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Chapter IV
Reservations to treaties

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3.4 Permissibility of reactions to reservations[1]

(1) Unlike the case of reservations, the Vienna Conventions do not set forth any criteria or conditions for the permissibility of reactions to reservations, although acceptances and objections occupy a substantial place as a means for States and international organizations to give or refuse their consent to a permissible reservation. Such reactions do not, however, constitute criteria for the permissibility of a reservation that can be evaluated objectively in accordance with the conditions established in article 19 of the Vienna Conventions and independently of the acceptances or objections to which the reservation has given rise. They are a way for States and international organizations to express their point of view regarding the permissibility of a reservation, but the permissibility (or impermissibility) of a reservation must be evaluated independently of the acceptances or objections to which it gave rise. Moreover, this idea is clearly expressed in guideline 3.3 (Consequences of the impermissibility of a reservation). The fact remains, however, that acceptances and objections constitute a way for States and international organizations to express their point of view regarding the permissibility of a reservation, and they may accordingly be taken into account in assessing the permissibility of a reservation.[2]

(2) The *travaux préparatoires* of the Vienna regime in respect of objections leave no doubt as to the lack of connection between the permissibility of a reservation and the reactions thereto.[3] It also follows that while it may be appropriate to refer to the "permissibility" of an objection or acceptance, the term does not have the same connotation as in the case of reservations themselves. The main issue is whether the objection or acceptance can produce its full effects. This is why, according to one view, guidelines 3.4.1 and 3.4.2 should have been placed, not in the part of the Guide to Practice dealing with the permissibility of reservations and related unilateral declarations,[4] but in the part on the effects of reservations and of these other declarations (Guide, Part 4).

3.4.1 Permissibility of the acceptance of a reservation

The express acceptance of an impermissible reservation is itself impermissible.

Commentary

(1) This guideline is based on the idea that, in the light of the *travaux préparatoires*, the Vienna Convention does in fact establish some connection and puts forward the principle that the impermissibility of the reservation has some implications for its acceptance.[5]

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[1] The Special Rapporteur wishes to recall that he remains convinced that these two guidelines do not belong in the Part 3 of the Guide to Practice (with, perhaps, the very marginal exception of certain extremely hypothetical objections "with intermediate effect").

[2] See the commentary to guideline [4.5.4].

[3] See the commentary to guideline 2.6.3, paras. 4–6.

[4] See the draft guideline originally proposed by the Special Rapporteur: "3.4 Substantive validity of acceptances and objections: Acceptances of reservations and objections to reservations are not subject to any condition of substantive validity." (Fourteenth report on reservations to treaties, A/CN.4/614/Add.1, para. 127).

[5] According to a minority theory ("effects"), the impermissibility of the reservation does not nullify its acceptance but prevents it from producing effects (see guideline [4.5.4]).

(2) It seems clear that contracting States or international organizations can freely accept a reservation that is permissible and that the permissibility of such acceptances cannot be questioned.[6] However, according to a majority of members of the Commission, such is not the case where a State or an international organization accepts a reservation that is impermissible.

(3) While acceptance cannot determine the permissibility of a reservation, commentators have argued that the opposite is not true:

> An acceptance of an inadmissible reservation is theoretically not possible. Directly or indirectly prohibited reservations under article 19 (1) (a) and (b) cannot be accepted by any confronted state. Such reservations and acceptances of these will not have any legal effects. (…) Similarly, an incompatible reservation under article 19 (1) (c) should be regarded as incapable of acceptance and as eo ipso invalid and without any legal effect.[7]

(4) This is the view that the Commission has adopted. It has considered that the express acceptance of a reservation could have effects, if not on the permissibility of a reservation as such, then at least on the assessment of such permissibility, in that such a declaration, which is derived from a deliberate and considered act of a State or an international organization, must at least be taken into consideration by those who are assessing the permissibility or impermissibility of the reservation.

(5) The principle put forward in guideline 3.4.1 must be accompanied by two major caveats, however. Firstly — as the wording itself indicates — it applies only to express acceptances (which are exceedingly rare in practice) and excludes the tacit acceptances represented by the absence of objection on the part of a contracting State or contracting international organization within the time period stipulated in article 20, paragraph 5, of the Vienna Conventions.[8] Second, what the contracting parties cannot do individually they can do collectively, in that the Commission has taken the view that conversely, when all of the contracting parties accept a reservation, this unanimity creates an agreement among the parties that modifies the treaty.[9]

3.4.2 Permissibility of an objection to a reservation

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

(1) The additional provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and[10]

(2) The objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

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[6] See above, section 2.C, guideline 4.1 and the commentary thereto. See also the commentary to guideline 2.8.2 (Express acceptance of a reservation), *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 232–235.

[7] See Frank Horn, *Reservations and Interpretive Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, The Hague, 1988, p. 121.

[8] See guidelines 2.8.1 and 2.6.13.

[9] See guideline 3.3.4. See also the commentary to guideline 2.3.1, in particular para. (8) (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 186), and the commentary to guideline 2.3.5, in particular para. (7) (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), p. 271).

[10] Suggestion from the Special Rapporteur: in the French text, the word "*que*" is supererogatory and should be deleted. This remark does not apply to the English text.

Commentary

(1) Guideline 3.4.2 relates solely to a very particular category of objections, frequently called those with "intermediate effect", through which a State or international organization considers that treaty relations should be excluded beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions, yet does not oppose the entry into force of the treaty between itself and the author of the reservation. The Commission has noted the existence of such objections, which might be called the "third type" of objections, in the commentary to guideline 2.6.1 on the definition of objections to reservations, without taking a position on their permissibility.[11]

(2) While treaty practice provides relatively few specific examples of intermediate-effect or "extensive" objections, some do exist. It would seem, however, that this "*nueva generación*"[12] ("new generation") of objections grew up exclusively around reservations to the 1969 Vienna Convention itself: some States agreed that the Convention could enter into force between themselves and the authors of the reservations, excluding not only the provisions on which the reservations in question had been made,[13] but also other articles that were related to them.[14] These objections thus had a much broader scope than that of objections with "minimum effect", without the authors of the objections stating that they did not wish to be associated with the author of the reservation through the treaty. Although a number of States parties to the Vienna Convention made objections to these reservations that were limited to the "presumed" effects envisaged in article 21, paragraph 3, of the 1969 Vienna Convention,[15] other States — Canada,[16] Egypt,[17] Japan,[18] the Netherlands,[19] New Zealand,[20] Sweden,[21] the United Kingdom[22] and the United States[23] — intended their objections to produce more serious consequences but did not wish to exclude the entry into

[11] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 199, para. (23) of the commentary to guideline 2.6.1.

[12] R. Riquelme Cortado, *Las reservas a los tratados, Lagunas y ambigüedades del Régimen de Viena,* Universidad de Murcia, 2004, p. 293.

