flexible position on the denunciation of a treaty, see International Court of Justice (ICJ), decision of 21 June 2000, *Aerial incident of 10 August 1999 (Competence of the Court), ICJ reports 2000*, p. 25, para. 28.

[95] Draft guideline 2.5.1, para. 1, reproduces this provision, while para. 2 details the procedure to be followed when the reservation relates to the constituent instrument of an international organization.

(9) With regard to the formulation of reservations proper, alternative draft guideline 2.1.3[96] is taken directly from article 7 of the Vienna Conventions entitled "Full powers". There seems no reason why these rules should not also apply to the withdrawal of reservations. The grounds on which they are justified in relation to the formulation of reservations[97] apply also to withdrawal: the reservation has altered the respective obligations of the reserving State and the other Contracting Parties and should therefore be issued by the same individuals or bodies with competence to bind the State or international organization at the international level. This must therefore apply a fortiori to its withdrawal, which puts the seal on the reserving State's commitment.

(10) The United Nations Secretariat firmly adopted that position in a letter dated 11 July 1974 to the Legal Adviser of the Permanent Mission of a Member State who had inquired about the "form in which the notifications of withdrawal" of some reservations made in respect of the Convention on the Political Rights of Women of 31 March 1953 and the Convention on Consent

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[96] "1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization if: (a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or (b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers. 2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs; (b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference; (c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body; (d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization."

[97] See the commentary to draft guideline 2.1.3 in *Report of the International Law Commission on the work of its fifty-fourth session (2002), Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. (8) to (12).

to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962 should be made.[98] After noting that the Vienna Convention makes no reference to the subject and recalling the definition of "full powers" given in article 2, paragraph 1 (c),[99] the author of the letter adds:

> "Clearly the withdrawal of a reservation constitutes an important transaction and one of those for which the production of full powers should certainly be contemplated. It would appear only logical to apply to a notification of withdrawal of reservations the same standard as to the formulation of reservations since the withdrawal would entail as much change in the application of the treaty concerned as the original reservations."

And in conclusion:

> "Our views, therefore, are that the withdrawal of reservations should *in principle* be notified to the Secretary-General either by the Head of State or Government or the Minister for Foreign Affairs, or by an official authorized by one of those authorities. While such a high level of procedure may prove somewhat burdensome, the fundamental safeguard which it provides to all concerned in regard to the validity of the notification more than makes up for the resulting inconvenience."[100]

(11) Firm though this conclusion is, the words "in principle", which appear in italics in the text of the Secretariat's legal advice, testify to a certain unease. This is explained by the fact that, as the writer of the letter acknowledges,

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[98] *United Nations Juridical Yearbook 1974*, pp. 190-191.

[99] "[The Vienna Convention] defines 'full powers' as 'a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty'".

[100] Original italics. A memorandum by the Secretariat dated 1 July 1976 confirms this conclusion: "A reservation must be formulated in writing (art. 23, para. 1, of the [Vienna] Convention), and both reservations *and withdrawals* of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally (art. 7 of the Convention)" (*United Nations Juridical Yearbook 1976*, p. 211 - italics added).

> "On several occasions, there has been a tendency in the Secretary-General's depositary practice, with a view to a broader application of treaties, to receive in deposit withdrawals of reservations made in the form of notes verbales or letters from the Permanent Representative to the United Nations. It was considered that the Permanent Representative, duly accredited with the United Nations and acting upon instructions from his Government, by virtue of his functions and without having to produce full powers, had been authorized to do so."[101]

(12) This raises a question that the Commission has already considered in relation to the formulation of reservations:[102] would it not be legitimate to assume that the representative of a State to an international organization that is the depositary of a treaty (or the ambassador of a State accredited to a depositary State) has been recognized as being competent to give notice of reservations? And the question arises with all the more force in relation to the withdrawal of reservations, since there may be a hope of facilitating such a step, which would have the effect of making the treaty more fully applicable and thus be instrumental in preserving, or re-establishing, its integrity.

(13) After thorough consideration, however, the Commission did not adopt this progressive development, since it was anxious to depart as little as possible from the provisions of article 7 of the Vienna Conventions. On the one hand, it would be strange to depart, without a compelling reason, from the principle of the *acte contraire*,[103] so long as it is understood that a "non-formalist conception"[104] of it is advisable. That means, in this case, that any of the authorities competent to formulate a reservation on behalf of a State may also withdraw it and the withdrawal need not necessarily be issued by the same body as the one which formulated the

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[101] *United Nations Juridical Yearbook 1974*, pp. 190-191. This is confirmed by the memorandum of 1 July 1976: "On this point, the Secretary-General's practice in some cases has been to accept the withdrawal of reservations simply by notification from the representative of the State concerned to the United Nations" (*United Nations Juridical Yearbook 1974*, p. 211, note 121).

[102] See commentary to draft guideline 2.1.3, preceding footnote 97, paras. (13) to (17).

[103] See para. (6) above.

[104] See Paul Reuter's phrase, ibid.

reservation. On the other hand, while it is true that there may well be a desire to facilitate the withdrawal of reservations, it is also the case that withdrawal resembles more closely than the formulation of reservations the expression of consent to be bound by a treaty. This constitutes a further argument for not departing from the rules contained in article 7 of the Vienna Conventions.

(14) Moreover, it seems that the United Nations Secretary-General has since adopted a harder line and no longer accepts notification or withdrawal of reservations from permanent representatives accredited to the Organization.[105] And, in the latest edition of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the Treaty Section of the Office of Legal Affairs states: "Withdrawal must be made in writing and under the signature of one of the three recognized authorities, since such withdrawal shall normally result, in substance, in a modification of the scope of the application of the treaty."[106] There is no mention of any possible exceptions.

(15) The Secretary-General of the United Nations is not, however, the only depositary of multilateral treaties and the practice followed by other depositaries in this regard could usefully be considered. Unfortunately, the replies by States to the questionnaire on reservations give no information of any practical benefit in that direction. On the other hand, publications of the Council of Europe indicate that it accepts the formulation[107] and withdrawal[108] of reservations by letters from the permanent representatives of the Council.

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[105] Jean-François Flauss mentions, however, a case in which a reservation by France (to art. 7 of the Convention on the Elimination of All Forms of Discrimination against Women, of 1 March 1980) was withdrawn on 22 March 1984 by the Permanent Mission of France to the United Nations ("Note sur le retrait par la France des réserves aux traités internationaux", *AFDI*, 1986, p. 860).

[106] *Summary of Practice of the Secretary-General of the United Nations as Depositary of Multilateral Treaties*, prepared by the Treaty Section of the Office of Legal Affairs, United Nations, 1997, ST/LEG/7, Sales No. E.94.V.15, p. 64, para. 216.

[107] See the commentary to draft guideline 2.1.3, preceding footnote 97, para. (14).

[108] Cf. European Committee on Legal Cooperation (CDCJ), *CDCJ Conventions and reservations to those Conventions*, Note by the Secretariat drafted by the Directorate-General of Legal Affairs, CDCJ (99) 36, 30 March 1999.

(16) It would be regrettable if such practices, which are perfectly acceptable and do not seem to give rise to any particular difficulties, were to be called into question by the inclusion of over-rigid rules in the Guide to Practice. That pitfall is avoided in the text adopted for draft guideline 2.5.4, which transposes to the withdrawal of reservations the wording of guideline 2.1.3 and takes care to maintain the "customary practices in international organizations which are depositaries of treaties".

(17) Even apart from the replacement of the word "formulate" by the word "withdraw", however, the transposition is not entirely word for word:

> Since the withdrawal procedure is, by definition, distinct both from that used in adopting or authenticating the text of a treaty and from the expression of consent to be bound and may take place many years later, it is necessary that the person applying the procedure should produce specific full powers (para. 1 (a));
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> For the same reason, paragraph 2 (b) of draft guideline 2.1.3 cannot apply to the withdrawal of reservations: when a State or an international organization comes to withdraw a reservation, the international conference which adopted the text is obviously no longer in session.

2.5.5 [2.5.5 bis, 2.5.5 ter] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

Commentary

(1) Draft guideline 2.5.5 is, in relation to the withdrawal of reservations, the equivalent of draft guideline 2.1.4 relating to the "Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations".[109]

(2) The competent authority to formulate the withdrawal of a reservation at the international level is not necessarily the same as the one with competence to decide the issue at the internal level. Here, too, mutatis mutandis,[110] the problem is the same as that relating to the formulation of reservations.[111]

(3) The replies by States and international organizations to the questionnaire on reservations do not give any utilizable information regarding competence to decide on the withdrawal of a reservation at the internal level. Legal theory, however, provides certain indications in that respect.[112] A more exhaustive study would very probably reveal the same diversity in relation to

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[109] "The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation."

[110] A reservation "removed" from the treaty; its withdrawal serves as the culmination of its acceptance.

[111] See the commentary to draft guideline 2.1.4, in *Report of the International Law Commission on the work of its fifty-fourth session (2002), Official Records of the General Assembly Fifty-seventh Session, Supplement No. 10 (A/57/10),* pp. 75-79.

