

The Vienna Conventions on the Law of Treaties

A Commentary

VOLUME I

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1986 Vienna Convention

Article 19 Formulation of reservations

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

(a) the reservation is prohibited by the treaty;

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

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

Bibliography

See the bibliography in the commentary on Article 19 of the 1969 Convention. Also, see further the commentaries that are more specially dedicated to the 1986 Convention:

Gaja, G., 'A "New" Vienna Convention on Treaties between States and International Organizations or between International Organizations: A Critical Commentary', *BYBIL*, 1987, pp 253-69

Manin, Ph., 'La Convention de Vienne sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales', *AFDI*, 1986, pp 454-3

Reuter, P., 'Du droit international au droit de l'intégration' in F. Capotorti et al (eds), *Liber Amicorum Pierre Pescatore* (Baden Baden: Nomos Verlagsgesellschaft, 1987), pp 545-64

1. Article 19 of the Vienna Convention 1986 reproduces purely and simply the text of the corresponding provision of 1969, adding merely 'or an international organization' after 'A State' in the introductory paragraph. The same goes for the rest of the provisions relating to reservations in that the 1986 Convention borrows from those of 1969 with minimal adaptations necessary to extend the legal regime of reservations that has been formulated for States to international organizations. At the same time, the largely customary character of this regime¹ was both confirmed and reinforced.

2. Nevertheless, this simple transposition did not happen as a matter of course, and at the instigation of its Special Rapporteur, Paul Reuter, the ILC envisaged making non-negligible amendments to the rules contained in Articles 19 to 23 of the 1969 Convention, which would have limited the possibility for international organizations to formulate reservations, a direction which the eastern countries favoured up until the Vienna Convention, without succeeding in imposing it.² Nevertheless, the last trace of 'discrimination' that was once envisaged for the expenses of international

¹ See *infra* the commentary on Art. 19 of the 1969 Convention, paras 55-69.

² See in particular the amendments by the USSR and the German Democratic Republic to Arts 19 and 20 (UN Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February-21 March 1986, Official Records, vol. II, Documents of the Conference (A/CONF.129/16/Add.1) pp 69-70).

organizations, and which still featured in the final draft of the Commission of 1982,³ was abandoned at the Conference.⁴

3. In 1975,⁵ the Special Rapporteur presented his Fourth Report to the Commission, the first that contained substantial developments on reservations.⁶ In the general commentary of section 2 which is concerned with reservations, Paul Reuter made remarks of a general character that are worth citing at length since they clarify all subsequent discussions.

4. The Special Rapporteur started with the principle that the inclusion of provisions on reservations in the draft satisfied juridical logic, but that it would only have limited practical relevance.

Articles 19 to 23 of the 1969 Convention dealing with reservations, are clearly one of the principal parts of the Convention, on account of both their technical preciseness and the great flexibility which they have introduced into the regime of multilateral conventions. It must therefore be admitted at the outset that analogous provisions prepared with the object of the present draft articles in mind are only of limited immediate practical interest. It has been said, and should be constantly repeated, that treaties concluded by international organizations are almost always bilateral treaties, for which reservations may come into play in theory but are of no interest in practice. The few multilateral treaties to which international organizations are parties are all treaties which fall under the provisions of article 20, paragraph 2; in other words, they only allow a very limited play to the reservations mechanism. Multilateral treaties open to a large number of signatories constitute the area in which reservations have a real practical function, and it is well-known that at present there are still very serious obstacles to the accession of international organizations to such treaties. To devote draft articles to reservations, therefore, meets a logical need which is only beginning to emerge in concrete form.⁷

5. Having made these remarks, he nevertheless did not consider that there existed any good reason to deny international organizations the right to formulate reservations under the same conditions as States since they were fully admitted to the treaty regime as 'parties', in order to allow them to pursue their specific interests. The Special Rapporteur did not conceal that from this principle there could result 'all sorts of complications', but he considered that this would connect to a more general problem, namely the risk of overlapping competences between the organization and its member States, which explains why 'it cannot be accepted without precautions that an organization should be party to a treaty at the same time as its own members'.⁸

³ *YILC*, 1982, vol. II, Part Two, p 35.