[13] As a general rule, article 66 of the Convention and the annex thereto (see the reservations formulated by Algeria (*Multilateral treaties deposited with the Secretary-General*, available from http://treaties.un.org/, chap. XXIII. 1), Belarus (*ibid.*), China (*ibid.*), Cuba (*ibid.*), Guatemala (*ibid.*), the Russian Federation (*ibid.*), the Syrian Arab Republic (*ibid.*), Tunisia (*ibid.*), Ukraine (*ibid.*) and Viet Nam (*ibid.*). Bulgaria, the Czech Republic, Hungary and Mongolia had formulated similar reservations but withdrew them in the early 1990s (*ibid.*). The German Democratic Republic had also formulated a reservation excluding the application of article 66 (*ibid.*).

[14] These are the other provisions in Part V of the Vienna Convention, in particular article 64 on *jus cogens* (arts. 53 and 64). See also para. (9) below.

[15] This is the case with Denmark and Germany (*ibid.*).

[16] In respect of the reservation by the Syrian Arab Republic (*ibid.*).

[17] Egypt's objection is directed not at one reservation in particular, but at any reservation that excludes the application of article 66 (*ibid.*).

[18] In respect of any reservation that excludes the application of article 66 or the annex to the Vienna Convention (*ibid.*).

[19] In respect of all States that had formulated reservations concerning the compulsory dispute settlement procedures. This general declaration was reiterated separately for each State that had formulated such a reservation (*ibid.*).

[20] In respect of Tunisia's reservation (*ibid.*).

[21] In respect of any reservation that excludes application of the dispute settlement provisions, in general, and of the reservations made by Cuba, the Syrian Arab Republic and Tunisia, in particular (*ibid.*).

[22] Provided in its declaration of 5 June 1987 and with the exception of Viet Nam's reservation.

[23] The objections made by the United States were formulated before it became a contracting party and concern the reservations made by the Syrian Arab Republic, Tunisia and Cuba (*ibid.*).

force of the Vienna Convention as between themselves and the reserving States.[24] Indeed, these States not only wanted to exclude the application of the obligatory dispute settlement provision or provisions "to which the reservation refers"; they also do not consider themselves bound by the substantive provisions to which the dispute settlement procedure or procedures apply in their bilateral relations with the reserving State. For example, the United States, in its objection to Tunisia's reservation to article 66 (a) of the Vienna Convention, states that:

> The United States Government intends, at such time as it becomes a party to the Convention, to reaffirm its objection […] and declare that it will not consider that article 53 or 64 of the Convention is in force between the United States of America and Tunisia.[25]

(3) While the 1969 and 1986 Vienna Conventions do not expressly authorize these objections with intermediate effect, they do not prohibit them. On the contrary, objections with intermediate effect, as their name indicates, may be entertained in that they fall midway between the two extremes envisaged under the Vienna regime: they purport to prohibit the application of the treaty to an extent greater than a minimum-effect objection (article 21, paragraph 3, of the Vienna Conventions), but less than a maximum-effect objection (article 20, paragraph 4 (b), of the Vienna Conventions).[26]

(4) Although in principle, "a State or international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation",[27] the question arises whether objections with intermediate effect must in some cases be deemed to be impermissible.

(5) Some authors propose to consider that "these extended objections are, in fact, reservations (limited *ratione personae*)".[28] This analysis is to some extent supported by the

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[24] The United Kingdom made maximum-effect objections, in due and proper form, to the reservations formulated by the Syrian Arab Republic and Tunisia. The effect of these objections seems, however, to have been mitigated *a posteriori* by the United Kingdom's declaration of 5 June 1987, which constitutes in a sense the partial withdrawal of its earlier objection (see draft guideline 2.7.7 and the commentary thereon (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 237–240), since the author does not oppose the entry into force of the Convention as between the United Kingdom and a State that has made a reservation to article 66 or to the annex to the Vienna Convention and excludes only the application of Part V in their treaty relations. This declaration, which the United Kingdom recalled in 1989 (with regard to Algeria's reservation) and 1999 (with regard to Cuba's reservation), states that "[w]ith respect to any other reservation the intention of which is to exclude the application, in whole or in part, of the provisions of article 66, to which the United Kingdom has already objected or which is made after the reservation by [the USSR], the United Kingdom will not consider its treaty relations with the State which has formulated or will formulate such a reservation as including those provisions of Part V of the Convention with regard to which the application of article 66 is rejected by the reservation". (*ibid.*) Nevertheless, in 2002, the United Kingdom again objected to the maximum-effect reservation made by Viet Nam by excluding all treaty relations with Viet Nam (*ibid.*). New Zealand also chose to give its objection to the Syrian reservation maximum effect (*ibid.*).

[25] *Ibid.*

[26] See Daniel Müller's commentary on article 21 in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités, Commentaire article par article*, Bruylant, Brussels, 2006, pp. 925–926, paras. 67–69.

[27] Guideline 2.6.3 (Freedom to formulate objections).

[28] See, *inter alia*, J. Sztucki, "Some Questions Arising from Reservations to the Vienna Convention on the Law of Treaties", *German Yearbook of International Law*, 1977, p. 297. The author suggests that such declarations should be viewed as "objections only to the initial reservations and own reservations of the objecting States in the remaining part" (*ibid.*, p. 291).

fact that other States have chosen to formulate reservations in the strict sense of the word in order to achieve the same result.[29] Thus, Belgium formulated a (late) reservation concerning the Vienna Convention, stating that:

> The Belgian State will not be bound by articles 53 and 64 of the Convention with regard to any party which, in formulating a reservation concerning article 66 (2), objects to the settlement procedure established by this article.[30]

As has been written:

> As a partial rejection modifies the content of the treaty in relation to the reserving State to an extent that exceeds the intended effect of the reservation, acceptance or acquiescence on the part of the reserving State appear to be necessary for a partial rejection to take its effect; failing this, no relations under the treaty are established between the reserving State and an objecting State which partially rejects those relations.[31]

(6) This approach has been disputed on the grounds that, by adhering to the letter of the definition of reservations,[32] the objecting State, which typically formulates its objection only after having become a party to the treaty, would be prevented from doing so within the established time period, and would be faced with the uncertainties that characterize the regime of late reservations.[33] Then, subject to the "reservations dialogue" that might be established, the reserving State would not, in principle, be in a position to respond effectively to such an objection. It has also been pointed out that it would be contradictory to make objections with intermediate effect subject to conditions of permissibility while maximum-effect objections are not subject to such conditions and that the determination and assessment of the necessary link between the provisions which could potentially be deprived of legal effect by the interaction between a reservation and a broad objection has more to do with the question of whether or not the objection with intermediate effect can produce the effect intended by its author.[34]

(7) The Commission was not convinced by this view and considered that objections with intermediate effect, which in some ways constitute "counter-reservations" (but are certainly not reservations *per se*), should conform to the conditions for the permissibility and form of reservations and, in any event, cannot defeat the object and purpose of the treaty, if only because it makes little sense to apply a treaty with no object or purpose. This is what is stated in guideline 3.4.2, paragraph 2.

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[29] Belgium's reservation quoted below is quite similar in spirit, purpose and technique to the conditional objections envisaged in draft guideline 2.6.14. See, *inter alia*, Chile's objection to the 1969 Vienna Convention, quoted in the commentary on draft guideline 2.6.14 (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 218–219, para. (2)).