[112] See, for example, G. Gaja, "Modalità singolari per la revoca di una reserva", *Rivista di diritto internazionale*, 1989, pp. 905-907, or Luigi Migliorino, "La revoca di riserve e di obiezioni a riserve", *Rivista di diritto internazionale*, 1994, pp. 332-333, in relation to the withdrawal of a reservation by Italy to the 1951 Convention relating to the Status of Refugees or, for France, Jean-François Flauss, "Note sur le retrait par la France des réserves aux traités internationaux", *AFDI,* 1986, p. 863.

internal competence to withdraw reservations as has been noted with regard to their formulation.[113] There seems no reason, therefore, why the wording of draft guidelines 2.1.4 should not be transposed to the withdrawal of reservations.

(4) It would, in particular, seem essential to indicate in the Guide to Practice whether and to what extent a State can claim that a reservation is not valid because it violates the rules of its internal law; this situation could very well arise in practice, although the Commission does not know of any specific example.

(5) As the Commission indicated in relation to the formulation of reservations,[114] there might be a case for applying to reservations the "defective ratification" rule of article 46 of the Vienna Conventions, and still more to the withdrawal of reservations, given that the process of ratification for accession is thereby completed. Whether the formulation of reservations or, still more, their withdrawal is involved, the relevant rules are seldom spelled out in formal texts of a constitutional or even a legislative nature.[115]

(6) The Commission wondered whether it would not be more elegant simply to refer the reader to draft guideline 2.1.4, of which draft guideline 2.5.5 is a word-for-word transposition, with the simple replacement of the words "formulation" and "formulate" by the words "withdrawal" and "withdraw". Contrary to the position that it took regarding draft guideline 2.5.6, the Commission decided that it would be preferable, in this case, to opt for the reproduction of draft guideline 2.1.4: draft guideline 2.5.5 is inextricably linked with draft guideline 2.5.4, for which a simple reference is impossible.[116] It seems preferable to proceed in the same manner in both cases.

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[113] See the commentary to draft guideline 2.1.4, preceding footnote 111, paras. (3)-(6).

[114] Ibid., para. (10).

[115] These uncertainties also explain the hesitation of the few authors who have tackled the question (see footnote 112 above). If a country's own specialists in these matters are in disagreement among themselves or criticize the practices of their own Government, other States or international organizations cannot be expected to delve into the mysteries and subtleties of international law.

[116] See commentary to draft guideline 2.1.4, para. (17).

2.5.6 Communication of withdrawal of a reservation

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.

Commentary

(1) As the Commission noted elsewhere,[117] the Vienna Conventions are completely silent as to the procedure for the communication of withdrawal of reservations. Article 22, paragraph 3 (a), undoubtedly implies that the contracting States and international organizations should be notified of a withdrawal, but it does not specify either who should make this notification or the procedure to be followed. Draft guideline 2.5.6. serves to fill that gap.

(2) To that end, the Commission used the same method as for the formulation of the withdrawal *stricto sensu*[118] and considered whether it might not be possible and appropriate to transpose draft guidelines 2.1.5 to 2.1.7 it had adopted on the communication of reservations themselves.

(3) The first remark that must be made is that, although the Vienna Conventions do not specify the procedure to be followed for withdrawing a reservation, the *travaux préparatoires* of the 1969 Convention show that those who drafted the law of treaties were in no doubt about the fact that:

Notification of withdrawal must be made by the depositary, if there is one; and

The recipients of the notification must be "every State which is or is entitled to become a party to the treaty" and "interested States".[119]

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[117] See the commentary to draft guideline 2.5.4, para. (1).

[118] Ibid, para. (8).

[119] Ibid, paras. (2) and (3).

(4) It is only because, at least partly at the instigation of Mr. Rosenne, it was decided to group together all the rules relating to depositaries and notification, which constitute articles 76 to 78 of the 1969 Vienna Convention,[120] that these proposals were abandoned.[121] They are, however, entirely consistent with draft guidelines 2.1.5 and 2.1.6.[122]

(5) This approach is endorsed by the legal theory on the topic,[123] meagre though it is, and is also in line with current practice. Thus,

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[120] And arts. 77 to 79 of the 1986 Vienna Convention.

[121] See the commentary to draft guideline 2.5.4, para. (4).

[122] Draft guideline 2.1.5 ("Communication of reservations"): "A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to the treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ."

Draft guideline 2.1.6 ("Procedure for communication of reservations"): "Unless otherwise provided in the treaty agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted: (i) If there is no depository, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or (ii) If there is a depository, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

Where a communication relating to a reservation to a treaty is made by electronic mail, or by facsimile, it must be confirmed by diplomatic note or depositary notification."

[123] See Luigi Migliorino, "La revoca di riserve e di obiezioni a riserve", *Rivista di diritto internazionale*, p. 323, or Adolfo Maresca, *Il Diritto dei trattati*, Giuffrè, Milan, 1971, p. 302.

Both the Secretary-General of the United Nations[124] and the Secretary-General of the Council of Europe[125] observe the same procedure on withdrawal as on the communication of reservations: they are the recipients of withdrawals of reservations made by States or international organizations to treaties of which they are depositaries and they communicate them to all the Contracting Parties and the States and international organizations entitled to become parties;

Moreover, where treaty provisions expressly relate to the procedure to be followed in respect of withdrawal of reservations, they generally follow the model used for the formulation of reservations, in line with the rules given in draft guidelines 2.1.5 and 2.1.6, in that they specify that the depositary must be notified of a withdrawal[126] and

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[124] See *Multilateral Treaties deposited with the Secretary-General*, status as at 31 December 2000 (United Nations publication, Sales No. E.01.V.5), vols. I and II, *passim* (see, among many other examples, the withdrawal of reservations to the Vienna Convention on Diplomatic Relations of 18 April 1961 by China, Egypt and Mongolia, vol. I, p. 111, notes 13 and 15 and p. 112, note 17; or to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 by Colombia, Jamaica and the Philippines, ibid., pp. 409 and 410, notes 8, 9 and 11).

[125] See European Committee on Legal Cooperation (CDCJ), *Conventions and Reservations to those Conventions*, note by the Secretariat drafted by the Directorate-General of Legal Affairs, CDCJ (1999) (see the withdrawal of reservations by Germany and Italy to the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in cases of Multiple Nationality of 1963, pp. 11 and 12).

[126] See, for example, the Convention on the Contract for the International Carriage of Goods by Road, of 19 May 1956, art. 48, para. 2; the Convention on the Limitation Period in the International Sale of Goods, as amended, of 1 August 1988, art. 40, para. 2; the Convention on the fight against corruption involving officials of the European Communities or officials of member States of the European Union, art. 15, para. 2; or the Council of Europe Convention on Cybercrime, art. 43, para. 1.

even that he should communicate it to the Contracting Parties[127] or, more broadly, to "every State" entitled to become party or to "every State", without specifying further.[128]

(6) As for the depositary, there is no reason to give him a role different from the extremely limited one assigned to him for the formulation of reservations in draft guidelines 2.1.6 and 2.1.7,[129] which are a combination of article 77, paragraph 1, and article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention[130] and are in conformity with the principles on which the relevant Vienna rules are based:[131]

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[127] See, for example, the European Agreement on Road Markings of 13 December 1957, arts. 15, para. 2, and 17 (b), or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, of 26 October 1961, arts. 18 and 34 (c).

[128] See, for example, the Convention on Psychotropic Substances of 21 February 1971, arts. 25, para. 5, and 33, the Customs Convention on Containers of 2 December 1972, arts. 26, para. 3, and 27, the International Convention on the Harmonization of Frontier Control of Goods of 21 October 1982, arts. 21 and 25, or the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (notification to be made "to Member States of the Hague Conference on Private International Law").

[129] See the text of draft guideline 2.1.6 above, footnote 122. Draft guideline 2.1.7 ("Functions of depositories"):

> "The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.
>
> In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of (a) the signatory States and organizations and the contracting States and contracting organizations; or (b) Where appropriate, the competent organ of the international organization concerned."

[130] These correspond to arts. 77 and 78 of the 1969 Convention.

[131] See the commentary to draft guidelines 2.1.6 and 2.1.7, in Report of the International Law Commission, fifty-fourth session (2002), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 102-123.

Under article 78, paragraph 1 (e), the depositary is given the function of "informing the Parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty"; notifications relating to reservations and their withdrawal are covered by this provision, which appears in modified form in draft guideline 2.1.6 (ii);

The first paragraph of draft guideline 2.1.7 is based on the provision contained in article 78, paragraph 1 (d), under which the depositary should examine whether "notification or communication relating to the treaty is in due and proper form and, if need be, [bring] the matter to the attention of the State or international organization in question"; this, too, applies equally well to the formulation of reservations and to their withdrawal (which could cause a problem with regard to, for example, the person making the communication);[132]

The second paragraph of the same draft guideline carries through the logic of the "letter-box depositary" theory endorsed by the Vienna Conventions in cases where a difference arises. It reproduces word for word the text of article 78, paragraph 2, of the 1986 Convention and, again, there seems no need to make a distinction between formulation and withdrawal.

