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

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CHAPTER IX

RESERVATIONS TO TREATIES

2. Text of the draft articles with commentaries thereto adopted by the Commission at its fifty-sixth session

2.3.5 Widening of the scope of a reservation

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

Commentary

(1) The question of the modification of reservations should be posed in connection with the questions of the withdrawal and late formulation of reservations. Insofar as a modification is intended to lessen the scope of a reservation, what is involved is a partial withdrawal of the initial reservation, which poses no problem in principle, being subject to the general rules

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concerning withdrawals; the provisions of draft guidelines 2.5.10 and 2.5.11 apply.[1] However, if the effect of the modification is to strengthen an existing reservation, it would seem logical to start from the notion that what is involved is the late formulation of a reservation and to apply to it the rules which are applicable in this regard and which are stated in draft guidelines 2.3.1 to 2.3.3.[2]

(2) This is the reasoning forming the basis for draft guideline 2.3.5, which refers to the rules on the late formulation of reservations and also makes it clear that, if a State makes an "objection" to the widening of the reservation, the initial reservation applies.

(3) These assumptions were contested by a minority of the members of the Commission, who took the view that these rules might unduly encourage States to widen existing reservations. In addition, the established practice of the Council of Europe seems to be to prohibit any "widening" modification.

(4) Within the Council framework, "[t]here have been instances where States have approached the Secretariat requesting information as to whether and how existing reservations could be modified. In its replies the Secretariat has always stressed that modifications which would result in an extension of the scope of existing reservations are not acceptable. Here the same reasoning applies as in the case of belated reservations … Allowing such modifications would create a dangerous precedent which would jeopardize legal certainty and impair the uniform implementation of European treaties".[3]

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[1] See these draft guidelines and the commentaries thereto in *Report of the International Law Commission, Fifty-fifth session, 2003, Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 244-259.

[2] For the text of these provisions and the commentaries thereto, see *Report of the International Law Commission, Fifty-third session, 2001, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 477-495.

[3] Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe Publishing, 1999, p. 96. This is comparable to the position taken by the European Commission of Human Rights in the case of *Chrysostomos et al. v. Turkey* (decision of 4 March 1991, applications Nos. 15299/89, 15300/89 and 15318/89, *R.U.D.H.* 1991, p. 193).

(5) The same author questions whether a State may denounce a treaty to which it has made reservations in order to ratify it subsequently with widened reservations. He feels that such a procedure may constitute an abuse of rights, while admittedly basing his arguments on grounds specific to the Council of Europe conventions.[4]

(6) The majority of the members of the Commission nevertheless considered that a regional practice (which is, moreover, absolutely not settled[5]) should not be transposed to the universal level and that, as far as the widening of existing reservations is concerned, it would not be logical to apply rules that differ from those applicable to the late formulation of reservations.

(7) If, after expressing its consent, together with a reservation, a State or an international organization wishes to "widen" the reservation, in other words, to modify in its favour the legal effect of the provisions of the treaty to which the reservation refers, such provisions will be fully applicable, for the same reasons:

- It is essential not to encourage the late formulation of limitations on the application of the treaty;

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[4] Ibid. One can interpret in this sense the Swiss Federal Court decision of 17 December 1992 in the case of *Elisabeth B. v. Council of State of Thurgau Canton* (*Journal des Tribunaux*, vol. I: *Droit Fédéral*, 1995, pp. 523-537); see the seventh report on reservations to treaties, A/CN.4/526/Add.3, paras. 199-200. On the same point, see J.-F. Flauss, "Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: *Requiem* pour la déclaration interprétative relative à l'article 6, § 1", *R.U.D.H.* 1993, p. 303. In this regard, it may be noted that, on 26 May 1998, Trinidad and Tobago denounced the Optional Protocol and ratified it again the same day with a new reservation (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, ST/LEG/SER.E/22, vol. I, chap. IV.5, p. 222, note 3). After several objections and a decision by the Human Rights Committee dated 31 December 1999 (Communication No. 845/1999, CCPR/C/67/D/845/1999 - see the fifth report on reservations to treaties, A/CN.4/508, para. 12), Trinidad and Tobago again denounced the Protocol on 27 March 2000 (*Multilateral Treaties* …, ibid.). What was involved, however, was not the modification of an existing reservation, but the formulation of an entirely new reservation.