[30] *Multilateral Treaties* ... available from http://treaties.un.org/, chap. XXIII.1, footnote 13 cited above.

[31] G. Gaja, "Unruly Treaty Reservations", in *Le Droit international à l'heure de sa codification, Études en l'honneur de Roberto Ago*, Milan, A. Giuffrè, 1987, p. 326. See also R. Baratta, *Gli effetti delle riserve ai trattati*, A. Giuffrè, Milan, 1999, p. 385.

[32] See guideline 1.1 (and article 2, paragraph 1 (b), of the Vienna Conventions).

[33] See section 2.3 of the Guide (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 184–192, and *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 269–274).

[34] According to this view, "it is one thing to say that an objection with intermediate effect is not valid and quite another to maintain that such an objection cannot produce the effect intended by its author. Thus, the issue does not bear on the validity of an objection and should therefore be included not in the part of the Guide to Practice on the substantive validity of declarations in respect of treaties, but rather in the part dealing with the effects that an objection with intermediate effect can actually produce" (fourteenth report on reservations to treaties, A/CN.4/614/Add.1, para. 118).

(8) Nevertheless, it would be unacceptable and entirely contrary to the principle of consensus[35] for States and international organizations to use a reservation as an excuse for attaching intermediate-effect objections of their choosing, thereby excluding any provision that they do not like. A look back at the origins of objections with intermediate effect would be edifying in this regard.

(9) As pointed out above,[36] the practice of making these objections with intermediate effect has been resorted to mainly, if not exclusively, in the case of reservations and objections to the provisions of Part V of the 1969 Vienna Convention and makes clear the reasons which led objecting States to seek to make use of them. Article 66 of the Vienna Convention and its annex relating to compulsory conciliation provide procedural guarantees which many States, at the time when the Convention was adopted, considered essential in order to prevent abuse of other provisions of Part V.[37] This link was stressed by some of the States that formulated objections with intermediate effect in respect of reservations to article 66. For example:

> The Kingdom of the Netherlands is of the view that the provisions regarding the settlement of disputes, as laid down in article 66 of the Convention, are an important part of the Convention and *cannot be separated* from the substantive rules with which they are connected.[38]

The United Kingdom stated even more explicitly that:

> Article 66 provides in certain circumstances for the compulsory settlement of disputes by the International Court of Justice (...) or by a conciliation procedure (...). These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference.[39]

(10) The reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal which some States had sought to undermine through reservations and which, save through a maximum-effect reservation,[40] could only be restored through an objection that went beyond the "normal" effects of the reservations envisaged by the Vienna Conventions.[41]

(11) It is thus clear from the practice concerning objections with intermediate effect that there must be an intrinsic link between the provision which gave rise to the reservation and the provisions whose legal effect is affected by the objection.

(12) After asking itself how best to define this link, and having contemplated calling it "intrinsic", "indissociable" or "inextricable", the Commission ultimately settled on the word "sufficient", which seemed to it to be similar to the words just cited but had the merit of showing that the particular circumstances of each case had to be taken into account.

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[35] See, *inter alia*, the commentary to guideline 3.1.7, in particular paragraph (3) (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), pp. 82–88).

[36] Para. (2).

[37] Jerzy Sztucki, "Some Questions Arising from Reservations to the Vienna Convention on the Law of Treaties", *German Yearbook of International Law*, vol. 20, 1977, pp. 286 and 287 (see also the references provided by the author).

[38] Italics added – see footnote 21 above.

[39] United Kingdom, objection of 5 June 1987 in respect of a Soviet reservation to article 66 of the Vienna Convention; see footnote 24 above.

[40] See articles 20, paragraphs 4 (b), and 21, paragraph 3, of the Vienna Conventions.

[41] D. Müller, Commentary on article 21, *op. cit.* No. 26, pp. 927–928, para. 70.

Moreover, guideline 3.4.2 probably has more to do with the progressive development of international law than with its codification *per se*; to the majority of the Commission's members, the use of the word "sufficient" had the merit of leaving room for the clarification that might come from future practice.

(13) Other limitations on the permissibility of objections with intermediate effect have been suggested. It has been pointed out that it seems logical to exclude objections aimed at articles to which reservations are not permitted under article 19, subparagraphs (a) and (b), of the Vienna Conventions.[42] The Commission does not disagree, but such hypotheses are so hypothetical and marginal that it seems unnecessary to address them expressly in guideline 3.4.2.

(14) It has also been pointed out that since, according to guideline 3.1.9, "a reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law",[43] the same should be true of objections with intermediate effect. The Commission has not adopted that point of view, considering that objections, even those with intermediate effect, are not reservations and have the main purpose of undermining the reservation, and that the latter's "proximity" to the provisions excluded by the objection[44] suffices to avert any risk of lack of conformity with *jus cogens*.

(15) Consequently, the Commission deliberately rejected the idea of referring to the impermissibility of an objection owing to its being contrary to a rule of *jus cogens*: it thought that, in reality, such a hypothesis could not arise.

(16) It is quite clear that if the effect of an objection is to modify the bilateral treaty relations between its author and the author of the reservation in a manner that proves to be contrary to a peremptory norm of international law (*jus cogens*), this result would be unacceptable. Such an eventuality would, however, seem to be impossible: an objection purports only to, and can only, exclude the application of one or more treaty provisions. Such an exclusion cannot "produce" a norm that is incompatible with a *jus cogens* norm. The effect is simply "deregulatory". Ultimately, therefore, the norms applicable as between the author of the reservation and the author of the objection are never different from those that predated the treaty and, unless application of the treaty as a whole is excluded, from treaty-based provisions not affected by the reservation. It is impossible under these circumstances to imagine an "objection" that would violate a peremptory norm.

(17) Furthermore, when the definition of "objection" was adopted, the Commission refused to take a position on the question of the permissibility of objections that purport to produce a "super-maximum" effect.[45] These are objections in which the authors determine not only that the reservation is not valid but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States. The permissibility of objections with super-maximum effect has frequently been questioned,[46] primarily because "the effect of such a statement is not to bar the application of the treaty as a whole or of the provisions to which the reservation refers in the relations between the two Parties but to render the reservation null and void without the consent of its author. This greatly exceeds the

[42] The text of which is incorporated in guideline 3.1 in the Guide to Practice.

[43] See the text of this guideline and the commentary thereto in *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), pp. 99–104.

[44] See guideline 3.4.2, para. 1.

[45] See paragraph 24 of the commentary on draft guideline 2.6.1 (Definition of objections to reservations) (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 200).