(7) Since the rules contained in draft guidelines 2.1.5 to 2.1.7 are in every respect transposable to the withdrawal of reservations, should they be merely referred to or reproduced in their entirety? In relation to the formulation of reservations, the Commission preferred to reproduce and adapt draft guidelines 2.1.3 and 2.1.4 in draft guidelines 2.5.4 and 2.5.5. That position was, however, primarily dictated by the consideration that simply transposing the rules governing competence to formulate a reservation to competence to withdraw it was impossible.[133] The same does not apply to the communication of withdrawal of reservations or the role of the depositary in that regard: the text of draft guidelines 2.1.5, 2.1.6 and 2.1.7 fits

[132] See the commentary to draft guideline 2.5.4, paras. (10) and (11).

[133] See the commentary to draft guideline 2.5.4, para. (17), and the commentary to draft guideline 2.5.5, para. (6).

perfectly, with the simple replacement of the word "formulation" by the word "withdrawal". The use of a reference has fewer disadvantages and, although several members did not agree, the Commission considered that it was enough merely to refer to those provisions.

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

Commentary

(1) In the abstract, it is not very logical to insert draft guidelines relating to the effect of the withdrawal of a reservation in a chapter of the Guide to Practice dealing with the procedure for reservations, particularly since it is scarcely possible to dissociate the effect of the withdrawal from that of the reservation itself: the one cancels out the other. After some hesitation, however, the Special Rapporteur has decided to do so, for two reasons:

In the first place, article 22 of the Vienna Conventions links the rules governing the form and procedure[134] of a withdrawal closely with the question of its effect; and

In the second place, the effect of a withdrawal may be viewed as being autonomous, thus precluding the need to go into the infinitely more complex effect of the reservation itself.

(2) Article 22, paragraph 3 (a), of the Vienna Conventions is concerned with the effect of the withdrawal of a reservation only in relation to the particular question of the time at which the

[134] Admittedly, only to the extent that para. 3 (a) refers to the "notice" of a withdrawal.

withdrawal "becomes operative". During the *travaux préparatoires* of the 1969 Convention, however, the Commission occasionally considered the more substantial question of how it would be operative.

> In his first report on the law of treaties, Sir Gerald Fitzmaurice proposed a provision that, where a reservation is withdrawn, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related and is equally entitled to claim compliance with that provision by the other parties.[135]
>
> Draft article 22, paragraph 2, adopted by the Commission on first reading in 1962, provided that "upon withdrawal of a reservation, the provisions of article 21 [relating to the application of reservations] cease to apply";[136] this sentence disappeared from the Commission's final draft,[137] although,
>
> In plenary, Sir Humphrey Waldock suggested that the Drafting Committee could discuss a further question, namely, "the possibility that the effect of the withdrawal of a reservation might be that the treaty entered into force in the relations between two States between which it had not previously been in force";[138] and,
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> During the Vienna Conference, several amendments aimed to re-establish a provision to that effect in the text of the Convention.[139]

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[135] *Yearbook … 1956*, vol. II, p. 118, document A/CN.4/101, art. 40, para. 3.

[136] *Yearbook … 1956*, vol. II, p. 201.

[137] It was discarded on second reading following consideration by the Drafting Committee of the new draft article proposed by Sir Humphrey Waldock, who retained it in part (cf. commentary to draft guideline 2.5.8, footnote 278), without offering any comment (cf. *Yearbook … 1965*, vol. I, 814th meeting, 29 June 1965, p. 272, para. 22).

[138] Ibid., 800th meeting, 14 June 1965, p. 178, para. 86; in that context, see Rosenne, ibid., para. 87.

[139] Amendment by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1; see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna,*

(3) The Conference Drafting Committee rejected the proposed amendments, on the grounds that they were superfluous and that the effect of the withdrawal of a reservation was self-evident.[140] This is only partially true.

(4) There can be no doubt that "the effect of withdrawal of a reservation is obviously to restore the original text of the treaty".[141] A distinction should, however, be made between three possible situations.

(5) In the relations between the reserving and the accepting State (or international organization) (art. 20, para. 4, of the Vienna Conventions), the reservation ceases to be operational (art. 21, para. 1): "In a situation of this kind, the withdrawal of a reservation will have the effect of re-establishing the original content of the treaty in the relations between the reserving and the accepting State. The withdrawal of the reservation produces the situation that would have existed if the reservation had not been made."[142] Migliorino gives the example of the withdrawal by Hungary, in 1989, of its reservation to the Single Convention on Narcotic Drugs, 1961, article 48, paragraph 2, of which provides for the competence of the International

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26 March-24 May 1968 and 9 April-22 May 1969, Conference Documents (United Nations publication, Sales No. E.70.V.5), Committee of the Whole, documents with a sub-amendment by the USSR (A/CONF.39/C.1/L.167, ibid.).

[140] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), Committee of the Whole, 70th meeting (14 May 1968), statement by K. Yasseen, Chairman of the Drafting Committee, p. 417, para. 37.

[141] Derek Bowett, "Reservations to Non-Restricted Multilateral Treaties", *British Year Book of International Law, 1976-1977*, p. 87. See also R. Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, 1970, p. 313.

[142] ("Intervendendo in una situazione di questo tipo, la revoca della riserva avrà l'effeto di ristablire il contenuto originario del trattato nei rapporti tra lo Stato riservante e lo Stato che ha acettato la riserva. La revoca della reserva crea quella situazione giuridica che sarebbe esistita se la reserva non fosse stata appostata.") Luigi Migliorino, "La revoca di riserve e di obiezioni a riserve", *Rivista di diritto internazionale*, 1994, p. 325; in that connection, R. Szafarz, prec., p. 314.

Court of Justice;[143] there had been no objection to this reservation and, as a result of the withdrawal, the Court's competence to interpret and apply the Convention was established from the effective date of the withdrawal.[144]

(6) The same applies to the relations between the State (or international organization) which withdraws a reservation and a State (or international organization) which has objected to, but not opposed the entry into force of the treaty between itself and the reserving State. In this situation, under article 31, paragraph 3, of the Vienna Conventions, the provisions to which the reservation related did not apply in the relations between the two parties: "In a situation of this kind, the withdrawal of a reservation has the effect of extending, in the relations between the reserving and the objecting State, the application of the treaty to the provisions covered by the reservation."[145]

(7) The most radical effect of the withdrawal of a reservation occurs where the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or organization. In that situation, the treaty enters into force[146] on the date on which the withdrawal takes effect. "For a State ... which had previously expressed a maximum-effect objection, the withdrawal of the reservation will mean the establishment of full treaty relations with the reserving State."[147]

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[143] *Multilateral Treaties deposited with the Secretary-General*, Status as at 31 December 2000 (United Nations publication, Sales No. E.01.V.5), vol. I, p. 382, footnote 16.

[144] L. Migliorino, op. cit. (footnote 107), pp. 325-326.

[145] L. Migliorino, ibid., pp. 326-327; the author gives the example of the withdrawal by Portugal, in 1972, of its reservation to the Vienna Convention on Diplomatic Relations of 1961, art. 37, para. 2, which gave rise to several objections by States which did not, nevertheless, oppose the entry into force of the Convention between them and Portugal (see *Multilateral Treaties* …, prec. footnote 143, p. 112, footnote 18).

[146] See art. 24 of the Vienna Conventions, especially para. 3.

[147] R. Szafarz, op. cit., footnote 141, pp. 315 and 316; in that connection, see José Maria Rude, "Reservations to Treaties", *RCADI*, 1975-III, vol. 146, p. 202; D. Bowett, op. cit., footnote 141, p. 87, and L. Migliorino, op. cit., footnote 142, pp. 328-329. The latter gives the example of the withdrawal by Hungary, in 1989, of its reservation to the 1969 Vienna Convention, art. 66 (see

(8) In other words, the withdrawal of a reservation entails the application of the treaty in its entirety (so long as there are no other reservations, of course) in the relations between the State or international organization which withdraws the reservation and all the other Contracting Parties, whether they had accepted or objected to the reservation, although, in the second case, if the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or international organization, the treaty enters into force from the effective date of the withdrawal.

(9) In the latter case, treaty relations between the reserving State or international organization and the objecting State or international organization are established even where other reservations remain, since the opposition of the State or international organization to the entry into force of the treaty was due to the objection to the withdrawn reservation. The other reservations become operational, in accordance with the provisions of article 21 of the Vienna Conventions, as of the entry into force of the treaty in the relations between the two parties.

(10) It should also be noted that the wording of the first paragraph of the draft guideline follows that of the Vienna Conventions, in particular, article 2, paragraph 1 (d), and article 23, which assume that a reservation refers to treaty provisions (in the plural). It goes without saying that the reservation can be made to only one provision or, in the case of an "across-the-board" reservation, to "the treaty as a whole with respect to certain specific aspects".[148] The first paragraph of draft guideline 2.5.7 covers both of these cases.

2.5.8 [2.5.9] Effective date of withdrawal of a reservation

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Multilateral Treaties ..., prec. footnote 143, vol. II, p. 280, footnote 7); this example is not really convincing, since the objecting States had not formally rejected the application of the Convention in the relations between themselves and Hungary.

[148] Cf. draft guideline 1.1.1.

