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

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## CHAPTER VIII

## RESERVATIONS TO TREATIES

**Addendum**

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## 2. Text of the draft guidelines and commentaries thereto adopted by the Commission at its fifty-eighth session

### 3. Validity of reservations and interpretative declarations

#### Commentary

(1) The purpose of the third part of the Guide to Practice, following the first part, devoted to definitions, and the second, which deals with the procedure formulation of reservations and interpretative declarations, is to determine the conditions for the validity of reservations to treaties.

(2) After extensive debate, the Commission decided, despite hesitation on the part of some members, to retain the term "validity of reservations" to describe the intellectual operation consisting in determining whether a unilateral statement made[1] by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty[2] in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation.

(3) Adhering to the definition found in article 2, paragraph 1 (d), of the Vienna Conventions, reproduced in draft guideline 1.1 of the Guide to Practice, the Commission accepted that all unilateral statements meeting that definition constituted reservations. But, as the Commission stated very clearly in its commentary on draft guideline 1.6, "[d]efining is not the same as regulating. […] A reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established".[3] It went on to say: "Furthermore, the exact

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[1] Since the mere formulation of a reservation does not allow it to produce the effects intended by its author, the word "formulated" would have been more appropriate (see below the commentary to draft guideline 3.1, paras. (6) and (7)); but the Vienna Conventions use the word "made" and as a matter of principle the Commission does not wish to revisit the Vienna text.

[2] Or of the treaty as a whole with respect to certain specific aspects (see draft guideline 1.1.1).

[3] *Yearbook of the International Law Commission 1999*, vol. II, (Part Two), p. 126, para. (2) of the commentary; also see below the commentary to the draft guideline as amended at the fifty-eighth session of the Commission.

determination of the nature of a statement is a precondition for the application of a particular legal regime, in the first place, for the assessment of its permissibility. It is only once a particular instrument has been defined as a reservation (...) that a decision can be taken as to whether it is permissible or not, its legal scope can be evaluated and its effect can be determined."[4]

(4) This terminology poses a problem. At an early stage, the Commission opted for the words "permissibility" and "impermissibility" in preference to "validity" and "invalidity" or "non-validity" in order to respond to the concerns expressed by some members of the Commission and some States who considered that the term "validity" cast doubt on the nature of statements that fit the definition of reservations given in article 2, paragraph 1 (d), of the Vienna Conventions but did not fulfil the conditions set forth in article 19.[5] Actually, the word "validity" seemed to a majority of the members of the Commission to be quite neutral in that regard. It offered the advantage that it did not prejudge the doctrinal controversy,[6] central to the question of reservations, between the proponents of "permissibility", who hold that "[t]he issue of 'permissibility' is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether as a matter of policy, other Parties find the reservations acceptable or not",[7] and the proponents of

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[4] *Ibid*., p. 126, para. (3) of the commentary. See also the commentary to draft guideline 1.1.1 in *Yearbook … 1998*, vol. II (Part Two), p. 101, para. (3) of the commentary, and the third report of the Special Rapporteur (A/CN.4/491/Add.3), paras. 158 and 179.

[5] See the statement of the United Kingdom in the Sixth Committee on 2 November 1993, A/C.6/48/SR.24, para. 42.

[6] On this doctrinal dispute, see in particular Jean Kyongun Koh, "Reservations to multilateral treaties: how international legal doctrine reflects world vision", *Harvard International Law Journal*, 1982, pp. 71-116, *passim*, in particular pp. 75-77; see also Catherine Redgwell, "Universality or Integrity? Some reflections on reservations to general multilateral treaties", *British Yearbook of International Law*, 1993, pp. 243-282, in particular pp. 263-269; and Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), p. 81, footnote 78.

[7] Derek W. Bowett, "Reservations to non-restricted multilateral treaties", *British Yearbook of International Law*, 1976-1977, p. 88.

"opposability", who hold that "the validity of a reservation depends solely on the acceptance of the reservation by another contracting State" and who therefore view article 19, subparagraph (c), of the Vienna Convention of 1969 "as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but not more than that".[8]

(5) Moreover, it was thought that the term "impermissible" ("*illicite*") was not appropriate in any case to characterize reservations that did not fulfil the conditions of form or substance set by the Vienna Conventions. According to a majority of the members of the Commission, "in international law, an internationally wrongful act entails its author's responsibility, and this is plainly not the case of the formulation of reservations which are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose".[9] Consequently, the Commission, which in 2002 had decided to reserve its position on this matter pending an examination of the effect of such reservations,[10] thought that it would be better to settle that question of terminology without further delay.

(6) It appeared to the Commission:

- In the first place, that the term "permissible" ("*licite*") implied that the formulation of reservations contrary to the provisions of article 19 of the Vienna Conventions would engage the responsibility of the reserving State or international organization, which was certainly not the case;[11] and

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[8] José Maria Ruda, "Reservations to Treaties", *Recueil des cours de l'Académie de droit international*, 1975-III, vol. 146, p. 190.

[9] Commentary to draft guideline 2.1.8 (Procedure in case of manifestly [impermissible] reservations), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 114, para. (7). According to a minority view, the formulation of an impermissible reservation would engage the responsibility of its author. The issue will be discussed in greater detail in the commentary to draft guideline 3.3.1.

[10] See the commentary on draft guideline 2.1.8, *ibid*.; see also draft guideline 2.1.7 (Functions of depositaries) and the commentary to it (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 105-112).

[11] See para. (5) above.

– In the second place, that the term “permissible” used in the English text of the draft guidelines adopted to date and their commentaries implied that it was exclusively a question of permissibility and not of opposability, which had the disadvantage of unprofitably prejudging the doctrinal dispute discussed above.[12]

(7) However, the term “permissibility” was retained to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions, since, according to the English speakers, the term did not imply taking a position as to the consequences of non-fulfilment of those conditions. That term was rendered in French by the expression “*validité substantielle*”.

(8) The third part of the Guide to Practice deals successively with the questions relating to:

– The permissibility of reservations;

– Competence to assess the validity of reservations; and

– The consequences of the non-validity of a reservation.

A special section will be devoted to the same questions in relation to interpretative declarations.

### 3.1 Permissible reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) In cases not falling under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

[12] Para. (4).

**Commentary**

(1) Draft guideline 3.1 faithfully reproduces the wording of article 19 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, which is patterned after the corresponding provision of the 1969 Convention with just two additions, which were needed in order to cover treaties concluded by international organizations.

(2) By providing that, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, "[a] State or an international organization may (...) formulate a reservation", albeit under certain conditions, that provision sets out "the general principle that the formulation of reservations is permitted …".[13] This is an essential element of the "flexible system" stemming from the advisory opinion of the International Court of Justice of 1951,[14] and it is no exaggeration to say that, on this point, it reverses the traditional presumption resulting from the system of unanimity,[15] the stated aim being to facilitate the widest possible participation in and, ultimately, the universality of treaties.

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[13] Commentary to draft article 18 adopted on first reading in 1962, *Yearbook … 1962*, vol. II, p. 180, para. (15); see also the commentary to draft article 16 adopted on second reading, *Yearbook … 1966*, vol. II, p. 207, para. (17). For the 1986 Convention, see the commentary to draft articles 19 (Case of treaties between international organizations) adopted in 1977, *Yearbook … 1977*, vol. II (Part Two), p. 106, para. (1), and 19 *bis* (Case of treaties between States and one or more international organizations or between international organizations and one or more States), *Yearbook … 1977*, vol. II (Part Two), p. 106, para. (3).

[14] *Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide*, 28 May 1951, *I.C.J. Reports*, 1951, p. 15.

[15] This concept, which had undoubtedly become the customary norm in the period between the wars (see the joint dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo, appended to the advisory opinion, *I.C.J. Reports*, 1951, pp. 34-35), significantly restricted the freedom to make reservations: this was possible only if all the other parties to the treaty accepted the reservation, otherwise the author remained outside the treaty. In its comments on the draft article 18 adopted by the Commission in 1962, Japan proposed reverting to the opposite presumption (see the fourth report of Sir Humphrey Waldock on the law of treaties (A/CN.4/177 and Adds.1 and 2), *Yearbook … 1965*, vol. II, p. 49).

(3) In this regard, the text of article 19 finally adopted in 1969 resulted directly from Waldock's proposals and takes the opposite view from the drafts prepared by the Special Rapporteurs on the law of treaties who preceded him, all of whom started from the inverse assumption, expressing in negative or restrictive terms the principle that a reservation might only be formulated (or "made")[16] if certain conditions were met.[17] Sir Humphrey,[18] on the other hand, presents the principle as the "power to formulate, that is, to *propose*, a reservation", which a State has "in virtue of its sovereignty".[19]

(4) However, this power is not unlimited:

- In the first place, it is limited in time, since a reservation may only be formulated "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty";[20]

- In the second place, the formulation of reservations may be incompatible with the object of some treaties, either because they are limited to a small group of States - a situation that is taken into account in article 20, paragraph 2, of the Convention,

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[16] On this point, see paras. (6) and (7) below.

[17] See, for example, draft article 10, para. 1, proposed by J.L.L. Brierly (A/CN.4/23, *Yearbook ... 1950*, vol. II, p. 238), the drafts of article 9 proposed by Hersch Lauterpacht (first report (A/CN.4/63), *Yearbook … 1953*, vol. II, pp. 91-92; and second report (A/CN.4/87), *Yearbook … 1954*, vol. II, p. 131); or draft article 39, para. 1, proposed by G.G. Fitzmaurice (*Yearbook … 1956*, vol. II, p. 115). See the comments of Pierre-Henri Imbert in *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), pp. 88-89.

[18] "A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation … unless: …" (first report (A/CN.4/144), *Yearbook … 1962*, vol. II, p. 60, article 17, para. 1 (a)).

[19] Commentary to art. 17, *ibid.*, p. 65, para. (9) - emphasis in the original.