[46] See the eighth report on reservations to treaties, A/CN.4/535/Add.1, paragraphs 97 and 98 and footnote 154. See also the commentary on draft guideline 2.6.1, *inter alia*, paragraphs (24) and (25), (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 200).

consequences of the objections to reservations provided for in article 21, paragraph 3, and article 20, paragraph 4 (b), of the Vienna Conventions. Whereas 'unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State', in this case it is the rule itself advocated by the reserving State which is challenged, and this is contrary to the very essence of an objection".[47]

(18) It is not, however, the permissibility of the objection as such that is called into question; the issue raised by this practice is whether the objection is capable of producing the effect intended by its author;[48] this is far from certain and depends, among other things, on the permissibility of the reservation itself.[49] A State (or an international organization) may well make an objection and wish to give it super-maximum effect, but this does not mean that the objection is capable of producing such an effect, which is not envisaged by the Vienna regime. However, as the Commission has acknowledged in its commentary on guideline 2.6.1, where the definition of the term "objection" unquestionably includes objections with super-maximum effect:

> The Commission has endeavoured to take a completely neutral position with regard to the validity of the effects [and not of the objection] that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections.[50]

(19) Furthermore, it should be reiterated that one who has initially accepted a reservation to an objection may no longer properly formulate an objection thereto. While this condition may be understood as a condition for the permissibility of an objection, it may also be viewed as a question of form or of formulation. Thus, guideline 2.8.12 (Final nature of acceptance of a reservation) states that "acceptance of a reservation cannot be withdrawn or amended". There seems to be no need to revisit the issue in the present guideline.

3.5 Permissibility of an interpretative declaration

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty or is incompatible with a peremptory norm of general international law.

Commentary

(1) The Vienna Conventions do not contain any rule on interpretative declarations as such, or, of course, on the conditions for the permissibility of such unilateral declarations. From that point of view, and from many others as well, they are distinct from reservations and cannot simply be equated with them. Guideline 3.5 and the ones that follow it seek to fill in this gap in respect of the permissibility of these instruments, it being understood in this connection that "simple" interpretative declarations (guideline 3.5) must be distinguished from conditional interpretative declarations, which in this respect follow the legal regime of reservations (guidelines 3.5.2 and 3.5.3). This does not mean that reservations are involved, although sometimes a unilateral declaration presented as

[47] *Ibid.*, para. 97.

[48] See the eighth report on reservations to treaties, A/CN.4/535/Add.1, paragraph 95, and the commentary to guideline 2.6.1, paragraph (24) (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 200).

[49] See below, guidelines 4.3.4 and [4.5.3].

[50] See paragraph (25) of the commentary on guideline 2.6.1 (Definition of objections to reservations) (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/60/10), p. 200).

interpretative by its author might be construed to be a true reservation, in which case its permissibility must be assessed in the light of the rules applicable to reservations (guideline 3.5.1).

(2) The definition of interpretative declarations provided in guideline 1.2 (Definition of interpretative declarations) is also limited to identifying the practice in positive terms:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.[51]

(3) However, this definition, as noted in the commentary, "in no way prejudges the validity or the effect of such declarations and (…) the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them".[52]

(4) There is, however, still some question as to whether an interpretative declaration can be permissible, a question that is clearly different from that of whether a unilateral statement constitutes an interpretative declaration or a reservation. Indeed, it is one thing to determine whether a unilateral statement "purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions" — which corresponds to the definition of "interpretative declarations" — and another to determine whether the interpretation proposed therein is valid, or, in other words, whether the "meaning or scope attributed by the declarant to a treaty or to certain of its provisions" is valid.

(5) The issue of the permissibility of interpretative declarations can doubtless be addressed in the treaty itself;[53] while this is quite uncommon in practice, it is still a possibility. Thus, a treaty's prohibition of any interpretative declaration would invalidate any declaration that purported to "specify or clarify the meaning or scope" of the treaty or certain of its provisions. Article XV. 3 of the 2001 Canada-Costa Rica Free Trade Agreement[54] is an example of such a provision. Other examples exist outside the realm of bilateral treaties. The third draft agreement for the Free Trade Area of the Americas (FTAA) of November 2003, though still in the drafting stage, states in Chapter XXIV, draft article 4:

> This Agreement shall not be subject to reservations [or unilateral interpretative declarations] at the moment of its ratification.[55]

(6) It is also conceivable that a treaty might merely prohibit the formulation of certain interpretative declarations to certain of its provisions. To the Special Rapporteur's

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[51] *Yearbook… 1999*, vol. II, Part Three, p. 103.

[52] *Ibid.*, p. 108, paragraph (33) of the commentary. The French term "*licéité*", used in 1999, should now be understood, as in the case of reservations, to mean "*validité*", a word which, in the view of the Commission, seems, in all cases, to be more appropriate (see *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 345).

[53] M. Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* ("Unilateral Interpretative Declarations to Multilateral Treaties"), Duncker & Humblot, Berlin, 2005, p. 114.

[54] Article XV. 3 – Reservations: "This Agreement shall not be subject to unilateral reservations or unilateral interpretative declarations" (available from http://www.sice.oas.org/Trade/cancr/English/text3_e.asp).

[55] See the FTAA website, http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp; the square brackets are original to the text.

knowledge, no multilateral treaty contains such a prohibition in this form. But treaty practice includes more general prohibitions which, without expressly prohibiting a particular declaration, limit the parties' capacity to interpret the treaty in one way or another. It follows that if the treaty is not to be interpreted in a certain manner, interpretative declarations proposing the prohibited interpretation are invalid. The European Charter for Regional or Minority Languages of 5 November 1992 includes examples of such prohibition clauses; article 4, paragraph 4, states:

> Nothing in this Charter shall be construed as limiting or derogating from any of the rights guaranteed by the European Convention on Human Rights.

And article 5 states:

> Nothing in this Charter may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States.

(7) Similarly, articles 21 and 22 of the Framework Convention for the Protection of National Minorities of 1 February 1995 also limits the potential to interpret the Convention:

> Article 21
>
> Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.
>
> Article 22
>
> Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.

(8) These examples show that the prohibition of interpretative declarations in guideline 3.5 may be express as well as implicit.

(9) With the exception of treaty-based prohibitions of unilateral interpretative declarations, the Commission believes that other grounds for the impermissibility of an interpretative declaration must be cited: the fact that the declaration is contrary to a peremptory norm of general international law (*jus cogens*).

(10) While there appear to be no specific cases when a party has invoked *vis-à-vis* the author of an interpretative declaration the fact that it is contrary to a peremptory norm, one cannot assume that the problem will never arise in the future. Such would be the case, for example, if a State party to the Convention against Torture sought to legitimize certain forms of torture under cover of an interpretation, or if a State that was a party to the Convention on the Prevention and Punishment of the Crime of Genocide interpreted it as not covering certain forms of genocide – even though it has been pointed out that, in these examples, these so-called "interpretations" could be considered reservations and could fall within the purview of guideline 3.5.1.

(11) This is why, although there was one opposing view, the Commission did not deem it necessary to provide in guideline 3.5 for a situation when an interpretative declaration was incompatible with the object and purpose of the treaty: that would be possible only if the declaration was considered a reservation, since by definition such declarations do not

purport to modify the legal effects of a treaty, but only to specify or clarify them.[56] This situation is covered in guideline 3.5.1.

(12) Similarly, but for different reasons, and despite the opposing views of some of its members, the Commission declined to consider that an objectively wrong interpretation — for example, one that is contrary to the interpretation given by an international court adjudicating the matter — should be declared impermissible.