Commentary

(1) Draft guideline 2.5.8 reproduces the text of the "chapeau" and of article 22, paragraph 3 (a), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

(2) This provision, which produces the 1969 text with the sole addition of the reference to international organizations, was not specifically discussed during the *travaux préparatoires* of the 1986 Convention[149] or at the Vienna Conference of 1968-1969, which did not more than clarify[150] the text adopted on second reading by the Commission.[151] Its adoption had, however, given rise to some discussion in the Commission in 1962 and 1965.

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[149] See Paul Reuter, fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook ... 1975*, vol. II, p. 38, and fifth report, *Yearbook ... 1976*, vol. II (Part One), p. 146; for the (lack of) discussion by the Commission: *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 100, paras. 30-35 and 1435th meeting, 7 June 1977, p. 103, paras. 1 and 2; also 1451st meeting, 1 July 1977, p. 194, paras. 12-16, and the Commission's report of the same year, ibid., vol. II (Part Two), pp. 114-116; and, for the second reading, see the tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II (Part One), p. 63, para. 84; the (lack of) discussion at the 1652nd meeting, 15 May 1981, and 1692nd meeting, 16 July 1981, *Yearbook ... 1981*, vol. I, p. 54, paras. 27-28 and p. 265, para. 38, and the final text, ibid., vol. II (Part Two), p. 140, and *Yearbook ... 1982*, vol. II (Part Two), pp. 36-37.

[150] See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (United Nations publications, Sales No. E.70.V.5), p. 142, para. 211 (text of the Drafting Committee).

[151] The plural ("... when notice of it has been received by the other contracting States": see *Yearbook ... 1966*, vol. II, p. 209, document A/6309/Rev.1) was changed to the singular, which had the advantage of underlining that the time of becoming operative was specific to each of the parties (cf. the exposition by Yasseen, Chairman of the Conference Drafting Committee, in *Official Records* ..., op. cit. (see previous footnote), 11th plenary meeting, p. 39, para. 11). On the final adoption of draft article 22 by the Commission, see *Yearbook ... 1965*, vol. I, p. 285, and *Yearbook ... 1966*, vol. I, p. 327.

(3) Whereas Sir Gerald Fitzmaurice had, in his first report, in 1956, planned to spell out the effects of the withdrawal of a reservation,[152] Sir Humphrey Waldock expressed no such intention in his first report, in 1962.[153] It was, however, during the Commission's discussions in that year that, for the first time, a provision was included, at the request of Bartoš, in draft article 22 on the withdrawal of reservations, that such withdrawal "takes effect when notice of it has been received by the other States concerned".[154]

(4) Following the adoption of this provision on first reading, three States reacted:[155] the United States of America, which welcomed it; and Israel and the United Kingdom of Great Britain and Northern Ireland, which were concerned about the difficulties that might be encountered by other States Parties as a result of the suddenness of the effect of a withdrawal. Their arguments led the Special Rapporteur to propose the addition to draft article 22 of a paragraph (c) involving a complicated formula whereby the withdrawal became operative as soon as the other States had received notice of it, but they were given three months' grace to make any necessary changes.[156] In this way, Sir Humphrey intended to give the other parties the opportunity to take the "requisite legislative or administrative action …, where necessary", so that their internal law could be brought into line with the situation arising out of the withdrawal of the reservation.[157]

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[152] See the commentary to draft guideline 2.5.1, para. (2).

[153] Ibid., para. (3).

[154] Ibid., para. (5).

[155] See the fourth report by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, pp. 55-56, document A/CN.4/177 and Add.1 and 2.

[156] "(c) On the date when the withdrawal becomes operative, article 21 ceases to apply, provided that, during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice."

[157] *Yearbook ... 1965*, v. I, 800th meeting, 11 June 1965, p. 175, para. 47.

(5) As well as criticizing the overcomplicated formulation of the solution proposed by the Special Rapporteur, the members of the Commission were divided on the principle of the provision. Ruda, supported by Briggs, said that there was no reason to allow a period of grace in the case of withdrawal of reservations when no such provision existed in the case of the entry into force of a treaty as a result of the consent given by a State to be bound.[158] Other members, however, including Tunkin and Waldock himself, pointed out, with some reason, that the two situations were different: where ratification was concerned, "a State could obtain all the time it required by the simple process of delaying ratification until it had made the necessary adjustments to its municipal law"; in the case of the withdrawal of a reservation, by contrast, "the change in the situation did not depend on the will of the other State concerned, but on the will of the reserving State which decided" to withdraw it.[159]

(6) The Commission considered, however, that "such a clause would unduly complicate the situation and that, in practice, any difficulty that might arise would be obviated during the consultations in which the States concerned would undoubtedly engage".[160] The Commission nevertheless showed some hesitation in once again stipulating that the date on which the withdrawal became operative was that on which the other Contracting Parties had been notified, because, in its final commentary, after explaining that it had concluded that to formulate as a general rule the granting of a short period of time within which States could "adapt their internal law to the new situation [resulting from the withdrawal of the reservation] would be going too far", the Commission "felt that the matter should be left to be regulated by a specific provision in the treaty. It also considered that, even in the absence of such a provision, if a State required a

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[158] Ibid., p. 176, para. 59 (Ruda), and p. 177, para. 76 (Briggs).

[159] Ibid., p. 176, paras. 68 and 69 (Tunkin); see also p. 175, para. 54 (Tsuruoka), and p. 177, paras. 78-80 (Waldock).

[160] Explanations given by Waldock, ibid., eight hundred and fourteenth session, 29 June 1965, p. 273, para. 24.

short interval of time in which to bring its internal law into conformity with the situation resulting from the withdrawal of the reservation, good faith would debar the reserving State from complaining of the difficulty which its own reservation had occasioned".[161]

(7) This raises another problem: by proceeding in this manner, the Commission surreptitiously reintroduced in the commentary the exception that Waldock had tried to incorporate in the text itself of what became article 22 of the Convention. Not only was such a manner of proceeding questionable, but the reference to the principle of good faith did not provide any clear guidance.[162]

(8) In the Commission's view the question is nevertheless whether the Guide to Practice should include the clarification contained in the commentary of 1965: it makes sense to be more specific in this code of recommended practices than in general conventions on the law of treaties. In this case, however, there are some serious objections to such inclusion: the "rule" set out in the commentary manifestly contradicts that appearing in the Convention and its inclusion in the Guide would therefore depart from that rule. That would be acceptable only if it was felt to meet a clear need, but this is not the case here. In 1965, Sir Humphrey Waldock had, "heard of no actual difficulty arising in the application of a treaty from a State's withdrawal of its reservation";[163] this would still seem to be the case 38 years later. It does not therefore appear necessary or advisable to contradict or relax the rule stated in article 22, paragraph 3, of the Vienna Conventions.

(9) It is nonetheless true that, in certain cases, the effect of the withdrawal of a reservation immediately after notification is given might give rise to difficulty. The 1965 commentary itself, however, gives the correct answer to the problem: in such a case, "the matter should ... be

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[161] *Yearbook … 1966,* v. II, p. 209, para. (2) of the commentary to the draft article 20, document (A/6309/Rev.1, para. 2).

[162] As the [International] Court [of Justice] has observed, the "principle of good faith is one of the basic principles governing the creation and performance of legal obligations" (*Nuclear Tests, ICJ Reports 1974,* p. 268, para. 46; p. 473, para. 49); "it is not in itself a source of obligation where none would otherwise exist" (*Border and Transborder Armed Actions (Nicaragua v. Honduras), Judgment,* (*ICJ Reports 1988,* p. 105, para. 94)).

[163] *Yearbook …1965,* vol. I, 814th meeting, 29 June 1965, p. 273, para. 24.

regulated by a specific provision of the treaty".[164] In other words, whenever a treaty relates to an issue, such as personal status or certain aspects of private international law, with regard to which it might be thought that the unexpected withdrawal of a reservation could cause the other parties difficulty because they had not adjusted their internal legislation, a clause should be included in the treaty specifying the period of time required to deal with the situation created by the withdrawal.

(10) This is, moreover, what happens in practice. A considerable number of treaties set a time limit longer than that given, in accordance with general law, in article 22, paragraph 3 (a), of the Vienna Conventions, for the withdrawal of a reservation to take effect. This time limit generally ranges from one to three months, starting, in most cases, from the notification of the withdrawal to the depositary rather than to the other contracting States.[165] Conversely, the treaty may set a shorter period than that contained in the Vienna Conventions. Thus, under the European Convention on Transfrontier Television, of 5 May 1989, article 32, paragraph 3,

> "Any Contracting State which has made a reservation under paragraph 1 may wholly or partly withdraw it by means of a notification addressed to the Secretary-General of the Council of Europe. The withdrawal shall take effect *on the date of receipt of such notification by the Secretary-General*."

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[164] See para. (6) above.

