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**DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION  
ON THE WORK OF ITS SIXTIETH SESSION**

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**CHAPTER VI**

**RESERVATIONS TO TREATIES**

**Addendum**

**2.8 Form of acceptances of reservations**

The acceptance of a reservation may arise from a unilateral statement in this respect or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13.

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\* Reissued for technical reasons.

### Commentary

(1) In accordance with paragraph 5 of article 20<sup>1</sup> of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986:

“For the purposes of paragraphs 2 and 4,<sup>[2]</sup> and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.”

(2) It emerges from this definition that acceptance of a reservation can be defined as the absence of an objection. Acceptance is presumed in principle from the absence of an objection, either at the end of the 12-month period following receipt of notification of the reservation or at the time of expression of consent to be bound. In both cases, which are conceptually distinct but yield identical results in practice, silence is tantamount to acceptance without the need for a formal unilateral declaration. This does not mean, however, that acceptance is necessarily tacit; moreover, paragraphs 1 and 3 of article 23 make explicit reference to “express acceptance of a reservation”, and such express wording may be binding, as is implied by the phrase “unless the treaty otherwise provides” in article 20, paragraph 5, even if this phrase was inserted in that provision for other reasons,<sup>3</sup> and the omission from the same provision of any reference to

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<sup>1</sup> This article is entitled “Acceptance of and objection to reservations”. Unlike the English text, the French version of the two Vienna Conventions keeps the word “acceptance” in the singular but leaves “objections” in the plural. This distortion, which appeared in 1962 (see *Annuaire de la Commission du droit international*, 1962, vol. I, 663rd meeting, 18 June 1962, p. 248 and *Yearbook of the International Law Commission*, 1962, vol. I, p. 223 (text adopted by the Drafting Committee); *Annuaire ... 1962*, vol. II, p. 194 and *Yearbook ... 1962*, vol. II, p. 176), was never corrected or explained.

<sup>2</sup> Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, treaties with limited participation and the constituent acts of international organizations.

<sup>3</sup> See paragraph (7) of the commentary to draft guideline 2.6.13.

paragraph 3 of article 20, concerning the acceptance of a reservation to the constituent instrument of an international organization, which does indeed require a particular form of acceptance.

(3) Guideline 2.8, which opens the section of the Guide to Practice dealing with the procedure and form of acceptances, presents two distinct forms of acceptance:

- Express acceptance, resulting from a unilateral declaration to that end; and
- Tacit acceptance, resulting from silence or, more specifically, the absence of any objection to the reservation during a certain period of time. This time period corresponds to the time during which an objection may legitimately be made, i.e. the period specified in draft guideline 2.6.13.

(4) It has been argued nevertheless that this division between formal acceptances and tacit acceptances of reservations disregards the necessary distinction between two forms of acceptance without a unilateral declaration, which could be either tacit or implicit. Furthermore, according to some authors, reference should be made to “early” acceptance when the reservation is authorized by the treaty:

“Reservations may be accepted, according to the Vienna Convention, in three ways: in advance, by the terms of the treaty itself or in accordance with article 20 (1).”<sup>4</sup>

While these distinctions may have some meaning in academic terms, the Commission did not feel that it was necessary to reflect them in the Guide to Practice, given that they did not have any concrete consequences.

(5) With respect to so-called “early” acceptances, the Commission’s commentary on draft article 17 (current article 20) clearly indicates that:

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<sup>4</sup> D.W. Greig, “Reservations: Equity as a Balancing Factor?”, *Australian Yearbook of International Law*, 1995, p. 118. This article is perhaps the most thorough study of the rules that apply to the acceptance of reservations (see in particular pp. 118-135 and 153).

“Paragraph 1 of this article covers cases where a reservation is expressly or impliedly authorized by the treaty; in other words, where the consent of the other contracting States has been given in the treaty. No further acceptance of the reservation by them is therefore required.”<sup>5</sup>

Under this provision, and unless the treaty otherwise provides, an acceptance is not, in this case, a requirement for a reservation to be established: it is established *ipso facto* by virtue of the treaty, and the reaction of States - whether an express acceptance, tacit acceptance or even an objection - can no longer call this acquired acceptance into question. Although this does not prohibit States from expressly accepting a reservation of this kind, such an express acceptance is a redundant act, with no specific effect. Moreover, no examples of such an acceptance exist. This does not mean that article 20, paragraph 1, of the Vienna Conventions should not be reflected in the Guide to Practice; however, the provision has much more to do with the effects of a reservation than with formulation or the form of acceptance; accordingly, its rightful place is in the fourth part of the Guide.

(6) Similarly, the Commission did not feel it appropriate to reflect in the Guide to Practice the distinction made by some authors, based on the two cases provided for in article 20, paragraph 5, of the Vienna Conventions, between “tacit” and “implicit” acceptances, depending on whether or not the reservation has already been formulated at the time the other interested party expresses its consent to be bound. In the former case, the acceptance would be “implicit”; in the latter, it would be “tacit”.<sup>6</sup> In the former case, States or international organizations are deemed to have accepted the reservation if they have raised no objection thereto when they express their consent to be bound by the treaty. In the latter case, the State or international organization has a period of 12 months in which to raise an objection, after which it is deemed to have accepted the reservation.