(13) It goes without saying that an interpretation may be held to be with or without merit although, in absolute terms, it is difficult to determine whether the author is right or wrong until a competent body rules on the interpretation of the treaty. Interpretation remains an eminently subjective process and it is rare that a legal provision, or a treaty as a whole, can be interpreted in only one way. "The interpretation of documents is to some extent an art, not an exact science."[57]

(14) As Kelsen has noted:

> If "interpretation" is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value ...[58]

As has also been pointed out:

> The process of interpretation [in international law] is, in fact, only occasionally centralized, either through a judicial body or in some other way. Competence to interpret lies with all subjects and, individually, with each one of them. The resulting proliferation of forms of interpretation is only partially compensated for by their hierarchy. Unilateral interpretations are, in principle, of equal value, and the agreed forms are optional and consequently unpredictable. However, the practical difficulties must not be overestimated. It is not so much a question of an essential flaw in international law as an aspect of its nature, which guides it in its entirety towards an ongoing negotiation that can be rationalized and channelled using the rules currently in force.[59]

(15) Thus, "on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party".[60] If States have the right to interpret treaties unilaterally, they must also have the right to let their point of view be known as regards the interpretation of a treaty or of certain of its provisions.

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[56] *Yearbook … 1998*, vol. II, Part Two, p. 100 (paragraph 16 of the commentary on draft guideline 1.2). See also the famous dictum of the International Court of Justice in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 18 July 1950, I.C.J. Reports 1950*, p. 229; and the 27 August 1952 judgment of the Court in *Rights of Nationals of the United States of America in Morocco (France v. the United States of America), I.C.J. Reports 1952*, p. 196.

[57] *Yearbook ... 1966*, vol. II, p. 218, para. 4. See also Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed., Cambridge and New York, Cambridge University Press, 2007, p. 230.

[58] Hans Kelsen, *Pure Theory of Law*, tr. Max Knight, Berkeley and Los Angeles, University of California Press, 1967, p. 351.

[59] Jean Combacau and Serge Sur, *Droit international public*, 8th ed., Paris, Montchrestien, 2008, p. 171.

[60] Patrick Daillier and Alain Pellet, *Droit international public*, 7th ed., Paris, L.G.D.J., 2002, p. 254. See also Charles Rousseau, *Droit international public*, vol. I, *Introduction et Sources*, Paris, Sirey, 1970, p. 250.

(16) International law does not, however, provide any criterion allowing for a definitive determination of whether a given interpretation has merit. There are, of course, methods of interpretation (see, initially, articles 31 to 33 of the Vienna Conventions), but they are only guidelines as to the ways of finding the "right" interpretation; they do not offer a final "objective" (or "mathematical") test of whether the interpretation has merit. Thus, article 31, paragraph 1, of the Vienna Conventions specifies that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*". This specification is in no way a criterion for merit, and still less a condition for the validity of the interpretations of the treaty, but a means of deriving one interpretation. That is all.

(17) In international law, the value of an interpretation is assessed not on the basis of its content, but of its authority. It is not the "right" interpretation that wins out, but the one that was given either by all the parties to the treaty — in which case it is called an "authentic" interpretation — or by a body empowered to interpret the treaty in a manner that is binding on the parties. In that regard, the instructive 1923 opinion of the Permanent Court of International Justice in the *Jaworzina* case is noteworthy. Although the Court was convinced that the interpretation reached by the Conference of Ambassadors lacked merit, it did not approach the problem as a question of validity, but rather of opposability. The Court stated:

> And even leaving out of the question the principles governing the authoritative interpretation of legal documents, it is obvious that the opinion of the authors of a document cannot be endowed with a decisive value when that opinion has been formulated after the drafting of that document and conflicts with the opinion which they expressed at that time. There are still stronger grounds for refusing to recognize the authority of such an opinion when, as in the present case, a period of more than two years has elapsed between the day on which it was expressed and the day on which the decision to be interpreted was itself adopted.[61]

(18) International law in general and treaty law in particular do not impose conditions for the validity of interpretation in general and of interpretative declarations in particular. It has only the notion of the opposability of an interpretation or an interpretative declaration which, as far as it is concerned, comes into full play in the context of determination of the effects of an interpretative declaration.[62] In the absence of any condition for validity, "*[e]infache Interpretationserklärungen sind damit grundsätzlich zulässig*" ["simple interpretative declarations are therefore, in principle, admissible"][63] (translated for the report), although this does not mean that it is appropriate to speak of validity or non-validity unless the treaty itself sets the criterion.[64]

(19) Thus, it has rightly been argued that:

> *Das Völkerrecht kennt keine Schranken für die Abgabe einfacher Interpretationserklärungen, da Verträge unabhängig von dem völkerrechtlichen Rang ihrer Bestimmungen grundsätzlich dezentral ausgelegt werden, für die Dauer ihrer Existenz angewandt und somit auch ausgelegt werden müssen. Grenzen für die Zulässigkeit einfacher Interpretationserklärungen können sich somit nur aus dem jeweiligen völkerrechtlichen Vertrag selbst ergeben. Dass heißt, eine einfache*

[61] Advisory opinion of 6 December 1923, *P.C.I.J., Series B*, No. 8, p. 38.
[62] See guidelines [4.7 and 4.7.1 to 4.7.3].
[63] Monika Heymann, *op. cit.* No. 53, p. 113.
[64] See paragraphs (5) and (8) above.

Interpretationserklärung ist nur dann verboten oder unterliegt zeitlichen Schranken, wenn das jeweilige Abkommen solche Sonderregeln vorsieht.[65]

[International law knows no limits to the formulation of a simple interpretative declaration since treaties, regardless of the hierarchical place of their provisions in international law, are in principle interpreted in a decentralized manner and, for the entire period of their existence, must be applied and consequently interpreted. Thus, restrictions on the admissibility of simple interpretative declarations may only derive from the treaty itself. This means that a simple interpretative declaration is not prohibited, or that its formulation is not time-limited, unless the treaty in question contains special rules in that regard (translated for the report).]

(20) In addition, it seemed to the Commission, although there was one opposing view, that in the course of assessing the permissibility of interpretative declarations, one must not slip into the domain of responsibility – which, for reservations, is prohibited by guideline 3.3.1. However, this would be the case for interpretative declarations if one considered that a "wrong" interpretation constituted an internationally wrongful act that "violated" articles 31 and 32 of the Vienna Convention.

3.5.1 Permissibility of an interpretative declaration which is in fact a reservation

If a unilateral statement which purports to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.13.

Commentary

(1) Section 1.3 of the Guide to Practice deals with a situation in which the effect of an interpretative declaration is in fact to undermine the legal effect of one of the provisions of the treaty or of the treaty as a whole.[66] In such a situation, it is not an interpretative declaration but a reservation, which should be treated as such and should therefore meet the conditions for the permissibility (and formal validity) of reservations.