[5] See the commentary to draft guideline 2.3.1 in *Report of the International Law Commission, Fifty-third session, 2001, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 485, para. (14), footnote 1164.

- On the other hand, there may be legitimate reasons why a State or an international organization would wish to modify an earlier reservation and, in some cases, it may be possible for the author of the reservation to denounce the treaty in order to ratify it again with a "widened reservation";

- It is always possible for the parties to a treaty to modify it at any time by unanimous agreement;[6] it follows that they may also, by unanimous agreement, authorize a party to modify, again at any time, the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to that party; and

- The requirement of the *unanimous* consent of the other parties to the widening of the scope of the reservation seems to constitute an adequate safeguard against abuses.

(8) At least the universal level, moreover, the justified reluctance not to encourage the States parties to a treaty to widen the scope of their reservations after the expression of their consent to be bound has not prevented practice in respect of the widening of reservations from being based on practice in respect of the late formulation of reservations,[7] and this is entirely a matter of common sense.

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[6] Cf. article 39 of the 1969 and 1986 Vienna Conventions.

[7] G. Gaja gives the example of the "correction" by France on 11 August 1982 of the reservation formulated in its instrument of approval of the 1978 Protocol to the International Convention of 1973 for the Prevention of Pollution from Ships (MARPOL), which it deposited with the Secretary-General of the International Maritime Organization on 25 September 1981 ("Unruly Treaty Reservations", *Le droit international à l'heure de sa codification - Études en l'honneur de Roberto Ago*, Giuffrè, Milan, 1987, vol. I, pp. 311-312). This is a somewhat unusual case, since, at the time of the "correction", the MARPOL Protocol had not yet entered into force with respect to France; in this instance, the depositary does not appear to have made acceptance of the new wording dependent on the unanimous agreement of the other parties, some of which did in fact object to the modified reservation (see *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions as at 31 December 1999*, J/7339, p. 77).

(9) Depositaries treat "widening modifications" in the same way as late reservations. When they receive such a request by one of the parties, they consult all the other parties and accept the new wording of the reservation only if none of the parties opposes it by the deadline for replies.

(10) For example, when Finland acceded to the 1993 Protocol on Road Markings, additional to the European Agreement supplementing the Convention on Road Signs and Signals of 1968, on 1 April 1985, it formulated a reservation to a technical provision of the instrument.[8] Ten years later, on 5 September 1995, Finland declared that its reservation also applied to a situation other than that originally mentioned:[9]

> "In keeping with the practice followed in similar cases, the Secretary-General proposed to receive the modification 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. None of the Contracting Parties to the Protocol having notified the Secretary-General of an objection within a period of 90 days from the date of its circulation (on 20 December 1995), the said modification was accepted for deposit upon the expiration of the above-stipulated 90-day period, that is, on 19 March 1996."[10]

The procedure followed by the Secretary-General is the same as the one currently followed in the case of late formulation of reservations.[11] [12]

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[8] In its original reservation with respect to paragraph 6 of the annex, Finland reserved "the right to use yellow colour for the continuous line between the opposite directions of traffic" (*Multilateral Treaties* …, vol. I, XI.B.25, p. 830).

[9] "… the reservation made by Finland also applies to the barrier line" (ibid., pp. 830-831).

[10] Ibid., note 4.

[11] See the commentary to draft guideline 2.3.1 ("Late formulation of a reservation"), *Report of the International Law Commission, Fifty-third session, 2001, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), paras. (11) and (13), pp. 484-485.

[12] It should be noted that, at present, the period would be 12 months, not 90 days (see draft guideline 2.3.2 ("Acceptance of late formulation of a reservation"), ibid., p. 489 and, in particular, paras. (5) to (10) of the commentary, ibid., pp. 490-493.