[20] See para. (9) below.

which reverts to the system of unanimity where such instruments are concerned[21] - or, in the case of instruments of global scope, because the parties intend to make the integrity of the treaty take precedence over its universality or, at any rate, to limit the power of States to formulate reservations; on this issue, as on all others, the Vienna Convention is only intended to be residuary in nature, and there is nothing to prevent the negotiators from inserting in the treaty "reservations clauses" that limit or modify the freedom set out as a principle in article 19.[22]

(5) It is probably excessive to speak of a "right to reservations",[23] even though the Convention undoubtedly proceeds from the principle that there is a presumption in favour of their validity. This, moreover, is the significance of the very title of article 19 of the Vienna Conventions ("Formulation of reservations"),[24] which is confirmed by its *chapeau*: "A State may (...) formulate a reservation unless …". Certainly, by using the verb "may", the introductory clause of article 19 recognizes that States have a right; but it is only the right to "formulate" reservations.[25]

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[21] "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

[22] With regard to the residuary nature of the Vienna regime, see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), pp. 124-126; John King Gamble, Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", *American Journal of International Law*, 1980, pp. 383-391; P.-H. Imbert, *op. cit.* in footnote 17, pp. 162-230; Lord McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), pp. 169-173; Jörg Polakiewicz, *Treaty-Making in the Council of Europe* (Strasbourg, Council of Europe, 1999), pp. 85-90 and 101-104; Rosa Riquelme Cortado, *Las reservas a los tratados - Formulación y ambigüedades del regimen de Viena* (Universidad de Murcia, 2004), pp. 89-136.

[23] Some members of the Commission, however, spoke in support of the existence of such a right.

[24] Concerning the modification of this title in the context of the Guide to Practice, see para. (10) below.

[25] P.-H. Imbert, *op. cit*. in footnote 17, p. 83; see also Paul Reuter, *Introduction au droit des traités*, 3rd ed., Philippe Cahier, ed. (Paris, Presse universitaires de France, 1995), p. 75; or R. Riquelme Cortado, *op. cit*. in footnote 22, p. 84. It may also be noted that a proposal by

(6) The words "formulate" and "formulation" were carefully chosen. They signify that, while it is up to the State intending to attach a reservation to its expression of consent to be bound to indicate how it means to modify its participation in the treaty,[26] this formulation is not sufficient of itself. The reservation is not "made", it does not produce effects, merely by virtue of such a statement. For that reason an amendment by China seeking to replace the words "formulate a reservation" with the words "make reservations"[27] was rejected by the Drafting Committee of the Vienna Conference.[28] As Waldock noted, "there is an inherent ambiguity in saying (...) that a State may '*make*' a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively 'made' unless and until it has been assented to by the other interested States".[29] Now, not only is a reservation only

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Briggs to replace the word "free" in Waldock's draft (see footnote 18 above) with the words "legally entitled" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 22) was not accepted, nor was an amendment along the same lines proposed by the Union of Soviet Socialist Republics at the Vienna Conference (A/CONF.39/C.1/L.115, *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* (A/CONF.39/11/Add.2), p. 133, para. 175). The current wording ("A State may … formulate a reservation unless ...") was adopted by the Commission's Drafting Committee (*Yearbook … 1962*, vol. I, 663rd meeting, 18 June 1962, p. 221, para. 3), then by the Commission in plenary meeting in 1962 (*ibid*., vol. II, pp. 175-176, article 18, para. 1). No amendments were made in 1966, other than the replacement of the words "*Tout État*" [in the French text] with the words "*Un État*" (see *Yearbook … 1965*, vol. I, 813th meeting, 29 June 1965, p. 287, para. 1 (text adopted by the Drafting Committee), and *Yearbook … 1966*, vol. II, p. 202 (art. 16 adopted on second reading)).

[26] Cf. D.W. Greig, "Reservations: equity as a balancing factor?", *Australian Yearbook of International Law*, 1995, p. 22.

[27] A/CONF.39/C.1/L.161 (see *Documents of the Conference* (A/CONF.39/11/Add.2), cited above in footnote 25, p. 145, para. 177).

[28] See *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* (A/CONF.39/11), Committee of the Whole, 23rd meeting, 11 April 1968, p. 121, para. 2 (explanations by China), and 24th meeting, 16 April 1968, p. 126, para. 13 (statement by the Expert Consultant, Sir Humphrey Waldock).

[29] First report (A/CN.4/144), cited above in footnote 18, p. 71, para. (1) of the commentary to draft arts. 17 to 19.

"established"[30] if certain procedural conditions - admittedly, not very restrictive ones[31] - are met, but it must also comply with the substantive conditions set forth in the three subparagraphs of article 19 itself, as the word "unless" clearly demonstrates.[32]

(7) According to some authors, the terminology used in this provision is not consistent in that regard, since "*[l]orsque le traité autorise certaines réserves (article 19, alinéa b), elles n'ont pas besoin d'être acceptées par les autres États (…). Elles son donc 'faites' dès l'instant de leur formulation par l'État réservataire*" ["if the treaty permits specified reservations (article 19, subparagraph (b)), they do not need to be accepted by the other States … They are thus 'made' from the moment of their formulation by the reserving State"].[33] Now, if subparagraph (b) meant to say that such reservations "may be *made*", the *chapeau* of article 19 would be misleading, for it implies that they, too, are merely "formulated" by their author.[34] But this is an empty argument:[35] subparagraph (b) is not about reservations that are established (or made)

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[30] See the *chapeau* of art. 21: "A reservation established with regard to another party in accordance with articles 19, 20 and 23 …".

[31] See articles 20, paras. 3-5, 21, para. 1, and 23 and draft guidelines 2.1 to 2.2.3. See also Massimo Coccia, "Reservations to multilateral treaties on human rights", *California Western International Law Journal*, 1985, p. 28.

[32] "This article states the general principle that the *formulation* of reservations is permitted except in three cases" (emphasis added) (*Yearbook … 1966*, vol. II, p. 207, commentary to art. 16, para. (17)); the use of the word "*faire*" in the French text of the commentary (*ibid*., p. 225) is open to criticism, but it is probably a translation error, rather than a deliberate choice - *contra*: P.-H. Imbert, *op. cit*. in footnote 17, p. 90. Moreover, the English text of the commentary is correct.

[33] P.-H. Imbert, *op. cit*. in footnote 17, pp. 84-85.

[34] See also J.M. Ruda, *op. cit*. in footnote 17, pp. 179-180, and the far more restrained criticism by 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), vol. 5, pp. 111-112.

[35] One may, however, question the use of the verbs "formulate" and "make" in art. 23, para. 2; it is not consistent to state, at the end of this provision, that, if a reservation formulated when signing [a treaty] is confirmed at the time of the expression of consent to be bound, "the reservation shall be considered as having been made on the date of its confirmation". In

simply by virtue of being formulated, but rather about reservations that are not permitted by the treaty. As in the situation in subparagraph (a), such reservations may not be formulated: in one case (subparagraph (a)), the prohibition is explicit; in the other (subparagraph (b)), it is implied.

(8) Moreover, the principle of freedom to formulate reservations (and, by extension, the presumption of their validity) cannot be separated from the exceptions to the principle. For this reason, the Commission, which in general has avoided modifying the wording of the provisions of the Vienna Conventions that it has carried over into the Guide to Practice, decided against elaborating a separate draft guideline dealing only with the principle of the presumption of the validity of reservations.

(9) For the same reason, the Commission chose not to leave out of draft guideline 3.1 a reference to all the different moments (or "cases" or "instances", to reproduce the terminology used at various times in draft guideline 1.1.2),[36] "in which a reservation may be formulated". As discussed above,[37] article 19 reproduces the temporal limitations included in the definition of reservations in article 2, paragraph 1 (d), of the Vienna Conventions,[38] and this repetition is no doubt superfluous, as was stressed by Denmark during the consideration of the draft articles on the law of treaties adopted in 1962.[39] However, the Commission did not think it necessary to correct the anomaly when the final draft was adopted in 1966, and the repetition is not a sufficiently serious drawback to merit rewriting the Vienna Convention, which has not been greatly inconvenienced by it.

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elaborating the Guide to Practice on reservations, the Commission has endeavoured to adopt consistent vocabulary in this regard (the criticisms directed at it by R. Riquelme Cortado - *op. cit*. in footnote 22, p. 85 - appear to be based on a translation error in the Spanish text).

[36] See *Yearbook … 1998*, vol. II (Part Two), p. 99.

[37] Para. (4).

[38] See draft guidelines 1.1 (Definition of reservations) and 1.1.2 (Cases in which a reservation may be formulated) and the commentary to them in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199 and 203-206.

[39] See the fourth report of Sir Humphrey Waldock (A/CN.4/177), cited in footnote 15 above, p. 47.

(10) The repetition also provides a discreet reminder that the validity of reservations does not depend solely on the substantive conditions set forth in article 19 of the Vienna Conventions but is also dependent on conformity with conditions of form and timeliness. However, those formal conditions are dealt with in the second part of the Guide to Practice, so that the third part places more emphasis on the substantive validity, that is, the permissibility of reservations - hence the title of "Permissible reservations" chosen by the Commission for draft guideline 3.1, for which it was not possible to retain the title of article 19 of the Vienna Conventions ("Formulation of reservations"), already used for draft guideline 2.1.3.[40] In any case, it would tend to put the accent, inappropriately, on the formal conditions for the validity of reservations.

### 3.1.1 Reservations expressly prohibited by the treaty

A reservation is expressly prohibited by the treaty if it contains a particular provision:

(*a*) Prohibiting all reservations;

(*b*) Prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions;

(*c*) Prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

**Commentary**

(1) According to Paul Reuter, the situations envisaged in subparagraphs (a) and (b) of article 19 (reproduced in draft guideline 3.1) constitute very simple cases.[41] Nothing could be less certain. It is true that these provisions refer to cases where the treaty to which a State or an

[40] "Formulation of a reservation at the international level" (*Official Documents of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 68-75).