(2) The Court of Arbitration that settled the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *Mer d'Iroise* case confirmed this approach. In that case, the United Kingdom maintained that France's third reservation to article 6 of the Geneva Convention on the Continental Shelf was merely an interpretative declaration and subsequently rejected this interpretation on the grounds that it could not be invoked against the United Kingdom. The Court rejected this argument and considered that France's declaration was not simply an interpretation; it had the effect of modifying the scope of application of article 6 and was therefore a reservation, as France had maintained:

> This condition, according to its terms, appears to go beyond mere interpretation; for it makes the application of that régime dependent on acceptance by the other State of the French Republic's designation of the named areas as involving "special circumstances" regardless of the validity or otherwise of that designation under Article 6. Article 2 (1) (d) of the Vienna Convention on the Law of Treaties, which both Parties accept as correctly defining a "reservation", provides that it means "a

[65] Monika Heymann, *op. cit.*, No. 53, p. 116.

[66] It being understood that it is not enough for another State or another international organization to "recharacterize" an interpretative declaration as a reservation for the nature of the declaration in question to be modified (see guideline 2.9.3 (Recharacterization of an interpretative declaration) and the commentary thereto in *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 263–268).

> unilateral statement, however phrased or named, made by a State … whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in its application to that State". This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the legal effect of certain provisions in their application to the reserving State. This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this "reservation" is to be considered a "reservation" rather than an "interpretative declaration".[67]

(3) While States often maintain or suggest that an interpretation proposed by another State is incompatible with the object and purpose of the relevant treaty,[68] an interpretative declaration, by definition, cannot be contrary to the treaty or to its object or purpose. Where this is not the case the statement is, in fact, a reservation, as noted in many States' reactions to "interpretative declarations".[69] Spain's reaction to the "declaration" formulated by Pakistan in signing the 1966 International Covenant on Economic, Social and Cultural Rights also demonstrates the different stages of thought in cases where the proposed "interpretation" is really a modification of the treaty that is contrary to its object and purpose. The term "declaration" must first be defined; only then will it be possible to apply to it conditions for permissibility (of reservations):

> The Government of the Kingdom of Spain has examined the Declaration made by the Government of the Islamic Republic of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966.
>
> The Government of the Kingdom of Spain points out that regardless of what it may be called, a unilateral declaration made by a State for the purpose of excluding or changing the legal effects of certain provisions of a treaty as it applies to that State constitutes a reservation.
>
> The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan, which seeks to subject the application of the provisions of the Covenant to the provisions of the constitution of the Islamic Republic of Pakistan is a reservation which seeks to limit the legal effects of the Covenant as it applies to the Islamic Republic of Pakistan. A

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[67] Arbitral award of 30 June 1977, Reports of International Arbitral Awards, vol. XVIII, p. 40, para. 55 (italics in the original).

[68] See, for example, Germany's reactions to Poland's interpretative declaration to the European Convention on Extradition of 13 December 1957 (European Treaty Series No. 24 (http://conventions.coe.int)) and to India's declaration interpreting article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (*Multilateral Treaties…*, footnote 13 above, chap. IV. 3 and 4).

[69] In addition to the aforementioned example of Spain's reservation, see Austria's objection to the "interpretative declaration" formulated by Pakistan in respect of the 1997 International Convention for the Suppression of Terrorist Bombings and the comparable reactions of Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America (*Multilateral Treaties* ..., footnote 13 above, chap. XVIII. 9). See also the reactions of Germany and the Netherlands to Malaysia's unilateral statement (*ibid.*) and the reactions of Finland, Germany, the Netherlands and Sweden to the "interpretative declaration" formulated by Uruguay in respect of the Statute of the International Criminal Court (*ibid.*, chap. XVIII. 10. For other examples of recharacterization, see the commentary to guideline 1.2, *Yearbook … 1999*, vol. II, Part Two, p. 105, No. 328.

> reservation that includes a general reference to national law without specifying its contents does not make it possible to determine clearly the extent to which the Islamic Republic of Pakistan has accepted the obligations of the Covenant and, consequently, creates doubts as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.
>
> The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan to the effect that it subjects its obligations under the International Covenant on Economic, Social and Cultural Rights to the provisions of its constitution is a reservation and that that reservation is incompatible with the object and purpose of the Covenant.
>
> According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a treaty are not permissible.
>
> Consequently, the Government of the Kingdom of Spain objects to the reservation made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Kingdom of Spain and the Islamic Republic of Pakistan.[70]

(4) Therefore, the issue is not the "validity" of interpretative declarations. These unilateral statements are, in reality, reservations and accordingly must be treated as such, including with respect to their permissibility and formal validity. The European Court of Human Rights followed that reasoning in its judgment in the case of *Belilos v. Switzerland*. Having recharacterized Switzerland's declaration as a reservation, it applied the conditions for the permissibility *of reservations* of the European Convention on Human Rights:

> In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content. In the present case, it appears that Switzerland meant to remove certain categories of proceedings from the ambit of article 6 § 1 (art. 6–1) and to secure itself against an interpretation of that article (art. 6–1) which it considered to be too broad. However, the Court must see to it that the obligations arising under the Convention are not subject to restrictions which would not satisfy the requirements of article 64 (art. 64) as regards reservations. Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision.[71]

3.5.2 Conditions for the permissibility of a conditional interpretative declaration

The permissibility of a conditional interpretative declaration must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.13.

(1) According to the definition contained in guideline 1.2.1, a conditional interpretative declaration is:

> A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State

[70] *Multilateral Treaties* ... footnote 13 above, chap. IV. 3.
[71] Judgment, 29 April 1988, *Series A*, vol. 132, para. 49, p. 18.

> or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof (...).[72]

(2) Thus the key feature of this kind of conditional interpretative declaration is not that it proposes a certain interpretation, but that it constitutes a condition for its author's consent to be bound by the treaty.[73] It is that element of conditionality that brings a conditional interpretative declaration closer to being a reservation.

(3) *A priori*, however, the question of the permissibility of conditional interpretative declarations seems little different from that of "simple" interpretative declarations and it would seem unwarranted to make formulation of a conditional interpretative declaration subject to conditions for permissibility other than those applicable to "simple" interpretative declarations.[74] It is clear from the definition of a conditional interpretative declaration that it does not purport to modify the treaty, but merely to interpret one or more of its provisions in a certain manner.

(4) The situation changes significantly, however, where the interpretation proposed by the author of a conditional interpretative declaration does not correspond to the interpretation of the treaty established by agreement between the parties. In that case, the condition formulated by the author of the declaration, stating that it does not consider itself to be bound by the treaty in the event of a different interpretation, brings this unilateral statement considerably closer to being a reservation. Frank Horn has stated that:

> If a state does not wish to abandon its interpretation even in the face of a contrary authoritative decision by a court, it may run the risk of violating the treaty when applying its own interpretation. In order to avoid this, it would have to qualify its interpretation as an absolute condition for participation in the treaty. The statement's nature as a reservation is established at the same time the propagated interpretation is established as the incorrect one.[75]

(5) Thus, any conditional interpretative declaration potentially constitutes a reservation: a reservation conditional upon a certain interpretation. This can be seen from one particularly clear example of a conditional interpretative declaration, the declaration that France attached to its expression of consent to be bound by its signature of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco), which stipulates that:

> In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States.[76]

In other words, France intends to exclude the application of the treaty in its relations with any States parties that do not accept its interpretation of the treaty, exactly as if it had made a reservation.

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[72] *Yearbook … 1999*, vol. II, Part Two, pp. 103–106.