[165] See the examples, given by Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 390, or Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, The Hague, 1988, p. 438, footnote 19. See also, for example, the United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980, art. 94, para. 4 (six months), the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), of 23 June 1979, art. XIV. para. 2 (90 days from the transmission of the withdrawal to the parties by the depositary), or the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, adopted 1 August 1989 by the Hague Conference on Private International Law, art. 24, para. 3 (three months after notification of the withdrawal).

and not on the date of receipt by the other Contracting Parties of the notification by the depositary.[166] And sometimes a treaty provides that it is for the State which withdraws its reservation to specify the effective date of the withdrawal.[167]

(11) The purpose of these express clauses is to overcome the disadvantages of the principle established in article 22, paragraph 3 (a), of the Vienna Conventions, which is not above criticism. Apart from the problems considered above[168] arising, in some cases, from the fact that a withdrawal takes effect on receipt of its notification by the other parties, it has been pointed out that the paragraph does not "really resolve the question of the time factor" (ne résout pas vraiement la question du factuer temps),[169] although, thanks to the specific provision introduced at the Vienna Conference in 1969,[170] the partners of a State or international organization which withdraws a reservation know exactly on what date the withdrawal has taken effect, the withdrawing State or international organization itself remains in uncertainty, for the notification may be received at completely different times by the other parties. This has the unfortunate effect of leaving the author of the withdrawal uncertain as to the date on which its new

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[166] Italics added. Council of Europe conventions containing clauses on the withdrawal of reservations generally follow this formula: cf. the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, art. 8, para. 2; the 1977 European Agreement on the Transmission of Applications for Legal Aid, art. 13, para. 2; or the 1997 European Convention on Nationality, art. 29, para. 3.

[167] Cf. the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention (Revised)) of 18 May 1973, art. 12, para. 2: "... Any Contracting Party which has entered reservations may withdraw them, in whole or in part, at any time by notification to the depositary specifying the date on which such withdrawal takes effect".

[168] Paras. (4) to (9).

[169] P.H. Imbert, op. cit., footnote 165, p. 290.

[170] See footnote 151 above.

obligations will become operational.[171] Short of amending the text of article 22, paragraph 3 (a), itself, however, there is no way of overcoming this difficulty, which seems too insignificant in practice[172] to justify "revising" the Vienna text.

(12) It should, however, be noted in this connection that the Vienna text departs from ordinary law: normally, an action under a treaty takes effect from the date of its notification to the depositary. That is what articles 16 (b), 24, paragraph 3, and 78 (b)[173] of the 1969 Convention provide. And that is how the International Court of Justice ruled concerning optional declarations of acceptance of its compulsory jurisdiction, following a line of reasoning that may, by analogy, be applied to the law of treaties.[174] The exception established by the provisions of article 22, paragraph 3 (a), of the Vienna Conventions is explained by the concern to avoid a situation in which the other Contracting Parties to a treaty to which a State withdraws its reservation find themselves held responsible for not having observed the treaty provisions with regard to that State, even though they were unaware of the withdrawal.[175] This concern must be commended.

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[171] In this connection, see the comments by Briggs, *Yearbook 1965*, vol. 1, 800th meeting, 14 June 1965, p. 177 para. 75, and 814th meeting, 29 June 1965, p. 273, para. 25.

[172] See paragraph (8) above.

[173] Art. 79 (b) of the 1986 Convention.

[174] "By the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from article 36. (...) For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned". Judgment of 26 November 1957, *Right of Passage over Indian Territory (Preliminary Objections), ICJ Reports 1957,* p. 146; see also *ICJ Reports 1998,* p. 291, para. 25; see ICJ Judgment of 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria* (*Preliminary Objections*), *ICJ Reports 1988,* p. 293, para. 30.

[175] See the Commission's commentary to draft art. 22, adopted on first reading, *Yearbook … 1962*, vol. II, pp. 181-182, and to draft art. 22, adopted on second reading, *Yearbook … 1966*, vol. II, p. 209.

(13) The Commission has sometimes criticized the inclusion of the phrase "unless the treaty otherwise provides"[176] in some provisions of the Vienna Conventions. In some circumstances, however, it is valuable in that it draws attention to the advisability of possibly incorporating specific reservation clauses in the actual treaty in order to obviate the disadvantages connected with the application of the general rule or the ambiguity resulting from silence.[177] That is certainly the case with regard to the time at which the withdrawal of a reservation became operative, which it is certainly preferable to specify whenever the application of the principle set forth in article 22, paragraph 3 (a), of the Vienna Conventions and also contained in draft guideline 2.5.8 might give rise to difficulties, either because the relative suddenness with which the withdrawal takes effect might put the other parties in an awkward position or, on the contrary, because there is a desire to neutralize the length of time elapsing before notification of withdrawal is received by them.

(14) In order to assist the negotiators of treaties where this kind of problem arises, the Commission has decided to include in the Guide to Practice model clauses on which they could base themselves, if necessary. The scope of these model clauses and the "instructions for use" are clarified in an "Explanatory note" at the beginning of the Guide to Practice.

Model clause A *- Deferment of the effective date of the withdrawal of a reservation*

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. This withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

[176] See, for example, the commentary to draft guideline 2.5.1, para. (15).

[177] See, for example, draft guidelines 2.3.1 and 2.3.2.

Commentary

(a) The purpose of model clause A is to extend the period of time required for the effective date of the withdrawal of a reservation and is recommended especially in cases when the other Contracting Parties might have to bring their own internal law into line with the new situation created by the withdrawal.[178]

(b) Although negotiators are obviously free to modify as they wish the length of time needed for the withdrawal of the reservation to take effect, it would seem desirable that, in the model clause proposed by the Commission, the period should be calculated as dating from receipt of notification of the withdrawal by the depositary rather than by the other Contracting Parties, as article 22, paragraph 3 (a), of the Vienna Conventions provides. In the first place, the effective date established in that paragraph, which should certainly be retained in draft guideline 2.5.9, is deficient in several respects.[179] In the second place, in cases such as this, the parties are in possession of all the information indicating the probable time scale of communication of the withdrawal to the other States or international organizations concerned; they can thus set the effective date accordingly.

Model clause B - *Earlier effective date of withdrawal of a reservation*

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of the receipt of such notification by [the depositary].

Commentary

(a) Model clause B is designed to cover the opposite situation to the one dealt with in model A, since situations may arise in which the parties agree that they prefer a shorter time scale than that resulting from the application of the principle embodied in article 22, paragraph 3 (a), of the Vienna Conventions and also contained in draft guideline 2.5.8. They may wish to avoid the slowness and uncertainty linked to the requirement that the other Contracting Parties must have received notification of withdrawal.

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[178] See para. (4) of the commentary to draft guideline 2.5.8.

[179] See the commentary to draft guideline 2.5.9.

(b) There is no reason against this, so long as the treaty in question contains a provision derogating from the general principle contained in article 22, paragraph 3 (a), of the Vienna Conventions and shortening the period required for the withdrawal to take effect. The inclusion in the treaty of a provision reproducing the text of model clause B, whose wording is taken from article 132, paragraph 3, of the 1989 European Convention on Transfrontier Television,[180] would achieve that objective.

Model clause C - *Freedom to set the effective date of withdrawal of a reservation*

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

Commentary

(a) The Contracting Parties may also wish to leave it to the discretion of the reserving State or international organization to determine the date on which the withdrawal would take effect. Model clause C, whose wording follows that of article 12, paragraph 2, of the 1973 Kyoto Convention (Revised),[181] applies to this situation.

(b) The insertion of such a clause in a treaty is pointless in the cases covered by draft guideline 2.5.9 and is of no real significance unless the intention is to permit the author of the reservation to give immediate effect to the withdrawal of the reservation or, in any event, to ensure that it becomes operative more rapidly than is provided for in article 22, paragraph 3 (a), of the Vienna Conventions. The purposes of model clause C are therefore similar to those of model clause B.

[180] See the complete text in para. (10) of the commentary to draft guideline 2.5.8.

[181] See the text of the commentary to draft guideline 2.5.8, footnote 167.

2.5.9 [2.5.10] Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation

The withdrawal of a reservation takes effect on the date set by the withdrawing State where:

(*a*) That date is later than the date on which the other contracting States or international organizations received notification of it; or

(*b*) The withdrawal does not add to the rights of the withdrawing State or international organization in relation to the other contracting States or international organizations.

Commentary

(1) Draft guideline 2.5.9 specifies the cases in which article 22, paragraph 3 (a), of the Vienna Conventions does not apply, not because there is an exemption to it, but because it is not designed for that purpose. Regardless of the situations in which an express clause of the treaty rules out the application of the principle embodied in this provision, this applies in the two above-mentioned cases, where the author of the reservation can unilaterally set the effective date of its withdrawal.

(2) The first subparagraph of draft guideline 2.5.9 considers the possibility of a reserving State or international organization setting that date at a time later than that resulting from the application of article 22, paragraph 3 (a). This does not raise any particular difficulties: the period provided for therein is intended to enable the other parties not to be caught unawares and to be fully informed of the scope of their commitments in relation to the State (or international organization) renouncing its reservation. From such time as that information is effective and available, therefore, there is no reason why the reserving party should not set the effective date of the withdrawal of its reservation as it wishes, since, in any case, it could have deferred the date by notifying the depositary of the withdrawal at a later time.