⁴ The ILC had not intended to extend the procedure of tacit acceptance of reservations in Art. 20(5) to international organizations; the Conference of Vienna gave up on maintaining this discrimination. See *infra* the commentary on Art. 20 of the 1986 Convention, para. 5; see also Ph. Manin, 'La Convention de Vienne sur le droit des traités entre Etats ou entre Etats et organisations internationales ou entre organisations internationales', *AFDI*, 1986, p 466. The draft of the Commission also introduced a restriction to the capability of formulating reservations in para. (a) of Art. 19, but this was not 'discriminatory' and concerned States as much as international organizations—on this point see *infra* para. 16.

⁵ The developments that follow are largely inspired by the preliminary report of the author of this commentary, Special Rapporteur of the ILC on reservations to treaties (*YILC*, 1995, vol. II, Part One, pp 137–9, *A/CN.4/470*, paras 73–88).

⁶ *YILC*, 1975, vol. II, pp 36–8.

⁷ *Ibid*, p 36.

⁸ *Ibid*, pp 36, 37.

6. Consequently, Reuter presented, without any particular commentary, draft Articles 19 to 23, closely modelled on the corresponding provisions of the 1969 Vienna Convention, with minor editorial modifications.⁹

7. The discussion of these draft Articles at the 27th session¹⁰ revealed the difficulty of the problems they raised. The two main ones were summarized by the Special Rapporteur in his Fifth Report, presented in 1976 and entirely concerned with reservations:

The first may be summed up as follows: is it necessary to provide, in certain cases and on certain points, for a regime fundamentally different from that of the Vienna Convention? The second, which goes beyond the scope of the problem of reservations but arises very clearly in that connexion, is the following: what provisions are needed to define clearly the respective spheres of application of the draft articles and the 1969 Vienna Convention, especially when a treaty originally designed to establish treaty relations between States and international organizations loses that character wholly or partially?¹¹

8. On the first point, it suffices to recall that, in short, the Commission gave up on adopting a position of rigid principle. As it indicates in its final commentary to the draft Articles, it sought

a balanced view denying organizations some of the facilities granted to States by the Vienna Convention and applying to organizations certain rules whose flexibility had been considered appropriate for States alone. However, it has maintained for international organizations the benefit of the general rules of consensuality wherever that presented no difficulties and seemed to be consistent with certain trends emerging in the modern world.¹²

9. At first, Paul Reuter, sensitive to certain categorical views expressed by some of the members of the Commission,¹³ substantially revised draft Articles 19 and 20 in a way that was less favourable to the freedom to make reservations:¹⁴ the new draft Article 19 reversed the presumption and stated that in principle all reservations are prohibited unless

- it is expressly authorized by the treaty (para. 1(a)),
- it is 'expressly accepted by all the States and international organizations parties' to the treaty (para. 1(b)),—or if international organizations participated in the treaty in the same way as States, under the conditions set out by the Vienna Convention 1969.

10. The Commission did not take a definitive stance in 1975¹⁵ and the following year, the Special Rapporteur made new propositions, returning to the principle of '[f]reedom to formulate reservations combined with a number of exceptions for treaties between two or more international organizations, and the application to reservations of an express authorization regime with certain exceptions for treaties between States and international organizations',¹⁶ in order to accommodate the difference in nature between States and organizations and to avoid the latter formulating reservations that would touch on the rights and obligations of States.¹⁷

⁹ *Ibid*, pp 37–8.

¹⁰ *YILC*, 1975, vol. I, 1348th to 1350th meeting, pp 237–49.

¹¹ *YILC*, 1976, vol. II, Part One, A/CN.4/290 and Add.1, p 139.

¹² *YILC*, 1982, vol. II, Part Two, A/37/10, p 13, para. 43.

¹³ Especially Ushakov, *YILC*, 1975, vol. I, 1348th meeting, p 239.