[73] *Ibid.*, p. 105, para. (16) of the commentary.

[74] See above, commentary to guideline 3.5.

[75] Frank Horn, *op. cit.*, No. 7, p. 326.

[76] This declaration was confirmed in 1974 at the time of ratification (United Nations, *Treaty Series*, vol. 936, p. 419 (No. 9068)). See also the commentary to guideline 2.9.10 (Reactions to conditional interpretative declarations), *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), p. 281, para. (1) of the commentary.

(6) While this scenario is merely a potential one, it seems clear that the declaration in question is subject to the conditions for permissibility set out in article 19 of the Vienna Conventions. Although it might be thought *prima facie* that the author of a conditional interpretative declaration is merely proposing a specific interpretation (subject solely to the conditions for permissibility set out in guideline 3.5), the effects of such a unilateral statement are, in fact, made conditional by its author upon one or more provisions of the treaty not being interpreted in the desired manner.

(7) The deliberate decision of the Netherlands to formulate reservations, rather than interpretative declarations, to the International Covenant on Civil and Political Rights clearly shows the considerable similarities between the two approaches:

> The Kingdom of the Netherlands clarif[ies] that although the reservations are partly of an interpretational nature, it has preferred reservations to interpretational declarations in all cases, since if the latter form were used doubt might arise concerning whether the text of the Covenant allows for the interpretation put upon it. By using the reservation form the Kingdom of the Netherlands wishes to ensure in all cases that the relevant obligations arising out of the Covenant will not apply to the Kingdom, or will apply only in the way indicated.[77]

(8) There is therefore no alternative to the application to these conditional interpretative declarations of the same conditions for permissibility as those that apply to reservations. The (precautionary) application of the conditions set out in article 19 of the Vienna Conventions is not easy, however, unless it has been established that the interpretation proposed by the author is unwarranted and does not correspond to the authentic interpretation of the treaty.

(9) Two opposing arguments have been made on this point. According to one view, so long as the status of the conditional interpretative declaration as to correctness has not been, or cannot be, determined, such a conditional interpretative declaration must meet both the conditions for the permissibility of an interpretative declaration (in the event that the interpretation is ultimately shared by the other parties or established by a competent body) and the conditions for the permissibility of a reservation (in the event that the proposed interpretation is rejected). So long as the correct interpretation has not been established, the conditional interpretative declaration remains in a legal vacuum and it is impossible to determine whether it is the rules on the permissibility of an interpretative declaration or those on the permissibility of a reservation that should be applied to it. Either case is still possible. Accordingly to this view, although a treaty may prohibit the formulation of reservations to its provisions, it does not follow that a State cannot subject its consent to be bound by the treaty to a certain interpretation of that treaty. If the interpretation proves to be warranted and in accordance with the authentic interpretation of the treaty, it is a genuine interpretative declaration that must meet the conditions for the permissibility of interpretative declarations, but only those conditions. If, however, the interpretation does not express the correct meaning of the treaty and is rejected on that account, the author of the "interpretative declaration" does not consider itself bound by the treaty unless the treaty is *modified* in accordance with its wishes. In that case, the "conditional declaration" is indeed a reservation and must meet the corresponding conditions for the permissibility of reservations.

(10) According to the other view, which was ultimately adopted by the Commission, conditional interpretative declarations must be considered from the very outset to be reservations. Once a State that makes a declaration makes its consent to be bound by a

[77] *Multilateral Treaties* ... footnote 13 above, chap. IV. 4.

treaty subject to a specific interpretation of its provisions, there and then it excludes any other interpretation, whether correct or incorrect, and this must, from the outset, be viewed as a reservation. By prohibiting all reservations, article 309 of the 1982 United Nations Convention on the Law of the Sea makes it impossible for a State to make its acceptance of the Convention subject to a given interpretation of one or the other of its provisions. For example, when expressing its consent to be bound, if a State wishes to say that in its view, a given island is a rock in the sense of article 121, paragraph 3, of the Convention, it may do so through a simple interpretative declaration, but if it makes its participation in the Convention subject to the acceptance of this interpretation, that would constitute a reservation that must be treated as such, and in this case, guideline 3.5.1 would apply.

(11) Furthermore, the problem remains largely theoretical. Even from the standpoint of the minority position,[78] where a treaty prohibits the formulation of interpretative declarations, a conditional interpretative declaration that proposes the "correct" interpretation must logically be considered impermissible, but the result is exactly the same: the interpretation of the author of the declaration is accepted (otherwise, the conditional declaration would not be an interpretative declaration). Thus, the permissibility or impermissibility of the conditional interpretative declaration as an interpretative declaration has no practical effect. Whether or not it is permissible, the proposed interpretation is identical with the authoritative interpretation of the treaty.

(12) The question of whether a conditional interpretative declaration meets the conditions for the permissibility of an interpretative declaration does not actually affect the interpretation of the treaty. However, in the event that the conditional interpretative declaration actually "behaves like" a reservation, the question of whether it meets the conditions for the permissibility of reservations does have a real impact on the content (and even the existence) of treaty relations.

(13) In light of these observations, there is no reason to subject conditional interpretative declarations to the same conditions for permissibility as "simple" interpretative declarations. Instead, they are subject to the conditions for the permissibility of reservations, as in the case of conditions for formal validity.[79]

(14) In conformity with the decision adopted by the Commission at its fifty-fourth session, guideline 3.5.2 and the commentary thereto will be placed in square brackets until the Commission takes a final position on the place conditional interpretative declarations are to occupy in the Guide to Practice.[80]

[3.5.3 Competence to assess the permissibility of a conditional interpretative declaration

The provisions of guidelines 3.2 to 3.2.4 apply, *mutatis mutandis*, to conditional interpretative declarations.]

Commentary

(1) In light of the observations concerning the permissibility of conditional interpretative declarations, the rules on competence to assess such permissibility can only be identical to those for the assessment of the permissibility of reservations.

[78] See above, para. (9).

[79] See draft guidelines 2.4.5 to 2.4.8 and 2.4.10 *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 502–506; *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 130 and 131; and *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 277–288.

[80] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 119, para. (5) of the commentary to guideline 2.4.7.

(2) In accordance with the Commission's consistent practice regarding these specific interpretative declarations, and pending its final decision as to whether to maintain the distinction, guideline 3.5.3 has been included in the Guide to Practice only on a provisional basis: hence the square brackets around the text and the commentary thereto.

3.6. Permissibility of reactions to interpretative declarations

Subject to the provisions of guidelines 3.6.1 and 3.6.2, an approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

Commentary

(1) The question of the permissibility of reactions to interpretative declarations — approval, opposition or recharacterization — must be considered in light of the study of the permissibility of interpretative declarations themselves. Since any State, on the basis of its sovereign right to interpret the treaties to which it is a party, has the right to make interpretative declarations, there seems little doubt that the other contracting parties also have the right to react to these interpretative declarations and that, where appropriate, these reactions are subject to the same conditions for permissibility as those for the declaration to which they are a reaction.