[41] Paul Reuter, "Solidarité et divisibilité des engagements conventionnels", *International Law at a Time of Perplexity - Essays in Honour of Shabtai Rosenne* (Dordrecht, Nijhoff, 1999), p. 625 (also reproduced in P. Reuter, *Le développement de l'ordre juridique international - Écrits de droit international* (Paris, Economica, 1999), p. 363).

international organization wishes to make a reservation contains a special clause prohibiting or permitting the formulation of reservations. But, aside from the fact that not all possibilities are explicitly covered,[42] delicate problems can arise regarding the exact scope of a clause prohibiting reservations and the effects of a reservation formulated despite that prohibition.

(2) Draft guideline 3.1.1 is intended to clarify the scope of subparagraph (a) of draft guideline 3.1, which does not indicate what is meant by "reservation prohibited by the treaty", while draft guidelines 3.1.2 and 3.1.4 undertake to clarify the meaning and the scope of the expression "specified reservations" contained in subparagraph (b).

(3) In draft article 17, paragraph 1 (a), which he submitted to the Commission in 1962, Waldock distinguished three situations:

- Reservations "prohibited by the terms of the treaty or excluded by the nature of the treaty or by the established usage of an international organization";

- Reservations not provided for by a clause that restricts the reservations that can be made; or

- Reservations not provided for by a clause that authorizes certain reservations.[43]

What these three cases had in common was that, unlike reservations incompatible with the object and purpose of the treaty,[44] "when a reservation is formulated that is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself".[45]

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[42] See footnote 47 and the commentary to draft guideline 3.1.3, para. (9), below.

[43] First report (A/CN.4/144), cited above in footnote 18, p. 60.

[44] Situation envisaged in para. 2 of draft art. 17 but in a rather different form than in the current text.

[45] Sir Humphrey Waldock, first report (A/CN.4/144), cited above in footnote 18, p. 74, para. (9) of the commentary.

(4) Even though it was taken up again, in a slightly different form, by the Commission,[46] this categorization was unnecessarily complicated and, at the rather general level at which the authors of the Convention intended to operate, there was no point in drawing a distinction between the first two situations identified by the Special Rapporteur.[47] In draft article 18, paragraph 2, which he proposed in 1965 in the light of the observations by Governments, he limited himself to distinguishing reservations prohibited by the terms of the treaty (or "by the established rules of an international organization")[48] from those implicitly prohibited as a result

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[46] Draft article 18, para. 1 (b), (c) and (d), *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209), *Yearbook ... 1962*, vol. II, p. 176 (see the commentary to this para., p. 180, para. (15)).

[47] On the contrary, during the discussion of the draft, Briggs considered that "the distinction was between the case set out in subparagraph (a), where all reservations were prohibited, and the case set out in subparagraphs (b) and (c), where only some reservations were either expressly prohibited or impliedly excluded" (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222, para. 12); *contra*: Waldock, *ibid.*, p. 247, para. 32; as the example of art. 12 of the 1958 Convention on the Limits of the Continental Shelf (see the commentary to draft guideline 3.1.2, para. (6) above) indicates, this comment is highly relevant.

[48] Although the principle had not been disputed at the time of the debate in the plenary Commission in 1965 but had been disputed by Lachs in 1962 (see *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142, para. 53) and had been retained in the text adopted during the first part of the seventeenth session (see *Yearbook ... 1965*, vol. II, p. 174) this indication disappeared without explanation from draft article 16 as finally adopted by the Commission in 1966 following the "final cleanup" by the Drafting Committee (see *Yearbook ... 1966*, vol. I (Part Two), 887th meeting, 11 July 1966, p. 195, para. 91). The deletion of this phrase should be seen in the context of the general safeguards clause concerning constituent instruments of international organizations and treaties adopted within an international organization appearing in art. 5 of the Convention and adopted the same day in its final form by the Commission (*ibid.*, p. 294, para. 79). In practice, it is very unusual to allow reservations to be formulated to the constituent instruments of an international organization (see Maurice H. Mendelson, "Reservations to the constitutions of international organizations", *B.Y.B.I.L.*, 1971, pp. 137-171). As for treaties concluded within the context of international organizations, the best example of (purported) exclusion of reservations is that of the International Labour Organization, whose consistent practice is not to accept the deposit of instruments of ratification of international labour conventions when accompanied by reservations (see the Memorandum submitted by the Director of the International Labour Office to the Council of the League of Nations on the admissibility of reservations to general conventions, *Official Journal* of the League of Nations, 1927, p. 882, or the memorandum submitted by the International Labour Organization to the International Court of Justice in 1951 in the case concerning *Reservations to the Convention on Genocide*, in *I.C.J. Reports*, 1951, *Pleadings, Oral Arguments and Documents*, pp. 227-228, or the statement of Wilfred Jenks, Legal Adviser of the International

of the authorization of specified reservations by the treaty.[49] This dual distinction is found in a more refined form[50] in article 19, subparagraphs (a) and (b), of the Convention, without any distinction being made as to whether the treaty prohibits, or fully or partially authorizes reservations.[51]

(5) According to Professor Tomuschat, the prohibition in subparagraph (a), as it is drafted, should be understood as covering both express prohibitions and implicit prohibitions of reservations.[52] Some justification for this interpretation can be found in the *travaux préparatoires* for this provision:

– In the original wording, proposed by Waldock in 1962,[53] it was specified that the provision concerned reservations that were "prohibited by the terms of the treaty",

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Labour Organization, during the oral pleadings on that case, *ibid.*, p. 234); for a discussion and critique of this position, see the commentary to draft guideline 1.1.8 (Reservations made under exclusionary clauses) of the Guide to Practice, in the *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230-241, paras. (3)-(5).

[49] Fourth report (A/CN.4/177), cited above in footnote 15, p. 53.

[50] On the editorial changes made by the Commission, see the debate on draft article 18 (*Yearbook ... 1965*, vol. I, especially the 797th and 798th meetings, 7 and 9 June 1965, pp. 163-173) and the text adopted by the Drafting Committee (*ibid.*, 813th meeting, 29 June 1965, p. 287, para. 1) and the debate on it (*ibid.*, pp. 287-289). The final texts of art. 16 (a) and (b) adopted on second reading by the Commission read as follows: "A State may ... formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty authorizes specified reservations which do not include the reservation in question" (*Yearbook ... 1966*, vol. II, p. 202), see also the commentary to draft guideline 3.1.2, footnote 85, below.

[51] The "alternative drafts" proposed *de lege ferenda* in 1953 in the first report submitted by Hersch Lauterpacht all refer to treaties that "[do] not prohibit or restrict the faculty of making reservations" (first report (A/CN.4/63), cited above in footnote 17, pp. 115-116, *Yearbook ... 1953*, pp. 91-92).

[52] Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties. Comments on articles 16 and 17 of the International Law Commission's draft articles on the law of treaties", *Z.a.ö.R.V.*, 1967, p. 469.

[53] See para. (3) above.

a clarification that was abandoned in 1965 without explanation by the Special Rapporteur and with little light being shed by the discussions in the Commission on this matter;[54]

– In the commentary on draft article 16 adopted on second reading in 1965, the Commission in effect seems to place on the same footing "reservations expressly or implicitly prohibited by the provisions of the treaty".[55]

(6) This interpretation, however, is open to discussion. The idea that certain treaties could "by their nature", exclude reservations was discarded by the Commission in 1962, when it rejected the proposal along those lines made by Waldock.[56] Thus, apart from the case of reservations to the constituent instruments of international organizations - which will be covered by one or more specific draft guidelines - it is hard to see what prohibitions could derive

[54] See, however, the statement by Yasseen, *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 19 "the words 'the terms of' (*expressément*) could be deleted and it could read simply: '[unless] the making of reservations is prohibited by the treaty ...' For it was enough that the treaty was not silent on the subject; it did not matter whether it referred to reservations implicitly or expressly" - but he was referring to the 1962 text.

[55] Like, moreover, "those expressly or impliedly authorized", *Yearbook ... 1966*, vol. II, p. 205, para. (10) of the commentary; see also p. 207, para. (17). In the same vein, art. 19, para. 1 (a) of the draft articles on the law of treaties concluded between States and international organizations or between two or more international organizations adopted by the Commission in 1981 places on equal footing cases where reservations are prohibited by treaties and those where it is "otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited" (*Yearbook ... 1981*, vol. II (Part Two), p. 137).

[56] See para. (4) above. The Special Rapporteur indicated that, in drafting this clause, "what he had had in mind was the Charter of the United Nations, which, by its nature, was not open to reservations" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 143, para. 60). This exception is covered by the safeguard clause of article 5 of the Convention (see footnote 48 above). The words "nature of the treaty" drew little attention during the discussion (Castrén, however, found the expression imprecise - *ibid.*, 652nd meeting, 28 May 1962, p. 166, para. 28; see also Verdross, *ibid.*, para. 35); it was deleted by the Drafting Committee (*ibid.*, 663rd meeting, 18 June 1962, p. 221, para. 3).

"implicitly" from a treaty, except in the cases covered by subparagraphs (a) and (b)[57] of article 19,[58] and it must be recognized that subparagraph (a) concerns only reservations expressly prohibited by the treaty. Moreover, this interpretation appears to be compatible with the great liberalism that pervades all the provisions of the Convention that deal with reservations.

(7) There is no problem - other than determining whether or not the declaration in question constitutes a reservation[59] - if the prohibition is clear and precise, in particular when it is a general prohibition, on the understanding, however, that there are relatively few such examples[60] even if some are famous, such as that in article 1 of the Covenant of the League of Nations:

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[57] The amendments of Spain (A/CONF.39/C.1/L.147) and of the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) aimed at reintroducing the idea of the "nature" of the treaty in subparagraph (c) were withdrawn by their authors or rejected by the Drafting Committee (see the reaction of the United States, *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April to 22 May 1969*, Summary records of plenary meetings and meetings of the plenary Committee (A/CONF.39/11/Add.1, p. 37). During the Commission's discussion of draft guideline 3.1.1, some members stated the view that certain treaties, such as the Charter of the United Nations, by their very nature excluded any reservations. The Commission nonetheless concluded that this idea was consistent with the principle enunciated in subparagraph (c) of art. 19 of the Vienna Conventions and that, where the Charter was concerned, the requirement of the acceptance of the competent organ of the organization (see art. 20, para. 3, of the Vienna Conventions) provided sufficient guarantees.