(3) Paragraph (a) of draft guideline 2.5.9 deliberately uses the plural (“the other contracting States or international organizations”) where article 22, paragraph 3 (a), uses the singular (“that State or that organization”). For the withdrawal to take effect on the date specified by the

withdrawing State, it is essential that *all* the other Contracting Parties should have received notification, otherwise neither the spirit nor the raison d'être of article 22, paragraph 3 (a), would have been respected.

(4) Subparagraph (b) concerns cases in which the date set by the author of the reservation is prior to the receipt of notification by the other Contracting Parties. In that situation, only the withdrawing State or international organization (and, where relevant, the depositary) knows that the reservation has been withdrawn. This applies all the more where the withdrawal is assumed to be retroactive, as sometimes occurs.[182]

(5) In the absence of a specific treaty provision, an intention expressed unilaterally by the reserving State cannot, in theory, prevail over the clear provisions of article 22, paragraph 3 (a), if the other Contracting Parties object. The Commission believes, however, that it is not worth retaining the category of treaties establishing "integral obligations", especially in the field of human rights; in such a situation, there can be no objection - quite the contrary - to the fact that the withdrawal takes immediate, even retroactive effect, if the State making the original reservation so wishes, since the legislation of other States is, by definition, not affected.[183] In practice, this is the kind of situation in which retroactive withdrawals have occurred.[184]

(6) The Commission debated whether it was preferable to view the question from the angle of the withdrawing State or that of the other parties, in which case subparagraph (b) would have been worded "… the withdrawal does not add to the obligations of the other Contracting States

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[182] See the example given by Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 291, footnote 38 (withdrawal of reservations by Denmark, Norway and Sweden to the Convention relating to the Status of Refugees of 1951 and the Convention relating to the Status of Stateless Persons of 1954: see *Multilateral treaties deposited with the Secretary-General*, Status as at 31 December 2000 (United Nations publication, Sales No. E.01.V.5) vol. I, pp. 314 and 319-320).

[183] In this connection, see P.H. Imbert, ibid., pp. 290-291.

[184] See footnote 182 above.

or international organizations". After lengthy discussion, the Commission agreed that this was two sides of the same coin and opted for the first solution, which seemed to be more consistent with the active role of the State that decides to withdraw its reservation.

(7) In the English text, the term "auteur du retrait" is translated by "withdrawing State or international organization". It goes without saying that this refers not to a State or an international organization which withdraws from a treaty, but to one which withdraws its reservation.

2.5.10 [2.5.11] Partial withdrawal of a reservation

The partial withdrawal of a reservation purports to limit the legal effect of the reservation and to achieve a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

Commentary

(1) In accordance with the prevailing doctrine, "[s]ince a reservation can be withdrawn, it may in certain circumstances be possible to modify or even replace a reservation, provided the result is to limit its effect".[185] While this principle is formulated in prudent terms, it is hardly questionable and can be stated more categorically: nothing prevents the modification of a reservation if the modification reduces the scope of the reservation and amounts to a partial withdrawal. This is the point of departure of draft guideline 2.5.10.

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[185] Anthony Aust, *Modern Treaty Law and Practice*, Cambridge U.P., 2000, p. 128. See also Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 293, or Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe Publishing, Strasbourg, 1999, p. 96.

(2) Clearly, this does not raise the slightest problem when such a modification is expressly provided for by the treaty. While this is relatively rare, there are reservation clauses to this effect. Thus, for example, article 23, paragraph 2, of the Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) of 6 February 1976 provides that:

> "The declaration provided for in paragraph 1 of this article may be made, withdrawn or modified at any later date; in such case, the declaration, withdrawal or modification shall take effect as from the ninetieth day after receipt of the notice by the Secretary-General of the United Nations."

(3) In addition, we more frequently find reservation clauses expressly contemplating the total *or partial* withdrawal of reservations. For example, article 8, paragraph 3, of the Convention on the Nationality of Married Women, of 20 February 1957, provides that:

> "Any State making a reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received."[186]

The same applies to article 17, paragraph 2, of the Council of Europe Convention on the Protection of the Environment Through Criminal Law, of 4 November 1998, which reads as follows:

> "Any State which has made a reservation ... may wholly or partly withdraw it by means of a notification addressed to the Secretary-General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary-General."[187]

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[186] See also, for example, article 50, paragraph 4, of the Single Convention on Narcotic Drugs of 1961, as amended in 1975: "A State which has made reservations may at any time by notification in writing withdraw all or part of its reservations."

[187] See also, for example, article 13, paragraph 2, of the European Convention on the suppression of terrorism of 27 January 1977: "Any State may wholly or partly withdraw a

In addition, under article 15, paragraph 2, of the Convention on the fight against corruption involving officials of the European Communities or officials of States members of the European Union, of 26 May 1997:

> "Any Member State which has entered a reservation may withdraw it at any time in whole or in part by notifying the depositary. Withdrawal shall take effect on the date on which the depositary receives the notification."

(4) The fact that they are mentioned simultaneously in numerous treaty clauses highlights the close relationship between total and partial withdrawal of reservations. This similarity, confirmed in practice, is, however, sometimes contested in the literature.

(5) During the preparation of the draft articles on the law of treaties by the International Law Commission, Sir Humphrey Waldock suggested the adoption of a draft article placing the total and partial withdrawal of reservations on an equal footing.[188] Following the consideration of this draft by the Drafting Committee, it returned to the plenary stripped of any reference to the possibility of withdrawing a reservation "in part",[189] although no reason for this modification can be inferred from the summaries of the discussions. The most plausible explanation is that this seemed to be self-evident - "he who can do more can do less" - and the word "withdrawal" should very likely be interpreted, given the somewhat surprising silence of the commentary, as meaning "total or partial withdrawal".

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reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary-General of the Council of Europe which shall become effective as from the date of its receipt." For other examples of conventions concluded under the auspices of the Council of Europe and containing a comparable clause, see the commentary to draft guideline 2.5.2, footnote 66.

[188] Cf. draft article 17, para. 6, in Sir Humphrey's first report, *Yearbook ... 1962*, vol. II, p. 69, para. 69.

[189] Ibid., p. 201; on the changes made by the Drafting Committee to the draft prepared by the Special Rapporteur, see the commentary to draft guideline 2.5.1, para. (3).

(6) The fact remains that this is not entirely self-evident and that practice and the literature[190] appear to be somewhat undecided. In practice, on can cite a number of reservations concluded within the framework of the Council of Europe which were modified without arousing opposition.[191] For its part, the European Commission of Human Rights "showed a certain flexibility" as to the time requirement set out in article 64 of the European Convention on Human Rights:[192]

> "As internal law is subject to modification from time to time, the Commission considered that a modification of the law protected by the reservation, even if it entails a modification of the reservation, does not undermine the time requirement of article 64. According to the Commission, despite the explicit terms of article 64, ... to the extent that a law *then in force* in its territory is not in conformity ... the reservation signed by Austria on 3 September 1958 (1958-1959) (2 *Annuaire* 88-91) covers ... the law of 5 July 1962, which did not have the result of enlarging, a posteriori, the area removed from the control of the Commission."[193]

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[190] Cf. P.H. Imbert, op. cit., footnote 185, p. 293.

[191] V.J. Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe Publishing, Strasbourg, 1999, p. 95; admittedly, it seems to be more a matter of "statements concerning modalities of implementation of a treaty at the internal level" within the meaning of draft guideline 1.4.5 (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 284-289) than of reservations as such.

[192] Article 57 since the entry into force of Protocol II: "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article. 2. Any reservation made under this Article shall contain a brief statement of the law concerned."

[193] William A. Schabas, commentary on article 64 in L.E. Pettiti, E. Decaux and P.H. Imbert, *La Convention européenne des droits de l'homme - commentaire article par article*, Economica, Paris, 1995, p. 932; italics in text; footnotes omitted. See the reports of the Commission in the cases of *Association X c. Autriche* (req. No. 473/59), *Ann*. 2, p. 405, or *X c. Autriche* (req. No. 88180/78), *DR* 20, pp. 23-25.

(7) This latter clarification is essential and undoubtedly provides the key to this jurisprudence: it is *because* the new law *limits* the scope of the reservation that the Commission considered that it was covered by the law.[194] Technically, what is at issue is not a modification of the reservation itself, but the effect of the modification of the internal law; nevertheless, it seems legitimate to make the same argument**.** Moreover, in some cases, States formally modified their reservations to the European Convention on Human Rights (in the sense of diminishing their scope) without protest from the other contracting parties.[195]

(8) The jurisprudence of the European Court of Human Rights can be interpreted in the same way, in the sense that, while the Strasbourg Court refuses to extend to new, more restrictive laws the benefit of a reservation made upon ratification, it proceeds differently if, following ratification, the law "goes no farther than a law in force on the date of the said reservation".[196] The outcome of the *Belilos* case is, however, likely to raise doubts in this regard.

(9) Following the highly disputable position taken by the Strasbourg Court concerning the follow-up to its finding that the Swiss "declaration" made in 1974, relating to article 6, paragraph 1, of the European Convention on Human Rights, was invalid,[197] Switzerland, after much hesitation, first modified its "declaration" - equated by the Court with a reservation, at least insofar as the applicable rules are concerned - so as to render it compatible with the

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[194] Cf. the partially dissenting opinion of Judge Valticos in the *Chorherr c. Autriche* case: "If the law is modified, the divergence to which the reservation refers could probably, if we are not strict, be maintained in the new text, but it could not, of course, be strengthened" (judgement of 25 August 1993, series A, No. 266-B, p. 40).