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<sup>5</sup> *Yearbook ... 1966*, vol. II, p. 207, para. 18.

<sup>6</sup> D.W. Greig, *op. cit.*, footnote 4 above, p. 120; Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (T.M.C. Asser Institute, The Hague, 1988), pp. 125-126; Daniel Müller, Commentary on article 20 (1969) in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article* (Brussels, Bruylant, 2006), p. 816, para. 35.

(7) Although the result is the same in both cases - the State or international organization is deemed to have accepted the reservation if no objection has been raised at a specific time - their grounds are different. With respect to States or international organizations which become contracting parties to a treaty after the formulation of a reservation, the presumption of acceptance is justified not by their silence but rather by the fact that this State or international organization, aware of the reservations formulated,<sup>7</sup> accedes to the treaty without objecting to the reservations. The acceptance is thus *implied* in the act of ratification of or accession to the treaty, that is, in a positive act which fails to raise objections to reservations already formulated,<sup>8</sup> hence the notion of “implicit” acceptances. In the case of States or international organizations that are already parties to a treaty when the reservation is formulated, however, the situation is different: it is their protracted silence - generally for a period of 12 months - or, in particular, the absence of any objection on their part which is considered as an acceptance of the reservation. This acceptance is therefore inferred only from the silence of the State or international organization concerned; it is tacit.

(8) In fact, this doctrinal distinction is of little interest in practice and should probably not be reflected in the Guide to Practice. It is sufficient, for practical purposes, to distinguish the States and international organizations which have a period of 12 months to raise an objection from those which, not yet being parties to the treaty at the time the reservation is formulated, have time for consideration until the date on which they express their consent to be bound by the

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<sup>7</sup> See article 23, paragraph 1, of the Vienna Convention of 1986, which stipulates that reservations must be “formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty”. See also draft guideline 2.1.5 and paragraphs (1) to (16) of the commentary thereto, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10)*, pp. 79-97.

<sup>8</sup> See D. Müller, *op. cit.*, footnote 6 above, p. 816, para. 36. See also draft article 10, paragraph 5, of Brierly, [First] Report on the law of treaties, A/CN.4/23, para. 100; for the English version see *Yearbook ... 1950*, vol. II, p. 241, para. 100.

treaty, which nevertheless does not prevent them from formulating an acceptance or an objection before that date.<sup>9</sup> The question is one of time period, however, and not one of definition.

(9) Another question relates to the definition itself of tacit acceptances. One may well ask whether in some cases an objection to a reservation is not tantamount to a tacit acceptance thereof. This paradoxical question stems from the wording of paragraph 4 (b) of article 20. The paragraph states:

“An objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization.”

It thus seems to follow that in the event that the author of the objection raises no objection to the entry into force of the treaty between itself and the reserving State, an objection has the same effects as an acceptance of the reservation, at least concerning the entry into force of the treaty (and probably the “establishment” of the reservation itself). This question, which involves much more than purely hypothetical issues, nevertheless primarily concerns the problem of the respective effects of acceptances and objections to reservations.

(10) Draft guideline 2.8 limits the potential authors of an acceptance to contracting States and organizations alone. The justification for this is to be found in article 20, paragraph 4, which takes into consideration only acceptances made by a contracting State or contracting international organization, and article 20, paragraph 5, which provides that the presumption of acceptance applies only to States that are parties to the treaty. Thus, a State or an international organization which on the date that notice of the reservation is given is not yet a contracting party to the treaty will be considered as having accepted the reservation only on the date when it expresses its consent to be bound - that is, on the date when it definitively becomes a contracting State or contracting organization.

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<sup>9</sup> See also paragraphs (8) and (9) of the commentary to draft guideline 2.6.5 and paragraphs (8) and (9) of draft guideline 2.6.13 above.

(11) It is a different matter, however, for acceptances of reservations to the constituent instruments of international organizations referred to in paragraph 3 of the same article on the one hand and express acceptances on the other. In the latter case, there is nothing to prevent a State or international organization that has not yet expressed its consent to be bound by the treaty from making an express declaration accepting a reservation formulated by another State, even though that express acceptance cannot produce the same legal effects as those described in article 20, paragraph 4, for acceptances made by contracting States or international organizations. The same holds true for any express acceptances by a State or international organization of a reservation to the constituent instrument of an international organization: there is nothing to prevent such express acceptances from being formulated, but they cannot produce the same effects as the acceptance of a reservation to a treaty that does not take this form.

(12) Furthermore, it can be seen both from the text of the Vienna Conventions and their *travaux préparatoires* and from practice that tacit acceptance is the rule and express acceptance the exception. Draft guideline 2.8, however, is purely descriptive and is not intended to establish cases in which it is possible or necessary to resort to either of the two possible forms of acceptances.

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