[58] This is also the final conclusion arrived at by C. Tomuschat (*op. cit.* in footnote 52, p. 471).

[59] See draft guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretive declarations) and its commentary, *Yearbook ... 1999*, vol. II (Part Two), pp. 107-109.

[60] Even in the area of human rights (see P.-H. Imbert, "Reservations and human rights conventions", *Human Rights Review*, 1981, p. 28 or W.A. Schabas, "Reservations to human rights treaties: time for innovation and reform", *Canadian Yearbook of International Law*, 1955, p. 46; see, however, for example, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 7 September 1956 (art. 9), the Convention against Discrimination in Education of 14 December 1960 (art. 9, para. 7), Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty of 28 April 1983 (art. 4) or the European Convention against Torture of 26 November 1987 (art. 21), which all prohibit any reservations to their provisions. Reservation clauses in human rights treaties sometimes refer to the provisions of the Vienna Convention concerning reservations (cf. art. 75 of the American Convention on Human Rights) -

> "The original Members of the League shall be those of the Signatories (...) as shall accede without reservation to this Covenant."[61]

Likewise, article 120 of the 1998 Rome Statute of the International Criminal Court states:

> "No reservations may be made to this Statute."[62]

And similarly, article 26, paragraph 1, of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal states:

> "No reservation or exception may be made to this Convention."[63]

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which conventions containing no reservation clauses do implicitly - or reproduce its provisions (cf. art. 28, para. 2, of the 1979 Convention on the Elimination of All Forms of Discrimination against Women or art. 51, para. 2, of the 1989 Convention on the Rights of the Child).

[61] It could be maintained that this rule was set aside when the Council of the League recognized the neutrality of Switzerland (in this respect, see M. Mendelson, *op. cit.* in footnote 48, pp. 140 and 141).

[62] However straightforward it may seem, this prohibition is not actually totally devoid of ambiguity: the highly regrettable article 124 of the Statute, which authorizes "a State on becoming a party [to] declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court" with respect to war crimes, constitutes an exception to the rule stated in article 120, for such declarations amount to reservations (see A. Pellet, "Entry into force and amendment of the Statute" in Antonio Cassese, Paola Gaeta and John R.W. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), vol. I, p. 157; see also the European Convention on the Service Abroad of Documents relating to Administrative Matters, whose art. 21 prohibits reservations, while several other provisions authorize certain reservations. For other examples, see Sia Spiliopoulou Åkermark, "Reservations clauses in treaties concluded within the Council of Europe", *I.C.L.Q.* 1999, p. 493 and 494; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, *L.G.D.J.*, 7th edition (Paris, 2002), p. 181; P.-H. Imbert, *op. cit.* in footnote 17, pp. 165 and 166; F. Horn, *op. cit.*, note 34, p.113; R. Riquelme Cortado, *op. cit.* in footnote 22, pp. 105-108; W.A. Schabas, *op. cit.* in footnote 60, p. 46.

[63] For a very detailed commentary, see Alessandro Fodella, "The Declarations of States Parties to the Basel Convention" in Tullio Treves ed., "Six Studies on Reservations", *Communicazioni e Studi*, vol. XXII, 2002, pp. 111-148; art. 26, para. 2, authorizes States parties to make "declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that

(8) Sometimes, however, the prohibition is more ambiguous. Thus, in accordance with paragraph 14 of the Final Act of the 1961 Geneva Conference which adopted the European Convention on International Commercial Arbitration, "the delegations taking part in the negotiation of the Convention ... declare that their respective countries do not intend to make any reservations to the Convention":[64] not only is it not a categorical prohibition, but this declaration of intention is even made in an instrument separate from the treaty. In a case of this type, it could seem that reservations are not strictly speaking prohibited, but that if a State formulates a reservation, the other Parties must, logically, object to it.

(9) More often, the prohibition is partial and relates to one or more specified reservations or one or more categories of reservations. The simplest (but rather rare) situation is that of clauses listing the provisions of the treaty to which reservations are not permitted.[65] Examples are article 42 of the Convention relating to the Status of Refugees of 28 July 1951[66] and article 26 of the 1972 International Convention for Safe Containers of the International Maritime Organization.

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such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State". The distinction between the reservations of para. 1 and the declarations of para. 2 can prove sensitive, but this is a problem of definition that does not in any way restrict the prohibition stated in para. 1: if a declaration made under para. 2 proves to be a reservation, it is prohibited. The combination of arts. 309 and 310 of the 1982 Convention on the Law of the Sea poses the same problems and calls for the same responses (see, in particular, A. Pellet, "Les réserves aux conventions sur le droit de la mer", *La mer et son droit - Melanges offerts a Laurent Lucchini et Jean-Pierre Quéneudec* (Paris, Pedone, 2003), pp. 505-517; see also the commentary to draft guideline 3.1.2, footnote 87, below).

[64] Example given by P.-H. Imbert, *op. cit.* in footnote 17, pp. 166 and 167.

[65] This situation is very similar to that in which the treaty specifies the provisions to which reservations are permitted - see the commentary to draft guideline 3.1.2, para. (5), below and the comments by Briggs (cited above in footnote 47).

[66] With regard to this provision, P.-H. Imbert notes that the influence of the opinion (of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* adopted two months earlier) is very clear, since such a clause effectively protects the provisions which cannot be the object of reservations (*op. cit.* in footnote 17, p. 167); see the other examples given, *ibid.*, or in the commentary to draft guidelines 3.1.2, paras. (5)-(8), below.

(10) The situation where the treaty does not prohibit reservations to specified provisions but excludes certain categories of reservations is more complicated. An example of this type of clause is provided by article 78, paragraph 3, of the International Sugar Agreement of 1977:

> "Any Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which do not affect the economic functioning of this Agreement …".

(11) The distinction between reservation clauses of this type and those excluding specific reservations was made in Sir Humphrey Waldock's draft in 1962.[67] For their part, the Vienna Conventions do not make such distinctions, and, despite the uncertainty that prevailed in their *travaux préparatoires*, it should certainly be assumed that subparagraph (a) of article 19 covers all three situations that a more precise analysis can discern:

- Reservation clauses prohibiting all reservations;
- Reservation clauses prohibiting reservations to specified provisions;
- Lastly, reservation clauses prohibiting certain categories of reservations.

(12) This clarification seems all the more helpful in that the third of these situations poses problems (of interpretation)[68] of the same nature as those arising from the criterion of compatibility with the object and purpose of the treaty, which certain clauses actually reproduce expressly.[69] By indicating that these reservations, prohibited without reference to a specific provision of the treaty, still come under article 19, subparagraph (a), of the Vienna Conventions, the Commission seeks from the outset to emphasize the unity of the legal regime applicable to the reservations mentioned in the three subparagraphs of article 19.

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[67] See footnote 43 above.

[68] "Whether a reservation is permissible under exceptions (a) or (b) will depend on interpretation of the treaty" (A. Aust, *op. cit.* in footnote 27, p. 110).

[69] See the examples given in footnote 60 above. This is a particular example of "categories of prohibited reservations" - in a particularly vague way, it is true.

### 3.1.2 Definition of specified reservations

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

**Commentary**

(1) A cursory reading of article 19, subparagraph (b), of the Vienna Conventions might suggest that it represents one side of the coin and subparagraph (a) represents the other. The symmetry is far from total, however. To create such symmetry, it would have been necessary to stipulate that reservations other than those expressly provided for in the treaty were prohibited. But that is not the case. Subparagraph (b) contains two additional details which prevent oversimplification. The implicit prohibition of certain reservations arising from this provision, which is considerably more complex than it seems, depends on the fulfilment of three conditions:

1. The treaty's reservation clause must permit the formulation of reservations;

2. The reservations permitted must be "specified";

3. It must be specified that "only" those reservations "may be made".[70]

The purpose of draft guideline 3.1.2 is to clarify the meaning of the expression "specified reservations", which is not defined by the Vienna Conventions. This definition could, however, have important consequences for the applicable legal regime, as, among other things, reservations which are not "specified" must pass the test of compatibility with the object and purpose of the treaty.[71]

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[70] On this word, see the commentary to draft guideline 3.1, paras. (6)-(7), above.

[71] See draft guideline 3.1.4 below.

(2) The origin of article 19, subparagraph (b), of the Vienna Conventions can be traced back to paragraph 3 of draft article 37 submitted to the Commission in 1956 by Fitzmaurice:

> "In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted."[72]

Waldock took up that concept again in paragraph 1 (a) of draft article 17, which he proposed in 1962 and which the Commission used in paragraph 1 (c) of draft article 18. That draft article was adopted the same year[73] and, following a number of minor drafting changes, was incorporated into article 16, subparagraph (b), of the 1966 draft,[74] then into article 19 of the Convention. That course of action did not go unchallenged, however, as during the Vienna Conference a number of amendments were submitted with a view to deleting the provision[75] on

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[72] First report (A/CN.4/101), *Yearbook ... 1956*, vol. II, p. 115; see also p. 127, para. 95.

[73] See the commentary to draft guideline 3.1.1, paras. (3)-(4), above.

[74] See footnote 50 above.