[195] Cf. the successive partial withdrawals by Finland of its reservation to article 5 in 1996, 1998, 1999 and 2001 (http://conventions.coe.int/treaty/en/cadreprincipal.htm).

[196] Judgement of 25 February 1982, *Campbell et Cosans*, series A, vol. 48, p. 17, para. 37.

[197] The Court held that "the contentious declaration does not meet two requirements of article 64 of the Convention (see footnote 192 above), so that it must be deemed invalid" (series A, vol. 132, para. 60) and that, since "there is no doubt that Switzerland considers itself bound by the Convention, independently of the validity of the declaration" (which, frankly speaking, was no less disputable), the Convention should be applied to Switzerland irrespective of the declaration (ibid.).

judgement of 29 April 1988.[198] The "interpretative declaration" thus modified was notified by Switzerland to the Secretary-General of the Council of Europe, the depositary of the Convention, and to the Committee of Ministers "acting as a monitoring body for the enforcement of judgements of the Court".[199] These notifications do not seem to have given rise to disputes or raised difficulties on the part of the Convention bodies or other States parties.[200] However, the situation in the Swiss courts was different**.** In a decision dated 17 December 1992, *Elisabeth B. v. Council of State of Thurgau Canton*, the Swiss Federal Court decided, with regard to the grounds for the *Belilos* decision, that it was the entire "interpretative declaration" of 1974 which was invalid and thus that there was no validly formulated reservation to be amended 12 years later; if anything, it would have been a new reservation, which was incompatible with the *ratione temporis* condition for the formulation of reservations established in article 64 of the Rome Convention[201] and in article 19 of the 1969 Vienna Convention.[202] On 29 August 2000, Switzerland officially withdrew its "interpretative declaration" concerning article 6 of the European Convention on Human Rights.[203]

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[198] Believing (correctly) that the Court's rebuke dealt only with the "penal aspect", Switzerland had limited its "declaration" to civil proceedings.

[199] J.-F. Flauss, op. cit., footnote 328, p. 298, footnote 7; see also William Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform", *Ann. canadien de droit international* 1985, p. 48. For references to these notifications, see Council of Europe, *Série des traités européennes* (STE), No. 5, pp. 16-17, and Committee Resolution DH (89) 24 (Annexe), dated 19 September 1989.

[200] Some authors have, however, contested their validity; see Gérard Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme", *RGDIP* 1989, p. 314, and the works cited in the judgement quoted below (footnote 202) of the Swiss Federal Court, of 17 December 1992 (para. 6.b), and by J.-F. Flauss, op. cit., p. 300.

[201] See footnote 192 above.

[202] Extensive portions of the Federal Court's decision are cited in French translation in the *Journal des* Tribunaux, vol. I: *Droit fédéral*, 1995, p. 537. The relevant passages are to be found in paragraph 7 of the decision (pp. 533-537).

[203] Cf. http://conventions.coe.int/treaty/en/cadreprincipal.htm.

(10) Despite appearances, however, it cannot be inferred from this important decision that the fact that a treaty body with a regulatory function (human rights or other) invalidates a reservation prohibits any change in the challenged reservation:

> The Swiss Federal Court's position is based on the idea that, in this case, the 1974 "declaration" was invalid in its entirety (even if it had not been explicitly invalidated by the European Court of Human Rights); and, above all:
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> In that same decision, the Court stated that:
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> "While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed. While neither article 64 of the European Convention on Human Rights nor the 1969 Vienna Convention on the Law of Treaties (RS 0.111) explicitly settles this issue, it would appear that, as a rule, the reformulation of an existing reservation should be possible if its purpose is to attenuate an existing reservation**.** This procedure does not limit the relevant State's commitment vis-à-vis other States; rather, it increases it in accordance with the Convention."[204]

(11) This is an excellent presentation of both the applicable law and its basic underlying premise: there is no valid reason for preventing a State from *limiting* the scope of a previous reservation by withdrawing it, if only in part; the treaty's integrity is better ensured thereby and it is not impossible that, as a consequence, some of the other parties may withdraw objections that they had made to the initial reservation.[205] Furthermore, as has been pointed out, without this option, the equality between parties would be disrupted (at least in cases where a treaty monitoring body exists): "States which have long been parties to the Convention might consider themselves to be subject to unequal treatment by comparison with States which ratified the

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[204] See the decision mentioned in footnote 202 above, p. 535.

[205] See Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, The Hague, 1988, p. 223.

Convention [more recently] and, a fortiori, with future contracting parties"[206] that would have the advantage of knowing the treaty body's position regarding the validity of reservations comparable to the one that they might be planning to formulate and of being able to modify it accordingly.

(12) Moreover, it was such considerations[207] which led the Commission to state in its preliminary conclusions of 1997 that, in taking action on the inadmissibility of a reservation, the State may, for example, modify its reservation so as to eliminate the inadmissibility;[208] obviously, this is possible only if it has the option of modifying the reservation by partially withdrawing it.

(13) In practice, partial withdrawals, while not very frequent, are far from non-existent; however, there are not many withdrawals of reservations in general. In 1988, Frank Horn noted that, of 1,522 reservations or interpretative declarations made in respect of treaties of which the Secretary-General of the United Nations is the depositary, "47 have been withdrawn completely or partly ...[209] In the majority of cases, i.e., 30 statements, the withdrawals have been partial. Of these, six have experienced successive withdrawals leading in only two cases to a complete withdrawal".[210] This trend, while not precipitous, has continued in recent years as demonstrated by the following examples:

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[206] Flauss, op. cit., footnote 199, p. 299.

[207] See *Yearbook ... 1997*, vol. II, Part Two, paras. 55-56; document A/52/10, paras. 86 and 141-144.

[208] See the preliminary conclusions, *Yearbook ... 1997*, vol. II, Part Two, para. 10.

[209] Of these 47 withdrawals, 11 occurred during a succession of States. There is no question that a successor State may withdraw reservations made by its predecessor, in whole or in part (cf. art. 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties); however, as the Commission has decided (cf. *Yearbook ... 1995*, vol. II, Part Two, para. 477 and *Yearbook ... 1997*, vol. II, Part Two, para. 221) all problems concerning reservations related to the succession of States will be studied *in fine* and will be the subject of a separate chapter of the Guide to Practice.

[210] Op. cit., footnote 205, p. 226. These figures are an interesting indication, but should be viewed with caution.

> On 11 November 1988, Sweden partially withdrew its reservation to article 9, paragraph 2, of the Convention on the Recovery Abroad of Maintenance;[211]
>
> On two occasions, in 1986 and 1995, Sweden also withdrew, in whole or in part, some of its reservations to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961;[212] and
>
> On 5 July 1995, following several objections, the Libyan Arab Jamahiriya modified the general reservation that it had made upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, making it more specific.[213]

In all these cases, which provide only a few examples, the Secretary-General, as depositary of the conventions in question, took note of the modification without any comment whatsoever.

(14) The Secretary-General's practice is not absolutely consistent, however, and, in some cases, even those involving modifications which apparently reduce the scope of the reservations in question, he proceeds as in the case of late formulation of reservations[214] and confines himself, "in keeping with the ... practice followed in similar cases", to receiving "the declarations in question for deposit in the absence of any objection on the part of any of the contracting States, either to the deposit itself or to the procedure envisaged".[215] This practice is defended in the

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[211] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000,* vol. II, chap. XX.1, footnote 9; see also Sweden's 1996 "reformulation" of one of its reservations to the 1951 Convention relating to the Status of Refugees and its simultaneous withdrawal of several other reservations (ibid., vol. I, footnote 23) and the partial, then total (in 1963 and 1980, respectively) withdrawal of a Swiss reservation to that Convention.

[212] Ibid., vol. II, chap. XIV.3, footnote 7; see also Finland's modification of 10 February 1994 reducing the scope of a reservation to the same Convention (ibid., footnote 5).

[213] Ibid., vol. I, chap. IV.8, footnote 24.

[214] See the commentary to draft guideline 2.3.1, *Report of the International Law Commission on the work of its fifty-third session (2001), Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 482-484, paras. (10) to (12).

[215] Cf., for example, the procedure followed in the case of Azerbaijan's undeniably limiting modification of 28 September 2000 (in response to the comments of States which had objected to

following words in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*: "when States have wished to substitute new reservations for initial reservations made at the time of deposit ... this has amounted to a withdrawal of the initial reservations - which raised no difficulty - and the making of (new) reservations".[216] This position seems to be confirmed by a memorandum dated 4 April 2000 from the United Nations Legal Counsel, which describes "the practice followed by the Secretary-General as depositary in respect of communications from States which seek to modify their existing reservations to multilateral treaties deposited with the Secretary-General or which may be understood to seek to do so" and extends the length of time during which parties may object from 90 days to 12 months.[217]

(15) Not only is this position contrary to what appears to be the accepted practice when the proposed modification limits the scope of the modified reservation; it is more qualified than initially appears. The note verbale of 4 April 2000 must be read together with the Legal Counsel's reply, of the same date, to a note verbale from Portugal reporting, on behalf of the European Union, problems associated with the 90-day time period. That note makes a distinction between "a modification of an existing reservation" and "a partial withdrawal thereof". In the case of the second type of communication, "the Legal Counsel shares the concerns expressed by the Permanent Representative that it is highly desirable that, as far as possible, communications which are no more than partial withdrawals of reservations should not be subjected to the procedure that is appropriate for modifications of reservations".