(11) As another example, the Government of Maldives notified the United Nations Secretary-General on 29 January 1999 that it wished to modify the reservations it had formulated upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women in 1993. Germany, which had objected to the original reservations, also opposed their modification, arguing, among other things, that:

> "… reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty (article 19 of the Vienna Convention on the Law of Treaties). After a State has bound itself to a treaty under international law, it can no longer submit new reservations or extend or add to old reservations. It is only possible to totally or partially withdraw original reservations, something unfortunately not done by the Government of the Republic of the Maldives with its modification."[13]

(12) However, just as it had not objected to the formulation of the original reservation by Maldives by opposing its entry into force as between the two States, so Germany did not formally oppose the modification as such. This reinforces the doubts of some members of the Commission as to whether the term "objection" should be used to refer to the opposition of States to late modification of reservations. A State might well find the modification *procedure* acceptable while objecting to the *content* of the modified reservation.[14] Since, however, contrary to the opinion of the majority of its members, the Commission decided to retain the word "objection" to refer to the opposition of States to late formulation of reservations in draft guidelines 2.3.2 and 2.3.3,[15] it considered that the same terminology should be used here.

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[13] *Multilateral Treaties* … vol. I, chap. IV.8, notes 35, 42, p. 237. For Germany's original objection, see p. 248. Finland also objected to the modified Maldivian reservation, ibid., p. 245. The German and Finnish objections were made more than 90 days after the notification of the modification, the deadline set at that time by the Secretary-General.

[14] See paragraph (23) of the commentary to draft guideline 2.3.1, *Report of the International Law Commission, Fifty-third session, 2001, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 489.

[15] See the text of these draft guidelines, ibid., p. 463.

(13) Draft guideline 2.3.5 refers implicitly to draft guidelines 2.3.1, 2.3.2 and 2.3.3 on the late formulation of reservations. It did not seem necessary to say so expressly in the text because these guidelines immediately precede it in the Guide to Practice.

(14) It should, however, be noted that the transposition of the rules applicable to the late formulation of reservations, as contained in draft guideline 2.3.3, to the widening of an existing reservation cannot be unconditional. In both cases, the existing situation remains the same in the event of an "objection" by any of the contracting parties, but this situation is different: prior to the late formulation of a reservation, the treaty applied in its entirety as between the contracting parties; in the case of the late widening of the scope of a reservation, however, the reservation was already established and produced the effects recognized by the Vienna Conventions. This is the difference of situation covered by the second sentence of draft guideline 2.3.5, which provides that, in this second case, the initial reservation remains unchanged in the event of an "objection" to the widening of its scope.

(15) The Commission did not consider it necessary for a draft guideline to define the "widening of the scope of a reservation" because its meaning is so obvious. Bearing in mind the definition of a reservation contained in draft guidelines 1.1 and 1.1.1, it is clear that this term applies to any modification designed to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole in respect of certain specific aspects in their application to the reserving State or international organization, in a broader manner than the initial reservation.

2.4.9 Modification of an interpretative declaration

Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

Commentary

(1) According to the definition given in draft guideline 1.2, "simple" interpretative declarations are merely clarifications of the meaning or scope of the provisions of the treaty.

They may be made at any time[16] (unless the treaty otherwise provides[17]) and are not subject to the requirement of confirmation.[18] There is thus nothing to prevent them from being modified at any time in the absence of a treaty provision stating that the interpretation must be given at a specified time, as indicated in draft guideline 2.4.9, the text of which is a combination of the texts of draft guidelines 2.4.3 ("Time at which an interpretative declaration may be formulated") and 2.4.6 ("Late formulation of an interpretative declaration").

(2) It follows that a "simple" interpretative declaration may be modified at any time, subject to provisions to the contrary contained in the treaty itself, which may limit the possibility of making such declarations in time, or in the case which is fairly unlikely, but which cannot be ruled out in principle, where the treaty expressly limits the possibility of modifying interpretative declarations.

(3) There are few clear examples illustrating this draft guideline. Mention may be made, however, of the modification by Mexico, in 1987, of the declaration concerning article 16 of the International Convention against the Taking of Hostages of 17 December 1979, made upon accession in 1987.[19]

(4) The modification by a State of unilateral statements made under an optional clause[20] or providing for a choice between the provisions of a treaty[21] also comes to mind; but such

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[16] Cf. draft guideline 2.4.3.

[17] Cf. draft guideline 2.4.6.

[18] Cf. draft guideline 2.4.4.

[19] See *Multilateral Treaties* ..., vol. II, chap. XVIII.5, p. 109.

[20] See, for example, the modification by Australia and New Zealand of the declarations made under article 24, paragraph 2 (ii), of the Agreement establishing the Asian Development Bank upon ratification of that Agreement (*Multilateral Treaties* ..., vol. I, chap. X.4, pp. 509-511).