[75] Amendments by the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) and the Federal Republic of Germany (A/CONF.39/C.1/L.128), which were specifically designed to delete subparagraph (b), and by the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115), France (A/CONF.39/C.1/L.169), Ceylon (A/CONF.39/C.1/L.139) and Spain (A/CONF.39/C.1/L.147), which proposed major revisions of article 16 (or of articles 16 and 17) that would also have led to the disappearance of that provision (for the text of these amendments, 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* (A/CONF.39/11/Add.2), cited above, pp. 144 and 145, paras. 174-177). During the Commission's discussion of the draft, certain members had also taken the view that that provision was unnecessary (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, Yasseen, p. 149, para. 18; Tunkin, *ibid.*, p. 150, para. 29; but, for a more nuanced position, see *ibid.*, p. 151, para. 33; or Ruda, p. 154, para. 70).

the pretext that it was "too rigid"[76] or redundant because it duplicated subparagraph (a),[77] or that it had not been confirmed by practice;[78] all those amendments were, however, withdrawn or rejected.[79]

(3) The only change to subparagraph (b) was made by means of a Polish amendment inserting the word "only" after the word "authorizes", which was accepted by the Drafting Committee of the Vienna Conference "in the interest of greater clarity".[80] This innocuous appearance must not obscure the vast practical implications of this amendment, which actually reverses the presumption made by the Commission and, in keeping with the Eastern countries' persistent desire to facilitate as much as possible the formulation of reservations, offers the possibility of doing so even when the negotiators have taken the precaution of expressly

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[76] According to the representatives of the United States of America and Poland at the 21st meeting of the Plenary Committee (10 April 1968, *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April to 22 May 1969*, Summary records of plenary meetings and meetings of the plenary Committee (A/CONF.39/11), cited above, p. 117, para. 8, and p. 128, para. 42); see also the statement made by the representative of the Federal Republic of Germany (*ibid.*, p. 119, para. 23).

[77] Colombia, *ibid.*, p. 123, para. 68.

[78] Sweden, *ibid.*, p. 127, para. 29.

[79] See *ibid.*, pp. 148-149, paras. 181-188 and the explanations of the Expert Consultant, Sir Humphrey Waldock, *Summary records* (A/CONF.39/11), 24th meeting, 16 April 1968, p. 137, para. 6, and the results of the votes on those amendments, *ibid.*, 25th meeting, 16 April 1968, p. 146, paras. 23-25.

[80] A/CONF.39/C.1/L.136; see *Summary records* (A/CONF.39/11), cited above, Plenary Committee, 70th meeting, 14 May 1968, p. 453, para. 16. Already in 1965, during the Commission's discussion of draft article 18, subparagraph (b), as reviewed by the Drafting Committee, Castrèn proposed inserting "only" after "authorizes" in subparagraph (b) (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 14, and 813th meeting, 29 June 1965, p. 264, para. 13); see also the similar proposal made by Yasseen, *ibid.*, para. 11, which, in the end, was not accepted following a further review by the Drafting Committee (see *ibid.*, 816th meeting, p. 308, para. 41).

indicating the provisions in respect of which a reservation is permitted.[81] This amendment does not, however, exempt a reservation which is neither expressly permitted nor implicitly prohibited from the requirement to observe the criterion of compatibility with the object and purpose of the treaty.[82] This is why, in the wording of draft guideline 3.1.2, the Commission favoured the word "envisaged" over the word "authorized" to qualify the reservations in question, in contrast to the expression "reservation expressly authorized", as found in article 20, paragraph 1, of the Vienna Conventions.

(4) In practice, the types of clauses permitting reservation are comparable to those containing prohibitive provisions and pose the same kind of difficulties with regard to determining *a contrario* those reservations which may not be formulated:[83]

- Some of them authorize reservations to particular provisions, expressly and restrictively listed either affirmatively or negatively;

- Others authorize specified categories of reservations;

- Lastly, others (few in number) authorize reservations in general.

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[81] See F. Horn, *op. cit.*, note 37, p. 114; Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties*: *Ratify and Ruin?*, T.M.C. Asser Institut (Dordrecht, Nijhoff, 1994), p. 39; Jean-Marie Ruda, *op. cit.* in footnote 8, p. 181; or Renata Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law*, 1970, pp. 299-300. Such restrictive formulas are not unusual - see, for example, article 17, para. 1, of the Convention on the Reduction of Statelessness of 1954 ("1. At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15. 2. No other reservations to this Convention shall be admissible") and the other examples given by R. Riquelme Cortado, *op. cit.* in footnote 22, pp. 128-129. On the significance of the reversal of the presumption, see also M. Robinson, *Yearbook of the International Law Commission*, 1995, vol. I, 2402nd meeting, p. 169, para. 17.

[82] See draft guideline 3.1.3 and commentary, in particular paras. (2)-(3), below.

[83] See draft guideline 3.1.1 and commentary above.

(5) Article 12, paragraph 1, of the 1958 Geneva Convention on the Continental Shelf appears to illustrate the first of those categories:

> "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive."[84]

As Sir Ian Sinclair noted, "Article 12 of the 1958 Convention did not provide for specified reservations, even though it may have specified articles to which reservations might be made"[85] and neither the scope nor the effects of that authorization are self-evident, as demonstrated by the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases[86] and, above all, by the arbitral ruling given in 1977 in the *Mer d'Iroise* case.[87]

(6) In that case, the Arbitral Tribunal emphasized that:

> "The clear terms of article 12 [of the 1958 Geneva Convention on the Continental Shelf] authorize any Contracting State, in particular the French Republic, to make its consent to be bound by the Convention conditional upon reservations to articles other than articles 1 to 3 inclusive."[88]

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[84] Article 309 of the United Nations Convention on the Law of the Sea provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention" (on this provision, see A. Pellet, *op. cit.*, note 66, pp. 505-511). A treaty may set a maximum number of reservations or provisions that can be subject to reservations (see, for example, article 25 of the 1967 European Convention on the Adoption of Children). These provisions may be compared with those authorizing Parties to accept certain obligations or to choose between the provisions of a treaty, which are not reservation clauses *stricto sensu* (see draft guidelines 1.4.6. and 1.4.7. of the Commission and the related commentary in the *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), cited above in footnote 51, pp. 241-252).

[85] Sir Ian Sinclair, *op. cit.* in footnote 6, 2nd ed. (Manchester University Press, 1984), p. 73. On the distinction between specified and non-specified reservations, see also paras. (11)-(13) below.

[86] See judgment of 20 February 1969, *I.C.J. Reports*, 1969, pp. 38-41.

[87] Ruling of 30 June 1977, *Reports of International Arbitral Awards*, vol. XVIII, pp. 161-165, paras. 39-44.

[88] *Ibid*., p. 161, para. 39.

However,

> "Article 12 cannot be understood to compel States to accept in advance any kind of reservation to articles other than articles 1 to 3. Such an interpretation of article 12 would almost give contracting States the freedom to draft their own treaty, which would clearly go beyond the object of this article. Only if the article in question had authorized the formulation of specific reservations could it be understood that parties to the Convention had accepted in advance a specified reservation. But that is not the case here, because article 12 authorizes the formulation of reservations to articles other than articles 1 to 3 in very general terms".[89]

(7) The situation is different when the reservation clause defines the categories of permissible reservations. Article 39 of the General Act of Arbitration of 1928 provides an example of this:

> "1. In addition to the power given in the preceding article[[90]], a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession.
>
> "2. These reservations may be such as to exclude from the procedure described in the present Act:
>
> "(*a*) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said party may have a dispute;

[89] *Ibid.*

[90] Article 38 provides that Parties may accede to only parts of the General Act.

"(*b*) Disputes concerning questions which by international laws are solely within the domestic jurisdiction of States;

"(*c*) Disputes concerning particular cases or clearly specified subject matters, such as territorial status, or disputes falling within clearly defined categories."

As the International Court of Justice pointed out in its judgment of 1978 in the *Aegean Sea Continental Shelf* case:

> "When a multilateral treaty thus provides in advance for the making only of particular, designated categories of reservations, there is clearly a high probability, if not an actual presumption, that reservations made in terms used in the treaty are intended to relate to the corresponding categories in the treaty",

even when States do not "meticulously" follow the "pattern" set out in the reservation clause.[91]

[91] Judgment of 19 December 1978, *I.C.J. Reports*, 1978, p. 28, para. 55.

(8) Another particularly famous and widely discussed example[92] of a clause authorizing reservations (which falls under the second category mentioned above)[93] is found in article 57 (ex 64) of the European Convention on Human Rights:

> "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."

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[92] See Angela Bonifazi, "La disciplina delle riserve alla Convenzione europea dei diritti dell'uomo", in *Les clauses facultatives de la Convention européenne des droits de l'homme* (Minutes of the round table organized in Bari on 17 and 18 December 1973 by the Faculty of Law of the University of Bari) (Bari, Levante, 1974), pp. 301-319; Gérard Cohen-Jonathan, *La Convention européenne des droits de l'homme* (Paris, Economica, 1989), pp. 86-93; J.A. Frowein, "Reservations to the European Convention on Human Rights", *Protecting Human Rights: the European Dimension. Studies in Honour of Gerard J. Warda* (Cologne, C. Heymanns Verlag, 1988), pp. 193-200; Pierre-Henri Imbert, "Reservations to the European Convention on Human Rights before the Strasbourg Commission: the *Temeltasch* case", *I.C.L.Q.*, 1984, pp. 58-595; Rolf Kühner, "Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention. Die Problematik des Art. 64 MRK am Beispiel der schweizerischen 'auslegenden Erklärung' zu Art. 6 Abs. 3 lit. e MRK", *ZaöRV*, vol. 42, 1982, pp. 58-92 (summary in English); S. Marcus-Helmons, "L'article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l'homme", *Revue de droit international et de droit comparé*, 1968, pp. 7-26; Maria Jose Morais Pires, *As reservas a Convenção europeia dos direitos do homen* (Coimbra, Portugal, Livraria Almedina, 1997), p. 493; Rosario Sapienza, "Sull'ammissibilità di riserve all'accettazione della competenza della Commissione europea dei diritti dell'uomo", *Rivista di Diritto internazionale*, 1987, pp. 641-653 and William A. Schabas, "Article 64" in E. Decaux, P.-H. Imbert and L. Pettiti dirs., *La Convention européenne des droits de l'homme: commentaire article par article* (Paris, Economica, 1995), pp. 923-942.