(2) As a general rule, like interpretative declarations themselves, these reactions may prove to be correct or erroneous, but this does not imply that they are permissible or impermissible. Nevertheless, according to guideline 3.5, the same is not true when an interpretative declaration is prohibited by a treaty or is incompatible with a peremptory norm of international law. This is the eventuality envisaged in guidelines 3.6.1 and 3.6.2, which refer, respectively, to the approval of an interpretative declaration and to opposition to such a declaration. This is indicated at the start of guideline 3.6: "Subject to the provisions of guidelines 3.6.1 and 3.6.2… ."

(3) The question of the permissibility of recharacterizations of interpretative declarations must be approached slightly differently. In a recharacterization, the author does not call into question[81] the content of the initial declaration, but rather its legal nature and the regime applicable to it.[82]

(4) The question of whether to use the term "reservation" or "interpretative declaration" must be determined objectively, taking into account the criteria that the Commission set forth in guidelines 1.3 and 1.3.1 to 1.3.3. Guideline 1.3 states:

[81] It may *simultaneously* call into question and object to the content of the recharacterized declaration by making an objection to it; in such cases, however, the recharacterization and the objection remain conceptually different from one another. In practice, States almost always combine the recharacterization with an objection to the reservation. It should be borne in mind, however, that recharacterizing an interpretative declaration as a reservation is one thing and objecting to the reservation thus "recharacterized" is another. Nonetheless, it should be noted that even in the case of a reservation that is "disguised" (as an interpretative declaration) — which, from a legal standpoint, has always been a reservation — the rules of procedure and formulation as set out in the present Guide to Practice remain fully applicable. This clearly means that a State wishing to formulate a recharacterization and an objection must abide by the procedural rules and time periods applicable to objections. This is why it is specified, in the second paragraph of draft guideline 2.9.3, that the author State or organization must accordingly treat the recharacterized reservation as a reservation.

[82] See the commentary to guideline 2.9.3, para. (5) (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 267–268.

> The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.[83]

(5) This "objective" test takes into account only the declaration's potential effects on the treaty *as intended by its author*. In other words:

> "only an analysis of the potential — and objective — effects of the statement can determine the purpose sought. In determining the legal nature of a statement formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement has (or would have). If it modifies or excludes the legal effect of the treaty or certain of its provisions, it is a reservation "however phrased or named"; if the statement simply clarifies the meaning or scope that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration."[84]

(6) Without prejudice to the effects of these unilateral statements, it is clear that they are an important factor in determining the legal nature of the initially formulated act: in order to determine whether such statements constitute interpretative declarations or reservations, they must be taken into account as expressing the position of parties to a treaty on the nature of the "interpretative declaration" or "reservation", with all the consequences that this entails. Nevertheless, the author of a recharacterization is simply expressing its opinion on this matter. That opinion may prove to be justified or unjustified when the test of guideline 1.3 is applied, but this in no way implies that the recharacterization is permissible or impermissible; these are two different questions.

(7) Recharacterizations, whether justified or unjustified, are not subject to criteria for permissibility. Abundant State practice[85] shows that contracting parties consider themselves entitled to make such declarations, often in order to ensure the integrity of the treaty or in response to treaty-based prohibitions of reservations.[86]

3.6.1. Permissibility of approvals of interpretative declarations

> An approval of an impermissible interpretative declaration is itself impermissible.

Commentary

(1) In approving an interpretative declaration, the author expresses agreement with the interpretation proposed and, in so doing, conveys its own point of view regarding the interpretation of the treaty or of some of its provisions. Thus, a State or international organization which formulates an approval does exactly the same thing as the author of the interpretative declaration.[87] It is difficult to see how this reaction could be subject to different conditions of permissibility than those applicable to the initial act.

(2) Furthermore, the relationship between an interpretation and its acceptance is mentioned in article 31, paragraph 3 (a), of the Vienna Conventions, which speak of "any

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[83] For the draft guideline and the commentary thereon, see *Yearbook … 1999*, vol. II, Part Two, p. 107.

[84] *Ibid., loc. cit.*, paragraph 3 of the commentary on draft guideline 1.3.1.

[85] See, *inter alia*, the commentary to guideline 2.9.3, para. (4) (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 264–267.

[86] For a particularly telling example, see the reactions of several States to the Philippines' "interpretative declaration" to the 1982 United Nations Convention on the Law of the Sea (*Multilateral Treaties ...* available from http://treaties.un.org, chap. XXI. 6).

[87] See also the commentary to guideline 2.9.1, paras. (4) to (6) (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 255–256; see also Monika Heymann's position (*op. cit.*, No. 53, pp. 119-123).

subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".[88]

(3) Guideline 3.6.1 therefore simply transposes the rules applicable to interpretative declarations to the approval of such declarations – with implicit reference to guideline 3.5.

(4) The fact remains, however, that the question of whether the interpretation proposed by the author of the interpretative declaration, on the one hand, and accepted by the author of the approval, on the other, is the "right" interpretation and, as such, is capable of producing the effects desired by the key players in relation both to themselves and to other parties to the treaty[89] is different from that of the permissibility of the declaration and the approval. The first of these questions is covered in the section of the Guide to Practice on the effects of interpretative declarations.

3.6.2. Permissibility of oppositions to interpretative declarations

An opposition to an interpretative declaration is impermissible to the extent that it does not comply with the conditions for permissibility of an interpretative declaration set forth in guideline 3.5.

Commentary

(1) The permissibility of a negative reaction — an opposition[90]— to an interpretative declaration is no more predicated upon respect for any specific criteria than is that of interpretative declarations or approvals.

(2) This conclusion is particularly evident in the case of opposition expressed through the formulation of an interpretation different from the one initially proposed by the author of the interpretative declaration. There is no reason to subject such a "counter-interpretative declaration", which simply proposes an alternate interpretation of the treaty or of some of its provisions, to different criteria and conditions for permissibility than those for the initial interpretative declaration. While it is clear that in the event of a conflict, only one of the two interpretations, at best,[91] could prevail, both interpretations should be presumed permissible unless, at some point, it becomes clear to the key players that one interpretation has prevailed. In any event, the question of whether one of them, or neither of them, actually expresses the "correct" interpretation of the treaty is a different matter and has no impact on the permissibility of such declarations. This subject is also covered in the section of Part 4 of the Guide to Practice on the effects of interpretative declarations.

(3) This is also true in the case of a simple opposition, where the author merely expresses its refusal of the interpretation proposed in an interpretative declaration without proposing another interpretation that it considers more "correct". One might take the view, however, that in a situation of this type, no problem of permissibility arises; the wording chosen for guideline 3.6.2 leaves the question open.

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[88] See the commentary to guideline 2.9.1, para (5), *ibid.*, p. 255.

[89] This question must be considered, in particular, in the context of article 41 of the Vienna Conventions (Agreements to modify multilateral treaties between certain of the parties only).

[90] See draft guideline 2.9.2 and the commentary thereon (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 256–263.

[91] In fact, it is not impossible that a third party might not agree with either of the interpretations proposed individually and unilaterally by the parties to the treaty if, through the application of methods of interpretation, it concludes that another interpretation arises from the provisions of the treaty. See, for example, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of 27 August 1952, *I.C.J. Reports* 1952, p. 211.