[21] See, for example, the note by the Ambassador of Mexico to the Hague dated 24 January 2002 informing the depositary of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965 of the modification of Mexico's requirements with respect to the application of article 5 of the said Convention (www.hcch.net/e/conventions/text14e.html).

statements are "outside the scope of the … Guide to Practice".[22] Also, on 7 March 2002, Bulgaria amended a declaration made upon signature and confirmed upon deposit of its instrument of ratification (in 1994) of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959;[23] however, strictly speaking, it might be considered that this was more a case of interpreting a reservation than modifying an interpretative declaration.[24]

(5) For all that, and despite the paucity of convincing examples, draft guideline 2.4.9 seems to flow logically from the very definition of interpretative declarations.

(6) It is obvious that, if a treaty provides that an interpretative declaration can be made only at specified times, it follows a fortiori that such a declaration cannot be modified at other times. In the case where the treaty limits the possibility of making or modifying an interpretative declaration in time, the rules applicable to the late formulation of such a declaration, as stated in draft guideline 2.4.6, should be applicable mutatis mutandis if, notwithstanding that limitation, a State or an international organization intended to modify an earlier interpretative declaration: such a modification would be possible only in the absence of an objection by any one of the other contracting parties.

2.4.10 Limitation and widening of the scope of a conditional interpretative declaration

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

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[22] Draft guidelines 1.4.6 and 1.4.7.

[23] http://conventions.coe.int/Treaty/EN/CADREListeTraites.htm.

[24] See also ibid.: the modification, in 1988, of the Swiss "interpretative declaration" of 1974 concerning article 6, para. 1, of the European Convention on Human Rights following the *Belilos* judgement of 29 April 1988. However, the Court had classed this "declaration" as a reservation and Switzerland simply withdrew its declaration retroactively following the decision of the Swiss Federal Court of 17 December 1992 in the case of *Elisabeth B. v. Council of State of Thurgau Canton* (see footnote 4, supra).

Commentary

(1) Unlike the modification of "simple" interpretative declarations, the modification of conditional interpretative declarations cannot be done at will: such declarations can, in principle, be formulated (or confirmed) only at the time of the expression by the State or the international organization of its consent to be bound[25] and any late formulation is excluded "except if none of the other contracting parties objects".[26] Any modification is thus similar to a late formulation that can be "established" only if it does not encounter the opposition of any one of the other contracting parties. This is what is stated in draft guideline 2.4.10.

(2) Although it may be difficult in some cases to determine whether the purpose of a modification is to limit or widen the scope of a conditional interpretative declaration, the majority of the members of the Commission were of the opinion that there was no reason to depart in this regard from the rules relating to the modification of reservations and that reference should therefore be made to the rules applicable respectively to the partial withdrawal[27] and to the widening of the scope of reservations.[28]

(3) In this second case, the applicable rules are thus also the same as the ones contained in draft guideline 2.4.8 on the "Late formulation of a conditional interpretative declaration", which reads:

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[25] Cf. draft guidelines 1.2.1 and 2.4.5.

[26] Draft guideline 2.4.8.

[27] See draft guidelines 2.5.10 and 2.5.11.

[28] See draft guideline 2.3.5.

> "A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other contracting parties objects to the late formulation of the conditional interpretative declaration".[29]

(4) The Commission is aware of the fact that it is also possible that a party to the treaty might decide not to make an interpretative declaration a condition of its participation in the treaty while maintaining it "simply" as an interpretation. This is, however, an academic question of which there does not appear to be any example.[30] There is accordingly probably no need to devote a draft guideline to this case, particularly as this would, in reality, amount to the withdrawal of the declaration in question as a *conditional* interpretative declaration and would thus be a case of unconditional withdrawal to which the rules contained in draft guideline 2.5.13 would apply, with the result that this could be done at any time.

2.5.12 Withdrawal of an interpretative declaration

An interpretative declaration may be withdrawn at any time, following the same procedure applicable to its formulation, by the authorities competent for that purpose.

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[29] For the commentary to this draft guideline, see *Report of the International Law Commission, Fifty-third session, 2001, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 505-506.