[93] Para. (4). For other examples, see A. Aust, *op. cit.* in footnote 27, pp. 109-110; S. Spiliopoulou Åkermark, *op. cit.* in footnote 65, pp. 495-496; William Bishop, Jr., "Reservations to treaties", *R.C.A.D.I.* 1996-II, vol. 103, pp. 323 and 324 or P. Daillier and A. Pellet, *op. cit.* in footnote 62, p. 181; see also the table of Council of Europe conventions showing clauses falling into each of the first two categories of permissible reservation clauses mentioned in para. (4) above, in C.R. Riquelme Cortado, *op. cit.* in footnote 22, p. 125, and the other examples of partial authorizations given by this author, pp. 126-129.

In this instance, the power to formulate reservations is limited by conditions relating to both form and content; in addition to the usual limitations *ratione temporis*,[94] a reservation to the Convention must:

- Refer to a particular provision of the Convention;
- Be justified by the status of legislation [in the reserving State] at the time that the reservation is formulated;
- Not be "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope";[95] and
- Be accompanied by a brief statement explaining "the scope of the Convention provision whose application a State intends to prevent by means of a reservation".[96]

Assessing whether each of these conditions has been met raises problems. It must surely be considered, however, that the reservations authorized by the Convention are "specified" within the meaning of article 19 (b) of the Vienna Conventions and that only such reservations are valid.

(9) It has been noted that the wording of article 57 of the European Convention on Human Rights is not fundamentally different[97] from that used, for example, in article 26, paragraph 1, of the European Convention on Extradition of 1957:

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[94] See the commentary to draft guideline 3.1, footnote 15, above.

[95] European Court of Human Rights, judgement of 29 April 1988, *Belilos, Series A*, vol. 132, p. 25, para. 55.

[96] Report of the European Commission of Human Rights of 5 May 1982, *Temeltasch*, Application No. 9116/80, *European Commission of Human Rights Yearbook*, vol. 25, para. 90.

[97] P.-H. Imbert, *op. cit.* in footnote 17, p. 186; see also R. Riquelme Cortado, op. cit., note 22, p. 122.

> "Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention",

even though the latter could be interpreted as a general authorization. While, however, the type of reservations that can be formulated to the European Convention on Human Rights is "specified", here the authorization is restricted only by the exclusion of across-the-board reservations.[98]

(10) In fact, a general authorization of reservations[99] itself does not necessarily resolve all the problems. It leaves unanswered the question of whether the other Parties may still object to reservations[100] and whether these expressly authorized reservations[101] are subject to the test of

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[98] Regarding this concept, see draft guideline 1.1.1 of the Commission's Guide to Practice and the commentary in *Yearbook ... 1999*, vol. II (Part Two), pp. 93-95.

[99] For another even clearer example, see article 18, paragraph 1, of the European Convention on the Compensation of Victims of Violent Crimes of 1983: "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more reservations."

[100] This is sometimes expressly stated (see, for example, article VII of the Convention on the Political Rights of Women of 1952 and the related comments by R. Riquelme Cortado, *op. cit.* in footnote 22, p. 121). Article 20, paragraph 1, of the Vienna Convention does not resolve the problem: it allows the reservation to be "established" (or "made") without requiring acceptance, but says nothing about objections. It can, however, be argued that paragraph 4 of the same article seems to exclude the possibility of objecting to a "reservation expressly authorized by a treaty" owing to the fact that paragraph 4 apparently does not apply to cases not falling under paragraph 1.

[101] It cannot be reasonably argued that subparagraph (b) could include "implicitly authorized" reservations - other than on the grounds that any reservations that are not prohibited are, *a contrario*, authorized, subject to the provisions of subparagraph (c). In this case, the expression "specified reservation" in article 19, subparagraph (b), is to some extent analogous to the expression "reservation expressly authorized by a treaty" found in article 20, paragraph 1.

compatibility with the object and purpose of the treaty.[102] The latter question is addressed by draft guideline 3.1.4,[103] which draws a distinction between specified reservations whose reservation clause defines the content and those which leave the content open.

(11) This distinction is not self-evident. It caused particular controversy following the arbitration in the *Mer d'Iroise* case[104] and divided the Commission, whose members advocated different positions. Some reserving States thought that a reservation was "specified" if the treaty set precise limits within which it could be formulated; those criteria then superseded (but only in that instance) the criterion of the object and purpose.[105] Others pointed out that that occurred very exceptionally, perhaps only in the rare case of "negotiated reservations",[106] and, furthermore, that the Commission had not retained Mr. Rosenne's proposal that the expression "specified reservations", which he considered "unduly narrow", should be replaced by

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[102] See the questions raised by S. Spiliopoulou Åkermark, *op. cit.* in footnote 62, pp. 496-497, or R. Riquelme Cortado, *op. cit.* in footnote 22, p. 124.

[103] For the commentary to draft guideline 3.1.4, see section C.2.

[104] See footnote 87 above.

[105] Derek W. Bowett, *op. cit.* in footnote 7, pp. 71-72.

[106] On this concept, see the commentaries to guideline 1.1.8 (Reservations made under exclusionary clauses) in *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), p. 201, para. (11). See also W. Paul Gormley, "The modification of multilateral conventions by means of 'negotiated reservations' and other 'alternatives': a comparative study of the ILO and Council of Europe", Part I, *Fordham Law Review*, 1970-1971, pp. 75 and 76. Cf. the annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles, which accords to Belgium the faculty over a period of three years to make a specific reservation, or article 32, paragraph 1 (b), of the European Convention on Transfrontier Television of 1989, which exclusively grants the United Kingdom the ability to formulate a specified reservation; examples provided by Sia Spiliopoulo Åkermark, *op. cit*. in footnote 62, p. 499. The main example given by D. Bowett to illustrate his theory relates precisely to a "negotiated reservation" (*op. cit.* in footnote 7, p. 71).

"reservations to specific provisions";[107] accordingly, it would be unrealistic to require the content of specified reservations to be established with precision by the treaty, otherwise subparagaph (b) would be rendered meaningless.[108] According to a third view, a compromise was possible between the undoubtedly excessive position that would require the content of the reservations envisaged to be precisely stated in the reservation clause and the position that equated a specified reservation with a "reservation expressly authorized by the treaty",[109] even though articles 19, paragraph (b), and article 20, paragraph 1, use different expressions. Consequently, it was suggested that it should be recognized that reservations that were specified within the meaning of article 19, subparagraph (b) (and of draft guideline 3.1 (b)), must, on the one hand, relate to specific provisions and, on the other, fulfil certain conditions specified in the treaty, but without going so far as to require their content to be predetermined.[110]

(12) The case law was not very helpful in reconciling those opposing views. The arbitral award of 1977, invoked by the proponents of both arguments, says more about what a specified reservation is not than what it is.[111] Indeed, the upshot of all this is that the mere fact that a reservation clause authorizes reservations to particular provisions of the treaty is not enough to "specify" these reservations within the meaning of article 19, subparagraph (b).[112] The Tribunal,

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[107] *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 264, para. 7. P.-H. Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire Français de Droit International*, 1978, p. 52, points out, however, that, even though Mr. Rosenne's proposal was not accepted, Sir Humphrey Waldock himself had also drawn this parallel (*ibid*., p. 265, para. 27).

[108] P.-H. Imbert, *op. cit.* in footnote 107, pp. 50-53.

[109] In this connection, see P.-H. Imbert, *op. cit.* in footnote 107, p. 53.

[110] See the tenth report on reservations to treaties (A/CN.4/558), para. 49.

[111] See para. (6) above.

[112] See paras. (6)-(7) above.

however, confined itself to requiring reservations to be "specific",[113] without indicating what the test of that specificity was to be. In addition, during the Vienna Conference, K. Yasseen, Chairman of the Drafting Committee, included specified reservations among reservations which were expressly authorized by the treaty[114] with no further clarification.

(13) Accordingly, most members of the Commission held that a reservation should be considered specified if a reservation clause indicated the treaty provisions in respect of which a reservation was possible or, to take into account draft guideline 1.1.1 on "across-the-board reservations",[115] indicated that reservations were possible to the treaty as a whole in certain specific aspects. The divergence between these different points of view should not be overstated, however; while the term "envisaged" reservations, which was preferred to "authorized" reservations undoubtedly gives more weight to the broad-brush approach favoured by the Commission, at the same time, in draft guideline 3.1.4, the Commission introduced a distinction between specified reservations with defined content and those whose content is not defined, the latter being subject to the subject to the test of compatibility with the object and purpose of the treaty.

### 3.1.3 Permissibility of reservations not prohibited by the treaty

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

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[113] In reality, it is the authorization that must apply to specific or specified reservations - terms which the Tribunal considered to be synonymous (see footnote 87 above).

[114] A/CONF.39/C.1/SR.70, para. 23.

[115] See *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

**Commentary**

(1) Draft guidelines 3.1.3 and 3.1.4 specify the scope of article 19, subparagraphs (a) and (b), of the Vienna Conventions (the 1986 text of which is repeated in draft guideline 3.1). They make explicit what the Conventions leave implicit, *viz*., that failing a contrary provision in the treaty - and in particular if the treaty authorizes specified reservations as defined in draft guideline 3.1.2 - any reservation must satisfy the basic requirement, set forth in article 19, subparagraph (c), of not being incompatible with the object and purpose of the treaty.

(2) This principle is one of the fundamental elements of the flexible system established by the Vienna regime, moderating the "radical relativism"[116] resulting from the pan-American system, which reduces multilateral treaties to a network of bilateral relations,[117] while avoiding the rigidity resulting from the system of unanimity.

(3) The notion of the object and purpose of the treaty,[118] which first appeared in connection with reservations in the advisory opinion of the International Court of Justice of 1951,[119] has become increasingly accepted. It is now the fulcrum between the need to preserve the essence of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of States. There is, however, a major difference between the role of the criterion of compatibility with the object and purpose of the treaty according to the 1951 advisory opinion,

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[116] P. Reuter, *op. cit.* in footnote 28, p. 73, para. 130. This eminent author applies the term to the system adopted by the International Court of Justice in its 1951 advisory opinion on *Reservations to the Genocide Convention* (*I.C.J. Reports*, 1951, p. 15); the criticism applies perfectly well, however, to the pan-American system.