¹⁴ *Ibid*, p 246.

¹⁵ *YILC*, 1975, vol. II, A/10010/Rev.1, pp 170 ff, para. 135.

¹⁶ Fifth Report, *supra* n 11, p 139.

¹⁷ See *ibid*, p 140.

11. In essence, these propositions were endorsed by the Commission on the completion of very long debates during its 29th meeting.¹⁸ But the retained system was, as far as detail is concerned, profoundly transformed and complicated,¹⁹ since it resulted in a differentiation of the regime applicable to reservations to treaties concluded between several organizations—modelled on that in the Vienna Convention 1969—and the regime relating to reservations to treaties concluded between organizations and States, restrictive for the former and liberal for the latter;²⁰ while the same dichotomy could be found in the context of objections²¹ and acceptance of reservations.²²

12. After the adoption of this draft at first reading, the Special Rapporteur was led to re-examine it in light of observations of States and international organizations, which he did in his Tenth Report in 1981.²³ Refusing to consider cases other than those considered in the draft Articles, as certain States invited him to do, 'because such an investigation would not be in the spirit of the Vienna Convention, which sought to allow practice of some measure of freedom so that the general principles laid down in the Convention could be given concrete application',²⁴ Paul Reuter concluded that the draft Articles were to be maintained, in return for some editorial clarifications and simplifications.

13. Nevertheless, following renewed and difficult debates,²⁵ the Commission returned for the most part to the provisions proposed originally by the Special Rapporteur,²⁶ that tended to transpose the rules in draft Articles 19 to 23 of the 1969 Convention—in return for an addition to Article 19, paragraph (a)²⁷ and subject to three substantive differences concerning Article 20.²⁸

14. After renewed debates,²⁹ and for reasons relating to the adoption of a draft Article 5 corresponding to Article 5 of the Vienna Convention 1969³⁰, the Commission re-established paragraph 3 of Article 20, but for the rest, confirmed in 1982 the draft of 1981.³¹ Once seized with the draft Articles, the General Assembly transmitted to the Conference via its Resolution 40/76 of 11 December 1985 'a list of draft articles of the basic proposal [these were the draft Articles of the ILC], for which substantive consideration is deemed necessary'. This list comprised Articles 19 ('Formulation of reservations') and 20 ('Acceptance of and objection to reservations'), that had been the subject of various comments and observations by States and international organizations.³²

¹⁸ *YILC*, 1977, vol. I, 1429th to 1435th, 1446th, 1448th, 1451st, and 1464th meetings, pp 70–103; 165–70; 176–81; 193–6, 255, and 256.

¹⁹ *Ibid.*, vol. II, Part Two, A/32/10, pp 96–8 and 105–16.

²⁰ Arts 19 and 19*bis*.

²¹ Art. 19*ter*; see the commentary on Art. 20 of the 1986 Convention para. 3.

²² Arts 20 and 20*bis*; see *ibid.*

²³ *YILC*, 1981, vol. II, Part One, A/CN.4/341 and Add.1, pp 56–64.

²⁴ *Ibid.*, p 59, para. 64.

²⁵ *YILC*, 1981, vol. I, 1648th to 1652nd and 1652nd meetings, pp 28–55 and 263–6.

²⁶ See *supra* para. 6.

²⁷ See *infra* para. 16.

²⁸ See *infra* the commentary on Art. 20 of the 1986 Convention, para. 5.

²⁹ *ACDI*, 1982, vol. I, 1727th and 1748th meetings, pp 177 and 178, and p 315.

³⁰ Art. 5 is drafted: 'The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.'

³¹ *YILC*, 1982, vol. II, Part Two, A/37/10, pp 32–7.

³² See the analytical compilation of comments and observations by States and principal international inter-governmental organizations on the final draft Articles on the law of treaties between States and international organizations or between international organizations (A/CONF.129/5, 8 October 1985), pp 124–31.