[30] There are, however, examples of statements specifying that earlier interpretative declarations do not constitute reservations. See, for example, the "communication received subsequently" (the date is not given) by which the Government of France indicated that the first paragraph of the "declaration" made upon ratification of the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 "did not purport to limit the obligations under the Convention in respect of the French Government, but only to record the latter's interpretation of article 4 of the Convention" (*Multilateral Treaties* ..., vol. I, chap. IV.2, p. 137, note 19). See also, for example, the statements by Indonesia and Malaysia concerning the declarations which accompanied their ratifications of the Convention on the International Maritime Organization of 6 March 1948, ibid., vol. II, chap. XII.1, p. 6, notes 14 and 16, or India's position with respect to the same Convention (see ibid., p. 5, note 13; see also O. Schachter, "The question of treaty reservations at the 1959 General Assembly", *American Journal of International Law,* 1960, pp. 372-379).

Commentary

(1) It follows from draft guideline 2.4.3 that, except where a treaty provides otherwise,[31] a "simple" interpretative declaration "may be formulated at any time". It may, of course, be inferred therefrom that such a declaration may also be withdrawn at any time without any special procedure. It would, moreover, be paradoxical if the possibility of the withdrawal of an interpretative declaration was more limited than that of the withdrawal of a reservation, which could be done "at any time".[32]

(2) While States seldom withdraw their interpretative declarations, this does happen occasionally. On 1 March 1990, for instance, the Government of Italy notified the Secretary-General that "it had decided to withdraw the declaration by which the provisions of articles 17 and 18 [of the Geneva Convention relating to the Status of Refugees of 28 July 1951] were recognized by it as recommendations only".[33] Likewise, "on 20 April 2001, the Government of Finland informed the Secretary-General [of the United Nations] that it had decided to withdraw its declaration in respect of article 7, paragraph 2, made upon ratification" of the 1969 Vienna Convention on the Law of Treaties (ratified by that country in 1977[34]).

(3) This practice is compatible with the very informal nature of interpretative declarations.

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[31] Cf. draft guideline 2.4.6.

[32] Cf. article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions and draft guideline 2.5.1.

[33] *Multilateral Treaties* ..., vol. I, chap. V.2, pp. 347, note 23. There are also withdrawals of "statements of non-recognition" (cf., for example, the withdrawal of the Egyptian declarations in respect of Israel concerning the 1966 International Convention on the Elimination of All Forms of Racial Discrimination or the Single Convention on Narcotic Drugs, following the Camp David Agreement in 1980, ibid., chap. IV.2, p. 136, note 18, or chap. VI.15, p. 406, note 18), but such statements are "outside the scope of the ... Guide to Practice" (draft guideline 1.4.3).

[34] Ibid., vol. II, chap. XXIII.1, p. 328, note 13. The declaration concerned the respective powers of the President of the Republic, the Head of Government and the Minister for Foreign Affairs to conclude treaties. See also the withdrawal by New Zealand of a declaration made upon ratification of the Agreement establishing the Asian Development Bank (ibid., vol. I, chap. X.4, p. 512, note 9).

(4) The withdrawal of an interpretative declaration must nevertheless be based on the few procedures provided for in draft guidelines 2.4.1 and 2.4.2 with regard to the authorities which are competent to formulate such a declaration (and which are the same as those which may represent a State or an international organization for the adoption or authentication of the text of the treaty or for expressing their consent to be bound). The wording used in draft guideline 2.5.12 implicitly refers to those provisions.

2.5.13 Withdrawal of a conditional interpretative declaration

The withdrawal of a conditional interpretative declaration is governed by the rules applicable to the withdrawal of reservations.

Commentary

(1) Unlike simple interpretative declarations, conditional interpretative declarations are governed insofar as their formulation is concerned by the legal regime of reservations: they must be formulated when the State or international organization expresses its consent to be bound,[35] except if none of the other contracting Parties objects to their late formulation.

(2) It follows inevitably that the rules applicable to the withdrawal of conditional interpretative declarations are necessarily identical to those applying reservations in this regard, and this can only strengthen the position that it is unnecessary to devote specific draft guidelines to such declarations. The Commission nevertheless believes that it would be premature to take a final decision in this regard as long as this "hunch" has not been verified in respect of the rules relating to the validity of both reservations and conditional interpretative declarations.

(3) Until a definite position has been taken on this problem of principle, the rules to which draft guideline 2.5.13 implicitly refers are those contained in draft guidelines 2.5.1 to 2.5.9.

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[35] See draft guideline 1.2.1.