[117] On the pan-American system, see the bibliography in P.-H. Imbert, *op. cit*. in footnote 17, pp. 485-486. In addition, aside from the description by P.-H. Imbert himself (*ibid*., pp. 33-38), see M.M. Whiteman, *Digest of International Law*, Department of State, Washington, D.C., 1970, vol. 14, pp. 141-144 or J.M. Ruda, *op. cit*., note 17, pp. 115-133.

[118] This notion will be defined in draft guideline 3.1.5.

[119] *I.C.J. Reports,* 1951, pp. 24 and 26.

on the one hand, and article 19, subparagraph (c), of the Convention, on the other.[120] In the advisory opinion, the criterion applied equally to the formulation of reservations and to objections:

> "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them."[121]

In the Convention, it is restricted to reservations: article 20 does not restrict the ability of other contracting States to formulate objections.

(4) While there is no doubt that this requirement that a reservation must be compatible with the object and purpose of the treaty now represents a rule of customary law which is unchallenged,[122] its content remains vague[123] and there is some uncertainty as to the consequences of incompatibility.[124] Moreover, article 19 does not dispel the ambiguity as to its scope of application.

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[120] V.M. Coccia, *op. cit.* in footnote 31, p. 9; L. Lijnzaad, *op. cit.* in footnote 81, p. 40; Manuel Rama-Montaldo, "Human rights conventions and reservations to treaties", *Héctor Gros Espiell* Amicorum Liber, vol. II (Brussels, Bruylant, 1997), pp. 1265-1266; or I. Sinclair, *op. cit.*, in footnote 6, p. 61.

[121] *I.C.J. Reports*, 1951, p. 24.

[122] See the many arguments to that effect given by C. Riquelme Cortado, *op. cit.* in footnote 22, pp. 138-143. See also the Commission's 1997 preliminary conclusions, in which it reiterated its view that "articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations". (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. (1)).

[123] See draft guidelines 3.1.5 to 3.1.13 proposed by the Special Rapporteur in his tenth report (A/CN.4/558/Add.1).

[124] See draft guidelines 3.3 to 3.3.4 proposed by the Special Rapporteur in his tenth report (A/CN.4/558/Add.1).

(5) The principle set forth in article 19, subparagraph (c), whereby a reservation incompatible with the object and purpose of the treaty may not be formulated, is of a subsidiary nature since it applies only in cases not covered in article 20, paragraphs 2 and 3, of the Convention[125] and where the treaty itself does not resolve the reservations issue.

(6) If the treaty does regulate reservations, a number of cases must be distinguished which offer different answers to the question whether the reservations concerned are subject to the test of compatibility with the object and purpose of the treaty. In two of these cases the answer is clearly negative:

- There is no doubt that a reservation expressly prohibited by the treaty cannot be held to be valid on the pretext that it is compatible with the object and purpose of the treaty;[126]

- The same applies to "specified" reservations: expressly authorized by the treaty, subject to specific conditions, they are automatically valid without having to be accepted by the other contracting States[127] and they are not subject to the test of compatibility with the object and purpose of the treaty.[128]

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[125] In the case of treaties with limited participation and the constituent instruments of international organizations. These cases do not constitute instances of implicit prohibitions of formulating reservations; they reintroduce the system of unanimity for particular types of treaties.

[126] In its observations on the draft adopted on first reading by the Commission, Canada had suggested that "consideration should be given to extending the criterion of 'compatibility with the object and purpose' equally to reservations made pursuant to express treaty provisions in order not to have different criteria for cases where the treaty is silent on the making of reservations and cases where it permits them." (Sir Humphrey Waldock, fourth report, A/CN.4/177, *op. cit.* in footnote 20, p. 48). That proposal, which was not very clear, was not retained by the Commission; cf. the clearer proposals along the same lines by Briggs in *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 246, paras. 13 and 14, and *Yearbook … 1965*, vol. I, 813th meeting, 29 June 1965, p. 288, para. 10; *contra*: Ago, *ibid.*, para. 16.

[127] Cf. art. 20, para. 1.

[128] See draft guideline 3.1.2 and commentary above.

In the Commission's view, these obvious facts are not worth mentioning in separate provisions of the Guide to Practice; they follow directly and inevitably from article 19, subparagraph (c), of the Vienna Conventions, the text of which is repeated in draft guideline 3.1.

(7) The same is not true of two other cases which arise *a contrario* out of the provisions of article 19, subparagraphs (a) and (b):

- Those in which a reservation is implicitly authorized because it does not fall under the category of prohibited reservations (subparagraph (a));

- Those in which a reservation is expressly authorized without being "specified" within the meaning of subparagraph (b) as spelt out in draft guideline 3.1.2.

(8) In both these cases, it cannot be presumed that treaty-based authorization to formulate reservations offers States or international organizations *carte blanche* to formulate any reservation they wish, even if it would leave the treaty bereft of substance.

(9) On the subject of implicitly authorized reservations, Sir Humphrey Waldock recognized, in his fourth report on the law of treaties, that "a conceivable exception [to the principle of automatic validity of reservations permitted by the treaty] might be where a treaty expressly forbids certain specified reservations and thereby implicitly permits others; for it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations". However, he excluded that eventuality not because this was untrue but because "this may, perhaps, go too far in refining the rules regarding the intentions of the parties, and there is something to be said for keeping the rules in article 18 [which became article 19 of the Convention] as simple as possible".[129] These considerations do not apply to the Guide to Practice, the aim of which is precisely to provide States with coherent answers to all questions they may have in the area of reservations.

[129] Report (A/CN.4/177) cited above in footnote 15, p. 53, para. (4).

(10) This is why draft guideline 3.1.3 stipulates that reservations which are "implicitly authorized" because they are not formally excluded by the treaty must be compatible with the object and purpose of the treaty. It would be paradoxical, to say the least, if reservations to treaties containing reservations clauses should be allowed more liberally than in the case of treaties which contain no such clauses.[130] Thus the criterion of compatibility with the object and purpose of the treaty applies.

### 3.1.4 Permissibility of specified reservations

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

**Commentary**

(1) Draft guideline 3.1.3 states that reservations not prohibited by the treaty are still subject to the criterion of compatibility with the object and purpose of the treaty. Draft guideline 3.1.4 does likewise in the case of specified reservations in the sense of draft guideline 3.1.1 where the treaty does not define the content of the reservation: the same problem arises, and the considerations put forward in support of draft guideline 3.1.3 apply *mutatis mutandis*.

(2) The Polish amendment to subparagraph (b), adopted by the Vienna Conference in 1968, restricted the possibility of implicit prohibition of reservations to treaties which provided "that *only* specified reservations, which do not include the reservation in question, may be formulated".[131] But it does not follow that reservations thus authorized may be made at will: the arguments applicable to non-prohibited reservations[132] apply here, and if one accepts the broad definition of specified reservations favoured by the majority of Commission members,[133] a

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[130] In that vein, Rosenne in *Yearbook … 1965*, vol. I, p. 164, 797th meeting, 8 June 1965, para. 10.

[131] See commentary to draft guideline 3.1.2, para. (3).

[132] See commentary to draft guideline 3.1.3, para. (9).

[133] See commentary to draft guideline 3.1.2, para. (13).

distinction must be drawn between reservations whose content is defined in the treaty itself and those which are permitted in principle but which there is no reason to suppose should be allowed to deprive the treaty of its object or purpose. The latter must be subject to the same general conditions as reservations to treaties which do not contain specific clauses.

(3) The modification made to article 19, subparagraph (c) of the 1969 Vienna Convention following the Polish amendment in fact goes in that direction. In the Commission's text, subparagraph (c) was drafted as follows:

> "(*c*) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty." [134]

This was consistent with subparagraph (b), which prohibited the formulation of reservations other than those authorized by a reservations clause. Once an authorization was no longer interpreted *a contrario* as automatically excluding other reservations, the formula could not be retained;[135] it was therefore changed to the current wording by the Drafting Committee of the Vienna Conference.[136] The result is, *a contrario*, that if a reservation does not fall within the scope of subparagraph (b) (because its content is not specified), it is subject to the test of compatibility with the object and purpose of the treaty.

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[134] *Yearbook … 1966*, vol. II, p. 202.

[135] Poland had not, however, put forward any amendment to subparagraph (c), drawing the consequences from the amendment it had successfully proposed for subparagraph (b). An amendment by Viet Nam, however, intended to delete the phrase "in cases where the treaty contains no provisions regarding reservations" (A/CONF.39/C.1/L.125), *Documents of the Conference* (A/CONF.39/11/Add.2), cited above in footnote 25, p. 145, para. 177, was rejected by the plenary Commission (*ibid.*, p. 148, para. 181).

[136] Curiously, the reason given by the Chairman of the Drafting Committee makes no connection between the modifications made to subparagraphs (b) and (c). K. Yasseen merely stated that "certain members of the Committee considered that a treaty could conceivably contain provisions on reservations which did not come under any of the categories envisaged in subparagraphs (a) and (b)" (*Summary records* (A/CONF.39/11), cited above in note 28, plenary Commission, 70th meeting, 14 May 1968, p. 452, para. 17). Cf. a remark by Briggs to the same effect during discussions in the Commission in 1965 (*Yearbook … 1965*, vol. I, 796th meeting, 4 June 1965, p. 161, para. 37).

(4) That was, indeed, the reasoning followed by the arbitral tribunal which settled the *Mer d'Iroise* dispute in deciding that the mere fact that article 12 of the Geneva Convention on the Continental Shelf authorized certain reservations without specifying their content[137] did not necessarily mean that such reservations were automatically valid.[138]

(5) In such cases, the validity of the reservation "cannot be assumed simply on the ground that it is, or purports to be, a reservation to an article to which reservations are permitted".[139] Its validity must be assessed in the light of its compatibility with the object and purpose of the treaty.[140]

(6) *A contrario*, it goes without saying that when the content of a specified reservation is indeed indicated in the reservations clause itself, a reservation consistent with that provision is not subject to the test of compatibility with the object and purpose of the treaty.