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its initial reservation) of its reservation to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (*Multilateral Treaties* ..., vol. I, chap. IV.12, footnote 6).

[216] Document prepared by the Treaty Section of the Office of Legal Affairs, ST/LEG/7/Rev.1, para. 206.

[217] Memorandum from the United Nations Legal Counsel addressed to the Permanent Representatives of States Members of the United Nations (LA41TR/221 (23-1)). For further information on this time period, see the commentary to draft guideline 2.3.2, in Report, footnote 214 above, pp. 491-492, paras. (8) and (9).

(16) The question is thus merely one of wording: the Secretary-General refers to withdrawals which enlarge the scope of reservations as "modifications" and to those which reduce that scope as "partial withdrawals"; the latter are not (or should not be, although this is not always translated into practice) subject to the cumbersome procedure required for the late formulation of reservations.[218] To require a one-year time period before the limitation of a reservation can produce effects, subjecting it to the risk of a "veto" by a single other party, would obviously be counterproductive and in violation of the principle that, to the extent possible, the treaty's integrity should be preserved.

(17) Despite some elements of uncertainty, the result of the foregoing considerations is that the modification of a reservation whose effect is to reduce its scope must be subject to the same legal regime as a total withdrawal. In order to avoid any ambiguity, especially in view of the terminology used by the Secretary-General of the United Nations,[219] it is better to refer here to a "partial withdrawal".

(18) The second paragraph of draft guideline 2.5.10 takes account of the alignment of the rules on partial withdrawal of reservations with those that apply in the case of a total withdrawal. Therefore, it implicitly refers to draft guidelines 2.5.1, 2.5.2, 2.5.5, 2.5.6 and 2.5.8, which fully apply to partial withdrawals. The same is not true, however, regarding draft guideline 2.5.7, on the effect of a total withdrawal.[220]

(19) To avoid any confusion, the Commission also deemed it useful to set out in the first paragraph the definition of what constitutes a partial withdrawal. The definition draws on the actual definition of reservations that stems from article 2 (d) of the 1969 and 1986 Vienna Conventions and on draft guidelines 1.1 and 1.1.1 (to which the phrase "achieve a more complete application … of the treaty as a whole" refers).

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[218] Cf. draft guidelines 2.3.1 to 2.3.3, ibid., pp. 462-495.

[219] See above, paras. (14) to (16).

[220] See draft guideline 2.5.11 and para. (1) of the commentary.

(20) It is not, however, aligned with that guideline: whereas a reservation is defined "subjectively" by the objective pursued by the author (as reflected by the expression "purports to …" in those provisions), partial withdrawal is defined "objectively" by the effects that it produces. The explanation for the difference lies in the fact that, while a reservation produces an effect only if it is accepted (expressly or implicitly),[221] withdrawal, whether total or partial, produces its effects and "the consent of a State or international organization which has accepted the reservation is not required";[222] nor indeed is any additional formality. This effect is mentioned in the first paragraph of draft guideline 2.5.10 (partial withdrawal "limits the legal effect of the reservation and ensures more completely the application of the provisions of the treaty, or the treaty as a whole") and explained in draft guideline 2.5.11.

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as the author does not withdraw it, to the extent that the objection does not apply exclusively to the part of the reservation which has been withdrawn.

No objection may be made to the reservation resulting from a partial withdrawal, unless that partial withdrawal has a discriminatory effect.

Commentary

(1) While the form and procedure of a partial withdrawal must definitely be aligned with those of a pure and simple withdrawal,[223] the problem also arises of whether the provisions of draft guideline 2.5.7 ("Effect of withdrawal of a reservation") can be transposed to partial withdrawals. In fact, there can be no hesitation: a partial withdrawal of a partial reservation cannot be compared to that of a total withdrawal nor can it be held that "the *partial* withdrawal of a reservation entails the application *as a whole* of the provisions to which the reservation related in the relations between the State or international organization which *partially* withdraws the reservation and all the other parties, whether they had accepted or objected to the

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[221] See article 20 of the Vienna Conventions.

[222] See draft guideline 2.5.1.

[223] See above, the commentary to draft guideline 2.5.10, para. (18).

reservation".[224] Of course, the treaty may be implemented more fully in the relations between the reserving State or international organization and the other Contracting Parties, but not "as a whole" since, hypothetically, the reservation (in a more limited form, admittedly) remains.

(2) However, while partial withdrawal of a reservation does not constitute a new reservation,[225] it nonetheless leads to modification of the previous text. Thus, as the first sentence of draft guideline 2.5.11 specifies, the legal effect of the reservation is modified "to the extent of the new formulation of the reservation". This wording is based on the terminology used in article 21 of the Vienna Conventions[226] without entering into a substantive discussion of the effects of reservations and objections thereto.

(3) Another specific problem arises in the case of partial withdrawal. In the case of total withdrawal, the effect is to deprive of consequences the objections that had been made to the reservation as initially formulated,[227] even if those objections had been accompanied by opposition to the entry into force of the treaty with the reserving State or international organization.[228] There is no reason for this to be true in the case of a partial withdrawal. Admittedly, States or international organizations that had made objections would be well advised to reconsider them and withdraw them if the motive or motives that gave rise to them were eliminated by the modification of the reservation and they may certainly proceed to withdraw them,[229] but they cannot be required to do so and they may perfectly well maintain their objections if they deem it appropriate, on the understanding that the objection has been expressly justified by the part of the reservation that has been withdrawn. In the latter case, the objection

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[224] Cf. draft guideline 2.5.7.

[225] See the commentary to draft guideline 2.5.10, para. (15).

[226] Cf. article 21, para. 1: "A reservation established with regard to any party in accordance with articles 19, 20 and 23: (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation".

[227] Cf. the first paragraph of draft guideline 2.5.7 ("… whether they had accepted the reservation or objected to it").

[228] Cf. the second para. of draft guideline 2.5.8.

[229] See the commentary to draft guideline 2.5.10, para. (11) and footnote 205.

disappears, which is what is meant by the phrase "to the extent that the objection does not relate exclusively to the part of the reservation that has been withdrawn". Two questions nonetheless arise in this connection.

(4) The first is to know whether the authors of an objection not of this nature must formally confirm it or whether it must be understood to apply to the reservation in its new formulation. In the light of practice, there is scarcely any doubt that this assumption of continuity is essential, for there seems to be no case where partial withdrawal of a reservation has led to a withdrawal of objections and the Secretary-General of the United Nations, as depositary, seems to consider that the continuity of the objection goes without saying.[230] This seems fairly reasonable, for the partial withdrawal does not eliminate the initial reservation and does not constitute a new reservation; a priori, the objections that were made to it rightly continue to apply as long as their authors do not withdraw them. The second sentence of the first paragraph of draft guideline 2.5.11 draws the necessary consequences.

(5) The second question that arises is whether partial withdrawal of the reservation can, conversely, constitute a new opportunity to object to the reservation resulting from the partial withdrawal. Since it is not a new reservation, but an attenuated form of the existing reservation, reformulated so as to bring the reserving State's commitments more fully into line with those provided for in the treaty, there might seem, prima facie, to be less doubt that the other contracting parties can object to the new formulation:[231] if they have adapted to the initial

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[230] The objections of Denmark, Finland, Mexico, Netherlands, Norway or Sweden to the reservation formulated by the Libyan Arab Jamahiriya to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (see the commentary to draft guideline 2.5.10, footnote 213) were not modified following the reformulation of the reservation and are still listed in *Multilateral treaties deposited with the Secretary-General*, status at 31 December 2000 (United Nations publication, Sales No. E.01.V.5), vol. I, chap. IV.8, pp. 245-250.

[231] Whereas they can certainly remove their initial objections, which, like reservations themselves, can be withdrawn at any time (see art. 22, para. 2, of the 1969 and 1986 Vienna Conventions); see the commentary to draft guideline 2.5.10, para. (11).

reservation, it is difficult to see how they can go against the new one, which, in theory, has attenuated effects. In principle, therefore, a State cannot object to a partial withdrawal any more than it can object to a pure and simple withdrawal.

(6) In the Commission's view, there is nonetheless an exception to this principle. While there seems to be no example, a partial withdrawal might have a discriminatory effect. Such would be the case if, for instance, a State or an international organization renounced a previous reservation except vis-à-vis certain parties or categories of parties. In that case, it would seem necessary for those parties to be able to object to the reservation even though they had not objected to the initial reservation when it applied to all of the Contracting Parties together. The second paragraph of draft guideline 2.5.11 sets out both the principle that it is impossible to object to a reservation in the event of a partial withdrawal and the exception when the withdrawal is discriminatory.