15. During the actual Conference, several amendments to these provisions were presented.³³ At the end of the debates³⁴—mainly revolving around the issue to what extent international organizations could be assimilated to States, for the purpose of these provisions, to benefit from the same rights and to have the same obligations—the Conference adopted Articles that implemented an assimilation of organizations to States that was even more advanced³⁵ and more closely modelled on the Articles of the Vienna Convention 1969 on the law of treaties than were the draft Articles of the Commission.

16. In particular as far as Article 19 is concerned, the Commission had proposed an addition to paragraph (a), which would state that a reservation was possible unless 'the reservation is prohibited by the treaty or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited'.³⁶ Curiously, the commentary gave no explanations for this modification. Nevertheless at the Vienna Conference, Paul Reuter explained that 'the reason was that the treaties of international organizations were considered as having a somewhat delicate character. Because of their particular nature, it was felt desirable to avoid opening the door too widely to reservations'. Nevertheless he immediately added that 'deletion of the two passages would do no harm. The rule they embodied went without saying, since there was nothing to prevent the parties to a treaty from agreeing among themselves subsequent to the adoption of a treaty that a particular reservation would be prohibited'.³⁷

17. It was thus decided³⁸ and, as with all the Articles on reservations, the text of Article 19 of the 1986 Convention was modelled on that of the 1969 Article. Under these circumstances one may question the utility of the long discussions dedicated to reservations at the work of the 1986 Convention—principally because of the determination of the Soviets and their friends to impose with all force an inferior legal status on international

³³ See *infra* para. 16 and the commentary on Art. 20, para. 5.

³⁴ See UN Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986, Official Documents, vol. I, Summary Records of the plenary meetings and of the meetings of the Committee of the Whole, 11th–14th plenary meetings, pp 95–119, and 27th meeting, p 186.

³⁵ Especially as far as the time limit for the acceptance is concerned (Art. 20, para. 5); see *supra* para. 2.

³⁶ *YILC*, 1982, vol. II, Part Two, A/37/10, p 35.

³⁷ UN Conference on the Law of Treaties between States and International Organizations or between International Organizations, Official Documents, Vienna, 18 February–21 March 1986, vol. I, Summary Records of the plenary meetings and of the meetings of the Committee of the Whole, (A/CONF.129/16), 11th meeting of the Committee of the Whole, 27 February 1986, p 97 paras 31 and 32. The plural ('passages') used by the Expert Consultant can be explained by the fact that the draft of the Commission distinguished, in two separate paragraphs that were nevertheless drafted identically, the formulation of reservations by States, on the one hand, and by international organizations, on the other hand (*YILC*, 1982, vol. II, Part Two, A/37/10, p 34); this bizarre situation was the result of a distinction once made between the regime applicable to the reservations of States and the rules on reservations by international organizations (see *infra* para. 11) and was not justified by any serious reason (cf the commentary of the ILC: 'It is only for the sake of clarity that the article retains separate paragraphs for States and international organizations; the rules it lays down are substantially the same in each case' *ibid*, p 35); it was abandoned by the Conference 'in an effort to lighten the text' (Mr Al-Khasawneh, President of the Drafting Committee, UN Conference on the Law of Treaties between States and International Organizations or between International Organizations, Official Documents, Vienna, 18 February–21 March 1986, vol. I, Summary Records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.129/16), 5th plenary meeting, 18 March 1986, p 13, para. 54). The explanations given by Reuter do not really clarify the issue, even though it may be relatively minor, whether para. (a) of Art. 19 extends to reservations that are implicitly prohibited (see the commentary on Art. 19, paras 153 and 154): they establish at best that the parties can agree to prohibit a reservation after the conclusion of the treaty; but that is not the issue.

³⁸ Without it being put to a vote (*ibid*, para. 56).

organizations in comparison to States, which is open to criticism in this particular case. This question can really be applied to the whole 1986 Convention: was it worth spending all the time and energy for adjustments that were overall very trivial, and that could just as well have been created through practice, and maybe better, than through a treaty that, 20 years after its adoption, is still not in force.

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