### 1.6 Scope of definitions

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the validity and effects of such statements under the rules applicable to them.

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[137] See the commentary to draft guideline 3.1.2, para. (5).

[138] Decision cited above in footnote 87, p. 161, para. 39. See the commentary to draft guideline 3.1.2, para. (6).

[139] D. Bowett, *op. cit.* in footnote 7, p. 72. In the same vein, J.M. Ruda, *op. cit.* in footnote 8, p. 182; or Gérard Teboul, "Remarques sur les réserves aux conventions de codification", *Revue générale de droit international public*, 1982, pp. 691-692. *Contra* P.-H. Imbert, *op. cit.* in footnote 107, pp. 50-53; this opinion, very well argued, does not sufficiently take into account the consequences of the modification made to subparagraph (c) at the Vienna Conference (cf. above para. (3)).

[140] C. Tomuschat gives a pertinent example: "If, for example, a convention on the protection of human rights prohibits in a 'colonial clause' the exception of dependent territories from the territorial scope of the treaty, it would be absurd to suppose that consequently reservations of any kind, including those relating to the most elementary guarantees of individual freedom, are authorised, even if by these restrictions the treaty would be deprived of its very substance" (*op. cit.* in footnote 52, p. 474).

**Commentary**

(1) This draft guideline was provisionally adopted by the Commission at its fiftieth session, in 1998, in a form which referred only to reservations. The related draft commentary indicated that its title and placement in the Guide to Practice would be determined at a later stage and that the Commission would consider the possibility of referring under a single caveat to both reservations and interpretative declarations, which, in the view of some members, posed identical problems.[141] At its fifty-first session, the plenary Commission adopted this approach, deeming it necessary to clarify and specify the scope of the entire set of draft guidelines with respect to the definition of the entire set of unilateral statements they define in order to make their particular object clear.

(2) As originally worded, draft guideline 1.6 read:

> "The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the *permissibility* and effects of such statements under the rules applicable to them."

At the fifty-seventh session, however, some members argued that the word "permissibility" was not appropriate: in international law, an internationally wrongful act entailed its author's responsibility,[142] and that was plainly not the case of the formulation of reservations that did not fulfil the conditions relating to form or substance that the Vienna Conventions imposed on reservations. At its fifty-eighth session, the Commission decided to replace "permissibility" by "validity", a term the majority of members considered more neutral. The commentary to draft guideline 1.6 was amended accordingly.[143]

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[141] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 213 -214.

[142] Cf. draft article 1 of the draft articles on responsibility of States for internationally wrongful acts annexed to General Assembly resolution 56/83 of 12 December 2001.

[143] And the text of and commentary to draft guideline 2.1.8 likewise. For the original wording of the commentary, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 308-310.

(3) Defining is not the same as regulating. As "a precise statement of the essential nature of a thing",[144] the sole function of a definition is to determine the general category in which a given statement should be classified. However, this classification does not in any way prejudge the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. *A contrario*, it is not a reservation if it does not meet the criteria set forth in these draft guidelines but this does not necessarily mean that such statements are valid (or invalid) from the standpoint of other rules of international law. The same is true of interpretative declarations, which might conceivably not be valid either because they would alter the nature of the treaty or because they were not formulated at the required time,[145] etc.[146]

(4) Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime, in the first place, for the assessment of its validity. It is only once a particular instrument has been defined as a reservation (or an interpretative declaration, either simple or conditional) that it can be decided whether it is valid, that its legal scope can be evaluated and that its effect can be determined. However, this validity and these effects are not otherwise affected by the definition, which requires only that the relevant rules be applied.

(5) For example, the fact that draft guideline 1.1.2 indicates that a reservation "may be formulated" in all the cases referred to in draft guideline 1.1 and in article 11 of the 1969 and 1986 Vienna Conventions does not mean that such a reservation is necessarily valid; its validity depends upon whether it meets the conditions stipulated in the law on reservations to treaties and, in particular, those stipulated in article 19 of the 1969 and 1986 Vienna Conventions. Similarly, the Commission's confirmation of the well-established practice of "across-the-board"

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[144] *The Oxford English Dictionary*, 2nd ed. (Oxford, The Clarendon Press, 1989).

[145] This problem may very likely arise in connection with conditional interpretative declarations (see draft guideline 1.2.1).

[146] The same may obviously be said about unilateral statements which are neither reservations nor interpretative declarations, referred to in section 1.4.

reservations in draft guideline 1.1.1 [1.1.4] is in no way meant to constitute a decision on the validity of such a reservation in a specific case, which would depend on its contents and context; the sole purpose of the draft is to show that a unilateral statement of such a nature is indeed a reservation and as such subject to the legal regime governing reservations.

(6) The "rules applicable" referred to in draft guideline 1.6 are, first of all, the relevant rules in the 1969, 1978 and 1986 Vienna Conventions and, in general, the customary rules applicable to reservations and to interpretative declarations, which this Guide to Practice is intended to codify and develop progressively in accordance with the Commission's mandate, and those relating to other unilateral statements which States and international organizations may formulate in respect of treaties, but which are not covered in the Guide to Practice.

(7) More generally, all the draft guidelines adopted thus far are interdependent and cannot be read and understood in isolation from one another.

### 2.1.8 [2.1.7 bis] Procedure in case of manifestly invalid reservations

Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

**Commentary**

(1) During the discussion of draft guideline 2.1.7, some members of the Commission considered that purely and simply applying the rules it established in the case of a reservation that was manifestly "invalid" gave rise to certain difficulties. In particular, they stressed that there was no reason to provide for a detailed examination of the formal validity of the reservation by the depositary, as the first paragraph of draft guideline 2.1.7 did, while precluding him from reacting in the case of a reservation that was manifestly impermissible from a substantive viewpoint (in particular, when the conditions specified in article 19 of the Vienna Conventions were not met).

(2) However, allowing him to intervene in the latter case would constitute a progressive development of international law, which, it had to be acknowledged, departed from the spirit in which the provisions of the Vienna Conventions on the functions of depositaries had been drawn up.[147] That is why, during its fifty-third session, the Commission considered it useful to consult member States in the Sixth Committee of the General Assembly about whether the depositary could or should "refuse to communicate to States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of a treaty".[148]

(3) The nuanced responses given to this question by the delegations to the Sixth Committee inspired the wording of draft guideline 2.1.8. Generally speaking, States expressed a preference for the strict alignment of the Guide to Practice with the provisions of the 1969 Vienna Convention concerning the role of the depositary, in particular article 77 thereof. Some of the delegations that spoke stressed that the depositary must demonstrate impartiality and neutrality in the exercise of his functions and should therefore limit himself to transmitting to the parties the reservations that were formulated. However, a number of representatives to the Sixth Committee expressed the view that, when a reservation was manifestly not valid, it was incumbent upon the depositary to refuse to communicate it or at least to first inform the author of the reservation of his position and, if the author maintained the reservation, to communicate it and draw the attention of the other parties to the problem.

(4) Most members of the Commission supported this intermediate solution. They considered that it was not possible to allow any type of censure by the depositary, but that it would be inappropriate to oblige him to communicate the text of a manifestly invalid reservation to the contracting or signatory States and international organizations without previously having drawn the attention of the reserving State or international organization to the defects that, in his opinion,

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[147] See the commentary to draft guideline 2.1.7, paras. (9) and (10).

[148] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 27-28, para. 25.

affected it. Nevertheless, it was to be understood that, if the author of the reservation maintained it, the normal procedure would resume and the reservation should be transmitted, with an indication of the nature of the legal problems in question. In point of fact, this amounts to bringing the procedure to be followed in the case of a reservation that is not manifestly valid in terms of substance into line with the procedure to be followed in the case of reservations that present problems of form. According to draft guideline 2.1.7, should there be a difference of opinion regarding such problems, the depositary "shall bring the question to the attention of: (a) [t]he signatory States and organizations and the contracting States and contracting organizations; or (b) [w]here appropriate, the competent organ of the international organization concerned".

(5) According to some members of the Commission, this procedure should be followed only if the "invalidity" invoked by the depositary is based on subparagraphs (a) and (b) of article 19 of the 1969 and 1986 Vienna Conventions (a reservation prohibited by the treaty, or not provided for in a treaty that authorizes only certain specific reservations). Other members consider that the only real problem is that of the compatibility of the reservation with the object and purpose of the treaty (subparagraph (c) of article 19). The Commission does not consider it justified to distinguish among the different types of invalidity listed in article 19.

(6) Similarly, despite the contrary opinion of some of its members, the Commission did not consider it useful to confine the exchange of opinions between the author of the reservation and the depositary implied by draft guideline 2.1.7 within strict time limits. The draft does not diverge from draft guideline 2.1.6 (ii), under which the depositary must act "as soon as possible". And, in any case, the reserving State or international organization must advise whether or not it is willing to discuss the matter with the depositary. If it is not, the procedure must follow its course and the reservation must be communicated to the other contracting parties or signatories.

(7) Although the Commission initially used the word "impermissible" to characterize reservations covered by the provisions of article 19 of the Vienna Conventions,[149] some

[149] For the original version of draft guideline 2.1.8 and its commentary, see *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 112-114.

members pointed out that the word was not appropriate in that case: in international law, an internationally wrongful act entails its author's responsibility,[150] but this is plainly not the case with reservations which are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose or which do not respect the stipulations as to form or time limits laid down by the Vienna Conventions. At its fifty-eighth session, the Commission therefore decided to replace the words "permissible", "impermissible", "permissibility" and "impermissibility" by "valid", invalid", "validity" and "invalidity", and to amend this commentary accordingly.[151]

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[150] Cf. draft article 1 of the draft articles on responsibility of States for internationally wrongful acts annexed to General Assembly resolution 56/83 of 12 December 2001.

[151] The text of and commentary to draft guideline 1.6 [1.4] have been similarly amended.